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No.: **ICC-01/05-01/08 OA**
Date: **16 December 2008**

THE APPEALS CHAMBER

Before:
Judge Erkki Kourula, Presiding Judge
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Sang-Hyun Song
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public document

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"

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Mr Nkwebe Liriss
Mr Karim A.A. Khan
Mr Aimé Kilolo-Musamba

REGISTRY

Registrar
Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Jean-Pierre Bemba Gombo of 22 August 2008 (ICC-01/05-01/08-74) against the "Decision on application for interim release" (ICC-01/05-01/08-73-Conf; a public redacted version was issued on 26 August 2008 – ICC-01/05-01/08-80-Anx),

After deliberation,

By majority, Judge Pikis dissenting,

Delivers the following

JUDGMENT

The decision of Pre-Trial Chamber III entitled "Decision on application for interim release" of 20 August 2008 is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. In order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case. Ideally, the arrested person should have all such information at the time of his or her initial appearance before the Court[1].

2. To allow this to take place, the Appeals Chamber considers that the Prosecutor should have this in mind when submitting an application for a warrant of arrest under article 58 of the Statute and should, as soon as possible, and preferably at that time, alert the Pre-Trial Chamber as to any redactions that he considers might be necessary.

3. The nature and timing of such disclosure must take into account the context in which the Court operates. The right to disclosure in these circumstances must be assessed by reference to the need, *inter alia*, to ensure that victims and witnesses are appropriately protected (see article 68 (1) of the Statute and rule 81 of the Rules). The Court has

[1] See footnote 78.

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jurisdiction over genocide, crimes against humanity and war crimes; the gravity of the crimes is such that the protection of victims and witnesses is a paramount consideration. An additional consideration is the need to safeguard ongoing investigations.

4. The Pre-Trial Chamber should ensure that in the disclosure process priority is given to those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention.

II. PROCEDURAL HISTORY

5. On 9 May 2008, the Prosecutor submitted an application for a warrant of arrest[2] ("Application for a Warrant of Arrest") in respect of Mr. Jean-Pierre Bemba Gombo ("the Appellant"). On 21 May 2008, the Pre-Trial Chamber issued a decision requesting additional information from the Prosecutor on his application for the warrant of arrest[3]. On 23 May 2008, the Prosecutor submitted the "Prosecutor's Application for Request for Provisional Arrest under Article 92" of the Rome Statute ("Statute")[4] and a warrant of arrest[5] and a request for provisional arrest of the Appellant[6] were issued. In the warrant of arrest, the Pre-Trial Chamber, *inter alia*, noted articles 19 (1) and 58 (1) of the Statute "and observe[d] that the analysis of the evidence and other information submitted by the Prosecutor [would] be set out in a decision to be issued later"[7]. The authorities of the Kingdom of Belgium arrested the Appellant on 24 May 2008[8].

6. On 27 May 2008, and further to the Chamber's decision of 21 May 2008 (see above), the Prosecutor filed "additional information and supporting material"[9] ("Prosecutor's Further Information"). The Pre-Trial Chamber issued its decision on the Application for a Warrant of Arrest dated 10 June 2008[10] ("Decision of 10 June 2008") and also issued a

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[2] Impugned Decision, para. 2.
[3] Impugned Decision, para. 3.
[4] ICC-01/05-01/08-28.
[5] Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr.
[6] *Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique*, 23 May 2008, ICC-01/05-01/08-3.
[7] Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr, para. 7.
[8] Impugned Decision, para. 5.
[9] Impugned Decision, para. 6.
[10] Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG.

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new warrant of arrest dated 10 June 2008 replacing that of 23 May 2008[11] ("Warrant of Arrest") and requested arrest[12]. The Appellant was surrendered to the Court on 3 July 2008[13]. His initial appearance took place on 4 July 2008 before Pre-Trial Chamber III[14]. On that occasion, the Appellant did not apply for interim release. He filed his application for interim release dated 23 July 2008[15] ("Application for Interim Release"). The Chamber issued two decisions on 4 August 2008 seeking in one observations from the Prosecutor[16] and in the second requesting the relevant authorities of the Kingdom of Belgium, the Republic of Portugal, the Swiss Confederation and the Kingdom of the Netherlands to make observations[17]. Observations by the Prosecutor and observations by the Kingdom of Belgium, the Republic of Portugal, the Swiss Confederation and the Kingdom of the Netherlands were submitted as requested[18]. On 15 August 2008, the Appellant applied for leave to reply[19]. On 20 August 2008, Judge Hans-Peter Kaul, acting as the Single Judge of Pre-Trial Chamber III, rendered the "Decision on application for interim release"[20] ("Impugned Decision").

7. As to the appeal proceedings, on 22 August 2008, the Appellant filed a notice of appeal against the Impugned Decision[21] ("Defence Appeal"). He filed his document in

[11] Warrant of arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008, 10 June 2008, ICC-01/05-01/08-15-tENG.
[12] *Demande d'arrestation et de remise de Jean-Pierre Bemba Gombo adressée au Royaume de Belgique,* 10 June 2008, ICC-01/05-01/08-16.
[13] Impugned Decision, para. 12.
[14] ICC-01/05-01/08-T-3-ENG ET WT.
[15] Application for interim release, 23 July 2008, ICC-01/05-01/08-49.
[16] Decision requesting observations of the Prosecutor on the Defence's Application for interim release, 4 August 2008, ICC-01/05-01/08-60.
[17] Decision Requesting Observations on the Defence's Application for Interim Release", 4 August 2008, ICC-01/05-01/08-61. The Pre-Trial Chamber stated: "The Defence requests in the application for interim release, *inter alia*, that the Chamber 'grant interim release to [him] and to designate a host country for him, in principle Belgium, in the alternative Portugal and as a second alternative Switzerland [...]" (para. 3). It also recalled, *inter alia*, regulation 51 of the Regulations of the Court (para. 5) which provides that "[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released".
[18] Impugned Decision, para. 17.
[19] Impugned Decision, para. 18. The Pre-Trial Chamber "consider[ed] that the information available is sufficient[] to rule on the Application for interim release and that, therefore, no reply to the observations of the Prosecutor of 11 August 2008 on the point indicated by the defence (see paragraphs 18, 30 and 33 above) is warranted" (Impugned Decision, para. 39).
[20] Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73-Conf; a redacted version was issued on 26 August 2008 (ICC-01/05-01/08-80-Anx).
[21] Notice of Appeal against the Decision on the Application for Interim Release of Jean-Pierre Bemba Gombo, 22 August 2008, ICC-01/05-01/08-74.

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support of the appeal on 25 August 2008[22] ("Document in Support of the Appeal") to which the Prosecutor responded on 1 September 2008[23] ("Prosecutor's Response to the Appeal").

Preliminary Issue: the confidential nature of the filings in this appeal

8. Although the Impugned Decision was initially filed confidentially[24], the Pre-Trial Chamber issued a public decision on 26 August 2008 annexing a redacted version[25] ("Decision of 26 August 2008"). The Defence Appeal was filed publicly while the Document in Support of the Appeal was filed confidentially. The Prosecutor's Response to the Appeal was also filed confidentially. On 18 November 2008, the Appeals Chamber issued an order under regulation 28 of the Regulations of the Court "in order for the Appeals Chamber to determine what information, if any, in the two filings referred to [above] should be kept confidential"[26]. In response to this order, the Appellant submitted two documents[27]. On 25 November 2008, the Prosecutor filed his response[28]. The Appeals Chamber considers it possible to refer to the content of those documents in this judgment. It will deal with the filing of public redacted versions thereof shortly. As to documents from the pre-trial record that are still not public, the Appeals Chamber considers it necessary to refer to certain documents of this nature in this judgment and

[22] Defence Appeal against the Decision of the Single Judge of Pre-Trial Chamber III of 20 August 2008, entitled 'Decision on application for interim release", dated 22 August 2008 but filed on 25 August 2008, ICC-01/05-01/08-78-Conf.
[23] Prosecution's Response to the Defence Document in Support of Appeal against the 'Decision on application for interim release, 1 September 2008, ICC-01/05-01/08-83-Conf.
[24] Impugned Decision, para. 1. The Pre-Trial Chamber stated that the decision was "classified as confidential because it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential or under seal". It further stated that "[a]s some of the documents in question emanate from or concern the parties[] and participants[], the preparation of a version of this decision available to the public will require that interests of those concerned be taken into account and, as the case may be, that they be consulted. A public version of this decision will follow as soon as practicable".
[25] Decision concerning the public version of the 'Decision on application for interim release' of 20 August 2008, 26 August 2008, ICC-01/05-01/08-80 with ICC-01/05-01/08-80-Anx.
[26] Order in relation to confidential filings, 18 November 2008, ICC-01/05-01/08-259.
[27] *Réponse de la défense au document du 18 novembre 2008 émanant de la Chambre d'appel et intitulé « Order in relation to confidential filings »*, dated 21 September 2008 but filed on 21 November 2008, ICC-01/05-01/08-273 and Corrigendum to the Defence Response to the Appeals Chamber document of 18 November 2008 entitled "Order in relation to confidential filings", ICC-01/05-01/08-273-Corr-tENG: the original was dated 21 November 2008 but filed on 24 November 2008.
[28] Prosecution's Response to Appeals Chamber's 'Order in relation to confidential filings', 25 November 2008, ICC-01/05-01/08-289.

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does so in a manner which it considers appropriate without revealing information which it considers should not be made public.

III. MERITS

9. In the Defence Appeal, the Appellant states that he:

> challenges the impugned Decision that the conditions set forth in article 58(1)(a) and (b)(i) and (ii) of the Rome Statute are fulfilled insofar as there are reasonable grounds to believe that Mr Jean-Pierre Bemba has committed crimes within the jurisdiction of the Court and his detention appears to be necessary to ensure his appearance at trial and to insure that Mr Jean-Pierre Bemba does not obstruct or endanger the investigation or the Court proceedings[29].

10. In the Document in Support of the Appeal, the Appellant states that the Impugned Decision:

> was not based on reliable evidence and the Single Judge:
>
> a. Erred in failing sufficiently to establish the existence of a risk that Jean-Pierre Bemba would abscond;
>
> b. Erred in failing to demonstrate that Jean-Pierre Bemba would obstruct or endanger the investigation or the Court proceedings;
>
> c. Erred in failing sufficiently to establish a causal link between the alleged risks of absconding or threats and the interim release of Jean-Pierre Bemba;[30]

11. Having set out the above errors, the Appellant proceeds to put forward arguments in three sections in his Document in Support of the Appeal based on errors identified by him under first, article 58 (1) (a) of the Statute, second, article 58 (1) (b) (i) of the Statute and third, article 58 (1) (b) (ii) of the Statute. These sections do not reflect the list of errors set out above. In particular, errors based on article 58 (1) (a) of the Statute are not included within that list albeit they comprise a section in the Document in Support of the Appeal. The Appeals Chamber has therefore classified the three sections in the Document in Support of the Appeal as the grounds of appeal.

12. In general, the Prosecutor submits that "the Appellant has failed to meet its burden of demonstrating that the Single Judge's conclusions are flawed on account of a misdirection on a question of law or a misappreciation of the facts founding his decision,

[29] Defence Appeal, para. 11.
[30] Document in Support of the Appeal, para. 9.

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a disregard of relevant facts, or that the Single Judge took into account facts extraneous to the *sub judice* issues. Absent such a showing, as required by the jurisprudence of this Appeals Chamber, deference to the Single Judge's findings is warranted, and accordingly the decision should be confirmed"[31].

