

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 14 August 2009

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

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

**Public Document**

**Decision on the Interim Release of Jean-Pierre Bemba Gombo  
and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal,  
the Republic of France, the Federal Republic of Germany, the Italian Republic,  
and the Republic of South Africa**

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

**The Office of the Prosecutor**

Fatou Bensouda, Deputy Prosecutor  
Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Nkwebe Liriss  
Karim A.A.Khan  
Aimé Kilolo-Musamba  
Pierre Legros

**Legal Representatives of the Victims**

Marie Edith Douzima-Lawson  
Paolina Massidda

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Competent authorities of  
the Kingdom of Belgium,  
the Republic of France,  
the Federal Republic of Germany,  
the Italian Republic  
the Kingdom of the Netherlands,  
the Republic of Portugal,  
the Republic of South Africa

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Maria-Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”),<sup>1</sup> renders the decision on the interim release of Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”).

### **I. Procedural History**

1. On 23 May 2008 Pre-Trial Chamber III issued a warrant of arrest against Mr Jean-Pierre Bemba<sup>2</sup> and on 24 May 2008 he was arrested in the Kingdom of Belgium.
  
2. On 10 June 2008 Pre-Trial Chamber III issued the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo” (the “10 June 2008 Decision”)<sup>3</sup> based on which it issued a new warrant of arrest which entirely replaced the one of 23 May 2008.<sup>4</sup>
  
3. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered to the seat of the Court where his first appearance took place before Pre-Trial Chamber III on 4 July 2008.<sup>5</sup>
  
4. On 20 August 2008 Judge Hans-Peter Kaul, acting as Single Judge on behalf of Pre-Trial Chamber III,<sup>6</sup> rendered the “Decision on application for interim release” pursuant to article 60(2) of the Rome Statute (the “Statute”), in which he rejected the first application for interim release of Mr Jean-Pierre Bemba<sup>7</sup> and decided that the suspect continue to be detained.<sup>8</sup> The Defence lodged an appeal against this

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<sup>1</sup> Pre-Trial Chamber II, Decision Designating Single Judges, ICC-01/05-01/08-393.

<sup>2</sup> Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1.

<sup>3</sup> Pre-Trial Chamber III, ICC-01/05-01/08-14-tENG.

<sup>4</sup> Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, ICC-01/05-01/08-15.

<sup>5</sup> Pre-Trial Chamber III, ICC-01/05-01/08-T-3-ENG ET.

<sup>6</sup> Pre-Trial Chamber III, Decision Designating a Single Judge for the Period from 1 to 31 August 2008, ICC-01/05-01/08-53.

<sup>7</sup> ICC-01/05-01/08-49 and annexes.

<sup>8</sup> Pre-Trial Chamber III, Decision on application for interim release, ICC-01/05-01/08-73-Conf; a public redacted version thereof was issued on 26 August 2008, ICC-01/05-01/08-80-Anx.

decision. The Appeals Chamber confirmed the decision of the then Single Judge and dismissed the appeal.<sup>9</sup>

5. On 16 December 2008 Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber III,<sup>10</sup> rendered the “Decision on Application for Interim Release” pursuant to article 60(3) of the Statute, in which she rejected the second application for interim release<sup>11</sup> and decided, *inter alia*, that Mr Jean-Pierre Bemba continue to be detained.<sup>12</sup>

6. On 19 March 2009 the Presidency decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the Central African Republic (the “CAR”) to Pre-Trial Chamber II.<sup>13</sup>

7. On 14 April 2009 Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Chamber,<sup>14</sup> issued the “Decision on Application for Interim Release” (the “14 April 2009 Decision”) pursuant to article 60(3) of the Statute, in which she, *inter alia*, rejected the Defence’s third application for interim release<sup>15</sup> and decided that Mr Jean-Pierre Bemba continue to be detained.<sup>16</sup>

8. On 15 June 2009 the Chamber issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (the “15 June 2009 Decision”) in which it was decided, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba is criminally responsible under article 28(a) of the Statute for two

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<sup>9</sup> Appeals Chamber, “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’”, ICC-01/05-01/08-323.

<sup>10</sup> Pre-Trial Chamber III, Decision Designating a Single Judge, ICC-01/05-01/08-293.

<sup>11</sup> ICC-01/05-01/08-200-tEN and annexes.

<sup>12</sup> Pre-Trial Chamber III, Decision on Application for Interim Release, ICC-01/05-01/08-321.

<sup>13</sup> Presidency, Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation, ICC-01/05-01/08-390.

<sup>14</sup> Pre-Trial Chamber II, Decision Designating Single Judges, ICC-01/05-01/08-393.

<sup>15</sup> ICC-01/05-01/08-333-Conf and annexes.

<sup>16</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403.

counts of crimes against humanity and three counts of war crimes and to commit him to a Trial Chamber.<sup>17</sup> The Prosecutor submitted a request for leave to appeal this decision,<sup>18</sup> which is still pending before the Chamber.

9. On 29 June 2009 the Single Judge held a hearing (the "Hearing of 29 June 2009") "for the sake of considering any issue related to the pre-trial detention of Mr. Bemba".<sup>19</sup> At the hearing the Defence requested the interim release of Mr Jean-Pierre Bemba to the Kingdom of Belgium, the Republic of France and the Republic of Portugal.<sup>20</sup> The parties were granted the opportunity to submit in writing additional arguments until 2 July 2009.

10. At the Hearing of 29 June 2009, the Single Judge also requested the Kingdom of Belgium, the Republic of France, the Republic of Portugal, and the Kingdom of the Netherlands, as the host State, to submit their observations in accordance with regulation 51 of the Regulations of the Court (the "Regulations") by no later than 10 July 2009 on "(...) Mr. Jean-Pierre Bemba's interim release; and (...), the conditions, if any, that would need to be imposed pursuant to Rule 119 of the Rules of Procedure and Evidence to enable the states in which Mr. Bemba seeks to be released to accept him on their territory".<sup>21</sup>

11. On 2 July 2009 the Defence<sup>22</sup> and the Prosecutor<sup>23</sup> filed their additional written submissions as granted at the Hearing of 29 June 2009. On the same date, the Defence requested to add the Federal Republic of Germany, the Italian Republic and

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<sup>17</sup> Pre-Trial Chamber II, ICC-01/05-01/08-424.

<sup>18</sup> ICC-01/05-01/08-427.

<sup>19</sup> Pre-Trial Chamber II, Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence", ICC-01/05-01/08-425; *ibid.*, ICC-01/05-01/08-T-13-ENG WT, p. 4, lines 22-23.

<sup>20</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 22, lines 2-6 and p. 31, lines 5-8.

<sup>21</sup> ICC-01/05-01/08-T-13-ENG WT, p. 64, lines 11-20.

<sup>22</sup> ICC-01/05-01/08-432-Corr.

<sup>23</sup> ICC-01/05-01/08-431

the Republic of South Africa to the list of States to which Mr Jean-Pierre Bemba seeks to be released.<sup>24</sup>

12. On 6 July 2009 the Single Judge received a request of the Kingdom of Belgium<sup>25</sup> to be granted an extension of time until 24 July 2009 to submit their observations on Mr Jean-Pierre Bemba's request for interim release, as was requested by the Single Judge at the Hearing of 29 June 2009. The Single Judge granted this request on 8 July 2009.<sup>26</sup>

13. On 10 July 2009 the Single Judge requested the Federal Republic of Germany, the Italian Republic and the Republic of South Africa to submit their observations in accordance with regulation 51 of the Regulations on (i) the request for interim release and (ii) the conditions, if any, that would have to be met to enable the States, to which Mr Jean-Pierre Bemba seeks to be released, to accept him on their territory by no later than 7 August 2009.<sup>27</sup>

14. On 13 July 2009 the Single Judge received the observations of the Republic of Portugal,<sup>28</sup> the Republic of France<sup>29</sup> and the Kingdom of the Netherlands<sup>30</sup> as requested by the Single Judge at the Hearing of 29 June 2009.

