

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/05-01/08 OA 9

Date of the original: 23 November 2011

Date of the redacted version: 15 December 2011

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Version

Judgment

on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”



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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Liriss Nkwebe
Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Mr Assingambi Zarambaud

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the accused’s applications for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011” of 26 September 2011 (ICC-01/05-01/08-1789-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the accused’s applications for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011” is confirmed. The appeal is dismissed.

I. KEY FINDINGS

1. A Chamber’s obligations to specify conditions and, if necessary, seek additional information regarding conditions of release is only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the Chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.
2. If a Chamber wishes to enter an additional ground of detention based on incidents post-dating the application for interim release, it must seek further observations from the parties on this issue prior to rendering its decision.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. On 6 June 2011, Mr Bemba filed an application for interim release to [REDACTED] (hereinafter: “[REDACTED]”) during the judicial recess and for periods of time in which the Trial Chamber would not sit for three consecutive days¹ (hereinafter: “Application for Interim Release to [REDACTED]”). Mr Bemba annexed a letter that his lawyer had sent to [REDACTED]² (hereinafter: “Mr Bemba’s Letter”), and [REDACTED]’s response thereto³ (hereinafter: “[REDACTED]’s Letter of 26 May 2011”).
2. On 8 June 2011, the Trial Chamber invited [REDACTED] to submit its observations on the Application for Interim Release to [REDACTED]⁴ (hereinafter: “Decision of 8 June 2011”). On 20 June 2011, [REDACTED] filed its observations⁵ (hereinafter: “[REDACTED]’s Observations”).
3. On 27 June 2011, the Trial Chamber rendered its “Decision on Applications for Provisional Release”⁶ (hereinafter: “Decision on Applications for Provisional Release”), rejecting, *inter alia*, the Application for Interim Release to [REDACTED].
4. On 29 June 2011, Mr Bemba appealed that decision.⁷
5. On 3 August 2011, the Registry filed two letters from [REDACTED] dated 9 June 2011 (hereinafter: “Letter of 9 June 2011”) and 28 July 2011 (hereinafter:

¹ “Additional request for the interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by [REDACTED]”, ICC-01/05-01/08-1479-Conf-tENG, para. 31.

² Annex B to “Additional request for the interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by [REDACTED]”, 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxB-tENG.

³ Annex A to “Additional request for the interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by [REDACTED]”, 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxA-tENG.

⁴ “Decision requesting observations on the “Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]”, ICC-01/05-01/08-1492-Conf, para. 9.

⁵ Annex 2 to the “Report of the Registry on the Implementation of Decision ICC-01/05-01/08-1492-Conf”, 20 June 2011, ICC-01/05-01/08-1556-Conf-Anx2.

⁶ ICC-01/05-01/08-1565-Conf.

⁷ “Notification d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 27 juin 2011 intitulée ‘Decision on Applications for Provisional Release’”, ICC-01/05-01/08-1573-Conf (OA 7).

“Letter of 28 July 2011”),⁸ setting out specific measures that [REDACTED] would implement if Mr Bemba were released to that country.⁹

6. On 19 August 2011, the Appeals Chamber reversed the Decision on Applications for Provisional Release to the extent that it dismissed Mr Bemba’s Application for Interim Release to [REDACTED] and directed the Trial Chamber to reconsider that application¹⁰ (hereinafter: “*Bemba OA 7 Judgment*”).

7. On 26 September 2011, the Trial Chamber rendered its “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”¹¹ (hereinafter: “Impugned Decision”), rejecting Mr Bemba’s Application for Interim Release to [REDACTED].

B. Proceedings before the Appeals Chamber

8. Mr Bemba appealed the Impugned Decision on 27 September 2011¹² (hereinafter: “Notice of Appeal”). In his Notice of Appeal, Mr Bemba requested the abridgment of time for the submissions of the parties and participants in the appeal and if necessary, a status conference to present oral arguments.¹³

9. On 3 October 2011, Mr Bemba filed the “Document in support of Defence appeal against Trial Chamber III’s decision of 26 September 2011 entitled: *Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011*”¹⁴ (hereinafter: “Document in Support of the Appeal”).

⁸ Annex 1 to “Transmission of the Registry of the observations of [REDACTED]”, ICC-01/05-01/08-1621-Conf-Anx1-tENG (OA 7).

⁹ Annex 1 to “Transmission of the Registry of the observations of [REDACTED]”, ICC-01/05-01/08-1621-Conf-Anx1-tENG (OA 7).

¹⁰ “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, ICC-01/05-01/08-1626-Conf (OA 7). A public redacted version was filed on 12 September 2011 as ICC-01/05-01/08-1626-Red (OA 7). All references herein are to the public redacted version. Judge Ušacka issued a partly dissenting opinion to the judgment; see pp. 31-38.

¹¹ ICC-01/05-01/08-1789-Conf. A public redacted version was filed on 27 September 2011 as ICC-01/05-01/08-1789-Red. All references herein are to the public redacted version.

¹² “Defence appeal against Trial Chamber III’s decision of 26 September 2011 entitled ‘*Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011*’”, ICC-01/05-01/08-1793-Conf-tENG (OA 9).

¹³ Notice of Appeal, paras. 8-10, 13.

¹⁴ ICC-01/05-01/08-1812-Conf-tENG (OA 9).

The Prosecutor filed his response thereto on 10 October 2011¹⁵ (hereinafter: “Response to the Document in Support of the Appeal”).

10. On 4 October 2011, Mr Assingambi Zarambaud (hereinafter: “Mr Zarambaud”) applied to participate in the present appeal on behalf of the victims he represents¹⁶ (hereinafter: “Application for Victims Participation”).

11. On 6 October 2011, Mr Zarambaud filed the “Observations of Mr Zarambaud Assingambi, Legal Representative of Victims, on the Defence appeal brief dated 3 October 2011”.¹⁷ On 11 October 2011, the Appeals Chamber decided to disregard these observations because they were filed without leave of the Appeals Chamber.¹⁸

12. On 12 October 2011, Mr Bemba filed the “Application for leave to reply to the Office of the Prosecutor’s response of 10 October 2011 to the document in support of the Defence appeal”¹⁹ (hereinafter: “Application for Leave to Reply”).

13. On 14 October 2011, the Prosecutor filed his response to the Application for Victims Participation.²⁰ Mr Bemba did not file a response.