13. In a section devoted to an overview of the appeal and the standard of review, the Prosecutor submits that the Appellant "fails to demonstrate any error in the Decision which would justify the intervention of the Appeals Chamber"[32]. He submits that the Appellant's submissions are "largely confined to expressing the Appellant's disagreement with various aspects of the [Impugned] Decision – in many cases repeating submissions made before the Pre-Trial Chamber[] or making submissions on an issue for the first time[] – and does not identify or demonstrate any appellable error"[33]. The Prosecutor refers to the standard that the Appeals Chamber must follow when reviewing an interim release decision[34] and states that "[t]he Appeals Chamber has stated that under Articles 58(1) and 60(2), the detention of the person 'must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence'"[35]. The Prosecutor submits that the Pre-Trial Chamber "did not misappreciate any of the facts upon which the [Impugned] Decision is founded, and the factors considered therein were all relevant and consistent with the jurisprudence of this Court"[36]. He submits that the question is not whether any one factor by itself warrants continued detention "but rather whether the factors taken together raise the possibility of that person absconding or seeking to obstruct or endanger the investigation"[37]. He submits that the Appellant "has failed to demonstrate that there is any relevant factor which the Single Judge failed to consider"[38]. He submits that the "Appellant has provided no basis on which the Appeals Chamber may interfere with the Single Judge's assessment"[39]. The Prosecutor further

[31] Prosecutor's Response to the Appeal, p. 3.
[32] Prosecutor's Response to the Appeal, para. 8.
[33] Prosecutor's Response to the Appeal, para. 8.
[34] Prosecutor's Response to the Appeal, para. 9, referring to the Appeals Chamber's findings in the 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.
[35] Prosecutor's Response to the Appeal, para. 10
[36] Prosecutor's Response to the Appeal, para. 11.
[37] Prosecutor's Response to the Appeal, para. 11.
[38] Prosecutor's Response to the Appeal, para. 11.
[39] Prosecutor's Response to the Appeal, para. 12.

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notes that article 58 (1) (b) (i) and (ii) of the Statute are in the alternative[40]. Therefore, even if an error is found under either limb this would not result in the overturning of the Impugned Decision[41]. He submits that "as long as the Single Judge correctly found that the continued detention [...] was justified on the basis of either [...], the question of whether or not his continued detention appears necessary under the other requirement is ultimately not decisive for the present appeal"[42].

A. Relevant part of the Impugned Decision

14. Referring to the contents of article 60 (2) and article 58 (1) of the Statute, the Pre-Trial Chamber stated that "the Application for interim release will further be examined on the existence of reasonable grounds to believe that Mr Jean-Pierre Bemba has committed a crime within the jurisdiction of the Court, as provided for under article 58(l)(a) of the Statute, and the appearance of the necessity of his arrest, as provided for under article 58(l)(b) of the Statute"[43].

15. Concerning article 58 (1) (a), it "note[d] that it is a pre-requisite for the issuance of a warrant of arrest that the Chamber must be satisfied that there are reasonable grounds to believe that the person committed the crimes in question and that the same applies in proceedings for interim release under article 60(2) of the Statute.[]"[44] It found that "[t]he grounds for believing that Mr Jean-Pierre Bemba has committed crimes under the jurisdiction of the Court are explained exhaustively in the Chamber's decision of 10 June 2008, as referred to in paragraphs 23 to 25 of the present decision. The Single Judge notes that the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand"[45].

16. Concerning article 58 (1) (b) of the Statute, the Pre-Trial Chamber first dealt with both sub-paragraphs (i) and (ii) together before considering them individually. It stated that "[t]he existence of reasonable grounds to believe that the person did commit the

[40] Prosecutor's Response to the Appeal, para. 13.
[41] Prosecutor's Response to the Appeal, para. 13.
[42] Prosecutor's Response to the Appeal, para. 13.
[43] Impugned Decision, para. 50.
[44] Impugned Decision, para. 51.
[45] Impugned Decision, para. 52.

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offences in question lays the ground for inquiring into the need for his or her detention"[46]. It stated that "[t]he reasons for detention pursuant to article 58(l)(b)(i) to (iii) of the Statute are in the alternative.[] What may justify arrest and, in this context, continued detention under article 58(l)(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.[]"[47] It stated that "[i]n its decision of 10 June 2008 the Chamber considered the arrest of Mr Jean-Pierre Bemba necessary under article 58(l)(b)(i) and (ii) of the Statute in order to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings[48]".

17. Concerning article 58 (1) (b) (i) of the Statute it stated:

> 55. In respect of ensuring the appearance of Mr Jean-Pierre Bemba at trial, the Chamber referred to his past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources. The Single Judge finds these considerations relevant[] and holds the view that they are still valid today.
>
> 56. In addition, as recognised by the Appeals Chamber, if a person is charged with grave crimes, the person may face a lengthy prison sentence, which in combination with other relevant facts may make the person more likely to abscond.[] The Single Judge considers that the crimes of which Mr Jean-Pierre Bemba stands accused fall in this category, which by implication increases the risk of him trying to escape.
>
> 57. As to the argument advanced by Mr Jean-Pierre Bemba that he could but did not escape despite the fact that the investigation against him had been going on for more than a year, the Single Judge notes that it was not known to the public that the investigation into the situation in the CAR was targeted at Mr Jean-Pierre Bemba and there is no indication that he had any knowledge to that effect. On the contrary, in the interview on 3 August 2007 Mr Jean-Pierre Bemba stated that he believed that he was not subject to any investigations by the Court (see paragraph 10 above.) The argument therefore cannot be sustained.
>
> 58. In the view of the Single Judge, the claim of Mr Jean-Pierre Bemba that he was willing to present himself to the Court can equally not be accepted because it is of a hypothetical nature and it is not supported by any concrete evidence[]. In this context, the Single Judge also notes that Mr. Jean-Pierre Bemba was planning to travel to the United States of America, a country that has not ratified the Statute, where he would potentially be beyond the reach of the Court (see paragraph 29 above).

[46] Impugned Decision, para. 53.
[47] Impugned Decision, para. 53.
[48] Impugned Decision, para. 54.

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18. As to article 58 (1) (b) (ii) of the Statute, the Pre-Trial Chamber stated:

> 59. As to article 58(1)(b)(ii) of the Statute, the Single Judge refers to the findings and conclusions of the Chamber in its decision of 10 June 2008 (see paragraph 24 above) which, in the absence of any relevant argument on the part of the defence to the contrary, the Single Judge finds still applicable today.

19. Finally, in summarising its findings, the Chamber "conclude[d] that the conditions set forth in article 58(l)(a) and (b)(i) and (ii) of the Statute are fulfilled insofar as there are reasonable grounds to believe that Mr Jean-Pierre Bemba has committed crimes within the jurisdiction of the Court and his detention appears to be necessary to ensure his appearance at trial and to ensure that Mr Jean-Pierre Bemba does not obstruct or endanger the investigation or the court proceedings"[49].

20. Regarding disclosure, the Pre-Trial Chamber stated that it decided, on 20 June 2008, "to unseal and reclassify as public certain documents and decisions in the record of the situation in the Central African Republic (the "CAR") and in the case against Mr Jean-Pierre Bemba. This concerned, *inter alia*, annexes [to the Application for a Warrant of Arrest and to the Prosecutor's Further Information]"[50]. It stated that "[a]nnex 14 to the [...] Application for Warrant of Arrest consists of a video recording of the 'Interview with Jean-Pierre Bemba' by Al Jazeera of 3 August 2007, in which Mr Jean-Pierre Bemba expressed his belief that he was not subject to any investigation by the Court"[51]. It stated that:

> 41. The Single Judge further observes that the Prosecutor's Application for Arrest Warrant and the Prosecutor's Further Submission as such have to date not been made available to the defence (see paragraph 15 above). However, the factual basis for the arrest warrants against Mr Jean-Pierre Bemba and for the Chamber's decision of 10 June 2008 is provided in that decision which is public and, as such, accessible to the defence. Furthermore, a number of annexes to the Prosecutor's Application for Warrant of Arrest and the Prosecutor's Further Submission have been unsealed and reclassified as public (see paragraph 10 above) and are accordingly also available to the defence. In these circumstances, and in view of the evidentiary threshold applicable under Article 60(2) in conjunction with article 58(l)(a) of the Statute to detention matters, the Single Judge considers that the lack of access to the remaining information does not have an impact on the legality of detention of Mr Jean-Pierre Bemba at this stage.

[49] Impugned Decision, para. 60.
[50] Impugned Decision, para. 10.
[51] Impugned Decision, para. 10.

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B. First ground of appeal - violation of article 58 (1) (a) of the Statute

1. Arguments of the Appellant

21. The Appellant submits that "[a]ccording to the Single Judge the grounds for believing that [he] has committed crimes are explained exhaustively in the Chamber's Decision of 10 June 2008. [] The Defence submits that this referral is insufficient because the information that is mentioned in the Decision of 10 June 2008 has not been fully disclosed to the Defence. The Defence therefore cannot put forward sufficient material facts or full arguments to rebut these grounds"[52].

2. Arguments of the Prosecutor

22. The Prosecutor submits that the Appellant has failed to identify any appellable error, instead repeating earlier submissions and expressing general dissatisfaction with the manner of the proceedings[53]. He submits that the "Pre-Trial Chamber had previously made detailed findings upon which it held that there are reasonable grounds to believe that the Appellant has committed various crimes within the jurisdiction of the Court", referring to the Decision of 10 June 2008, stating that "[t]hese findings had been made less than three months before the Decision on interim release"[54]. He submits that "[t]he decision containing these findings was available to the Appellant, putting him in an adequate position to make submissions before the Single Judge regarding the grounds to believe that he had committed the crimes in question"[55]. He submits that "[h]owever in the Application for Interim Release, the Appellant did not provide the Single Judge with 'any material fact or argument to rebut these grounds'" (quoting the Impugned Decision)[56]. He submits that "[i]n the absence of any basis on which to alter its assessment, or any factor indicating that the circumstances or bases of its previous assessment may have changed,[] the Prosecution submits that the Single Judge was

[52] Document in Support of the Appeal, para. 11.
[53] Prosecutor's Response to the Appeal, para. 14.
[54] Prosecutor's Response to the Appeal, para. 15 and footnote 16.
[55] Prosecutor's Response to the Appeal, para. 15.
[56] Prosecutor's Response to the Appeal, para. 15.

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entirely correct to hold that there remained reasonable grounds to believe that the Appellant has committed the crimes in question"[57].

3. Determination by the Appeals Chamber

23. In essence, the issue on appeal is whether the Impugned Decision should be reversed as a result of the lack of full disclosure to the Appellant of the information relied upon by the Pre-Trial Chamber to justify his detention.

24. The Appeals Chamber notes that the Pre-Trial Chamber, in paragraph 50 of the Impugned Decision, correctly recalled its duty in relation to the Application for Interim Release to consider "the existence of reasonable grounds to believe that [the Appellant] has committed a crime within the jurisdiction of the Court". In this regard, article 60 (2) of the Statute provides:

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

25. In the Impugned Decision, the Pre-Trial Chamber recalled, when summarising the arguments of the parties, that the Appellant had submitted that he had "not been given access to all the relevant information underlying the decision of 10 June 2008"[58]. The Pre-Trial Chamber recalled that it had unsealed various documents[59]. Having observed that the Application for a Warrant of Arrest and the Prosecutor's Further Information had not been made available to the Appellant, but that "the factual basis for the arrest warrants against [the Appellant] and for the [Decision of 10 June 2008] is provided in that decision which is public and, as such, accessible to the defence", and having noted the information that was available to him, it stated that "[i]n these circumstances, and in view of the evidentiary threshold applicable under Article 60(2) in conjunction with article 58(1)(a) of the Statute to detention matters, the Single Judge considers that the

[57] Prosecutor's Response to the Appeal, para. 15.
[58] Impugned Decision, para. 26.
[59] Impugned Decision, para. 10.