15. On 22 July 2009 the Office of Public Counsel for Victims (the "OPCV"), representing some of the victims participating in the present case, filed its

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<sup>24</sup> ICC-01/05-01/08-433.

<sup>25</sup> ICC-01/05-01/08-438, p. 7 and its confidential annex 2. The Single Judge, being aware of the confidential nature of Annex 2 of this filing, does not consider the revelation of this particular information to be inconsistent with the confidential nature of the filing as such.

<sup>26</sup> Pre-Trial Chamber II, "Decision on the Belgian Authorities' Request for Extension of Time Limit", ICC-01/05-01/08-442.

<sup>27</sup> Pre-Trial Chamber II, "Decision Seeking Observations on the Defence's Request for Interim Release", ICC-01/05-01/08-446.

<sup>28</sup> ICC-01/05-01/08-448-Conf-Anx1.

<sup>29</sup> ICC-01/05-01/08-448-Conf-Anx2.

<sup>30</sup> ICC-01/05-01/08-448-Conf-Anx3.

observations in response to the additional written submissions of the Prosecutor and the Defence dating 2 July 2009.<sup>31</sup>

16. On 24 July 2009 the Single Judge received the observations of the Kingdom of Belgium as requested by the Single Judge.<sup>32</sup>

17. On 29 July 2009 the Single Judge received additional observations of the Republic of Portugal on the application for interim release of Mr Jean-Pierre Bemba.<sup>33</sup>

18. On 4 August 2009 the Defence requested leave to reply to the observations of all States in order to provide general observations on points of law and fact.<sup>34</sup>

19. On 5 August 2009 the Republic of South Africa submitted a request for an extension of time to submit its observations until 28 August 2009.<sup>35</sup> The request was notified to the Single Judge on 6 August 2009, who granted an extension of time until 12 August 2009.<sup>36</sup>

20. On 7 August 2009 the Single Judge received the observations of the Federal Republic of Germany<sup>37</sup> and the Italian Republic,<sup>38</sup> as requested by the Single Judge's decision of 10 July 2009.

21. On 12 August 2009 the Single Judge received the observations of the Republic of South Africa.<sup>39</sup>

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<sup>31</sup> ICC-01/05-01/08-457.

<sup>32</sup> ICC-01/05-01/08-461-Conf-Anx2.

<sup>33</sup> ICC-01/05-01/08-465-Conf-Anx2.

<sup>34</sup> ICC-01/05-01/08-467. The request reads: "La Défense prie la Chambre Préliminaire II d'accueillir la présente requête et de l'autoriser à formuler des observations générales sous forme de réplique, en droit et en faits, aux observations formulées par l'ensemble des Etats d'accueil sur les territoires desquels Mr Jean-Pierre Bemba Gombo a demandé d'être libéré provisoirement."

<sup>35</sup> ICC-01/05-01/08-468.

<sup>36</sup> ICC-01/05-01/08-470.

<sup>37</sup> ICC-01/05-01/08-472-Conf-Anx2.

<sup>38</sup> ICC-01/05-01/08-472-Conf-Anx1.

## **II. The Submissions of the Parties and Participants**

22. The present decision takes account of the oral submissions of the parties during the Hearing of 29 June 2009 and their written submissions of 2 July 2009. It further takes into consideration the submissions of the OPCV of 22 July 2009 and the observations of the host State and the States to which Mr Jean-Pierre Bemba seeks to be released.

### *The Defence's Application and Arguments*

23. At the Hearing of 29 June 2009, the Defence requested that Mr Jean-Pierre Bemba be released, albeit under conditions.<sup>40</sup> The Defence contended that "changed circumstances" in terms of article 60(3) of the Statute warrant the modification of the Single Judge's previous ruling on Mr Jean-Pierre Bemba's detention, which include: the "significant reduction of the charges",<sup>41</sup> the Chamber's determination as to Mr Jean-Pierre Bemba's responsibility pursuant to article 28 of the Statute, as opposed to the initial legal characterization thereof under article 25(3)(a) of the Statute,<sup>42</sup> consequentially, the lighter sentencing in case of conviction,<sup>43</sup> the fact that Mr Jean-Pierre Bemba would never abscond because of his personal security situation,<sup>44</sup> the fact that Mr Jean-Pierre Bemba's one-year detention will be deducted from a possible sentence, thus reducing the likelihood of him absconding,<sup>45</sup> his readiness to cooperate with the Prosecutor and to surrender voluntarily,<sup>46</sup> and the change of Mr Jean-Pierre Bemba's financial situation due to the seizure and freezing of all Mr

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<sup>39</sup> ICC-01/05-01/08-473-Conf-Exp-Anx2.

<sup>40</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 22, lines 2-3; p. 26, lines 24 until p. 27, line 1; p. 31, line 4; p. 46, lines 1-2.

<sup>41</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 13, line 7; see also p. 40, lines 8-13.

<sup>42</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 13, lines 8-23; p. 14, lines 3-6.

<sup>43</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 14, lines 20-22; see also p. 42, lines 1-7.

<sup>44</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 17, lines 2-24, p. 18, lines 20-22.

<sup>45</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 42, lines 8-10.

<sup>46</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 19, lines 21-22; p. 43, lines 4-5.



Jean-Pierre Bemba's assets<sup>47</sup>. The Defence therefore requested that Mr Jean-Pierre Bemba be released to the Kingdom of Belgium or the Republic of France or the Republic of Portugal under six conditions.<sup>48</sup> The Defence further advanced twenty "personal guarantees" should interim release be granted to Mr Jean-Pierre Bemba.<sup>49</sup> To support its arguments, the Defence made reference to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") and that of the European Court of Human Rights (the "ECtHR").

24. At the end of the Hearing Mr Jean-Pierre Bemba addressed the Single Judge in private session and presented his arguments. The Single Judge deems it important to reflect the essence of the arguments brought forward by Mr Jean-Pierre Bemba as they relate to his request for interim release and are pertinent considerations for adjudicating on his request. The Single Judge therefore refers to those arguments in a manner which she considers appropriate, without revealing the identities of witnesses and victims or information pertaining to the privacy of Mr Jean-Pierre Bemba.

25. Mr Jean-Pierre Bemba put forward his volatile security situation, exemplified in the need for enhanced protection in Portugal.<sup>50</sup> He further explained that he has been in politics for the past eleven years and would set aside those "years of sacrifice" if he was to become a fugitive, referring also to his political endeavours in the Democratic Republic of the Congo (the "DRC").<sup>51</sup> He stated it would not be in

<sup>47</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 21, lines 18-21.

<sup>48</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 22, line 6; p. 24, lines 11-24. Those conditions are: (1) "that [the States] be able to provide security for Mr Bemba and inform the Registrar, if need be, if his security is at risk and that he be in a secure situation, as is the case here today in the prison in The Hague"; (2) "that Mr Bemba accept the conditions that he go to the police on a regular basis"; (3) "that he be arrested immediately if he does not respect the conditions that [the Chamber] could define for his interim release"; (4) "that those states inform the Court immediately of any violation and take the necessary measures to send him back to the prison here in The Hague, if need be"; (5) "ensure that Mr Bemba return to the Netherlands for his trial in The Hague"; (6) "ensure cooperation amongst parties and the confidentiality of the information exchanged in that exchange".

<sup>49</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 25, lines 3 until p. 26, line 23.

<sup>50</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 53, line 20 until p. 54, line 9.