14. On 17 October 2011, the Appeals Chamber rejected Mr Bemba’s Application for Leave to Reply.²¹

15. On 19 October 2011, the Appeals Chamber rendered its “Decision on ‘Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 21 September 2011’”, granting the group of victims represented by Mr Zarambaud

¹⁵ “Prosecution’s Response to the ‘Document in support of Defence Appeal against Trial Chamber III’s decision of 26 September 2011 entitled “*Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011*””, ICC-01/05-01/08-1836-Conf (OA 9).

¹⁶ “Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 27 September 2011”, ICC-01/05-01/08-1817-Conf-tENG (OA 9).

¹⁷ ICC-01/05-01/08-1832-Conf-tENG (OA 9).

¹⁸ “Order on the filing of a response to the application by victims for participation in the appeal against the ‘Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011’ of Trial Chamber III”, ICC-01/05-01/08-1837-Conf (OA 9).

¹⁹ ICC-01/05-01/08-1841-tENG (OA 9).

²⁰ “Prosecution’s response to ‘Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 27 September 2011’ (ICC-01/05-01/08-1817-Conf)”, ICC-01/05-01/08-1842-Conf (OA 9).

²¹ “Decision on ‘Application for leave to reply to the Office of the Prosecutor’s response of 10 October 2011 to the document in support of the defence appeal’”, ICC-01/05-01/08-1846 (OA 9).

(hereinafter: the “Victims”) the right to participate in the appeal with the exception of victims referred to as “a/??32/10” and “a/7/14 05”.²²

16. On 24 October 2011, Mr Zarambaud filed the Victims’ observations on the Document in Support of the Appeal²³ (hereinafter: “Victims’ Observations”).

17. On 26 October 2011, Mr Bemba²⁴ and the Prosecutor²⁵ filed their respective responses to the Victims’ Observations (respectively hereinafter: “Mr Bemba’s Response to the Victims’ Observations” and “Prosecutor’s Response to the Victims’ Observations”). The Prosecutor notes that the Victims concur with his Response to the Document in Support of the Appeal and the arguments advanced therein.²⁶ Mr Bemba reiterates the submissions made in the Document in Support of the Appeal.²⁷

III. PRELIMINARY ISSUE: MR BEMBA’S REQUEST FOR ABRIDGMENT OF TIME OR A STATUS CONFERENCE

18. As noted above, in Mr Bemba’s Notice of Appeal, Mr Bemba requested an abridgement of the time limit for the filing of submissions in this appeal and if necessary, a status conference to present oral arguments.²⁸ Noting that the Trial Chamber will not sit from 10 to 14 October 2011,²⁹ Mr Bemba submitted that the appeal is “extremely urgent” and requested that the Appeals Chamber abridge the time limits for the filings in order to ensure that he is given an effective right “insofar as [his] application for release pertains to those periods during which the Chamber will not sit for at least three consecutive days, including long weekends and periods of judicial recess”.³⁰

19. With respect to Mr Bemba’s application for an abridgment of the time limit for the filing of submissions, regulation 35 (2) of the Regulations of the Court provides

²² ICC-01/05-01/08-1848-Conf (OA 9).

²³ “Observations of Mr Zarambaud Assingambi, Legal Representative of Victims, on the Defence’s 3 October 2011 document in support of the appeal”, ICC-01/05-01/08-1860-Conf-tENG (OA 9).

²⁴ “Defence reply to the observations of the Legal Representative of Victims dated 24 October 2011”, ICC-01/05-01/08-1865-Conf-tENG (OA 9).

²⁵ “Prosecution’s Response to the ‘Observations de Maître Zarambaud Assingambi, Représentant légal de victimes sur le document de la Défense du 3 octobre 2011 à l’appui de sa requête d’appel’ (ICC-01/05-01/08-1860-Conf)”, ICC-01/05-01/08-1863-Conf (OA 9).

²⁶ Prosecutor’s Response to the Victims’ Observations, para. 6.

²⁷ Mr Bemba’s Response to the Victims’ Observations, paras 2-12.

²⁸ Notice of Appeal, paras 10, 13.

²⁹ Notice of Appeal, para. 9.

³⁰ Notice of Appeal, para. 8.

that a Chamber may extend or reduce a time limit prescribed in the Regulations of the Court or ordered by a Chamber if good cause is shown.

20. The Appeals Chamber finds that in the present case, Mr Bemba has not established good cause for the abridgment of time. Mr Bemba is requesting interim release for all periods during which the Trial Chamber does not sit for three consecutive days and his request is not limited to the period between 10 to 14 October 2011. Accordingly, Mr Bemba's argument that he cannot effectively exercise his right to appeal if a judgment on the appeal was not issued in advance of 10 October 2011 is unpersuasive. The Appeals Chamber also notes in this context that Mr Bemba himself did not file his Document in Support of the Appeal before the time limit for its submission had expired.

21. Turning to Mr Bemba's request for a status conference, rule 156 (3) of the Rules of Procedure and Evidence requires proceedings on appeal to be in writing unless the Appeals Chamber decides to convene a hearing. In the present case, having decided that it was not appropriate to abridge the time limits on the appeal, the Appeals Chamber did not consider it necessary to hold an oral hearing on the appeal.

IV. MERITS OF THE APPEAL

22. In this appeal, Mr Bemba raises three main grounds of appeal. First, he contends that the Trial Chamber committed a procedural and legal error by evaluating only the conditions set out by [REDACTED] without itself identifying appropriate conditions of release or seeking further information from [REDACTED] about additional conditions.³¹ Second, he submits that the Trial Chamber committed a factual error by misappreciating the weight to be given to [REDACTED]'s letters and guarantees and in making an unreasonable inference about Mr Bemba's financial resources.³² Third, he argues that the Trial Chamber erred in concluding that [REDACTED]'s proposed conditions did not sufficiently mitigate the alleged risk of intimidation of witnesses.³³ These grounds of appeal will be analysed below.

³¹ Document in Support of the Appeal, paras 7-22.

³² Document in Support of the Appeal, paras 23-27.

³³ Document in Support of the Appeal, paras 28-43.

A. First Ground of Appeal: Whether the Trial Chamber erred by not identifying itself the appropriate conditions of release and by not seeking additional observations from [REDACTED]

1. Procedural context and relevant part of the Impugned Decision

23. In Mr Bemba's Letter, Mr Bemba sought [REDACTED]'s consent to implement specific conditions aimed at guaranteeing his appearance at trial.³⁴ In [REDACTED]'s Letter of 26 May 2011, [REDACTED] agreed to Mr Bemba's request, noting that the practical arrangements that would be implemented would be communicated to the Court as soon as practicable.