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lack of access to the remaining information does not have an impact on the legality of detention of Mr. Jean-Pierre Bemba at this stage"[60].

26. There is no express regime for disclosure in relation to applications for interim release in the legal texts of the International Criminal Court ("Court" or "ICC"). What is provided for is the following. When arrested, a person has a right to receive a copy of the warrant of arrest. This is clear from rule 117 (1) of the Rules[61]. Article 58 (3) of the Statute sets out what the warrant of arrest shall contain, including, "(b) [a] specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) A concise statement of the facts which are alleged to constitute those crimes". Article 60 (1) of the Statute provides that "[u]pon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial".

27. Also relevant is rule 121 of the Rules providing in sub-rule (1) that "[a] person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. [...]". The rights set forth in article 67 include the right "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks" (article 67 (1) (a) of the Statute), with paragraph 2 providing for disclosure of "evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence". Specific provisions regulating disclosure at the pre-trial phase concern disclosure for the purposes of the confirmation of the charges against the suspect[62].

[60] Impugned Decision, para. 41.
[61] See also regulation 186 of the Regulations of the Registry which regulates arrival of the detained person at the detention centre and provides that that person shall be provided with, *inter alia*, a certified copy of the warrant of arrest (regulation 186 (2) (b) (viii)).
[62] See e.g. article 61 (3) of the Statute, rule 121 (2) of the Rules.

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28. As has previously been recalled by the Appeals Chamber, "article 21 (3) of the Statute stipulates that the Statute must be interpreted and applied consistently with internationally recognised human rights"[63]. In this regard, the Appeals Chamber notes article 9 (2) to (4) of the International Covenant on Civil and Political Rights[64] and article 7 (4) to (6) of the American Convention on Human Rights[65]. Article 5 (Right to liberty and security) (2) to (4) of the Convention for the Protection of Human Rights and Fundamental Freedoms[66] ("EConvHR") provides as follows:

> 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.
>
> 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[63] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 46.
[64] 999 United Nations Treaty Series 171. Article 9 (2) to (4) provides: "2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".
[65] "Pact of San José, Costa Rica", 1144 United Nations Treaty Series 17955. Article 7 (4) to (6) provides: "4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies".
[66] 4 November 1950 as amended by Protocol 11, 213 United Nations Treaty Series 221 et seq.

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29. The ECtHR has held, in proceedings under paragraph 4, "that the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention"[67]. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person[68].

30. In the case of *Lamy v. Belgium*, the ECtHR held that "it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively"[69]. It held that access was "essential for the applicant at this crucial stage in the proceedings, when the court had to decide whether to remand him in custody or to release him"[70]. It noted more generally that "the appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case"[71]. This case has been cited in other cases in which the ECtHR held that "[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention"[72].

31. At the same time, it is noted that the ECtHR recognises that this entitlement to disclosure is not absolute. In *Migoń v. Poland* it held that "proceedings conducted under article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure"[73]. In *Garcia Alva v. Germany* it explicitly acknowledged "the need for criminal investigations to be conducted

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[67] See *Brogan v The United Kingdom*, nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para. 65; as quoted in *Nikolova* v. *Bulgaria*, no. 31195/96, 25 March 1999, para. 58, *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, para. 39.

[68] *Sanchez-Reisse v. Switzerland*, no. 9862/82, 21 October 1986, para. 51, *Toth v. Austria*, no. 11894/85, 12 December 1991, para. 84, *Kampanis v Greece*, no. 17977/91, 13 July 1995, para. 47.

[69] *Lamy v. Belgium*, no. 10444/83, 30 March 1989, para. 29.

[70] *Lamy v. Belgium*, no. 10444/83, 30 March 1989, para. 29.

[71] *Lamy v. Belgium*, no. 10444/83, 30 March 1989, para. 29.

[72] *Nikolova* v. *Bulgaria*, no. 31195/96, 25 March 1999, para. 58; *Garcia Alva v Germany*, no. 23541/94, 13 February 2001, para. 39.

[73] *Migoń v Poland*, no. 24244/94, 25 June 2002, para. 79. See also *Chruścińska v. Poland*, no. 22755/04, 6 November 2007, para. 55.

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efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice"[74]. However, the court proceeded to point out that: "this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence"[75]. The ECtHR also found that "[t]he opportunity of challenging effectively the statements or views which the prosecution bases on specific documents in the file may in certain instances presuppose that the defence be given access to these documents (see the Lamy v. Belgium judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29)"[76].

32. Based on the jurisprudence of the ECtHR, the Appeals Chamber considers that, in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case. Ideally, the arrested person should have all such information at the time of his or her initial appearance before the Court[77]. This would allow the person to challenge his or her detention as soon as he or she is in detention at the Court and in circumstances in which he or she is appraised of the material on which the arrest warrant was based.

33. To allow this to take place, the Appeals Chamber considers that the Prosecutor should have this in mind when submitting an application for a warrant of arrest under article 58 of the Statute and should, as soon as possible, and preferably at that time, alert the Pre-Trial Chamber as to any redactions that he considers might be necessary. In this regard, jurisprudence of the ECtHR illustrates that the right to disclosure in these circumstances is not unqualified. The nature and timing of such disclosure must take into account the context in which the Court operates. The right to disclosure in these circumstances must be assessed by reference to the need, *inter alia*, to ensure that victims and witnesses are appropriately protected (see article 68 (1) of the Statute and

[74] *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, para. 42.
[75] *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, para. 42.
[76] *Wloch v. Poland,* no. 27785/95, 19 October 2000, para. 127.
[77] This ground of appeal concerns disclosure for the purposes of an application for interim release under article 60 (2) of the Statute. The Appeals Chamber is therefore not considering pre-requisites for applications for interim release made under article 59 (3) of the Statute.

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rule 81 of the Rules). The Court has jurisdiction over genocide, crimes against humanity and war crimes; the gravity of the crimes is such that the protection of victims and witnesses is a paramount consideration. An additional consideration is the need to safeguard ongoing investigations. Finally, the Pre-Trial Chamber should ensure that in the disclosure process priority is given to those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention.

34. In the instant case, and as seen above (paragraph 25) by the time of his Application for Interim Release on 23 July 2008 which resulted in the Impugned Decision the Appellant had not received all of the material relied upon by the Pre-Trial Chamber nor had he received all of the material that was "essential in order effectively to challenge the lawfulness of detention". However, as stated above, the right to the immediate disclosure of such material is not absolute. The Appeals Chamber considers it appropriate to consider the circumstances of the case.

35. Prior to the Appellant's transfer to the Court on 3 July 2008, the Pre-Trial Chamber convened a confidential *ex parte* conference on 19 June 2008[78]. The Appeals Chamber notes that "[i]n its decision convening the status conference it sought observations from the Prosecutor with regard to the unsealing of certain documents in the situation and case record"[79]. The Chamber also asked the Prosecutor if he had already started preparing a redacted version, to submit to the Chamber for its approval, of the following documents: the Application for a Warrant of Arrest and its annexes and the Prosecutor's Further Information and its annexes[80]. At that hearing, the Prosecutor answered in the affirmative[81].

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[78] Decision on unsealing and re-classification of certain documents and decisions, 20 June 2008, ICC-01/05-01/08-20, para. 1 referring to ICC-01/05-01/08-17-Conf-Exp.
[79] Decision on unsealing and re-classification of certain documents and decisions, 20 June 2008, ICC-01/05-01/08-20, para. 2, referring to ICC-01/05-01/08-17-Conf-Exp, p. 6.
[80] *Ordonnance sollicitant du Procureur et de la Division d'Aide aux Victimes et aux Temoins des observations relatives a la levee des scelles concernant certain documents et a la modification du niveau de confidentialite de ceux-ci*, 20 June 2008, ICC-01/05-01/08-21, para. 2.
[81] *Ordonnance sollicitant du Procureur et de la Division d'Aide aux Victimes et aux Temoins des observations relatives a la levee des scelles concernant certain documents et a la modification du niveau de confidentialite de ceux-ci*, 20 June 2008, ICC-01/05-01/08-21, para. 2.

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36. Thereafter, the Pre-Trial Chamber issued two orders in which, in the one[82], it unsealed various documents (including some of the annexes to the two relevant documents) and in the other, it set deadlines for the Prosecutor to make submissions on the treatment of the Application for a Warrant of Arrest and the Prosecutor's Further Information and the annexes thereto as well as the reasons justifying the treatment proposed; it also made provision for the Victims and Witnesses Unit ("VWU") to submit observations thereon[83]. Deadlines were fixed ending on 9 July 2008 with regard to the main documents and 7 August 2008 with regard to the annexes[84]. In this regard, the Appeals Chamber notes that at issue were, *inter alia*, with regard to the annexes, large quantities of pages. The Prosecutor filed the submissions sought on 30 June and 16 July 2008[85]. On 23 July 2008, the Pre-Trial Chamber rendered a decision concerning the submissions of the Prosecutor[86].

37. In the meantime, the Appellant had also raised the issue of disclosure before the Pre-Trial Chamber on several occasions, including at his initial appearance on 4 July 2008[87], in a motion requesting the unsealing of documents filed on 14 July 2008 (which included the Application for a Warrant of Arrest and the Prosecutor's Further Information)[88] ("Motion to Unseal") and in his Application for Interim Release which

[82] Decision on unsealing and re-classification of certain documents and decisions, 20 June 2008, ICC-01/05-01/08-20.
[83] *Ordonnance sollicitant du Procureur et de la Division d'Aide aux Victimes et aux Temoins des observations relatives a la levee des scelles concernant certain documents et a la modification du niveau de confidentialite de ceux-ci*, 20 June 2008, ICC-01/05-01/08-21.
[84] *Ordonnance sollicitant du Procureur et de la Division d'Aide aux Victimes et aux Temoins des observations relatives a la levee des scelles concernant certain documents et a la modification du niveau de confidentialite de ceux-ci*, 20 June 2008, ICC-01/05-01/08-21, pp. 5 - 8.
[85] Prosecution's Application Pursuant to Rules 81(2) and 81(4) for redactions to the Application for a Warrant of Arrest and the Further Submission, 30 June 2008, ICC-01/05-01/08-32-US-Exp and Prosecution's Application for Redaction Pursuant to Rules 81(2) and 81(4), 16 July 2008, ICC-01/05-01/08-44-US-Exp.
[86] Decision concerning the Prosecutor's proposals for redactions, 23 July 2008, ICC-01/05-01/08-48-US-Exp.
[87] The Appellant stated that he had been informed of the crimes charged under article 60 of the Statute (ICC-01/05-01/08-T-3-FRA, p. 3). His counsel also stated that they had only had some disclosure that day. He stated that they were "a little bit handicapped with [their] information because [he] read through the documents and the Prosecutor [states that he is] afraid that [the Appellant] will flee or otherwise endanger the case. So [he] would like [the Prosecutor] to disclose that information, that we can use that information before filing the request for provisional release – for conditional release" (ICC-01/05-01/08-T-3-ENG, p. 4). Otherwise, the issue of disclosure was not raised during the hearing.
[88] ICC-01/05-01/08-42. The Appellant stated that during the initial appearance he "invited the Prosecutor to disclose information which the Prosecutor relied on that the conditions of article 58 of the Rome Statute paragraph 1 under b were met" (para. 3). He stated that he intended "in the near future [to] file motions challenging the arrest warrants and requesting interim release. However the Defence feels prejudiced that it

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was filed on 23 July 2008[89]. The Pre-Trial Chamber issued a decision on the Motion to Unseal dated 22 July 2008 and stated that on 4 July 2008 all non *ex parte* court records in the case were notified to the Appellant's counsel[90]. This included the annexes to the Application for a Warrant of Arrest and Prosecutor's Further Information that had been made public[91]. It further stated that "[t]o the extent that the Motion for unsealing concerns the [Application for a Warrant of Arrest and the Prosecutor's Further Information] and those of their respective annexes that have not been unsealed and re-classified under the decision of 20 June 2008, the motion can equally not be granted at the present time as the Prosecutor's applications for redactions are under consideration and will be decided upon in due course"[92].