<sup>51</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 54, lines 16-20.

his interest to intervene with witnesses or victims and that he has not done so to this day.<sup>52</sup> He offered his cooperation with the Court with a view to clearing his name.<sup>53</sup> Mr Jean-Pierre Bemba gave his word that he would not abscond.<sup>54</sup> Lastly, he pleaded to be released to join his family.<sup>55</sup>

26. In its additional written submissions of 2 July 2009 the Defence reiterated that there had been a “marked change” with respect to: (1) the gravity of the crimes and severity of the possible sentence incurred, (2) Mr Jean-Pierre Bemba’s individual responsibility and (3) the guarantee that he would appear at trial.<sup>56</sup> It further recalled its arguments pertaining to the gravity of the crimes, risk of absconding, intimidation of witnesses, cooperation and government guarantees. The Defence emphasized that the burden of proof laid with the Prosecutor to prove that Mr Jean-Pierre Bemba would abscond.<sup>57</sup>

#### *The Prosecutor’s Response and Arguments*

27. At the Hearing of 29 June 2009, the Prosecutor argued that Mr Jean-Pierre Bemba’s continued detention be maintained as no substantial change of the underlying considerations in the 14 April 2009 Decision warranted the modification of the Single Judge’s ruling.<sup>58</sup> He recalled that a “firmer evidential basis” existed as the charges have been confirmed against Mr Jean-Pierre Bemba.<sup>59</sup> He referred to Mr Jean-Pierre Bemba’s position as *de jure* president of the *Mouvement pour la Libération du Congo* (the “MLC”) and Commander-in-Chief of the *Armée de Libération du Congo* and the fact that he still had *de facto* ultimate control over the MLC commanders.<sup>60</sup> The Prosecutor averred that the accused would now abscond “given both the

<sup>52</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 55, lines 2-6; p. 56, lines 22-24.

<sup>53</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 56, line 2-4.

<sup>54</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 56, lines 6-7.

<sup>55</sup> ICC-01/05-01/08-T-13-CONF-ENG WT, p. 57, line 12 until p. 58, line 9.

<sup>56</sup> ICC-01/05-01/08-432-Corr, pp. 4-5, paras 18-20.

<sup>57</sup> ICC-01/05-01/08-432-Corr, p. 9, para. 40.

<sup>58</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 34, lines 6-16; p. 36, lines 1-6.

<sup>59</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 32, line 2.

<sup>60</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 32, lines 7-9.

gravity of the charges confirmed (...) as well as the possibility that he faces a long prison sentence".<sup>61</sup> He also referred to the fact that Mr Jean-Pierre Bemba benefited from the support of a number of influential networks in both the DRC and Europe which, as a matter of predictability,<sup>62</sup> could facilitate his flight from the Court's jurisdiction.<sup>63</sup> The Prosecutor further recalled that 21 identities of witnesses have been disclosed to the Defence, information which would enable him to exert pressure on these witnesses and obstruct court proceedings.<sup>64</sup> The Prosecutor referred to two instances of Defence interference with prosecution witnesses while Mr Jean-Pierre Bemba was in detention.<sup>65</sup> Lastly, the Prosecutor argued that all twenty "personal guarantees" of Mr Jean-Pierre Bemba were not pertinent considerations under article 58(1)(b)(i) of the Statute.

28. In addition, the Prosecutor argued that the detention of Mr Jean-Pierre Bemba was not "unreasonable" within the meaning of article 60(4) of the Statute. Mr Jean-Pierre Bemba's detention of "close to one year"<sup>66</sup> "remain[ed] within acceptable limits and the interests of justice".<sup>67</sup> He further contended that there was no inexcusable delay by the Prosecutor and that he had discharged his obligations in a diligent and timely manner.<sup>68</sup>

29. In his additional written submissions of 2 July 2009 the Prosecutor reiterated that there had been no substantial change of circumstances and that, in light of the fulfillment of the conditions of article 58(1) of the Statute, article 60(2) of the Statute required Mr Jean-Pierre Bemba's continued detention.<sup>69</sup> The Prosecutor maintained that the Chamber's determination in the 15 June 2008 Decision on article 28(a) of the

<sup>61</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 32, lines 20-22.

<sup>62</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 33, lines 1-4.

<sup>63</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 32, lines 23-25.

<sup>64</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 33, lines 12-16.

<sup>65</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 33, lines 16-20.

<sup>66</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 34, line 25.

<sup>67</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 35, lines 6-8.

<sup>68</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 35, lines 17-25.

<sup>69</sup> ICC-01/05-01/08-431, paras 4 and 14.

Statute did not constitute a change of circumstances and suggested that the Trial Chamber is not bound by the findings of the Pre-Trial Chamber, which it may modify according to regulation 55 of the Regulations of the Court (the "Regulations").<sup>70</sup> He also pointed out that the status of commander may in itself be considered an aggravating factor entailing heavier sentencing than that of subordinates.<sup>71</sup> The Prosecutor further put forward that the Chamber had declined to confirm some of the charges on the basis of cumulative charging and not on the basis of an evaluation of the evidence.<sup>72</sup> Furthermore, he questioned that ICTY and ECtHR jurisprudence could be referred to as they would not take into account the distinct conditions under which the Court operates. The Prosecutor argued that in cases before the ICTY persons would be released into States within the former Yugoslavia which would also give an undertaking to protect witnesses residing on their territories. At the ICC, on the contrary, Mr Jean-Pierre Bemba wished to be released to States (Belgium, France and Portugal) which are different from that in which the Prosecutor is conducting his investigations and witnesses reside. The State, in which Mr Jean-Pierre Bemba would be released, would not be under an obligation to ensure that Mr Jean-Pierre Bemba appeared at trial or be able to prevent any interferences with prosecution witnesses in other parts of the world.<sup>73</sup> Lastly, the Prosecutor reiterated his submission that, having failed to disprove the applicability of article 58(1) of the Statute, the twenty guarantees advanced by Mr Jean-Pierre Bemba were premature at this stage of the proceedings.<sup>74</sup>

*The OPCV's Submissions and Arguments of 22 July 2009*

30. The OPCV, in responding to the additional written submissions of the parties, and for similar reasons to those given by the Prosecutor, submitted that the Single Judge dismiss the request for interim release by Mr Jean-Pierre Bemba.<sup>75</sup> The OPCV

<sup>70</sup> ICC-01/05-01/08-431, para. 8.

<sup>71</sup> ICC-01/05-01/08-431, para. 9.

<sup>72</sup> ICC-01/05-01/08-431, para. 10.

<sup>73</sup> ICC-01/05-01/08-431, para. 12.

<sup>74</sup> ICC-01/05-01/08-431, para. 13.

<sup>75</sup> ICC-01/05-01/08-457, p. 8.

contended that no substantial circumstances warranted a variation of the Single Judge's earlier ruling on detention<sup>76</sup> and highlighted the risk to victims and witnesses in case Mr Jean-Pierre Bemba be released<sup>77</sup>. It further emphasized that no hierarchy existed amongst the different modes of liability under the Statute and recalled that the Court's jurisdiction covered the most serious crimes of concern to the international community as a whole.<sup>78</sup>

*The Observations of the Governments of the Kingdom of Belgium, the Republic of France, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Republic of Portugal and the Republic of South Africa*

31. The observations of the governments of the Kingdom of Belgium, the Republic of France, the Federal Republic of Germany, the Italian Republic the Kingdom of the Netherlands, the Republic of Portugal, and the Republic of South Africa treat the question of interim release of Mr Jean-Pierre Bemba on their respective territories, if released. The Kingdom of Belgium and the Republic of South Africa also submitted detailed observations on the twenty "personal guarantees" offered by Mr Jean-Pierre Bemba.

### **III. Applicable Law**

32. The Single Judge notes articles 21, 43(6), 58(1), 60, 86 and 88 of the Statute, rules 118 and 119 of the Rules of Procedure and Evidence (the "Rules") and regulations 20 and 51 of the Regulations.

33. Pursuant to article 60(3) of the Statute and rule 118(2) of the Rules, the Single Judge shall review anew<sup>79</sup>, at least every 120 days, the prior decision on release or

<sup>76</sup> ICC-01/05-01/08-457, para. 8.

<sup>77</sup> ICC-01/05-01/08-457, para. 9.

<sup>78</sup> ICC-01/05-01/08-457, para. 11.