24. In the Decision of 8 June 2011, the Trial Chamber requested [REDACTED] to indicate, *inter alia*, "whether [REDACTED] would be in a position to impose one or more of the conditions listed in Rule 119 of the Rules, should the Chamber order the interim release of Mr Bemba on the territory of [REDACTED]".³⁵ In [REDACTED]'s Observations, [REDACTED] stated that it was in a position to implement one or more of those conditions should Mr Bemba be released onto its territory. The Trial Chamber did not seek clarification of [REDACTED]'s submissions before the Chamber.

25. In its Decision on Applications for Provisional Release, the Trial Chamber found that [REDACTED]'s Letter of 26 May 2011 and [REDACTED]'s Observations were brief and did not specify which conditions under rule 119 (1) of the Rules of Procedure and Evidence [REDACTED] was able to implement, nor did they guarantee Mr Bemba's appearance at trial. Consequently, the Trial Chamber concluded that the proposals made in [REDACTED]'s Letter of 26 May 2011 and [REDACTED]'s Observations did not mitigate the risk of Mr Bemba absconding if released to [REDACTED].³⁶

³⁴ Mr Bemba's Letter, p. 4-5.

³⁵ Decision of 8 June 2011, para. 9.

³⁶ Decision on Applications for Provisional Release, para. 59.

26. Mr Bemba appealed the Decision on Applications for Provisional Release.³⁷ In the *Bemba OA 7 Judgment*, the Appeals Chamber reversed the Decision on Applications for Provisional Release to the extent that it dismissed Mr Bemba's Application for Interim Release to [REDACTED] and directed the Trial Chamber to reconsider that application in light of the *Bemba OA 7 Judgment*.³⁸

27. In the Impugned Decision, the Trial Chamber found that there was no need to seek additional observations from [REDACTED].³⁹ This was because, in the Trial Chamber's opinion, [REDACTED]'s Letter of 9 June 2011 and Letter of 28 July 2011, which the Registrar had filed on 3 August 2011, contained sufficient information as to the "specific conditions [[REDACTED] is] willing or able to impose",⁴⁰ in order to "enable the Chamber to make an informed decision' on whether to grant the accused provisional release to [REDACTED]".⁴¹

2. Submissions of Mr Bemba

28. Mr Bemba submits that the "Chamber committed a manifest error of law and procedure in evaluating only those conditions set out in [REDACTED]'s letters, whereas it should instead have invited [REDACTED] to provide information on its willingness and capacity to implement additional conditions identified by the Judges themselves".⁴² In his view, this could have been done "via an *ex parte* status conference with [REDACTED] and the Registry".⁴³ He interprets the *Bemba OA 7 Judgment* to mean that "it is the responsibility of the Chamber, rather than the State Party" into which conditional release is being sought, "to set the conditions" of release⁴⁴ and concludes that "the Trial Chamber should have provided [REDACTED] with a concrete and exhaustive list of conditions" to enable [REDACTED] to decide whether it was willing and able to implement them.⁴⁵

³⁷ "Notification d'Appel de la Défense contre la décision de la Chambre de Première Instance III du 27 Juin 2011 intitulée 'Decision on Applications for Provisional Release'", 29 June 2011, ICC-01/05-01/08-1573-Conf (OA 7).

³⁸ *Bemba OA 7 Judgment*, p. 3.

³⁹ Impugned Decision, paras 15-18.

⁴⁰ Impugned Decision, para. 18.

⁴¹ Impugned Decision, para. 18.

⁴² Document in Support of the Appeal, para. 15.

⁴³ Document in Support of the Appeal, para. 16.

⁴⁴ Document in Support of the Appeal, para. 10.

⁴⁵ Document in Support of the Appeal, paras 10, 12-13.

3. *Submissions of the Prosecutor*

29. The Prosecutor generally avers that Mr Bemba fails to demonstrate any error in the Impugned Decision and that his arguments are mainly grounded on a misrepresentation of the *Bemba OA 7 Judgment*.⁴⁶ First, he recalls that “there is no unconditional right to conditional release, there is only the right to release if conditions can be fashioned to mitigate the risks that would follow from release”.⁴⁷ Second, he interprets the Chamber’s obligation to seek conditions from the *Bemba OA 7 Judgment* as follows:

[T]he Chamber considering release must only seek observations from a particular State as to its ability to enforce specific conditions identified by the Chamber in certain instances, namely when (a) a State has indicated its general willingness and ability to accept a detained person and enforce conditions; (b) the Chamber is considering conditional release; and (c) the Chamber finds that the “State’s observations are insufficient to enable the Chamber to make an informed decision” and specific conditions have yet to be identified.⁴⁸

The Prosecutor agrees with the Trial Chamber that [REDACTED]’s guarantees were specific and clear, and additional submissions were not necessary for the Chamber to issue an informed decision.⁴⁹

30. Furthermore, the Prosecutor submits that the Trial Chamber had the discretion to identify and propose the conditions of release.⁵⁰ He considers that since he had demonstrated “that release would entail a risk of flight under article 58(1) of the Statute, it is the Appellant’s burden, as the party seeking release, to establish that there exist conditions that will guarantee his appearance for trial” and that the *Bemba OA 7 Judgment* “cannot logically be interpreted as imposing such an obligation upon the Trial Chamber”.⁵¹

31. Lastly, the Prosecutor submits that Mr Bemba “confus[ed] the identification and selection of measures to mitigate or eliminate risks under article 58 (1) (b) of the Statute with the subsequent discussions about the effective implementation of the

⁴⁶ Response to the Document in Support of the Appeal, para. 19.

⁴⁷ Response to the Document in Support of the Appeal, para. 25.

⁴⁸ Response to the Document in Support of the Appeal, para. 26, referring to the *Bemba OA 7 Judgment*, paras 53, 55-56.

⁴⁹ Response to the Document in Support of the Appeal, paras 24-27.

⁵⁰ Response to the Document in Support of the Appeal, para. 29.