38. The issue of disclosure was raised by the Appellant on several occasions before the Impugned Decision was issued. However, the Pre-Trial Chamber was aware of its general obligation to ensure that the Appellant received relevant information[93]. The

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does not possess the same information as which the Court and the Prosecutor does". He acknowledged that certain documents and decisions had been unsealed and re-classified but stated that "the material relevant for the motions that the Defence desires to file has not been unsealed" (para. 5). He stated that "[r]egulation 23 bis of the Regulations of the Court paragraph 3 permits the Defence to request the Chamber to re-classify a document and the Defence has given good cause that it is in the Defence's interest to do so" (para. 6). He sought the unsealing and reclassification of, *inter alia*, the Application for a Warrant of Arrest and the Prosecutor's Further Information and their respective annexes (p. 6). The Prosecutor responded by stating that it had asked the Pre-Trial Chamber for authorization to redact those documents (some annexes already being public) and that the Appellant's request should "be deferred in respect of the two remaining documents and their annexes until such time that the PTC III renders a decision on the treatment of these documents" (Prosecutor's Response to Defence "Motion to unseal certain documents and decisions", 18 July 2008, ICC-01/05-01/08-46, paras. 4 and 5).

[89] The Appellant recalled the history of his arrest and transfer to the Court, including the filing and rejection by the Chamber of his motion to unseal. He submitted that "[a]s a result the Defence is still ignorant of the material that justifies the warrant of arrest of the 10th June 2008" (Application for Interim Release, para. 4). He also submitted *inter alia*: "According to the ordinary meaning of article 60 (2 of the Statute, the burden of proof in relation to the continuing existence of the conditions mentioned in article 58 (1), of the Statute during the time a person is under pre-trial detention lies with the prosecution.[] 21. As debated in the motion to unseal certain documents and decisions filed on the 14th of July 2008 the Defence is ignorant of the fact that there are reasonable grounds to believe that Mr Jean-Pierre Bemba committed the offences as stipulated in the arrest warrant" (paras. 20 – 21).

[90] Decision on the "Motion to unseal certain documents and decisions" of 14 July 2008, 22 July 2008, ICC-01/05-01/08-47, para. 7.

[91] Decision on the "Motion to unseal certain documents and decisions" of 14 July 2008, 22 July 2008, ICC-01/05-01/08-47, para. 12.

[92] Decision on the "Motion to unseal certain documents and decisions" of 14 July 2008, 22 July 2008, ICC-01/05-01/08-47, para. 13.

[93] The Appeals Chamber notes the following. In the "Decision on unsealing and re-classification of certain documents and decisions", 20 June 2008, ICC-01/05-01/08-20, para. 5, in unsealing certain documents, the Pre-Trial Chamber noted "the rights of [the Appellant] under article 67 of the Statute. In particular, the Chamber recalls the principle of public proceedings before the Court as enshrined in article 67(1) of the Statute". In the Impugned Decision, the Pre-Trial Chamber recalled that it would "apply the relevant law in

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Pre-Trial Chamber clearly took steps to ensure that the information would be disclosed expeditiously and when it was safe to do so. The Pre-Trial Chamber set a timetable for the Prosecutor to submit a proposal concerning treatment of the material that underlay the Warrant of Arrest and the Chamber ruled thereon expeditiously. In ruling on matters related to disclosure, the Pre-Trial Chamber also ensured that the VWU was involved. As such, the Pre-Trial Chamber appears to have ensured that the Appellant was provided with the material that underpinned the Warrant of Arrest in as timely a manner as possible on the facts of the present case.

39. The Appeals Chamber notes that the Pre-Trial Chamber had to decide to either postpone the decision on interim release until all evidence had been disclosed to the Appellant or to render a decision on the application in the absence of full disclosure. Given the proximity of the Application for a Warrant of Arrest (dated 9 May 2008) to the arrest (24 May 2008) and surrender (3 July 2008) of the Appellant to the Court[94], the efforts by the Pre-Trial Chamber to ensure disclosure of the information, the need to protect victims and witnesses and the duty to render a decision without delay (rule 118 (2) of the Rules), in the circumstances of this case, the Pre-Trial Chamber did not err. In this context the Appeals Chamber also notes that a person may, despite the fact that he or she has not yet had full disclosure, wish to raise arguments in relation to interim release in order to have a speedy decision rendered by a Chamber. As soon as the Appellant had received full disclosure, he had the right to apply for interim release again which would have allowed him to make full arguments at that time.

40. Consequently the Appeals Chamber is not persuaded that the Pre-Trial Chamber erred when deciding on the Application for Interim Release at a point in time when the Appellant had not yet received all documents and evidence relating to the grounds for his detention. The Appeals Chamber notes that the Appellant is entitled to apply for

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compliance with internationally recognised human rights" (para. 36); it "observe[d] at the outset that the right to liberty is of fundamental importance for everyone and that for any deprivation of liberty to be acceptable, it must be on such grounds and in accordance with such procedure as are established by the applicable legal regime. Furthermore it must not be arbitrary" (para. 37); it recalled "the time-sensitivity of a decision on any application for interim release" and stated that it "consider[ed] the present application within the limits of the applicable statutory framework and as soon as permitted by the procedural circumstances" (para. 38); it found the information before it to be sufficient to rule on the application (para. 39).

[94] See Impugned Decision, paras. 2, 5 and 12.

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interim release again at which point the Chamber shall consider the matter and take all relevant factors into consideration.

C. Second ground of appeal - violation of article 58 (1) (b) (i) of the Statute

1. Arguments of the Appellant

41. As his second ground of appeal, the Appellant submits that the Impugned Decision "was not based on reliable evidence and the Single Judge: [...] [e]rred in failing sufficiently to establish the existence of a risk that Jean-Pierre Bemba would abscond [...]" and that he "[e]rred in failing sufficiently to establish a causal link between the alleged risks of absconding or threats and the interim release of Jean-Pierre Bemba[95]".

42. The Appellant first submits that the Pre-Trial Chamber relied on findings regarding his "past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources"[96]. He submits that this finding would "be valid for any leader of state, opposition leader or important government official" and that it would only be relevant "if there would be any current and concrete evidence available that this position would be used to flee"[97].

43. Regarding the Pre-Trial Chamber's reference to the fact that the Appellant "is accused of grave crimes and may face a lengthy prison sentence", the Appellant argues "that only the seriousness of the crime and the fact that the accused might face a lengthy prison sentence is insufficient to meet the test that it appears necessary to ensure the person's appearance at trial"[98].

44. The Appellant submits that the Pre-Trial Chamber incorrectly dismissed the argument that he "did not escape despite the fact that the investigation against him had been going on for more than a year"[99]. He notes that the Pre-Trial Chamber relied on the interview of 3 August 2007 wherein the Appellant "stated that he believed that he was

[95] Document in Support of the Appeal, para. 9.
[96] Document in Support of the Appeal, para. 12.
[97] Document in Support of the Appeal, para. 12.
[98] Document in Support of the Appeal, para. 13.
[99] Document in Support of the Appeal, para. 14.

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not subject to any investigation by the Court"[100]. The Appellant submits that at the time of the interview, he did not feel obliged to tell the interviewer what he knew of ongoing investigations and that "he was correct in saying that officially he was not a suspect in any ICC proceedings because he never had been officially notified by the Prosecutor that he was under suspicion for the criminal charges that are mentioned in the warrant of arrest"[101]. He also submits that he knew he was being investigated by the ICC "as this was common knowledge to everybody interested in the situation in the DRC or the CAR"[102], directing the Appeals Chamber to reports on such investigations on a website of 24 May 2007 and 14 April 2006. Finally, he refers to the Pre-Trial Chamber's finding that his claim of being willing to present himself to the Court could not be accepted as "it is of a hypothetical nature and it was not supported by any concrete evidence"[103]. He submits that if he "would have been invited by the Prosecutor to appear before the ICC he would have done so. But by being arrested in the way he has been the Prosecutor has taken away this opportunity to prove that Mr Bemba would indeed appear voluntarily"[104].

45. Regarding the finding that in the context of the argument that he was willing to present himself to the Court he was planning to travel to the United States of America, which has not ratified the Statute and "where he would potentially be beyond the reach of the Court", the Appellant argues that he is not a United States citizen and does not have a "staying permit" but would be travelling in the United States on a visa with a temporary and limited legal status[105]. He argues that the United States will deal with arrest and extradition proceedings concerning the Court regarding non-US citizens on a case by case basis[106]. He further submits that he knew he was being investigated since May 2007 but "he had already visited the USA on September 2007 and returned to Portugal without trying to hide from ICC jurisdiction"[107].

[100] Document in Support of the Appeal, para. 14.
[101] Document in Support of the Appeal, para. 14.
[102] Document in Support of the Appeal, para. 14.
[103] Document in Support of the Appeal, para. 15.
[104] Document in Support of the Appeal, para. 15.
[105] Document in Support of the Appeal, para. 16
[106] Document in Support of the Appeal, para. 16.
[107] Document in Support of the Appeal, para. 16.

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2. Arguments of the Prosecutor

46. The Prosecutor submits that the Chamber considered a range of factors in deciding that detention was necessary under article 58 (1) (b) (i) of the Statute and that this determination was reasonable and founded on the relevant provisions of the Statute as well as the jurisprudence of the Court[108]. The Prosecutor argues that the Appellant has not demonstrated either that the Pre-Trial Chamber considered irrelevant factors or that the Chamber failed to consider any relevant factor and that the appeal on this portion of the Impugned Decision must thus fail[109].

47. The Prosecutor submits that the Appellant misconstrues or misstates the manner in which the Pre-Trial Chamber considered the position, contacts, and financial means of the Appellant, and the gravity of the crimes[110]. He submits that these factors were not considered in isolation to justify continued detention, but that the Chamber properly considered a range of factors in combination[111]. He underlines that the seriousness of the crimes "has been held by the Appeals Chamber to be one relevant factor in assessing an application for interim release"[112] and refers to Appeals Chamber jurisprudence on consideration of the fact that a person has connections and the means to flee the Court's jurisdiction, in addition to jurisprudence of the ECtHR[113]. On the issue of concrete evidence, he submits that the Appeals Chamber has previously confirmed that, "such evidence is not required, and that the availability of international contacts and the means to flee remains a relevant consideration"[114].