<sup>79</sup> Appeals Chamber, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2007 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", ICC-01/04-01/07-572, para. 10.

detention. To date, the review of the Chamber's ruling on the detention of Mr Jean-Pierre Bemba has been conducted three times, the last rendered in the 14 April 2009 Decision, remanding Mr Jean-Pierre Bemba in custody. Accordingly, the deadline for the review of Mr Jean-Pierre Bemba's continued detention under article 60(3) of the Statute by the Single Judge is 14 August 2009.

34. In this context, the Single Judge notes that the Defence requested<sup>80</sup> the interim release of Mr Jean-Pierre Bemba during the Hearing of 29 June 2009, which was held in accordance with rule 118(3) of the Rules. In light of the approaching deadline for the review by the Single Judge under article 60(3) of the Statute and for the sake of expediting the proceedings, it is appropriate that the Single Judge review Mr Jean-Pierre Bemba's detention on the basis of the Defence's request made during the Hearing of 29 June 2009.

35. The Single Judge wishes to recall that article 60(3) of the Statute, as any other statutory provision, must be interpreted and applied in accordance with internationally recognized human rights, as provided for in article 21(3) of the Statute.<sup>81</sup> The right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention is enshrined in many international human rights instruments, such as article 9 of the Universal Declaration of Human Rights,<sup>82</sup> article 9 of the International Covenant on Civil and Political Rights,<sup>83</sup> article 5 of the (European) Convention for

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<sup>80</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 22, lines 2-6.

<sup>81</sup> See also Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 38.

<sup>82</sup> United Nations General Assembly, GA/RES/217 A(III) of 10 December 1948. In this context, the Single Judge refers also to the "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", annexed to the General Assembly resolution 45/110 of 14 December 1990 and the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", annexed to United Nations General Assembly resolution A/RES/43/173 of 9 December 1988.

<sup>83</sup> International Covenant on Civil and Political Rights (ICCPR, adopted and opened for signature on 19 December 1966), UN Treaty Series, vol. 999, p. 171.

the Protection of Human Rights and Fundamental Freedoms,<sup>84</sup> article 6 of the African Charter on Human and Peoples' Rights<sup>85</sup> and article 7 of the American Convention on Human Rights<sup>86</sup>.

36. The Single Judge further recalls the 14 April 2009 Decision in which she stressed that “when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an *exception* and not a rule (emphasis added).<sup>87</sup>

37. The Single Judge wishes to clarify that this fundamental principle, a corollary of the presumption of innocence provided in article 66 of the Statute, continues to be the guiding principle upon which the present review is based.<sup>88</sup>

38. The Single Judge also emphasizes that pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes.<sup>89</sup> The Single Judge’s task is to weigh up and balance the factors presented to her, mindful of the particular circumstances of each individual case.

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<sup>84</sup> Convention of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, UN Treaty Series, vol. 213, p. 221. Within the context of the Council of Europe, the Single Judge wishes to point out the recommendation Rec(2006)13 of the Committee of Ministers to Member States entitled the “Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse”, adopted at the 974<sup>th</sup> meeting of Minister’s Deputies on 27 September 2006.

<sup>85</sup> African Charter on Human and Peoples' Rights, concluded at Nairobi on 27 June 1981, UN Treaty Series, vol. 1520, p. 217.

<sup>86</sup> American Convention on Human Rights, also referred to as the Pact of San José, Costa Rica, adopted on 22 November 1969, UN Treaty Series, vol. 1144, p. 143.

<sup>87</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403, para. 36. See also Inter-American Court of Human Rights (the “IACtHR”), *Case of Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No 114, para. 106; IACtHR, *Case of Acosta-Calderón v. Ecuador*, Judgment of 24 June 2005, para. 74; IACtHR, *Case of Children’s Rehabilitation*, Judgment of 2 September 2004, Series C No. 112, para. 228; Human Rights Committee, Communication 526/1993, *Hill and Hill v. Spain*, 23 June 1997, para. 12.3; ECtHR, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application no. 33977/96, para. 85.

<sup>88</sup> This principle has been applied also by Pre-Trial Chamber I, see ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, pp. 6-7; *ibid.*, Decision on Application for interim Release of Mathieu Ngudjolo Chui, ICC-01/04-01/07-345, p. 6.

<sup>89</sup> IACtHR, *Case of Acosta-Calderón v. Ecuador*, Judgment of 24 June 2005, paras 75 and 111; IACtHR, *Case of Suárez Rosero v. Ecuador*, Judgment of 12 November 1997, Series C No. 35, para. 77.

39. The Single Judge, further mindful of the relevant jurisprudence of the Appeals Chamber,<sup>90</sup> recalls that a review pursuant to article 60(3) of the Statute requires revisiting anew the conditions motivating the 14 April 2009 Decision, on the basis of which the continued detention of Mr Jean-Pierre Bemba was decided. The requirements for continued detention are encapsulated in article 58(1) of the Statute: the Single Judge must first (a) ascertain that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court as set out in article 58(1)(a) of the Statute, and thereafter (b) be satisfied that continued detention appears necessary on account of the fulfillment of one of the conditions enlisted in article 58(1)(b) of the Statute. The conditions, as set forth in article 58(1)(b) of the Statute, are in the alternative.<sup>91</sup> The fulfillment of one of those conditions is sufficient to negate the need to address the others and (continued) detention must be maintained. However, for the sake of granting interim release, the Single Judge must be satisfied that none of the three conditions are met.

40. The criterion of “appearance” within article 58(1)(b) of the Statute, as interpreted by the Appeals Chamber, “revolves around the possibility, not the inevitability, of a future occurrence”.<sup>92</sup> To this end, when examining the apparent necessity of continued detention, the Single Judge may base her determination on all relevant factors taken together and not on the basis of one factor in isolation.<sup>93</sup>

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<sup>90</sup> Appeals Chamber, 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*’, ICC-01/05-01/08-824; *ibid.*, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2007 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, ICC-01/04-01/07-572; *ibid.*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘*Decision on application of interim release*’, ICC-01/05-01/08-323; *ibid.*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘*Decision on the release of Thomas Lubanga Dyilo*’, ICC-01/04-01/06-1487.

<sup>91</sup> Appeals Chamber, 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*’, ICC-01/05-01/08-824, para. 139.

<sup>92</sup> Appeals Chamber, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2007 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, ICC-01/04-01/07-572, para. 21.

<sup>93</sup> Appeals Chamber, ICC-01/05-01/08-323, para. 55.



41. As the Appeals Chamber has clarified,<sup>94</sup> “the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature. Depending on whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released”. This holds also true in the framework of review under article 60(3) of the Statute.

42. Lastly, the Single Judge generally clarifies that when, within the confines of article 21 of the Statute, reference is made to the jurisprudence of other international courts, in particular the *ad hoc* tribunals, accurate attention must be paid to the courts’ legal framework and the particular circumstances of the case.

#### **IV. Findings of the Single Judge**

43. At the outset, the Single Judge clarifies that a review decision pursuant to article 60(3) of the Statute, ultimately leading to the interim release of the detained person, follows a two-tier approach: first, the Chamber must initially decide to release the person concerned and second, if this is the case, it is necessary to define thereafter the conditions restricting liberty pursuant to rule 119 of the Rules.

##### *Review pursuant to article 60(3) of the Statute*

44. Article 58(1)(a) of the Statute requires that an assessment be made of whether there are reasonable grounds to believe that the person committed a crime which falls within the jurisdiction of the Court. In the context of this review pursuant to article 60(3) of the Statute, it is essential to ascertain whether such grounds still exist.

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<sup>94</sup> Appeals Chamber, 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*’, ICC-01/04-01/06-824, para. 134.

45. In her 14 April 2009 Decision, the Single Judge made reference to the 10 June 2008 Decision in which the Chamber had found that “there were reasonable grounds to believe that Mr Jean-Pierre Bemba [was] criminally responsible under article 25(3)(a) of the Statute, jointly with another person or through other persons, for [three counts of crimes against humanity and five counts of war crimes committed in the context of an internal or non-international armed conflict]”.<sup>95</sup> She concluded that “there has been no substantial change in the circumstances warranting a modification to her previous ruling” and considered that the requirement of article 58(1)(a) of the Statute continued to be satisfied.<sup>96</sup>

46. The Single Judge recalls that in the 15 June 2009 Decision the Chamber found that there is sufficient evidence to establish *substantial* grounds to believe – an even higher evidentiary threshold than that required under article 58(1)(a) of the Statute – that Mr Jean-Pierre Bemba is criminally responsible under article 28(a) of the Statute for two counts of crimes against humanity and three counts of war crimes.