⁵¹ Response to the Document in Support of the Appeal, para. 31.

identified measures and the related logistics.⁵² He adds that Mr Bemba failed “to specify which concrete measures [REDACTED] failed or could have failed to mention and had to be discussed without his being privy of such information”.⁵³

4. *Submissions of the Victims*

32. The Victims agree with the Trial Chamber’s view that [REDACTED]’s Letter of 9 June 2011 and Letter of 28 July 2011 provided a sufficient basis to rule on Mr Bemba’s Application for Interim Release and that it was therefore unnecessary for the Trial Chamber to seek additional observations from [REDACTED].⁵⁴

5. *Determination by the Appeals Chamber*

33. The Appeals Chamber is not persuaded by Mr Bemba’s submissions that the Trial Chamber “committed a manifest error of law and procedure in evaluating only those conditions set out in [REDACTED]’s letters, whereas it should instead have invited [REDACTED] to provide information on its willingness and capacity to implement additional conditions identified by the Judges themselves”.⁵⁵

34. In the *Bemba OA 7 Judgment*, the majority⁵⁶ of the Appeals Chamber addressed a Chamber’s obligations to specify conditions of release or seek additional information from a State willing and able to accept a detained person and impose conditions:

[I]n a situation such as the present, where the Trial Chamber has found that detention is necessary to ensure the person’s appearance at trial, the Chamber has the discretion to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release. However, given that a person’s personal liberty is at stake if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber. Depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State’s observations are insufficient to enable the Chamber to make an informed decision. That is not to say that the Chamber upon receiving observations from the State is obliged to

⁵² Response to the Document in Support of the Appeal, para. 33.

⁵³ Response to the Document in Support of the Appeal, para. 33.

⁵⁴ Victims’ Observations, para. 16.

⁵⁵ Document in Support of the Appeal, para. 15.

⁵⁶ In her partly dissenting opinion to the *Bemba OA 7 Judgment*, Judge Ušacka stated that she could not find an error in the factual evaluation of the Trial Chamber relevant to interim release. She therefore did not agree with remanding the matter to the Trial Chamber but would have confirmed the Decision on Applications for Provisional Release.

grant conditional release. It only means that the Chamber must seek information that would enable it to make an informed decision on the matter.⁵⁷

35. The majority of the Appeals Chamber made this finding in the particular circumstances giving rise to the *Bemba OA 7 Judgment*. In the Decision on Applications for Provisional Release (the impugned decision in the *Bemba OA 7* appeal), the Trial Chamber noted that “[REDACTED]’s brief letter and its equally succinct submission to this Chamber convey little more than a general willingness to accept the accused into [REDACTED]’s territory and do not specify which of Rule 119(1)’s conditions [REDACTED] would be able to implement”.⁵⁸ However, the majority of the Appeals Chamber found the Trial Chamber to have committed two errors in this regard. First, as the majority of the Appeals Chamber noted, “in a situation where a Chamber has not (yet) identified specific conditions which it considers appropriate to impose, a State willing to accept a detained person can do little more than indicate its general willingness and ability to impose conditions”.⁵⁹ As such, in these particular circumstances, it was the Trial Chamber which should have indicated which conditions it deemed relevant. These may be conditions under rule 119 (1) of the Rules of Procedure and Evidence or they may include additional conditions. Second, the Trial Chamber erred in finding that [REDACTED] did not specify which conditions set forth in rule 119 (1) of the Rules of Procedure and Evidence it was able to implement. The majority of the Appeals Chamber found that it was “at least clear that [REDACTED] considered that it could [...] impose any of the conditions listed in rule 119 (1)”.⁶⁰ It was against this backdrop that the majority of the Appeals Chamber found that “[i]f the Trial Chamber considered this information to be insufficient for its purposes, it should have sought further information from [REDACTED] regarding the latter’s capacity to enforce those conditions or any other conditions that the Trial Chamber considered appropriate to impose”.⁶¹ The obligations identified by the Appeals Chamber in the *Bemba OA 7 Judgment* to specify possible conditions of detention and, if necessary, to seek further information must be understood in that context. They are only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general

⁵⁷ *Bemba OA 7 Judgment*, para 55.

⁵⁸ Decision on Applications for Provisional Release, para. 59.

⁵⁹ *Bemba OA 7 Judgment*, para. 53.

⁶⁰ *Bemba OA 7 Judgment*, para. 52.

⁶¹ *Bemba OA 7 Judgment*, para. 56.

willingness and ability to accept a detained person into its territory; and (c) the Chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.

36. Turning to the circumstances giving rise to the present appeal, the Appeals Chamber finds that it was not necessary for the Trial Chamber to specify the conditions of release or seek additional information from [REDACTED]. At the time of the Impugned Decision, the information before the Trial Chamber regarding the conditions that [REDACTED] was willing to impose included [REDACTED]'s Letter of 26 May 2011 (responding to Mr Bemba's Letter), [REDACTED]'s Observations of 20 June 2011 (responding to the Trial Chamber's Decision of 8 June 2011), [REDACTED]'s Letter of 9 June 2011, and [REDACTED]'s Letter of 28 July 2011. In its Letter of 9 June 2011, [REDACTED] agreed to "set up a system to protect Mr Jean Pierre Bemba's safety fully and to monitor him around the clock during his temporary stay on its national territory in order to avoid any impediment to the smooth conduct of the ongoing proceedings before the International Criminal Court".⁶² Most importantly, in [REDACTED]'s Letter of 28 July 2011, it proposed an extensive list of conditions, informing the Trial Chamber of specific measures that would "ensure the accused's safety and monitoring during his stay on [REDACTED]ese territory, and of the guarantee that Mr Bemba will be transferred back to the Seat of the Court when called to appear at his trial".⁶³ [REDACTED] stated that "Mr Bemba's place of residence in [REDACTED] will be in a neighbourhood appropriate to round-the-clock monitoring".⁶⁴ [REDACTED] also proposed specific measures to ensure that Mr Bemba complied with the conditions of his release and, in particular, did not abscond or interfere with witnesses. These measures included: (1) a police officer making unannounced visits to his residence to verify his presence there; (2) arresting him in the event of a violation of the conditions of his release and notifying the Court of any violation; (3) ensuring that he appeared for trial when ordered by the Court; and (4) arresting him if he attempted to escape.⁶⁵

⁶² Letter of 9 June 2011, p. 4.

⁶³ Letter of 28 July 2011, p. 2.

⁶⁴ Letter of 28 July 2011, p. 2.

⁶⁵ Letter of 28 July 2011, pp. 2-3.