48. In relation to the argument that the Appellant knew he was under investigation and did not escape albeit the investigations against him had been going on for more than a year, the Prosecutor submits that the Pre-Trial Chamber correctly dismissed this argument[115]. He submits that there was no material before the Chamber to suggest he "had knowledge of the fact that he was personally subject to investigations by the

[108] Prosecutor's Response to the Appeal, para. 16.
[109] Prosecutor's Response to the Appeal, para. 16.
[110] Prosecutor's Response to the Appeal, para. 17.
[111] Prosecutor's Response to the Appeal, para. 17.
[112] Prosecutor's Response to the Appeal, para. 18.
[113] Prosecutor's Response to the Appeal, para. 19.
[114] Prosecutor's Response to the Appeal, para. 20.
[115] Prosecutor's Response to the Appeal, para. 22.

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Court"[116]. The only relevant piece of information before the Pre-Trial Chamber, the interview of 3 August 2007, suggests that the Appellant believed that he was not subject to any investigations by the Court[117]. On the Appellant's reference to information that purports to show he was aware he was being investigated by the Court and that this was common knowledge in the Democratic Republic of the Congo and the Central African Republic, the Prosecutor submits that none of this information was before the Chamber or is part of the record[118]. He argues that arguments based on such new evidence should not be considered by the Appeals Chamber (see further below)[119]. He argues that even if considered, the additional evidence and arguments thereon, do not demonstrate an error[120]. The Document in Support of the Appeal "even taken on its face and read together with the evidence that was before the Single Judge, does not establish that the Appellant knew that he was subject to investigations by the Court"[121].

49. The Prosecutor argues that the Pre-Trial Chamber was correct "in disregarding the Appellant's submissions regarding his alleged willingness to present himself to the Court"[122]. He submits that "[i]n the absence of concrete evidence of an intention to surrender, such assertions must be considered as hypothetical, and should not be considered as relevant to the [Impugned] Decision"[123]. He submits that the Appellant has not presented any concrete evidence of his alleged intention to surrender and has not demonstrated that the Chamber erred by failing to consider this alleged intention as a relevant factor[124].

50. On the Pre-Trial Chamber's observations on the Appellant's planned travel to the United States of America, the Prosecutor submits that this was not a central element in the determination of the risk of flight, but only an additional point that the Pre-Trial Chamber noted as further supporting its decision not to consider the Appellant's alleged

[116] Prosecutor's Response to the Appeal, para. 22.
[117] Prosecutor's Response to the Appeal, para. 22.
[118] Prosecutor's Response to the Appeal, para. 23.
[119] Prosecutor's Response to the Appeal, para. 23.
[120] Prosecutor's Response to the Appeal, para. 24.
[121] Prosecutor's Response to the Appeal, para. 24.
[122] Prosecutor's Response to the Appeal, para. 25.
[123] Prosecutor's Response to the Appeal, para. 25.
[124] Prosecutor's Response to the Appeal, para. 25.

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willingness to present himself to the Court[125]. The Prosecutor submits that it was appropriate for the Pre-Trial Chamber to consider an intended travel to a non-State party in such a limited manner[126].

3. Determination by the Appeals Chamber

51. In relation to the second ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber did not err in finding that the detention of the Appellant appears necessary to ensure his appearance at trial.

52. The Appeals Chamber recalls the standard of review for appeals against decisions rejecting applications for interim release:

> Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues[127].

53. The Pre-Trial Chamber based its finding on a number of factors put forward by the Prosecutor, namely, the Appellant's "past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources"[128], repeating findings already made in the Decision of 10 June 2008[129] and concluding that these findings were "still valid" at the time it rendered the Impugned Decision[130]. The Appeals Chamber considers that it would have been preferable for the Pre-Trial Chamber to state in more detail in the Impugned Decision the reasons for which it concluded that the conditions of article 58 (1) (b) (i) of the Statute continued to be fulfilled. The Appeals Chamber is nevertheless satisfied that the Pre-Trial Chamber's omission to provide more detailed reasoning did not detract from the correctness and adequacy of its finding on this point.

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[125] Prosecutor's Response to the Appeal, para. 26.
[126] Prosecutor's Response to the Appeal, para. 26.
[127] *Prosecutor v. Germain Katanga,* "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), para. 25.
[128] Impugned Decision, para. 55.
[129] Decision of 10 June 2008, para. 87.
[130] Impugned Decision, para. 55.

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54. The Appeals Chamber notes furthermore that the Pre-Trial Chamber relied in the Impugned Decision on two additional factors in reaching its decision regarding article 58 (1) (b) (i) of the Statute that it had not addressed in the Decision of 10 June 2008: namely that the Appellant allegedly committed serious crimes and may face a lengthy prison sentence[131]; and that he was planning to travel to the United States[132].

55. Turning to the argument raised by the Appellant that there was no current and concrete evidence before the Pre-Trial Chamber that would indicate that the Appellant would flee, the Appeals Chamber recalls its previous jurisprudence where it noted that in order for article 58 (1) (b) of the Statute to be fulfilled, the detention of the suspect must "appear" to be necessary. "The question revolves around the possibility, not the inevitability, of a future occurrence"[133]. The apparent necessity of continued detention in order to ensure the detainee's appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together. This was the approach taken in the Impugned Decision[134]. The Pre-Trial Chamber did not rely on a single factor, but concluded that the conditions of article 58 (1) (b) (i) of the Statute were fulfilled on the basis of the Appellant's position, contacts, background, network and resources[135] as well as the seriousness of the crimes he is alleged to have committed, the punishment that he might face[136], and his travel plans to a State not party to the Statute[137]. None of these factors appear to be extraneous to the question of whether there is a risk of absconding. The Appeals Chamber notes in this context that it has held in the past that the seriousness of the crimes allegedly committed is a relevant factor and may make a person more likely to abscond[138]. Regarding the Appellant's travel plans to the United States of America, a

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[131] Impugned Decision, para. 56.
[132] Impugned Decision, para. 58.
[133] *The 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, para. 21.
[134] Impugned Decision, para. 56.
[135] Impugned Decision, para. 55.
[136] Impugned Decision, para. 56.
[137] Impugned Decision, para. 58.
[138] See *The 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, where the Appeals Chamber noted at para. 21 that "[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail"; and

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State not party to the Statute, the Appeals Chamber considers that it is not erroneous to note such travel plans.

56. Regarding the Appellant's contention that the Pre-Trial Chamber erred in dismissing his argument that the arrest of the Appellant took away his opportunity of proving that he would appear voluntarily, the Appeals Chamber reiterates that in the absence of concrete evidence of an intention of voluntary surrender, such hypothetical claims are of little weight in the determination of whether the conditions of article 58 (1) (b) (i) of the Statute are fulfilled[139].

57. The Appeals Chamber notes that the Appellant has in this appeal made factual submissions in order to show that he had not tried to escape from the jurisdiction of the Court for a year even though he had been aware of the Prosecutor's investigations in respect of crimes allegedly committed by him[140]. These factual submissions had not been presented to the Pre-Trial Chamber. The Appeals Chamber observes that given the weight of the other considerations, the Appellant's additional submissions do not detract from the overall finding of the Pre-Trial Chamber that continued detention of the Appellant appeared necessary to ensure his appearance at trial. It is therefore not necessary in the context of the present appeal to decide whether factual submissions may be made for the first time before the Appeals Chamber in proceedings pursuant to article 82 (1) (b) of the Statute.

58. In light of the above and on the basis of the standard of review noted at paragraph 52 above, the Appeals Chamber therefore cannot identify an error in the Pre-Trial Chamber's conclusion that the Appellant's continued detention appeared necessary to ensure his presence at trial.

The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, where the Appeals Chamber found at para. 136 that "[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond".

[139] See *The Prosecutor v Thomas Lubanga Dyilo,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, para. 138.

[140] Document in Support of the Appeal, para. 14 and footnote 9.

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D. Third ground of appeal - violation of article 58 (1) (b) (ii) of the Statute

1. Arguments of the Appellant

59. The Appellant submits that the Impugned Decision violates article 58 (1) (b) (ii) of the Statute. He states that the Single Judge "merely refers to the findings and conclusions of the Decision of 10 June 2008"[141]. He argues that "[i]n that Decision the Pre-Trial Chamber only recognizes that Mr. Jean-Pierre Bemba was and is a powerful man and that he could easily locate victims and witnesses."[142] He submits that there has been no assessment made of current and concrete actions taken by him to these anonymous victims or witnesses, referring to a Trial Chamber decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY")[143]. He also submits that no full disclosure has been made and he therefore also does not know of the identity of the Prosecutor's witnesses or victims who could be approached[144]. He refers to ICTY jurisprudence in which a Chamber took into account the fact that a detained person resided in an area which was far from the place where the crimes covered by the indictment had been allegedly committed, "and therefore would not pose a threat to witnesses and victims or could endanger the judicial proceedings otherwise"[145].

2. Arguments of the Prosecutor

60. The Prosecutor submits that the Appellant failed to raise any arguments relating to article 58 (1) (b) (ii) of the Statute before the Pre-Trial Chamber[146]. He submits that as a general rule an appellant should not be allowed to raise new arguments for the first time on appeal if he or she could have raised the arguments before the first instance chamber, citing jurisprudence of the ICTY[147]. The Prosecutor submits furthermore that even if the Appeals Chamber considered the Appellant's arguments these arguments should be dismissed as no error has been identified[148]. Recalling the Pre-Trial Chamber's findings,

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[141] Document in Support of the Appeal, para. 18.
[142] Document in Support of the Appeal, para. 18.
[143] Document in Support of the Appeal, para. 18 and footnote 15.
[144] Document in Support of the Appeal, para. 18.
[145] Document in Support of the Appeal, para. 18.
[146] Prosecutor's Response to the Appeal, para. 28.
[147] Prosecutor's Response to the Appeal, para. 29.
[148] Prosecutor's Response to the Appeal, para. 29.

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the Prosecutor submits that the Appellant's arguments as to the factual basis of the Pre-Trial Chamber's conclusion must be dismissed[149].

61. The Prosecutor argues that the standard for justifying 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.'"[150] In line with this standard, it is not necessary for the Prosecutor to establish that the Appellant has taken current and concrete actions against anonymous victims or witnesses[151]. "The applicable standard requires that in the circumstances of the case, there is a possibility that the Appellant may obstruct or endanger the investigation of court proceedings, and that as a result the detention of the person appears necessary to avert this possibility"[152].

62. The Prosecutor distinguishes the case of *Prosecutor v. Momir Talic*, relied on by the Appellant. He submits that the Chamber stated that the humanitarian basis made the application distinct from most of the other applications at the ICTY and "in particular from cases where provisional release was sought during the pre-trial phase and where there was no critical state of health involved"[153].

63. On the Appellant's argument that he has not received full disclosure of the identity of witnesses and victims, and that he therefore cannot approach them, the Prosecutor submits that although the Appellant was unaware of the identities of the witnesses at the time of the Impugned Decision, the Pre-Trial Chamber had already taken steps to ensure that he would receive disclosure of the relevant information[154], and that subject to rules 81 and 82 and any protective measures, the Appellant will be provided with the identity of many witnesses leading up to the confirmation hearing[155]. The Prosecutor submits that "[t]he Single Judge was therefore not required to take into consideration the present lack

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[149] Prosecutor's Response to the Appeal, para. 30.
[150] Prosecutor's Response to the Appeal, para. 31.
[151] Prosecutor's Response to the Appeal, para. 31.
[152] Prosecutor's Response to the Appeal, para. 31.
[153] Prosecutor's Response to the Appeal, para. 32.
[154] Prosecutor's Response to the Appeal, para. 33.
[155] Prosecutor's Response to the Appeal, para. 33.