47. According to the Defence, the Chamber’s rejection in the same decision of co-perpetratorship of Mr Jean-Pierre Bemba with another person, pursuant to article 25(3)(a) of the Statute, shows that the accused was not personally responsible for the crimes committed in the CAR<sup>97</sup> and that his responsibility weighed less<sup>98</sup> than before the confirmation of charges.

48. The Single Judge sees no merit in the Defence’s argument: the Chamber’s decision to decline confirming the charges under article 25(3)(a) of the Statute does not entail that Mr Jean-Pierre Bemba bears no criminal responsibility. As the Prosecutor has pointed out, the Chamber has confirmed that Mr Jean-Pierre Bemba

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<sup>95</sup> Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tEN, paras 29-68 and 84.

<sup>96</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403, paras 40 and 43.

<sup>97</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 14, lines 3-6.

<sup>98</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 50, lines 17-21; ICC-01/05-01/08-432-Corr, p. 6, para. 28.

is criminally responsible within the meaning of article 28(a) of the Statute for those charges, as partly confirmed. As the wording of article 28 of the Statute unequivocally clarifies, command responsibility is "*in addition* to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court" (emphasis added). Likewise, as the OPCV has rightly observed,<sup>99</sup> there exists no hierarchy between the different modes of individual criminal responsibility, nor has the Chamber's 15 June 2009 Decision created such a hierarchy. To the contrary, the unambiguous wording of article 58(1)(a) of the Statute demands that there are reasonable grounds to believe that "*a crime within the jurisdiction of the Court*" (emphasis added) has been committed, regardless of the mode of criminal liability. In this context, considerations of the length of sentences following a possible conviction under article 28(a) of the Statute are premature at this stage and, in the opinion of the Single Judge, shall therefore not be paid heed to.

49. In the light of the foregoing, the Single Judge concludes that the requirement of article 58(1)(a) of the Statute continues to be satisfied.

50. However, as already stated, to deprive a person of liberty entails that the requirement of article 58(1)(a) of the Statute is met cumulatively with at least one of the conditions set forth in article 58(1)(b) of the Statute (see paragraph 39 above).

51. The Single Judge recalls that continued detention cannot be maintained, unless she is satisfied that it appears necessary (i) to ensure the person's appearance at trial; or (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. In reviewing the ruling on detention of Mr Jean-Pierre Bemba, the Single Judge must

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<sup>99</sup> ICC-01/05-01/08-457, para. 11.

now examine anew whether changed circumstances warrant a modification of her previous ruling.

52. In the 14 April 2009 Decision, the Single Judge found that Mr Jean-Pierre Bemba's continued detention was necessary to ensure that he appeared at trial (article 58(1)(b)(i) of the Statute). As the conditions of article 58(1)(b) of the Statute are in the alternative, the Single Judge deemed it unnecessary to examine the remaining conditions.<sup>100</sup>

53. In that decision the Single Judge held that the continued detention of Mr Jean-Pierre Bemba appeared necessary, as she assessed the risk of absconding as likely. This finding was based on the following considerations:

The charges that Mr Jean-Pierre Bemba is facing are various and of such gravity that they might result in multiple convictions leading to an overall lengthy sentence. If this is taken into consideration, in view of other existing factors such as his ties, international contacts and political position, which may provide him with the means to flee, and the proximity of the date on which a decision on whether to confirm the charges against him will be issued, the risk of him absconding becomes more likely.<sup>101</sup>

54. A further factor for the Single Judge to pay heed to was the fact that

[N]one of the countries seemed willing to accept the applicant if conditionally released and accordingly they offered no guarantees which ensure the applicant's appearance at trial.<sup>102</sup>

55. In light of this, the Single Judge further stated that

[The Court] lacks the direct means to re-arrest a suspect/accused if he/she has absconded, and depends primarily on the cooperation of States, without which the applicant's trial might be compromised. Moreover, in *Boskoski*, the ICTY Appeals Chamber upheld the finding of the Trial Chamber when it considered that the failure of the Croatian government to "issue guarantees of the Appellant's appearance for trial", combined with other factors, "weigh[ed] heavily" against his provisional release. These reasons justify a cautious approach by the Single Judge".<sup>103</sup>

<sup>100</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403, para. 50.

<sup>101</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403, para. 47.

<sup>102</sup> *Ibid.*, para. 48.

<sup>103</sup> *Ibid.*, para. 49.

56. In the present decision, the Single Judge is required to examine anew whether the requirements of article 58(1)(b) of the Statute are still met. In this context, the Single Judge recalls the jurisprudence of the Appeals Chamber, where it stated “that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction.”<sup>104</sup>

57. For the purposes of this decision, the Single Judge is called upon to assess all relevant factors of the case taken together and weigh up and balance those factors in reaching her finding, mindful of the particular circumstances of this case.<sup>105</sup> Thus, the Single Judge underlines that she bases her decision on a thorough consideration of the entirety of relevant factors and not simply on one isolated fact.

58. The Single Judge also remains of the view that Mr Jean-Pierre Bemba maintains his political and professional position.<sup>106</sup> She continues to consider that Mr Jean-Pierre Bemba benefits from international contacts and ties.

59. Further, the charges confirmed holding Mr Jean-Pierre Bemba responsible within the meaning of article 28(a) of the Statute may still result in a conviction leading to an overall lengthy sentence. Bearing in mind that the potential length of sentence could constitute an incentive for Mr Jean-Pierre Bemba to abscond, the Single Judge is nonetheless of the view that this factor cannot in itself serve to justify long periods

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<sup>104</sup> Appeals Chamber, ICC-01/04-01/06-824, para. 137.

<sup>105</sup> ECtHR, *Smirnova v. Russia*, Judgment of 24 July 2003, Application nos 46133/99 and 48183/99, para. 60.

<sup>106</sup> See Mr Jean-Pierre Bemba’s personal statement at the Hearing of 29 June 2009 stating that he is still considers himself the leader of the opposition of his country, Pre-Trial Chamber II, ICC-01/05-01/08-T-13-CONF-ENG ET, p. 54, lines 13-14; see further the declaration of the President of the Senate of the DRC dating 3 June 2008 which states that Mr Jean-Pierre Bemba “is a Senator for the present legislature”, ICC-01/05-01/08-200-Anx2-tENG; the same information was provided by Mr Jean-Pierre Bemba in the hearing of his first appearance, Pre-Trial Chamber III, ICC-01/05-01/08-T-3-ENG-ET, p. 3, line 1; see further a letter signed by the members of the MLC proving that Mr Jean-Pierre Bemba as a Congolese political leader to be the “National President of the MLC”, ICC-01/05-01/08-200-Anx2-tENG.

of pre-trial detention.<sup>107</sup> The Single Judge, in addition, stresses that Mr Jean-Pierre Bemba still benefits from the presumption of innocence in accordance with article 66 of the Statute.

60. As to the argument of the Defence for the possible voluntary surrender of Mr Jean-Pierre Bemba, the Single Judge observes that it has been raised before the Chamber already at the occasion of its first decision on interim release dating 20 August 2008 in which the then Single Judge had decided that the argument was of a hypothetical nature lacking any concrete evidence.<sup>108</sup> The Appeals Chamber upheld this determination.<sup>109</sup>

61. In the present decision the Single Judge, sharing the approach of the Chamber mentioned above, reiterates that she cannot build her findings solely on a hypothetical argument. But, bearing in mind some developments related to the present proceedings, she is of the view that it could be assessed with all other relevant factors of the case taken together.

