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PRE-TRIAL CHAMBER III

Before: **Judge Ekaterina Trendafilova (Presiding Judge)**
Judge Hans-Peter Kaul
Judge Mauro Politi

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

Public Document

Prosecution's Response to Defence's ''Requête de Mise en Liberté Provisoire''

Source: **The Office of the Prosecutor**

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

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Legal Representatives of Victims	**Legal Representatives of Applicants**
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REGISTRY

Registrar Ms Silvana Arbia	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

On 12 November 2008, the Pre-Trial Chamber III (hereinafter referred to as "the Chamber") issued the "Decision Requesting Observations on the Defence's Application for Interim Release,"[1] requesting the Office of the Prosecutor (hereinafter referred to as the "Prosecution") to submit observations on the Defence's Application for Interim Release (hereinafter referred to as the "Defence's Application"). The Prosecution respectfully submits its observations on the Defence's Application, as requested.

Procedural background

1. On 9 May 2008, the Prosecution filed the "Prosecutor's Application for Warrant of Arrest under Article 58" (hereinafter referred to as the "Arrest Warrant Application"), seeking the issuance of arrest warrant against Jean-Pierre Bemba Gombo (hereinafter referred to as the "suspect") on four counts of crimes against humanity and six counts of war crimes.[2]

2. On 21 May 2008, the Chamber rendered the "Decision Requesting Additional Information in respect of the Prosecutor's Application for a Warrant of Arrest under Article 58 of the Statute," in which it requested the Prosecution to provide additional information and supporting material on various aspects of the Arrest Warrant Application.[3]

3. On 23 May 2008, the Prosecution filed an Application for Request for Provisional Arrest under Article 92 of the Statute (hereinafter referred to as the "Statute").

4. On the same day, the Chamber issued a warrant of arrest for the suspect and a request for provisional arrest which was subsequently executed by the authorities of the Kingdom of Belgium on 24 May 2008.[4]

5. On 27 May 2008, the Prosecution submitted additional information and supporting material in response to the Chamber's decision of 21 May 2008.[5]

[1] ICC-01/05-01/08-238. The Decision requested the Prosecution to file its observations no later than 18 November 2008.
[2] ICC-01/05-01/08-26-US-Exp.
[3] ICC-01/05-01/08-27.
[4] ICC-01/05-01/08-1-tENG-Corr.
[5] ICC-01/05-01/08-29-US-Exp

6. On 10 June 2008, the Chamber issued a new warrant of arrest, which replaced first arrest warrant of 23 May 2008, and requested the arrest and surrender of the suspect pursuant to Article 91 of the Statute.[6]

7. On 3 July 2008, the suspect was transferred to the Court.[7]

8. On 4 July 2008, the suspect appeared for the first time, before the Chamber and was informed that the confirmation hearing was scheduled for 4 November 2008.

9. On 23 July 2008, the suspect lodged an application for interim release.[8]

10. On 31 July 2008, the Chamber issued the "Decision on the Evidence Disclosure System and Setting a Timetable for disclosure between the Parties" (hereinafter referred to as the "31 July 2008 Decision"),[9] in which it ordered the Prosecution to (i) disclose to the Defence all evidence on which it intends to rely no later than 3 October 2008 and; (ii) submit all requests for redactions no later than 3 September 2008.

11. On 30 June 2008, the Prosecution submitted its application for redactions to certain information in the Arrest Warrant Application, the Prosecutor's Submission on Further Information and Materials (hereinafter referred to as the "Further Submissions") and their respective annexes.[10]

12. On 20 August 2008, the Chamber rendered the "Decision on application for interim release."[11] In that decision, the Chamber rejected the Defence's application and found that the suspect's arrest was necessary both to ensure his appearance at trial and to protect victims and witnesses.