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of disclosure of the identities of victims and witnesses [...] and no error can be found in the [Impugned] Decision on this ground"[156].

3. Determination by the Appeals Chamber

64. In relation to the third ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber did not err in finding that the continued detention of the Appellant appeared necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings.

65. Regarding the conditions of article 58 (1) (b) (ii) of the Statute, the Pre-Trial Chamber referred to previous findings in the Decision of 10 June 2008, where it had noted at paragraphs 88 and 89:

> The Chamber recalls that many of the victims and witnesses are financially destitute and that, in view of their place of residence, Mr Jean-Pierre Bemba could easily locate them, and that this places them at particular risk.[]
>
> Lastly, the Chamber concludes that, in his capacity as President of the MLC, Mr Jean-Pierre Bemba continues to exercise *de facto* and *de jure* authority over this movement; that he can rely on the movement's network and his former soldiers to influence the witnesses in his case; and that his past behaviour indicates that he will do so.[]

66. In the Impugned Decision the Pre-Trial Chamber found that "in the absence of any relevant argument on the part of the defence to the contrary, the Single Judge finds [these findings and conclusions] still applicable today"[157], indicating that the Pre-Trial Chamber was satisfied, at the time of the Impugned Decision, that the conditions of article 58 (1) (b) (ii) of the Statute were fulfilled. Again, it would have been preferable to state in more detail why the Pre-Trial Chamber reached this conclusion (see paragraph 53 above).

67. However, turning to the arguments of the Appellant, and in light of the standard of review (see paragraph 52 above), the Appeals Chamber finds no identifiable error in the Impugned Decision that would merit its intervention. The Appeals Chamber is not persuaded by the Appellant's argument that the Pre-Trial Chamber failed to make an assessment of the "current and concrete actions" by the Appellant in respect of witnesses.

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[156] Prosecutor's Response to the Appeal, para. 33.
[157] Impugned Decision, para. 59.

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As has been noted above at paragraph 55, article 58 (1) (b) of the Statute requires that the continued detention "appears to be necessary" for one of the reasons given in the provision, and that the question revolves around a *possibility*. To establish that the conditions of article 58 (1) (b) (ii) of the Statute were fulfilled, the Pre-Trial Chamber considered that the witnesses and victims are easily identifiable and that the Appellant continues to have the means to influence witnesses. The Chamber also noted the previous behaviour of the Appellant, which indicated to the Chamber that the Appellant may indeed use these means to do so. These factors support the conclusion that the conditions of article 58 (1) (b) (ii) of the Statute exist and they are therefore relevant factors in deciding the question on appeal.

68. Regarding the Appellant's argument that an ICTY Trial Chamber had taken into account that an accused resided far away from where the alleged crimes had been committed, the Appeals Chamber notes that in the present case, the Pre-Trial Chamber had considered that the Appellant continued to have influence in the region where the alleged crimes covered by the Warrant of Arrest were committed. Thus, the Appeals Chamber does not consider that the place of residence of the Appellant was, in the context of the present case, of such importance that the Pre-Trial Chamber should have taken it into account, and that the failure to do so would amount to an error.

IV. APPROPRIATE RELIEF

69. The Appellant requests, pursuant to article 83 (2) (a) of the Statute[158], that the Appeals Chamber reverse the Impugned Decision and "order the immediate interim release of Mr Jean-Pierre Bemba subject to such conditions as may be deemed appropriate"[159]. The Prosecutor requests "that the Appeals Chamber dismiss the appeal and uphold the [Impugned] Decision"[160].

[158] Article 83 (2) (a) provides: "2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may: (a) Reverse or amend the decision or sentence;".
[159] Defence Appeal, para. 12.
[160] Prosecutor's Response to the Appeal. para. 34.

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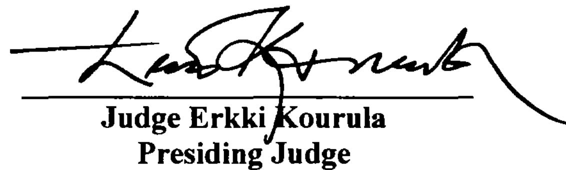
70. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, the Impugned Decision is confirmed.

71. Judge Pikis appends a dissenting opinion to this judgment.

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



Judge Erkki Kourula
Presiding Judge

Dated this 16th day of December 2008

At The Hague, The Netherlands

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Dissenting opinion of Judge Georghios M. Pikis

I. PROCEDURAL HISTORY

1. On 10 June 2008, Pre-Trial Chamber III (hereinafter "Pre-Trial Chamber), sitting en banc, issued a warrant[1] for the arrest of Mr. Bemba Gombo, the appellant. Following his initial appearance before the Pre-Trial Chamber on 4 July 2008, the appellant submitted a written application[2] for his interim release on 23 July 2008. The Prosecutor opposed the application in his response[3] of 11 August 2008. On 20 August 2008, the Pre-Trial Chamber, its jurisdiction in the matter being exercised by a Single Judge, issued the *sub judice* decision[4], whereby the motion for interim release was rejected. Mr. Bemba Gombo appealed[5] the decision two days later, pursuant to the provisions of article 82 (1) (b) of the Statute. He supported his appeal by a document[6] filed on 26 August 2008. The Prosecutor made his response[7] on 1 September 2008, asking for the dismissal of the appeal.

A. Decision on interim release:

2. The Single Judge affirms that under the provisions of article 60 (2) of the Statute, a person may apply for interim release pending trial.[8] He recounts its provisions to the effect that detention, imposed by a warrant of arrest, may continue if "the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1 are met". These are: The Pre-Trial Chamber must be satisfied from the material placed before it by

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[1] *Prosecutor v Bemba Gombo* "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo" 10 June 2008 (ICC-01/05-01/08-14-tENG).
[2] *Prosecutor v Bemba Gombo* "Application for interim release" 23 July 2008 (ICC-01/05-01/08-49).
[3] *Prosecutor v. Bemba Gombo* "Prosecution's Observations on the "Defence's Application for interim release" 11 August 2008 (ICC-01/05-01/08-65-Conf).
[4] *Prosecutor v Bemba Gombo* "Decision on the application for interim release" 20 August 2008 (ICC-01/05-01/08-73-Conf), hereinafter "Impugned Decision"
[5] *Prosecutor v. Bemba Gombo* "Notice of Appeal against the Decision on the Application for Interim Release of Jean-Pierre Bemba Gombo" 22 August 2008 (ICC-01/05-01/08-74).
[6] *Prosecutor v. Bemba Gombo* "Defence Appeal against the Decision of the Single Judge of Pre-Trial Chamber III of 20 August 2008, entitled 'Decision on application for interim release'" 26 August 2008 (ICC-01/05-01/08-78-Conf), hereinafter "Document in support of the appeal".
[7] *Prosecutor v. Bemba Gombo* "Prosecution's Response to the Defence Document in Support of Appeal against the 'Decision on application for interim release'" 1 September 2008 (ICC-01/05-01/08-83-Conf), hereinafter "Response".
[8] See Impugned Decision, para. 50.

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the Prosecutor that a) there are reasonable grounds to believe that the person whose detention is sought committed a crime within the jurisdiction of the Court, and b) his/her detention appears to be necessary for any one or more of the three reasons specified in article 58 (1) (b) of the Statute.

3. The question of who should satisfy these prerequisites and by what evidence is not directly addressed in the *sub judice* decision. But indirectly it is, inasmuch as the position of the Single Judge on the subject can be deduced from a number of passages of the impugned decision. Paragraph 52 is one such passage, wherein the following is said:

> The grounds for believing that Mr Jean-Pierre Bemba has committed crimes under the jurisdiction of the Court are explained exhaustively in the Chamber's decision of 10 June 2008, as referred to in paragraphs 23 to 25 of the present decision. The Single Judge notes that the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand.[9]

For the Single Judge, as it emerges, the yardstick for the determination of the issues under article 60 (2) of the Statute is the warrant of arrest and the decision of the Pre-Trial Chamber founding it, notwithstanding the fact that the decision was taken in the absence of the person to be arrested. Thus, the decision of the Pre-Trial Chamber for the issuance of the warrant of arrest provides, according to the Single Judge, the premise for Mr. Bemba Gombo's continued detention unless the arrestee rebuts the findings of the Pre-Trial Chamber depicted in its decision of 10 June 2008. Sequentially, the Prosecutor need not adduce any evidence or material before the Pre-Trial Chamber dealing with an application under article 60 (2) of the Statute other than the decision for the arrest warrant itself.

4. Despite the fact that the decision of the Single Judge was premised on the decision of the Pre-Trial Chamber for the issuance of the warrant of arrest, the arrestee was furnished neither with the Prosecutor's application for his arrest nor with the evidence relied upon in support of it, save for the part that had been reclassified as public and made available to the defence. In the absence of knowledge of the material relied upon in the decision for arrest, the unavoidable question is how could the person contest

[9] Impugned Decision, para. 52.

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its foundation? All that is said on the matter in the *sub judice* decision is encapsulated in the following passage of the decision:

> In these circumstances, in view of the evidentiary threshold applicable under Article 60(2) in conjunction with article 58 (1)(a) of the Statute to detention matters, the Single Judge considers that the lack of access to the remaining information does not have an impact on the legality of detention of Mr Jean-Pierre Bemba at this stage.[10]

5. Why non-disclosure of such material has no impact on the lawfulness of the decision is not explained, and no reasons are given in support of this conclusion. The reasoning of the Single Judge on the matter is elliptical. The contention of the appellant that proceedings in Belgium, where he was arrested, were irregular, is summarily dismissed, as can be gathered from the following passage:

> Nevertheless, the Single Judge is of the opinion that the defence has not substantiated sufficiently its allegations of procedural irregularities at the national level so as to allow unequivocally to establish the facts and to verify their compliance with the applicable legal regime.[11]

This aspect of the decision is not a subject of the appeal. It is recounted because it reflects the Single Judge's understanding of the law, that it is not for the prosecutorial authority to establish and justify the prolongation of the arrestee's detention, but for the latter to justify his release from captivity.

6. Not only is the finding of the Pre-Trial Chamber that there were reasonable grounds to believe that Mr. Bemba Gombo had committed the crimes attributed to him based on the decision of the Pre-Trial Chamber of 10 June 2008, but so is the finding that need exists for the detention of the person in order a) to ensure his attendance at the trial and b) to eliminate the possibility of his obstructing or endangering the investigation or the court proceedings.[12]

7. The following paragraph is characteristic of the approach of the Single Judge to the resolution of the issues before him:

> In respect of ensuring the appearance of Mr Jean-Pierre Bemba at trial, the Chamber referred to his past and present political position, international

[10] Impugned Decision, para. 41.
[11] Impugned Decision, para. 44.
[12] See Impugned Decision, para. 54.

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> contacts, financial and professional background and availability of the necessary network and financial resources. The Single Judge finds these considerations relevant and holds the view that they are still valid today.[13]

Why such considerations were valid at the time of the issuance of the *sub judice* decision and by reference to what evidence is not explained. Nor does the Single Judge disclose the process of reasoning by which he arrived at this conclusion.

8. Equally characteristic of the approach of the Single Judge is the following passage from his decision respecting the asserted readiness of Mr. Bemba Gombo to respond to any call of the Court to appear before it, obviating the need for his detention:

> In the view of the Single Judge, the claim of Mr Jean-Pierre Bemba that he was willing to present himself to the Court can equally not be accepted because it is of a hypothetical nature and it is not supported by any concrete evidence.[14]

What concrete evidence the person could adduce in a matter solely reflecting his intentions is not indicated.