62. The same holds true with respect to the Defence's argument on the financial situation and resources of Mr Jean-Pierre Bemba, the Single Judge wishes again to recall her findings in the 14 April 2009 Decision in which she once again had addressed this argument: it remains her belief that "a decision on continued detention is not generally made with reference to one sole element. (...) Thus, regardless of the weight to be given to the Defence's argument, the Single Judge's determination will not be confined to this specific factor".<sup>110</sup>

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<sup>107</sup> ECtHR, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application no. 33977/96, paras 80 and 81; see for a similar approach taken before the ICTY in *Prosecutor v. Prlic*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic, 30 July 2004, para. 29.

<sup>108</sup> Pre-Trial Chamber III, ICC-01/05-01/08-80-Anx, para. 58.

<sup>109</sup> Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application of interim release', ICC-01/05-01/08-323, para. 55.

<sup>110</sup> Pre-Trial Chamber II, ICC-01/05-01/08-403, para. 46.

63. The Single Judge recalls several events which took place since 14 April 2009 and which merit consideration. The Single Judge held the Hearing of 29 June 2009 pursuant to rule 118(3) of the Rules, specifically dedicated to any issue related to the pre-trial detention of Mr Jean-Pierre Bemba. Such a hearing, which is held at least once every year, is meant to allow the Single Judge to re-assess the entire situation of Mr Jean-Pierre Bemba's pre-trial detention after having listened to him.

64. After the hearing pursuant to article 61(7) of the Statute, some of the charges have been confirmed in the present case. In this context, the Single Judge observes that, based on the information available to her, up to this day Mr Jean-Pierre Bemba has shown good behaviour in detention and has not tried to interfere with the proceedings before this Court in any way. This conclusion of the Single Judge finds support in six reports by the Registrar which address the monitoring of Mr Jean-Pierre Bemba's non-privileged telephone communications over several months.<sup>111</sup>

65. This assessment of the Single Judge is further supported by the fact that on 8 July 2009, after the issuance of the 15 June 2009 Decision, due to exceptional humanitarian circumstances, the transfer of Mr Jean-Pierre Bemba was authorized for a period that did not exceed 24 hours, subject to conditions, from the Court's detention centre to the Kingdom of Belgium in order to attend his father's funeral ceremony.<sup>112</sup> The Single Judge was informed by the Registrar after the event that Mr Jean-Pierre Bemba cooperated fully with the Court and the national authorities of The Kingdom of the Netherlands and of the Kingdom of Belgium. He had respected all conditions set by the Single Judge and returned to the seat of the Court, complying with the Single Judge's order. Even though the information related to this event remains confidential in the record of the case, the Single Judge considers

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<sup>111</sup> These reports are contained in ICC-01/05-01/08-346-Conf annexes 1 to 10; ICC-01/05-01/08-375-Conf annexes 1 to 3; ICC-01/05-01/08-444-Conf and annex. The Single Judge, being aware of the confidential nature of these reports, does not consider the revelation of this particular information and the mention of the reports to be inconsistent with the confidential nature of the documents as such.

<sup>112</sup> Pre-Trial Chamber II, Decision on the Defence's Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, ICC-01/05-01/08-437-Conf.

that its revelation *ex post* does not prejudice the proceedings or the safety of Mr Jean-Pierre Bemba due to the fact that this event has already taken place.

66. Furthermore, Mr Jean-Pierre Bemba, in addressing the Single Judge at the end of the Hearing of 29 June 2009, renewed his continuous offer to cooperate with the Court and to appear at trial voluntarily. As the Single Judge held on earlier occasions,<sup>113</sup> this statement is not *per se* sufficient to grant the suspect interim release. However, she accepts Mr Jean-Pierre Bemba's *bona fide* intention to appear at trial and shall assess this factor alongside other factors.

67. Moreover, the Single Judge takes note of Mr Jean-Pierre Bemba's statement at the Hearing of 29 June 2009 regarding his political career plans and his averment that he would not set aside those past "years of sacrifice" and be a fugitive.<sup>114</sup> This is a factor which carries some weight when considering whether Mr Jean-Pierre Bemba has a motive to abscond.

68. Lastly, the Single Judge also observes that Mr Jean-Pierre Bemba appears to have strong family ties. The Single Judge has been recently informed of the importance for Mr Jean-Pierre Bemba to keep contact with his family, exemplified in the authorization to have communications with his family outside regular hours.<sup>115</sup> The Single Judge is aware of the serious impact of Mr Jean-Pierre Bemba's detention on the lives of his wife and five children as well as on Mr Jean-Pierre Bemba himself. The Single Judge believes that Mr Jean-Pierre Bemba's family situation forms a factor which, in the opinion of the Single Judge, makes it more difficult for him to abscond.

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<sup>113</sup> Pre-Trial Chamber III, ICC-01/05-01/08-321, para. 37; Pre-Trial Chamber II, ICC-01/05-01/08-403, para. 50.

<sup>114</sup> See paragraph 25 above, ICC-01/05-01/08-T-13-CONF-ENG WT, p. 54, lines 16-20.

<sup>115</sup> ICC-01/05-01/08-429-Conf-Exp, pp. 3-4, and annexes. The Single Judge deems it important and appropriate to refer to this pertinent aspect contained in the confidential, *ex parte* filing of the Registrar. The Single Judge further does not consider the mention of this confidential *ex parte* filing to be inconsistent with the confidential, *ex parte* nature of the document as such.



69. In weighing all factors outlined above, the Single Judge is satisfied that the entirety of factors set out in paragraphs 58 to 68 reflect a substantial change of circumstances since the issuance of the 14 April 2009 Decision. In reaching her finding, the Single Judge did not rely on one single factor but considered all factors collectively. This change in circumstances requires the Single Judge to modify the previous ruling ordaining Mr Jean-Pierre Bemba's detention. Thus, having regard to the entire range of factors, and having weighed up all factors, the Single Judge considers that the condition of article 58(1)(b)(i) of the Statute is not satisfied any longer.

70. Having said this, the Single Judge would conclude to modify the previous ruling, which was based on article 58(1)(b)(i) of the Statute, and grant the interim release of Mr Jean-Pierre Bemba. However, in any case of granting release, as stated above, the Single Judge is not confined to examine only one condition under article 58(1)(b) of the Statute but is required to address all three conditions under article 58(1)(b) of the Statute and examine whether they are met.

71. The Single Judge observes that, according to article 68(1), first sentence, of the Statute, she is duty-bound to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In this context, it is incumbent on her to examine whether the continued detention of Mr Jean-Pierre Bemba appears necessary in order to ensure that he does not obstruct or endanger the investigation or court proceedings by, in particular, interfering with witnesses or victims.

72. The Single Judge takes note of the Prosecutor's general allegation that, if released, Mr Jean-Pierre Bemba would exert pressure on victims and witnesses. She also takes note of a similar argument advanced by the OPCV. In this regard, the Single Judge is of the opinion that the arguments provided by the Prosecutor and

the OPCV reflect a general concern rather than an apprehension linked to any specific act or conduct of Mr Jean-Pierre Bemba himself. Admittedly, the submissions of the Prosecutor and the OPCV ought to be based on more concrete information.<sup>116</sup>

73. According to the Prosecutor, two past instances of Defence interference allegedly support his submission that, if released, Mr Jean-Pierre Bemba would exert pressure on witnesses and victims.<sup>117</sup> The Single Judge observes that the Prosecutor did not present any concrete evidence to substantiate his allegations. The Single Judge recalls that, when the Chamber was notified of these allegations in the past, she had advised the Prosecutor to submit a complaint regarding the Defence's alleged misconduct to the Registry.<sup>118</sup> The Single Judge is not aware of the initiation of such complaint proceedings to this day. Therefore, the Single Judge cannot weigh this factor against the request of Mr Jean-Pierre Bemba for interim release.