37. The Appeals Chamber notes that [REDACTED] may not have provided an “exhaustive list” of conditions.⁶⁶ Nevertheless, the conditions proposed were extensive, specific and covered nearly all of the conditions enumerated in rule 119 (1) of the Rules of Procedure and Evidence. Therefore, the Trial Chamber was indeed in a position to make an informed decision as to whether conditions could sufficiently mitigate the risk of flight under article 58 (1) (b) (i) of the Statute. In these circumstances, the Appeals Chamber considers that the Trial Chamber did not have to specify conditions of release or seek additional submissions from [REDACTED].

38. The first ground of appeal is therefore dismissed.

B. Second Ground of Appeal: Whether the Trial Chamber erred in assessing whether the measures proposed by [REDACTED] mitigate the risk of flight

39. Mr Bemba’s second ground of appeal is two-fold. He submits that the Trial Chamber: (a) did not give sufficient weight to the measures proposed by [REDACTED],⁶⁷ and (b) made an unreasonable inference as to the financial means available to him.⁶⁸

1. Relevant part of the Impugned Decision

40. As to the weight given to the measures proposed by [REDACTED], the Trial Chamber recalled in the Impugned Decision the discretionary nature of assessing whether conditional release under rule 119 of the Rules of Procedure and Evidence should be granted or not.⁶⁹ Then, as to [REDACTED]’s proposed measures to mitigate the risk of flight in its Letter of 28 July 2011, the Trial Chamber noted that the monitoring system consisted of, *inter alia*, “a reporting system [and] unannounced visits to the accused’s residence”.⁷⁰ The Trial Chamber found that while those measures “may increase the difficulty of absconding, they do not eliminate that risk”

⁶⁶ In the Impugned Decision, at para. 17, the Trial Chamber found that the Letter of 9 June 2011 and the Letter of 28 July 2011 “appear to constitute an exhaustive list of the measures that [REDACTED] is willing to implement if the accused is released into its territory”.

⁶⁷ Document in Support of the Appeal, paras 23-27.

⁶⁸ Document in Support of the Appeal, paras 23, 24, 26.

⁶⁹ Impugned Decision, para. 35.

⁷⁰ Impugned Decision, para. 36.



or “reduce it to an acceptable degree”.⁷¹ It concluded that those measures were “unlikely to prevent the accused from absconding if he chooses to do so”.⁷²

41. Regarding Mr Bemba’s financial resources as a factor justifying his continued detention under article 58 (1) (b) (i) of the Statute, the Trial Chamber found that the factual basis underlying its decision of 17 December 2010⁷³ that Mr Bemba’s detention was necessary under article 58 (1) (b) (i) of the Statute remained unchanged.⁷⁴ The Trial Chamber noted that Mr Bemba submitted that “the costs of charter flights, security and monitoring would be borne by the accused’s ‘family members and friends’” and it stated that “[i]f the accused can summon sufficient funds for those purposes, it is a proper inference that he can also muster the funds he would need to abscond”.⁷⁵

2. Submissions of Mr Bemba

42. Mr Bemba submits that the Trial Chamber did not give sufficient weight to the guarantees proposed by [REDACTED] in its Letter of 28 July 2011.⁷⁶ He submits that the Trial Chamber’s finding in its decision of 17 December 2010 that he had the means to flee was made in the absence of a State guarantee.⁷⁷ In Mr Bemba’s view, the [REDACTED] guarantees constitute a change in circumstance because the financial and other means available to Mr Bemba “would hardly jeopardise the success of the operation which [REDACTED] has pledged to implement”.⁷⁸

43. As to the inferences regarding his financial resources, Mr Bemba argues that the Trial Chamber erred by concluding “without the least shred of evidence, that the creditors of the Accused, who are willing to provide him with assistance or lend him money within the legitimate and legal framework of a release decided by the Court,

⁷¹ Impugned Decision, para. 37.

⁷² Impugned Decision, para. 38.

⁷³ “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010”, ICC-01/05-01/08-1088, paras 36, 40.

⁷⁴ Impugned Decision, paras 21-23.

⁷⁵ Impugned Decision, para. 23.

⁷⁶ Document in Support of the Appeal, paras 23-27.

⁷⁷ Document in Support of the Appeal, para. 24.

⁷⁸ Document in Support of the Appeal, para. 24, *see also* para. 27.

would agree to lend the same support within the totally illegal framework of abscondment”.⁷⁹

3. *Submissions of the Prosecutor*

44. The Prosecutor argues that the Trial Chamber considered the measures proposed by [REDACTED], but found that they “were aimed at monitoring the Appellant’s physical location while in [REDACTED], his compliance with the Chamber’s conditions and return to the Court, but they did not address the Chamber’s central concern, namely that the Appellant might abscond if given the opportunity as he has the motive and the means to flee”.⁸⁰

45. As to Mr Bemba’s financial resources, the Prosecutor submits that it was reasonable to infer that “if persons close to the Appellant are willing to cover the costs of his private transport to any country that the Chamber chooses, they may well provide those same funds to ensure that the Appellant does not return to the seat of the Court”.⁸¹ Furthermore, he emphasises that Mr Bemba made the same argument in prior applications and that the Appeals Chamber already stated that “the Chamber does not need to enter findings on circumstances already decided in the prior ruling on detention, nor does the Chamber has [*sic*] to entertain submissions by the Appellant that merely repeat arguments that the Chamber has already addressed in previous decisions”.⁸²

4. *Submissions of the Victims*

46. The Victims submit that the Trial Chamber was correct in ruling that the guarantees proposed by [REDACTED] do not sufficiently mitigate the risk of Mr Bemba absconding given [REDACTED].⁸³

⁷⁹ Document in Support of the Appeal, para. 26.

⁸⁰ Response to the Document in Support of the Appeal, para. 37.

⁸¹ Response to the Document in Support of the Appeal, para. 38.

⁸² Response to the Document in Support of the Appeal, para. 38, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, 19 November 2011, ICC-01/05-01/08-1019 (OA 4), (hereinafter: “*Bemba OA 4 Judgment*”), para. 53.

⁸³ Victims’ Observations, para. 17.