B. Appellant's arguments:

9. The appellant challenges nearly every aspect of the impugned decision, disputing the findings and conclusions of the Single Judge that the conditions of either article 58 (1) (a) of the Statute or those of article 58 (1) (b) were satisfied.

10. The appeal is introduced under the following heading:

> The Defence seeks to challenge the reasoning adopted by the Single Judge [...][15]

Under this umbrella, the soundness of the *sub judice* decision is disputed with regard to the findings of the Pre-Trial Chamber to the effect that there was a risk that a) the person would abscond, or b) he would obstruct or endanger the investigation or the proceedings. Moreover, the risks, if any, of the appellant absconding are in no way, as suggested, correlated to his release from custody.

[13] Impugned Decision, para. 55.
[14] Impugned Decision, para. 58.
[15] *Prosecutor v Bemba Gombo* "Defence Appeal against the Decision of the Single Judge of Pre-Trial Chamber III of 20 August 2008, entitled 'Decision on application for interim release'" 22 August 2008 (ICC-01/05-01/08-78-Conf), para 9, hereinafter "Document in Support of the Appeal".

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11. Further, the appellant challenges the finding of the Single Judge that there are reasonable grounds to believe that he committed the crimes attributed to him, a finding based exclusively on the decision pertaining to the issuance of the warrant of arrest, a decision that could not be contested in the absence of disclosure of the evidence and material founding it.[16]

12. The finding that the detention of the appellant is necessary in order to ensure his appearance at the trial lacks, in his submission, credibility, because it is based on unsubstantiated assumptions.[17] By the last ground of appeal, Mr. Bemba Gombo questions the reliability of the finding of the Single Judge that if freed he would endanger either the investigations or Court proceedings,[18] a finding incorporated in the following passage of the decision of the Single Judge:

> As to article 58(1)(b)(ii) of the Statute, the Single Judge refers to the findings and conclusion of the Chamber in its decision of 10 June 2008 (see paragraph 24 above) which, in the absence of any relevant argument on the part of the defence to the contrary, the Single Judge finds still applicable today.[19]

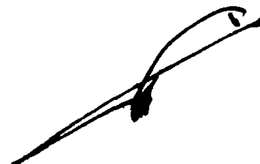
The appellant wonders how he could challenge the contention that he is likely to interfere with witnesses whose identity was not disclosed to him.

C. Prosecutor's response:

13. At the outset of his response the Prosecutor cites the passage set out below from the judgment of the Appeals Chamber of 9 June 2008, which he submits sets the standard of review of a decision determinative of the detention or release of the arrestee:

> Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts

[16] See Document in Support of the Appeal, paras. 10 and 11.
[17] See Document in Support of the Appeal, paras. 12 to 17.
[18] See Document in Support of the Appeal, para. 18.
[19] Impugned Decision, para. 59.



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> founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues.[20]

14. The Prosecutor argues that the decision of the Pre-Trial Chamber of 10 June 2008 adequately informed the appellant of the grounds justifying his detention. In the absence of evidence rebutting them, the sustenance of the impugned decision must be the inevitable outcome of the appeal.[21] It emerges from this statement that the Prosecutor is of the view that the material placed before the Pre-Trial Chamber leading to the decision for his arrest need not be disclosed to the person seeking his/her release under article 60 (2), nor should it be put anew before the Pre-Trial Chamber for evaluation and appraisal.

15. In the Prosecutor's submission, "the Single Judge was entirely correct to hold that there remained reasonable grounds to believe that the Appellant has committed the crimes in question"[22]. Consequently, the finding that there were reasonable grounds to believe that the person did commit the crimes ascribed to him is well-founded. Equally sound, in his contention, is the finding that the detention of the person appears necessary to ensure his attendance at the trial. The gravity of the offence is a material factor in forecasting the likelihood of the possibility of the person not attending his/her trial.

16. The Prosecutor disputes the professed readiness of the appellant to respond to any call of the Court to appear before it, adding "[i]n the absence of concrete evidence of an intention to surrender, such assertions must be considered as hypothetical, and should not be considered as relevant to the Decision"[23]. The Prosecutor, as may be inferred, supports the proposition that the burden lies on the person to establish the opposite of what had been decided in the decision approving the issuance of the warrant of arrest.

17. In relation to the likelihood of the appellant endangering the investigation or court proceedings, the Prosecutor submits that it is not an argument open to the appellant because the subject was not raised before the Single Judge.[24] No statutory provision or

[20] *Prosecutor v. Katanga and 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), para. 25.
[21] See Response, para 15.
[22] See Response, para. 15.
[23] Response, para. 15.
[24] See Response, para. 29.

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authority is cited in support of this proposition, entailing restriction of the grounds of appeal to issues specifically raised and argued before the first-instance court.

18. With regard to the complaint of the appellant that he was not apprised of the names or identity of the witnesses he was likely to approach and influence, the Prosecutor concludes, "[f[inally, the Appellant submits that he has not yet been provided with full disclosure of the identity of the Prosecutor's witnesses or victims, and that therefore he is not in a position to approach them" [25], and adds:

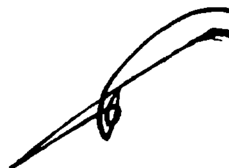
> The Single Judge was therefore not required to take into consideration the present lack of disclosure of the identities of victims and witnesses, as asserted by the Appellant, and no error can be found in the Decision on this ground.[26]

What the implications of non-disclosure would be in the event of the dismissal of the submission that this subject could not be made the subject of appeal, the Prosecutor does not inform.

II. DETERMINATION:

19. Beginning with the submission of the Prosecutor that non-disclosure of the names of witnesses cannot be made the subject of appeal as it was not raised in the first instance proceedings, the submission can find no support in the Statute or the Rules of Procedure and Evidence as neither imposes such a limitation. On the contrary, neither article 81 nor article 82 of the Statute impose any restrictions on the grounds by reference to which an appeal may be raised, other than that they must relate to the soundness and correctness of the decision challenged. Article 81 of the Statute confers a right on both the Prosecutor and the accused to appeal a judgment on any ground involving legal, procedural or factual errors, and in addition thereto, in the case of the accused, on any ground that affects the fairness or reliability of the proceedings or decision. Article 82 confines the right to appeal to specified decisions enumerated thereunder, again without imposing any restrictions on the grounds that may render them vulnerable to being set aside. In its judgment of 13 October 2006, the Appeals Chamber held that the grounds upon which a

[25] Response, para. 33.
[26] Response, para. 33.



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decision may be challenged under article 82 (1) (d) are, in essence, similar to those articulated in article 81 of the Statute.[27] In a separate opinion, it was pointed out that the same holds true in relation to every decision that may be made the subject of appeal under article 82 (1). Consequently, the submission of the Prosecutor in this connection cannot but be rejected, leaving the Appeals Chamber without any answer from the Prosecutor as to the implications of non-disclosure to the appellant of the names of witnesses.

20. The proceedings relevant to the issuance of a warrant of arrest are held in the absence of the person whose arrest is sought. If there were no provision in the Statute affording the arrested person the opportunity to contest the deprivation of his/her liberty, we would be confronted with a dire denial of his/her human rights. Every person is assured the right to contest the lawfulness of his/her detention. Lawfulness in this context signifies the soundness in law of the factual basis of the decision, as well as the correctness of the legal provisions by reference to which the case is decided. The right of a person to contest the lawfulness of his detention, ordered in his absence and without hearing him, is safeguarded by the provisions of article 60 (2) of the Statute, requiring the Pre-Trial Chamber to evaluate, in proceedings held in the presence and with the participation of the person affected, the lawfulness and sequentially the justification of the deprivation of liberty. The provisions of article 60 (2), like every other provision of the Statute, must, as underlined in the judgment of the Appeals Chamber of 9 June 2008, be construed and applied in accordance with internationally recognized human rights. The passage below is to the point:

> The provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with "internationally recognized human rights".[28]

[27] See *Prosecutor v. Lubanga Dyilo* "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" 13 October 2006 (ICC-01/04-01/06-568), para. 14.

[28] *Prosecutor v. Katanga and 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), para 15.

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21. The Pre-Trial Chamber must, in the presence of the accused, examine whether the requisites of article 58 (1) of the Statute are satisfied in order for the Chamber to sanction the continuation of detention. As the Appeals Chamber explained in the above judgment:

> Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined. Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it.[29]

The Appeals Chamber stressed, in the first place, that justification of detention must be examined anew, i.e. from the beginning, and that a decision of the Pre-Trial Chamber under article 60 (2) must be founded on the material placed before it, and not that placed before any other Chamber. It is in this context that article 58 (1) must be applied.

22. Article 58 (1) requires the Prosecutor to establish the need for the arrest and detention of the person, i.e. that there are reasonable grounds to believe that he committed the crime(s) imputed to him and that his arrest is necessary for any one or more of the reasons specified therein. The transposition of article 58 (1) of the Statute into article 60 (2) as the criterion for the continuation of the detention of the arrestee in no way correlates or subordinates the decision to be made to that taken in his/her absence sanctioning the deprivation of liberty.

23. The decision of the Single Judge to the contrary is ill-founded and premised on a wrong interpretation of the provisions of article 60 (2) of the Statute. Article 60 (2) does not envisage a review of the legality or correctness of the decision authorizing the arrest of the person. On the contrary, it requires the Pre-Trial Chamber, by reference to article 58 (1), to decide anew, as already decided by the Appeals Chamber in its judgment of 9 June 2008[30], whether the person's detention can find justification in law by reference to the criteria set down in article 58 (1) of the Statute. Where review of a previous decision

[29] *Ibid.*, para. 12.
[30] See supra.

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of the Court is contemplated, specific provision to that end is made, as in the case of the paragraph following paragraph 2 of article 60 of the Statute, notably paragraph 3.[31]

24. Article 60 (2) of the Statute specifically provides that the Pre-Trial Chamber must be satisfied that the conditions set forth in article 58 (1) are met. Who must satisfy the Pre-Trial Chamber in this connection? Undoubtedly, the answer is the person seeking the limitation of the liberty of the individual; in this case the Prosecutor. Therefore, the material that supports this position must be put before the Pre-Trial Chamber by the authority seeking the confinement of the person. And as article 60 (2) underlines, the Pre-Trial Chamber must be "satisfied" that the conditions of article 58 (1) are met; first and foremost that the material placed before it establishes the existence of reasonable grounds warranting the belief that the person committed the crimes itemized in the accusation.

25. As explained in the separate opinion to the judgment of the Appeals Chamber of 13 February 2007:

> The difference between the two provisions of the Statute (articles 60 (2) and 58 (1)) lies in the change of the time perspective from which justification and necessity of the detention are to be judged. The Pre-Trial Chamber must decide whether the conditions set down in article 58 (1) of the Statute essential for the justification of the detention of the person exist at the time of consideration of an application for interim release.[32]

The Pre-Trial Chamber must determine, in light of the evidence put before it, whether the requisites of article 58 (1) are satisfied at the time that the decision under article 60 (2) is taken.

26. Although reference is made in the impugned decision to the judgment of the Appeals Chamber of 9 June 2008,[33] no stock is taken of the crucial passage in paragraph 12 cited above that under article 60 (2) of the Statute the Pre-Trial Chamber must examine anew the necessity for detention by reference to the criteria set out in article 58 (1). On the contrary, the decision is premised on the findings of the Pre-Trial Chamber made in the context of the issuance of the warrant of arrest, limiting the proceedings

[31] See *Prosecutor v Lubanga Dyilo* "Judgment in the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo'" 13 February 2007 (ICC-01/04-01/06-824) OA7.
[32] *Ibid.*, para. 10 of the separate opinion.
[33] See Impugned Decision, footnote 77.