74. Paying due regard to the particular circumstances of the present case, the Single Judge is not convinced that Mr Jean-Pierre Bemba would interfere with witnesses or victims. The identities of the victims have not been disclosed to the Defence, a fact which makes Mr Jean-Pierre Bemba's interference unlikely. Even though the identities of 21 witnesses have been disclosed to the Defence, Mr Jean-Pierre Bemba has not tried to contact or threaten any of them or even attempted to obstruct or endanger the investigation or court proceedings during the entire year of pre-trial detention. The Chamber, in exercising its obligations under article 68(1) of the Statute, had ordered that Mr Jean-Pierre Bemba's non-privileged telephone communications be monitored by the Registry over a period of several months. The

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<sup>116</sup> ECtHR, *Smirnova v. Russia*, Judgment of 23 July 2003, Application nos 46133/99 and 48183/99, para. 63; see for a similar approach taken before the ICTY in *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 22; ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic, 30 July 2004, para. 28.

<sup>117</sup> ICC-01/05-01/08-162-Conf and ICC-01/05-01/08-217-Conf.

<sup>118</sup> Pre-Trial Chamber III, Decision on the Prosecutor's Applications to Open an Inquiry with Respect to Witnesses 0037 and 0045, ICC-01/05-01/08-295-Conf.

reports of the Registrar have shown that at no point in time threats to victims or witnesses emanated from Mr Jean-Pierre Bemba. This prompted the Registrar to terminate the monitoring of non-privileged telephone calls.<sup>119</sup>

75. Thus, the Single Judge concludes that it seems unlikely that Mr Jean-Pierre Bemba's release would endanger witnesses or victims or lead to the obstruction or endangerment of the investigation or the court proceedings. In light of the aforesaid, the Single Judge therefore concludes that the condition of article 58(1)(b)(ii) of the Statute is also not met.

76. Similarly, the Single Judge does not consider that Mr Jean-Pierre Bemba's continued detention appears necessary to "prevent [him] from continuing with the commission of [the crimes] which is within the jurisdiction of the Court and which arises out of the same circumstances" (article 58(1)(b)(iii) of the Statute). The situation in the CAR is stable and no information is available to the Single Judge indicating that Mr Jean-Pierre Bemba would interfere or act in the CAR and commit the same or related crimes which arise out of the same circumstances in the present case. The Single Judge therefore concludes that the condition of article 58(1)(b)(iii) of the Statute is not met as well.

77. In conclusion, the Single Judge holds that the continued detention of Mr Jean-Pierre Bemba does not appear necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute. The Single Judge also concludes that the continued detention is not necessitated by the other two alternatives encapsulated in article 58(1)(b)(ii) and (iii) of the Statute. Recalling that the decision

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<sup>119</sup> Pre-Trial Chamber III, First decision on the Prosecutor's request for redactions, ICC-01/05-01/08-85-Conf, p. 16; *ibid.*, Decision on the Monitoring of Jean-Pierre Bemba Gombo's Non-Privileged Communications, ICC-01/05-01/08-118-Conf-tENG; The Registrar submitted six reports on the monitoring of the non-privileged telephone communications of Mr Jean-Pierre Bemba conducted over several months, contained in ICC-01/05-01/08-346-Conf annexes 1 to 10; ICC-01/05-01/08-375-Conf annexes 1 to 3; ICC-01/05-01/08-444-Conf and annexes. The Single Judge, being aware of the confidential nature of these decisions and reports, does not consider their mention to be inconsistent with the confidential nature of the documents as such.

on continued detention or release is not of a discretionary nature, and mindful of the underlying principle that deprivation of liberty is the exception and not the rule, the Single Judge decides that Mr Jean-Pierre Bemba shall therefore be released, albeit under conditions.

78. The Single Judge, however, determines that the implementation of this decision is deferred pending a decision by the Chamber on the set of conditions to be imposed on Mr Jean-Pierre Bemba, the State to which he is to be released and all necessary arrangements have been put in place.

#### *Conditional Release*

79. As stated above, only after a decision to release the person is taken, the Single Judge will turn to the issue whether conditions as provided under rule 119 of the Rules should be imposed.

80. In light of the above, the Single Judge, mindful of the discretionary nature of rule 119(1) of the Rules providing that the Single Judge “may” set one or more conditions restricting liberty, still deems it appropriate that conditions be imposed on Mr Jean-Pierre Bemba. She also recalls that during the Hearing of 29 June 2009, Mr Jean-Pierre Bemba offered twenty “personal guarantees”, reflecting some of the conditions restricting liberty pursuant to rule 119(1) of the Rules.

81. The Single Judge also recalls rule 119(3) of the Rules according to which “[b]efore imposing (...) any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case”.

82. It is the belief of the Single Judge that seeking the views on the conditions to be imposed *before* the decision on interim release would be premature and would give

the impression of pre-determination of the Single Judge with regard to the said decision. Thus, the conditions to be imposed will be determined subsequently by the Single Judge, after the views of the Prosecutor, Mr Jean-Pierre Bemba, the relevant States and victims in that case have been sought. As to the Defence, the Single Judge will consider the proposed conditions and “personal guarantees” offered during the Hearing of 29 June 2009 and provided in writing thereafter.

83. Consequently, the Single Judge wishes to clarify that in this decision no ruling is rendered on the question which set or type of conditions restricting liberty are deemed appropriate to be imposed on Mr Jean-Pierre Bemba and in which State he shall be conditionally released.

*Cooperation of States to implement the present decision*

84. At the outset, the Single Judge deems it necessary to underline that the cooperation of States Parties is vital for the functioning of the Court and for the execution of its decisions, such as, *inter alia*, decisions for conditional release.

85. In this context, the Single Judge recalls the Court’s operational environment and the lack of enforcement mechanisms. This makes the Court dependent on State cooperation, as envisaged and provided for by the founding fathers and reflected in various provisions of the Statute. To this end, the Single Judge recalls article 86 of the Statute which reads: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court”.

86. The Single Judge underlines that article 86 of the Statute refers to all provisions of the Statute, therefore, including those in Part 5 concerning interim release.

87. The Single Judge also recalls that for State cooperation under Part 9 of the Statute to be effective, all States Parties to the Statute have to provide for procedures under their national law. In this respect, the Single Judge recalls article 88 of the Statute which provides that “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part”.

88. At this point in time the Single Judge emphasizes that the decision on interim release ultimately rests with the Single Judge, who is mandated to examine the prerequisites for any deprivation of liberty, based on the law exclusively and the specific circumstances of the case. The fact that States may have not provided guarantees cannot weigh heavily against Mr Jean-Pierre Bemba’s release. Neither are conditions of “guarantees” proposed by the States a prior indispensable requirement for granting interim release; rather they provide assurance to the Single Judge.<sup>120</sup>

89. Having said this, the Single Judge reiterates that cooperation of States is essential in these proceedings. Therefore, on crucial issues such as the one in question, the Court seeks observations from States, as was done by the Single Judge at the Hearing of 29 June 2009 and subsequently in a decision dating 10 July 2009. In particular, the Single Judge requested the States, to which Mr Jean-Pierre Bemba seeks to be released, and also the host State to submit their observations on his release as well as on the conditions, if any, to be imposed, as closely related issues.

90. The Single Judge recalls that the host State and the six States concerned have provided observations on the interim release and possible conditions (restricting liberty) to be imposed, as requested by the Single Judge. In their observations the States have, at this stage, in principle expressed objections or concerns to host Mr

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<sup>120</sup> For a similar understanding see ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic, 30 July 2004, para. 31.

Jean-Pierre Bemba on their territory, if released. The reasoning of the States' position varies considerably. The Single Judge cannot, however, infer from the said observations that these States would *in any event* reject his presence on their territory. Equally, the Single Judge cannot deduce from those observations that these States would not, *under any circumstances*, provide guarantees or agree that conditions be imposed on Mr Jean-Pierre Bemba. The Single Judge therefore considers that further observations from the States are needed.

91. Furthermore, the Single Judge recalls that in light of rule 119(3) of the Rules, she is obliged to seek not only the views of the relevant States but also of the Prosecutor, the person concerned and the victims that have communicated with the Court in that case on the conditions restricting liberty to be imposed.