5. Determination by the Appeals Chamber

47. Regarding the standard of review for appeals granting or denying release, the Appeal Chamber has previously held that it:

[It] will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.⁸⁴

48. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber.⁸⁵ Therefore, in determining whether a Pre-Trial or Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences [that the Pre-Trial or Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention”⁸⁶ and “will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.⁸⁷

49. In the view of the Appeals Chamber, in the present case, the Trial Chamber did not commit a clear error in its weighing of the measures proposed by [REDACTED]. The Trial Chamber assessed “whether the conditions that [REDACTED] is willing to implement would mitigate the risks identified under Article 58(1)(b) of the Statute to such an extent that conditional release would be appropriate pursuant to Rule 119 of

⁸⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 61.

⁸⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25.

⁸⁶ *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”’”, 14 July 2011, ICC-01/04-01/10-283 (OA), para. 17 (hereinafter: “*Mbarushimana OA Judgment*”).

⁸⁷ *Mbarushimana OA Judgment*, para. 17. See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’”, 8 October 2010, ICC-01/04-01/06-2582 (OA 18), para. 56 (citing *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 (OA 13), para. 84).

the Rules”.⁸⁸ The Chamber noted that the proposed conditions consisted of, *inter alia*, a “reporting system, unannounced visits to the accused’s residence, the monitoring of his telephone calls and [...] arresting the accused and returning him to The Hague if he attempts to escape or violates the conditions of his release”.⁸⁹ It concluded that the measures proposed by [REDACTED] were “unlikely to prevent the accused from absconding if he chooses to do so [...] and do not mitigate the risk of flight to an acceptable degree”.⁹⁰ Given the nature of the proposed measures, the Appeals Chamber does not find this conclusion to be unreasonable.

50. With regard to the Trial Chamber’s inference as to Mr Bemba’s financial means, the Appeals Chamber notes that Mr Bemba made the same argument in the *Bemba OA 7* appeal,⁹¹ and has not further supported this claim in the present appeal. He thus appears to seek reconsideration of the issue, even though the Appeals Chamber already reviewed that inference and found no clear error in the Trial Chamber’s reasoning.⁹² For that reason, Mr Bemba’s submission that the Trial Chamber made an unreasonable inference as to his financial means will not be considered any further.

51. In sum, the Appeals Chamber therefore dismisses the second ground of appeal.

C. Third Ground of Appeal: Whether the Trial Chamber committed an error in assessing whether the measures proposed by [REDACTED] mitigate the risk of witness intimidation

52. Under the third ground of appeal, Mr Bemba raises three arguments: (a) that he was not given the opportunity to respond to allegations of witness intimidation, (b) that there is no link between Mr Bemba and incidents of witness intimidation, and (c) that the Trial Chamber erred in finding the telephone monitoring measures to be insufficient to mitigate the risk of witness inference.⁹³

⁸⁸ Impugned Decision, para. 34.

⁸⁹ Impugned Decision, para. 36.

⁹⁰ Impugned Decision, para. 38.

⁹¹ See “Document in support of Defence Appeal against Trial Chamber III’s decision on Applications for Provisional Release, dated 27 June 2011”, 1 July 2011, ICC-01/05-01/08-1586-Conf (OA 7), para. 17.

⁹² *Bemba OA 7 Judgment*, paras 61-62.

⁹³ Document in Support of the Appeals, paras 28-43.



1. *Relevant procedural context and part of the Impugned Decision*

53. In the Decision on Applications for Provisional Release, the Trial Chamber found that Mr Bemba's detention also appeared necessary under article 58 (1) (b) (ii) of the Statute because of the risk of witness intimidation, thus adding an additional ground of detention if compared to the Trial Chamber's previous reviews of detention.⁹⁴ In the *Bemba OA 7 Judgment*, the Appeals Chamber stated that "in order for the Trial Chamber to have found that Mr Bemba's continued detention was now necessary also under article 58 (1) (b) (ii) of the Statute, it would have had to demonstrate a new fact or a change in the circumstances founding the Decision of 17 December 2010".⁹⁵ The Appeals Chamber concluded that "although the [Decision on Applications for Provisional Release] identified certain factors as the basis for the finding that there was the possibility that Mr Bemba would interfere with witnesses if released, the Trial Chamber did not explain why those factors constituted a change in the circumstances since the Decision of 17 December 2010".⁹⁶ The Appeals Chamber found that the Trial Chamber therefore erred in holding that article 58 (1) (b) (ii) of the Statute provided an additional basis for Mr Bemba's detention.⁹⁷

54. In the Impugned Decision, the Trial Chamber explained that it considered "the witness interference concerns that have been raised since December 2010 Decision"⁹⁸ because the Appeals Chamber had ruled that a "Chamber must not limit itself to the arguments of the parties when considering a request for interim release; it 'must also consider any other new information which has a bearing on the subject'".⁹⁹ It referred to "[s]everal incidents [that] have been reported since July 2011 in which threats have allegedly been made against prosecution witnesses and their families in connection with their testimony at the Court".¹⁰⁰

55. The Trial Chamber noted in particular that it appears that the identities of witnesses 169 and 173 had been revealed despite the protective measures that the Chamber had ordered and that one of the witnesses had reported that he had received

⁹⁴ Decision on Applications for Provisional Release, paras 62-65.

⁹⁵ *Bemba OA 7 Judgment*, para. 72.

⁹⁶ *Bemba OA 7 Judgment*, para. 73.

⁹⁷ *Bemba OA 7 Judgment*, para. 74.

⁹⁸ Impugned Decision, para. 28.

⁹⁹ Impugned Decision, para. 28 quoting the *Bemba OA 4 Judgment*, para. 52.

¹⁰⁰ Impugned Decision, para. 29.

death threats.¹⁰¹ The Trial Chamber stated that it could not conclude at this stage who was responsible for the alleged incidents, but found that it was “a reasonable inference [...] that some may have originated from individuals who support the accused”.¹⁰² The Chamber also noted that the alleged threats to witnesses were made at a time when the “prosecution’s case [had] shifted [...] to the question of the accused’s criminal responsibility”, and that “in this context, [it was] reasonable to conclude that releasing the accused would increase his ability to interfere with witnesses or to cause others to do the same”.¹⁰³ Recalling jurisprudence of the Appeals Chamber that article 58 (1) (b) (ii) of the Statute is satisfied “if there is a ‘possibility’ of witness interference”, the Trial Chamber held that “[t]he information currently before the Chamber indicates that witness interference has moved from a hypothetical ‘possibility’ into a reality”.¹⁰⁴

56. The Trial Chamber also found that [REDACTED]’s specific proposal to monitor Mr Bemba’s visits and telephone calls was insufficient to mitigate the risk of witness intimidation because of “[REDACTED]’s lack of specific information regarding witness protection issues”.¹⁰⁵ This would “limit [[REDACTED]’s] ability to properly assess the risk of witness interference and to take steps to minimise this risk”.¹⁰⁶

2. Submissions of Mr Bemba

57. Mr Bemba submits that the Trial Chamber never invited him “to respond to or make submissions” on allegations of witness interference, arguing that this led to a “breach of article 67 of the Statute”.¹⁰⁷ He furthermore emphasises that during the testimony of witness 173, the Trial Chamber had ascertained that it “sees no reason at all until now to infer any interference of the Defence with the witness”,¹⁰⁸ implying that he had no reason to believe that he should file any submissions on this matter.¹⁰⁹

¹⁰¹ Impugned Decision, para. 30.