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under article 60 (2) and sequential determination of the issue of detention to whether the arrestee has rebutted their presence.

27. It appears that nothing in the nature of evidence was placed before the Single Judge in support of the claim for the continuation of detention. Examination of the issues was confined to the decision of the Pre-Trial Chamber of 10 June 2008, which constituted the basis for the examination and determination of the application of Mr Bemba Gombo for interim release. The decision of the Pre-Trial Chamber of 10 June 2008 was founded upon evaluation of the evidence put before it by the Prosecutor. There is no indication whatsoever that the Single Judge made any effort to assess such material in light of the case of the person. On the contrary, the findings of the Pre-Trial Chamber recorded in its decision of 10 June 2008 were treated as a solid basis, warranting the continuation of the person's detention unless rebutted by the person to the extent of shaking the foundations of that decision. In other words, the judge deemed that the requisites of article 58 (1) were satisfied by virtue of the decision of the Pre-Trial Chamber ordering the arrest of Mr Bemba Gombo unless the latter proved the contrary. Consequently, the Single Judge did not endeavour, as required by the provisions of article 60 (2), to satisfy himself that the provisions of article 58 (1) were met.

28. Another significant error is that a large part of the evidence and material leading to the issuance of the warrant of arrest was not disclosed to the person. Even if we were to assume that the test applied by the Single Judge was the correct one, how could the person rebut evidence or material of which he was unaware? According to the Single Judge, the decision itself disclosed all that was necessary to enable him to do so. The failure or omission, on the other hand, to acquaint the appellant with the material leading to the order for his arrest made it impossible for him to even query the substratum of his arrest. How could he contest the lawfulness of his detention in the absence of the material relied upon by the Single Judge to justify it?

29. It is the human right of every individual to be informed of the grounds and reasons for which the deprivation of his/her liberty is sought.[34] The right to contest one's

[34] Article 9 (2), (4) of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, Article 5 (2) of the *Convention for the Protection of Human Rights and*

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detention requires, as in every process involving the freedom of man, disclosure of every piece of evidence relied upon by the authority seeking detention. The requirement is that everything that would enable the person to effectively challenge the lawfulness of his detention must be disclosed. This has been repeatedly affirmed by the European Court of Human Rights.[35] The right to challenge one's detention warrants that every piece of evidence put forward in support of the request for detention must be disclosed to the internee.[36] In the words of the European Court of Human Rights, the "precise content"[37] of it must be revealed to the person whose liberty is at issue. In the *Case of Mooren v. Germany*, the European Court of Human Rights held that the Prosecutor is duty-bound to disclose to the person not only the general tenor of the evidence relied upon in support of his detention, but the evidence itself.[38] Proceedings relating to the arrest of a person must adhere to an adversarial hearing, as must every judicial process involving the liberty of man; equality of arms must be assured to the two sides, a right inherent in every process where the deprivation of liberty of an individual is at issue; a right imported by the right of a person to challenge every act delimiting his/her freedom. The right to contest an accusation involving the loss of liberty is an inseverable aspect of a fair trial.[39]

30. The case law of the European Court of Human Rights has acknowledged that disclosure of evidence may be withheld where it exposes the investigation to foreseeable dangers, provided such evidence is inconsequential for the build-up of the premises for

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Fundamental Freedoms (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, Article 7 (4), (5) of *The American Convention on Human Rights*, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955.

[35] See *Case of Lamy v Belgium*, application no. 10444/83, 30 March 1989, para. 29; *Case of Nikolova v. Bulgaria*, application no. 31195/96, 25 March 1999, para. 58; *Case of Wloch v Poland*, application no. 27785/95, 19 October 2000, final 17 January 2001, paras. 125 to 127; *Case of Garcia Alva v Germany*, application no. 23541/94, 13 February 2001, para. 39.

[36] See *Case of Garcia Alva v. Germany*, application no. 23541/94, 13 February 2001, para. 41; *Case of Lietzow v. Germany*, application no. 24479/94, 13 February 2001, paras. 45 and 46; *Case of Mooren v Germany*, application no. 11364/03, 13 December 2007, para. 94; Case of Laszkiewicz v Poland, application no. 28481/03, 15 January 2008, paras. 77 to 78.

[37] *Case of Garcia Alva v Germany*, application no. 23541/94, 13 February 2001, para. 41.

[38] See *Case of Mooren v. Germany*, application no 11364/03, 13 December 2007, para. 96.

[39] See *Case of Lamy v Belgium*, application no. 10444/83, 30 March 1989, para. 29; *Case of Toth v. Austria*, application no. 11894/85, 12 December 1991, para. 84, *Case of Kampanis v Greece*, 19 July 1995, Series A no. 318-B, para. 47.

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detention.[40] But no exception is admitted to the requirement to disclose evidence relied upon in justification of detention.[41]

31. A more stringent test must apply in the case of detention under the Statute where detention is neither meant to facilitate the investigation nor related to reasonable suspicion of involvement in the commission of a crime. Article 58 (1) (a) postulates, as the foremost prerequisite for depriving one's liberty, the existence of evidence disclosing complicity in the commission of a crime within the jurisdiction of the Court. Beyond that, the Chamber must be persuaded that such evidence provides reasonable grounds to believe that the person did commit the crimes imputed to him. A finding as to involvement in the commission of a crime is made. Rule 121 of the Rules extends the right of the accused to timely disclosure of the evidence founding the case against him/her, guaranteed by article 67 of the Statute, to every person arrested or summoned before the Court; whereas article 21 (3) assures to every individual the right to effectively contest the deprivation of liberty.

32. How can a person defend him/herself in this connection without total disclosure of everything leading to the creation of the conviction of implication in the commission of a crime? The notion of reasonable grounds to believe entails, as pointed out in the judgment of the Appeals Chamber of 9 June 2008, that the belief is founded on grounds such as to warrant its reasonableness.[42] In the context of article 60 (2), the Appeals Chamber underlined that belief denotes acceptance of a fact, to which the Chamber added, "[t]he facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes"[43]. Suspicion *simpliciter*, as pointed out, is not enough.[44] A contrast of the meaning of the two words "belief" and

[40] See *Case of Lietzow v. Germany*, application no. 24479/94, 13 February 2001, para. 47; *Case of Andrei Georgiev v. Bulgaria*, application no. 61507/00, 26 July 2007, final 26 October 2007, para. 89.
[41] See *Case of Lietzow v. Germany*, application no. 24479/94, 13 February 2001, para. 47; *Migon v Poland* (24244/94) 25 June 2002, final 25 September 2002, para. 80; *Case of Chruscinski v Poland*, application no. 22755/04, 6 November 2007, paras. 56 and 59 to 62; *Case of Mooren v Germany*, application no. 11364/03, 13 December 2007, paras. 91 and 92.
[42] See *Prosecutor v Katanga and 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), para. 18.
[43] *Ibid.*, para. 18.
[44] See *ibid.*

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"suspicion" tells of the different standard imported by the notion of "suspicion"[45] and that of "belief"[46].

33. A person cannot contest the lawfulness of his/her detention without knowledge of the facts relied upon to justify restriction of liberty. The decision of the Single Judge that he "considers that the lack of access to the remaining information does not have an impact on the legality of detention of Mr Jean-Pierre Bemba Gombo at this stage"[47] leaves much to be desired. No reasons are provided for this conclusion.[48]

34. The sole justification for prolonging the detention of Mr. Bemba Gombo is to be traced in the following passage of the *sub judice* decision:

> The grounds for believing that Mr Jean-Pierre Bemba has committed crimes under the jurisdiction of the Court are explained exhaustively in the Chamber's decision of 10 June 2008, as referred to in paragraphs 23 to 25 of the present decision.[49]

To that the Single Judge adds:

> The Single Judge notes that the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand.[50]

35. So the Single Judge was satisfied that, as the grounds founding the arrest of the person had not been rebutted, he should continue to be detained. It derives from the above that the Single Judge adopts the view that it is for the person to prove the need for his liberty, and not for his accusers to substantiate the necessity for his incarceration. That the Single Judge approached the questions before him in this frame of mind is also evidenced by the following passage of his decision:

[45] Shorter Oxford English Dictionary on Historical Principles, Volume 1, A-M (Fifth Edition), page 213: "Mental acceptance of a statement, fact, doctrine, thing, etc. as true or existing [...]".
[46] Shorter Oxford English Dictionary on Historical Principles, Volume 2, N-Z (Fifth Edition), page 3128: "Imagination of something (not necessarily evil) as possible or likely; a faint belief that something is the case; a notion, an inkling".
[47] Impugned Decision, para. 41.
[48] For the need for reasoning and what it entails, see: *Prosecutor v. Lubanga Dyilo* "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" 14 December 2006 (ICC-01/04-01/06-773).
[49] Impugned Decision, para. 52.
[50] Impugned Decision, para. 52.

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> In the view of the Single Judge, the claim of Mr Jean-Pierre Bemba that he was willing to present himself to the Court can equally not be accepted because it is of a hypothetical nature and it is not supported by any concrete evidence.[51]

36. It is evident from the above that the Single Judge did not address the justification for the detention of Mr. Bemba Gombo anew, as he ought to have done under the provisions of article 60 (2) of the Statute. Secondly, he failed to evaluate and determine the cogency of the evidence warranting detention, relying exclusively on the findings of the Pre-Trial Chamber in the arrest proceedings held in the absence of the person. The third error is that the Single Judge acted upon the assumption that it is for the person to demonstrate that he is entitled to remain free, and not for his accusers to establish the necessity for his detention.

37. Irrespective of and in addition to the above, the Single Judge adopted, without inquiry, the findings of the Pre-Trial Chamber sitting en banc, whereas he assumed jurisdiction under article 60 (2) as a Single Judge. The fact that the Single Judge was a member of the Pre-Trial Chamber does not diminish the differences between the composition of the two judicial bodies.[52] That both exercise the jurisdiction of Pre-Trial Chamber III does not eliminate those differences. In its judgment of 9 June 2008, the Appeals Chamber deprecated as impermissible reliance on the findings of another Chamber in other proceedings.[53] The same applies to a Single Judge assuming responsibility to determine issues under article 60 (2) of the Statute. The decision of 10 June 2008 reflects the deliberations and the cross-processes of resolving issues before a three-membered Pre-Trial Chamber. A Single Judge cannot absolve himself of the duty to singularly address the issues before him, unaffected by the prior determinations of the Pre-Trial Chamber.

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[51] Impugned Decision, para. 58.

[52] Article 39 (2) (b) (iii) of the Statute lays down that the functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Chamber or by a Single Judge.

[53] *Prosecutor v. Katanga and 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), para. 26.

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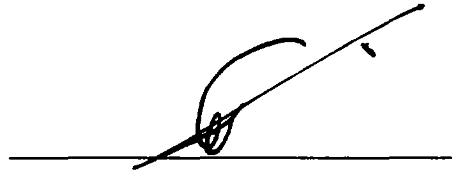
38. For the reasons given, the appealed decision is fraught with error in every material respect. The errors identified vitiate the *sub judice* decision to the core, making its reversal inevitable, and so I would order.

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



Judge Georghios M. Pikis

Dated this 16th day of December 2008

At The Hague, The Netherlands

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