92. Therefore, in addition to the further detailed information regarding the observations of the States submitted, the Single Judge must seek the views of the said parties and participants in the present proceedings on the set of conditions restricting liberty to be imposed on Mr Jean-Pierre Bemba,

93. The Single Judge, thus, deems it vital that the issue of the implementation of this decision on conditional release of Mr Jean-Pierre Bemba is discussed thoroughly in public hearings at the seat of the Court with those States to which Mr Jean-Pierre Bemba requested to be released, namely the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa as well as with the Prosecutor, Mr Jean-Pierre Bemba and the victims who have communicated with the Court in that case.

94. For the sake of proper preparation of the public hearings to be held with the relevant States, the parties and participants, the Single Judge wishes to inform the States sufficiently in advance of the nature of issues which will form the basis of the hearings and which will assist the Single Judge to take an informed decision.

95. At the hearings, the Single Judge wishes the States concerned to provide informative observations regarding Mr Jean-Pierre Bemba's release onto their territory and, in particular, observations on the following issues:

(a) any matter related to the issue of possible release of Mr Jean-Pierre Bemba onto the territory of the State concerned;

(b) the applicability of the conditions restricting liberty enlistered in rule 119(1) of the Rules on the State's territory and any related difficulties which the State concerned may encounter in their practical implementation in the present case;

(c) the applicability of the twenty "personal guarantees" offered by Mr Jean-Pierre Bemba during the Hearing of 29 June 2009<sup>121</sup> on the State's territory and any related difficulties which the State concerned may encounter in their practical implementation in the present case. Those twenty "personal guarantees" include the conditions:

(1) to "hand in his passport to the Registrar of the Court";

(2) "to present himself each day to the police at his place of residence in the host country";

(3) "that he not come into contact with the media as regards the ongoing procedure";

(4) "that there be no contact with the other accused of the ICC, with any victims or any witnesses, and of course not to try to intimidate them or endanger them";

(5) "to stay away from certain places and certain individuals as defined by the Court";

(6) "not to be involved in certain activities that [the] Court could list";

(7) "to have a valid round-trip ticket, an open ticket, from the host country to the Netherlands, that is to The Hague";

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<sup>121</sup> Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 25, lines 3 until p. 26, line 23.



(8) to “accept any kind of police surveillance 24 hours around the clock at his place of residence, and when he travels within the host country”;

(9) that “Mr Bemba as well as any person who may be in his residence in [the State concerned] authorise the use of surveillance measures that be implemented in order to provide for satisfactory surveillance”;

(10) “that with the financial aid of his family, [he] will bear all costs that be incurred in [the State concerned] in hosting him and providing surveillance of the suspect”;

(11) that “he is committing to authorising any adaptation of his property in light of the requirements of the host country in order to be able to satisfy the conditions of appropriate surveillance”;

(12) that “he commits to not leaving the territory of the host country except to be escorted here to the Court”;

(13) that “he commits to limiting his travel to a perimeter that [the Chamber] shall define”;

(14) that “he accepts that he be under house arrest if the Court so desires”;

(15) that “he accepts that all of his assets that have been seized and frozen by decision of [the] Court be used as a guarantee”;

(16) to “establish his place of residence at an address which will be included in the decision for interim release and he promise not to change his address without having received beforehand the permission of this Court”;

(17) “to accept to come voluntarily to The Hague at the date and time which shall be set”;

(18) “to abide by any decision made by the Court modifying his interim release or even putting an end to his interim release”;

(19) "to produce a statement under oath whereby he states that he will not abscond and that he will apply the orders of the Court";

(20) that "Mr Bemba accepts any additional condition that Belgium, France, or Portugal may decide to impose in order to accept to host him on their territory";

(d) any other condition available under the national laws of the States concerned that could be imposed on Mr Jean-Pierre Bemba during his conditional release on the State's territory, and any related difficulties in the practical implementation of such condition which the State concerned wishes to bring to the attention of the Single Judge.

96. At the conclusion of those public hearings, the Prosecutor, the victims that have communicated with the Court and Mr Jean-Pierre Bemba will be given the opportunity to present their views regarding the conditions restricting liberty, or any other condition, if deemed necessary.

97. However, regarding the Defence and its proper preparation for the hearings, the Single Judge considers it appropriate that the Defence be granted the right to respond in writing to the observations of all States as submitted on 13 July, 24 July, 29 July, 7 and 12 August 2009.

98. Lastly, the Single Judge highlights that once a decision is taken in which State Mr Jean-Pierre Bemba will be released, the Court will enter into consultations with the host State which shall facilitate his transfer<sup>122</sup> into and from a State other than the host State.

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<sup>122</sup> Article 47 of the Headquarter Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08.

99. The Single Judge is fully aware that the conditional release of Mr Jean-Pierre Bemba may bring about concerns, in particular from the witnesses and victims, in the local communities in the CAR and the DRC. The Single Judge, conscious of her obligations to take appropriate measures to protect the safety, physical and psychological well-being of witnesses and victims, considers it appropriate that the Victims and Witnesses Unit (the "VWU"), in consultation with the Prosecutor, continuously assess the risk to the safety and well-being of the witnesses and to immediately inform the Single Judge of any changes in their current security situation.

100. The Single Judge further considers it vital that the legal representatives of victims inform their clients of this decision and immediately inform the Single Judge in case of change to the victims' safety and security situation.

101. Finally, the Single Judge recalls that according to article 60(5) of the Statute, the Chamber may issue a warrant of arrest to secure the presence of Mr Jean-Pierre Bemba in case he is released onto the territory of another State.

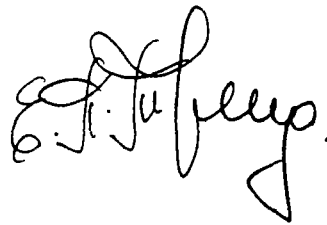
#### **FOR THESE REASONS, THE SINGLE JUDGE**

- a) **decides** that Jean-Pierre Bemba Gombo be granted conditional release, until decided otherwise;
- b) **decides** that the implementation of this decision be deferred pending a decision in which State Jean-Pierre Bemba Gombo will be released and which set of conditions shall be imposed on him;
- c) **decides** to grant the Defence's request lodged on 4 August 2009 to submit by no later than **24 August 2009 at 16h00** a response to the observations submitted by all States dating 13 July, 24 July, 29 July, 7 and 12 August 2009;

- d) orders** the Registrar to notify the relevant authorities of the Kingdom of Belgium, the Republic of France, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Republic of Portugal and the Republic of South Africa of the present decision;
- e) invites** the competent authorities of the Kingdom of Belgium to a public hearing at the seat of the Court on **7 September 2009 at 14h00** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;
- f) invites** the competent authorities of the Republic of Portugal to a public hearing at the seat of the Court on **8 September 2009 at 14h00** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;
- g) invites** the competent authorities of the Republic of France to a public hearing at the seat of the Court on **9 September 2009 at 14h00** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;
- h) invites** the competent authorities of the Federal Republic of Germany to a public hearing at the seat of the Court on **10 September 2009 at 14h00** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;
- i) invites** the competent authorities of the Italian Republic to a public hearing at the seat of the Court on **11 September 2009 at 14h00** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;
- j) invites** the competent authorities of the Republic of South Africa to a public hearing at the seat of the Court on **14 September 2009 at 09h30** in Courtroom I in order to provide further observations as well as views on the issues raised in paragraph 95 of the present decision;

- k) **invites** the Prosecutor, the Defence, the legal representatives of victims and the representative of the Registrar to be present during the public hearings to be held between 7 and 14 September 2009;
- l) **orders** the VWU, in consultation with the Prosecutor, to continuously assess the risk to the safety and well-being of the victims and witnesses in the present case and to immediately inform the Single Judge of any changes in their current security situation;
- m) **orders** the legal representatives of victims to inform their clients of this decision and immediately inform the Single Judge in case of change to the victims' safety and security situation.

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Friday, 14 August 2009

At The Hague, The Netherlands