¹⁰² Impugned Decision, para. 31.

¹⁰³ Impugned Decision, para. 31.

¹⁰⁴ Impugned Decision, para. 32.

¹⁰⁵ Impugned Decision, para. 40.

¹⁰⁶ Impugned Decision, para. 40.

¹⁰⁷ Document in Support of the Appeal, para. 35.

¹⁰⁸ Transcript of 29 August 2011, ICC-01/05-01/08-T-149-CONF-ENG (ET), p. 47, lines 9-10.

¹⁰⁹ Document in Support of the Appeal, paras 38-39.

58. Regarding the substance of the Trial Chamber's findings, Mr Bemba avers that the Trial Chamber erred by inferring that he might be involved in alleged witness intimidation in the absence of any factual basis.¹¹⁰ Mr Bemba emphasises that the Trial Chamber acknowledged that it did not know who was responsible for the intimidation of witness 173 and even stated that it had no reason to believe that Mr Bemba himself was responsible.¹¹¹ Therefore, Mr Bemba submits that "the Chamber cannot reasonably continue to detain [him] based on alleged intimidation by persons unknown".¹¹²

59. As to the insufficiency of telephone monitoring mechanisms proposed by [REDACTED], Mr Bemba contends that the Trial Chamber misappreciated the relevant facts when evaluating [REDACTED]'s commitment to cooperate fully with the Court.¹¹³ He submits that [REDACTED] could simply have agreed to transmit the transcripts of the monitored phone calls to the Registrar of the Court which did not require any specific knowledge.

3. *Submissions of the Prosecutor*

60. The Prosecutor submits that Mr Bemba's assertions as to his right to be heard overlook the background of the Impugned Decision and argues that it was Mr Bemba's choice to remain passive as he was on notice of the issue of witness intimidation at least since the Trial Chamber rendered its 27 June 2011 Decision.¹¹⁴ He also avers that the Trial Chamber never changed its position as it never "determined that the Defence was involved in any threats to Prosecution witnesses", but rather consistently inferred that some of the said threats may have originated from individuals who support the accused.¹¹⁵

61. As to Mr Bemba's arguments regarding the substance of the Trial Chamber's findings, the Prosecutor recalls that "a 'possibility' of witness interference suffices for the purposes of article 58(1)(b)(ii)".¹¹⁶ He further submits that Mr Bemba does not

¹¹⁰ Document in Support of the Appeal, paras 28-34, 38-40.

¹¹¹ Document in Support of the Appeal, paras 38-40.

¹¹² Document in Support of the Appeal, para. 40.

¹¹³ Document in Support of the Appeal, para. 42.

¹¹⁴ Response to the Document in Support of the Appeal, paras 45-47, referring to paras 49-58, 71-74 of the Decision on Applications for Provisional Release.

¹¹⁵ Response to the Document in Support of the Appeal, para. 48.

¹¹⁶ Response to the Document in Support of the Appeal, paras 41-43, referring to *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of

identify any factual error as to whether the Trial Chamber's conclusions were unreasonable on the basis of the facts that were before it, but rather submits an "unsubstantiated assertion that the Chamber's conclusions are speculative or lacking evidentiary support".¹¹⁷

62. With regard to the insufficiency of telephone monitoring mechanisms, the Prosecutor submits that Mr Bemba misrepresents the Impugned Decision,¹¹⁸ as the Trial Chamber "correctly concluded that the issue was not simply 'a matter of monitoring calls and visits'"¹¹⁹ and proceeded to a "perfectly reasonable exercise of its discretion [...] mindful of the Trial Chamber's protective duties under Article 68 of the Statute vis-à-vis witnesses".¹²⁰ With regard to Mr Bemba's argument that [REDACTED] could send the transcripts of the monitored phone calls to the Registrar, the Prosecutor submits that this was "a mere hypothesis" which "cannot amount to a relevant factor that the Chamber was bound to consider".¹²¹ He further submits that, where witness intimidation does occur, relying on the "cooperation from national authorities is neither efficient nor desirable" and concludes that the Trial Chamber simply determined the "most efficient manner to neutralize the risk of witness interference".¹²²

4. *Submissions of the Victims*

63. The Victims argue that the Trial Chamber, by referring to specific incidents of witness intimidation, "more than amply justified" the threat to victims and witnesses in the event of Mr Bemba's interim release.¹²³ They underline that Mr Bemba is a senator in the province of Equateur, "which borders the Central African Republic where the victims are located".¹²⁴ The Victims also argue that since the legal representatives of victims may still call victims to testify, "[i]t stands to reason that

27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 21.

¹¹⁷ Response to the Document in Support of the Appeal, paras. 43-44.

¹¹⁸ Response to the Document in Support of the Appeal, para. 49.

¹¹⁹ Response to the Document in Support of the Appeal, para. 50.

¹²⁰ Response to the Document in Support of the Appeal, para. 51, referring to the Impugned Decision, para. 33.

¹²¹ Response to the Document in Support of the Appeal, para. 51

¹²² Response to the Document in Support of the Appeal, para. 51.

¹²³ Victims' Observations, para. 18.

¹²⁴ Victims' Observations, para. 18.

[Mr Bemba's] release would heighten those victims' legitimate fears considerably and might dissuade them from testifying".¹²⁵

5. Determination by the Appeals Chamber

64. As to Mr Bemba's argument that the Trial Chamber should have sought observations from him on the issue of witness intimidation before entering a finding under article 58 (1) (b) (ii) of the Statute, the Appeals Chamber notes rule 118 (3) of the Rules of Procedure and Evidence, which provides as follows:

After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. *The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person.* The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year. [Emphasis added.]

The Appeals Chamber considers that the third sentence of rule 118 (3) of the Rules of Procedure and Evidence stipulates an important rule regarding the procedure to be followed when deciding on interim release or continued detention of a person: the parties must be given an opportunity to submit their observations before the Chamber makes a decision. This rule is all the more important because the detained person's personal liberty is at stake. In the usual course of events, if a Chamber rules on an application for interim release by a detained person, the detained person's observations will be contained therein.

65. In the particular circumstances of this case, however, the proceedings that led to the Impugned Decision were triggered by the Application for Interim Release to [REDACTED] of 6 June 2011. It appears from the Impugned Decision that the incidents of witness intimidation regarding witnesses 173 and 169, upon which the Trial Chamber relied, were brought to Mr Bemba's attention on 25 and 29 August 2011 respectively.¹²⁶ Furthermore, at the hearing of 29 August 2011, the Presiding Judge stated, with reference to witness 173, that:

¹²⁵ Victims' Observations, para. 22.

¹²⁶ Transcript of 25 August 2011, ICC-01/05-01/08-T-146-Conf-ENG (ET), p. 48, line 11, to p. 51, line 24; Annex 1 to "Observations de Maître Zarambaud Assingambi, Représentant légal de victimes, sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo, en date du 24 août 2011", 29 August 2011, ICC-01/05-01/08-1660-Conf-Exp-Anx1, pp. 4-5. This document was reclassified as Confidential *Ex Parte*.

If there is anything that implicates directly or indirectly the Defence in such report, of course the Defence will be communicated and will be given the opportunity to give its reasons or make its observations and even if need be the witness can be called again to clarify in case any point has been not clarified yet. What I can ensure in advance to the Defence is that apparently the issue has been clarified, but without consulting VWU I cannot share with the Defence right now the conversations held between VWU and the Defence in that respect, but I can assure to the Defence that the Chamber sees no reason until now to infer any interference of the Defence with the witness.¹²⁷

66. Thus, Mr Bemba could not have possibly addressed these allegations in his Application for Interim Release to [REDACTED] on 6 June 2011 and could not have foreseen at that time that this would be a reason for denying his application. Under these circumstances, Mr Bemba cannot be faulted for failing to address these issues in the Application for Interim Release to [REDACTED]. In light of the purpose of the third sentence of rule 118 (3) of the Rules of Procedure and Evidence, the Trial Chamber therefore should have sought submissions from Mr Bemba concerning the allegations of witness intimidation before deciding on this issue as an additional ground of detention under article 58 (1) (b) (ii) of the Statute. Depriving Mr Bemba of the opportunity to address witness intimidation allegations which post-date his application for release is depriving him of a genuine possibility to influence the Chamber's decision on his release.¹²⁸

67. Having thus found that the Trial Chamber made a procedural error when finding that Mr Bemba's continued detention appeared necessary also under article 58 (1) (b)

VWU and Prosecution only on 9 September 2011, with the Trial Chamber's "Decision on the prosecution's application regarding a letter dated 6 August 2011", ICC-01/05-01/08-1727-Conf. Mr Bemba was provided with a redacted version on 15 September 2011, "Prosecution's Submission of the Redacted Version of ICC-01/05-01/08-1660-Conf-Anx1", dated 14 September 2011 and registered on 15 September 2011, ICC-01/05-01/08-1748-Conf. All parts of the letter related to the threats allegations were redacted.

¹²⁷ Transcript of 29 August 2011, ICC-01/05-01/08-T-149 (ET), p. 47, lines 8-10.

¹²⁸ See ECtHR, *S. v. Estonia*, "Judgment", application no. 17779/08, 4 October 2011, paras. 43-47: In that case, the applicant was not heard by the court before it ruled on her compulsory deprivation of liberty (compulsory detention in a psychiatric hospital) and the ECtHR therefore found a violation of article 5 (1) of the Convention. See also ECtHR, *Grauzinis v. Lithuania*, "Judgment", 10 October 2000, application no. 37975/97, which held that article 5 (4) was violated when the Court extended the accused's detention by amending the ground of his detention (risk of absconding and influencing witnesses, as opposed to the initial ground of the risk of committing further crimes) even when the accused's counsel was present at the hearing, but not the accused himself to instruct his counsel. The Court held, at para. 34, that: "[G]iven what was at stake for the applicant, i.e. his liberty, as well as the lapse of time between the various decisions, and the re-assessment of the basis for the remand, the applicant's presence was required throughout the pre-trial remand hearings of 3 and 17 July 1997 in order to be able to give satisfactory information and instructions to his counsel. Furthermore, viewed as a whole, these and the subsequent proceedings failed to afford the applicant an effective control of the lawfulness of his detention, as required by Article 5 § 4 of the Convention."

(ii) of the Statute, the Appeals Chamber does not consider it necessary, or even appropriate, to address in any detail the other arguments raised by Mr Bemba under the third ground of appeal. Nevertheless, the Appeals Chamber would like to highlight that article 58 (1) (b) (ii) of the Statute stipulates that detention must be necessary “to ensure that *the person* does not obstruct or endanger the investigation or the court proceedings” (emphasis added). This indicates that there must be a link between the detained person and the risk of witness interference.

V. APPROPRIATE RELIEF

68. 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).¹²⁹ Since the Appeals Chamber has found that the Trial Chamber made a procedural error when it found that Mr Bemba’s detention was justified because of the risk of witness intimidation, article 58 (1) (b) (ii) of the Statute cannot provide an additional basis for Mr Bemba’s continued detention. Nevertheless, the Trial Chamber’s finding that Mr Bemba’s continued detention was justified under article 58 (1) (b) (i) of the Statute because of the risk of absconding was not materially affected by the error. Accordingly, the Impugned Decision is confirmed to the extent that it found article 58 (1) (b) (i) of the Statute to be the basis for Mr Bemba’s continued detention.

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



Judge Erkki Kourula
Presiding Judge

Dated this 15th day of December 2011

At The Hague, The Netherland

¹²⁹ Pursuant to rule 158 (2) of the Rules of Procedure and Evidence read with article 83 (4) of the Statute, judgments of the Appeals Chamber “shall be delivered in open court.” As the proceedings in the present appeal are confidential, the Appeals Chamber delivers this judgment by way of notification to the parties (regulations 31 and 32 of the Regulations of the Court).