[6] ICC-01/05-01/08-15
[7] ICC-01/05-01/08-T-3-ENG, p. 4
[8] ICC-01/05-01/08-49
[9] ICC-01/05-01/08-55
[10] ICC-01/05-01/08-32-US-Exp
[11] ICC-01/05-01/08-73-Conf

13. On 31 August 2008, the Single Judge issued the "First Decision on Redactions" granting partially redactions of information contained in the Arrest Warrant Application, Further Submissions and respective annexes.[12]

14. On 30 September 2008, the Prosecution disclosed to the Defence, the authorized redacted English and French versions of the Arrest Warrant Application, Further Submissions and related annexes.[13]

15. On the same day, the Prosecution submitted a second request for summaries and redactions to witness statements and related documents. In that application, the Prosecution informed the Chamber that it intended to rely on eleven additional witnesses for the confirmation hearing.[14]

16. On 1 October 2008, the Chamber issued the "Second Decision on Redactions."[15]

17. On 1 and 3 October 2008, the Prosecution disclosed to the Defence, the Document Containing the Charges (hereinafter referred to as the "DCC") together with items of incriminatory and exculpatory evidence and other materials under Rule 77 of the Rules of Procedure and Evidence (hereinafter referred to as the "Rules").[16]

18. Between 4 October and 7 November 2008, the Prosecution disclosed to the Defence; incriminatory, exculpatory evidence and material under Rule 77 in accordance with the various decisions of the Chamber.[17]

19. On 8 October 2008, the Chamber convened a status conference with the Prosecution to assess the progress of the evidence disclosure system.[18]

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[12] ICC-01/05-01/08-85-Conf.
[13] ICC-01/05-01/08-128-Conf
[14] ICC-01/05-01/08-126-US-Exp.
[15] ICC-01/05-01/08-135-Conf
[16] ICC-01/05-01/08-129, ICC-01/05-01/08-132, ICC-01/05-01/08-133 and ICC-01/05-01/08-138.
[17] ICC-01/05-01/08-55, ICC-01/05-01/08-170, ICC-01/05-01/08-199, ICC-01/05-01/08-T-8-Conf-ENG CT, p. 30, lines 17-21.
[18] ICC-01/05-01/08-T-6-CONF-EXP-ENG-ET

20. On 14 October 2008, at the request of the Chamber,[19] the Registry filed a report entitled "Registry Report on the Implementation of Disclosure to the Defence" (hereinafter referred to as the "Registry Report").[20] In that Report, the Registry stated that the evidence disclosure process took place on 1 and 3 October 2008 in accordance with the 31 July 2008 Decision and its specified annex.

21. On 16 October 2008, the Defence submitted its response to the Registry Report citing among other things the technical and logistical problems it faced in having access to the Registry Ringtail environment.[21]

22. On 17 October 2008, the Prosecution submitted its third request for redactions. In that application, the Prosecution informed the Chamber that it intended to rely upon one additional witness for the purpose of the confirmation hearing.[22]

23. On the same day, the Chamber issued the "Décision relative au report de l'audience de confirmation des charges" and decided to postpone the date of the confirmation of charges hearing and to suspend the timetable for disclosure between the parties as established in its Decision on Disclosure.[23] The Chamber also ordered the convening of a status conference on 22 October 2008, and determined that it will set a new date for the confirmation hearing after the status conference of the 22 October 2008.

24. On 31 October 2008, the Chamber issued the "Décision fixant la date de l'audience de confirmation des charges" setting the date of the hearing from 8 to 12 December 2008 and also established a new timetable for disclosure between the parties.[24] In that decision, the Chamber ordered the Prosecution to disclose all evidence, on which it intends to rely upon for the confirmation hearing, no later than 7 November 2008.

25. On 6 November 2008, the Chamber issued the "Third Decision on Redactions" partially granting redactions and ordering the Prosecution to disclose witness statements and

[19] ICC-01/05-01/08-148.
[20] ICC-01/05-01/08-155.
[21] ICC-01/05-01/08-159-Corr.
[22] ICC-01/05-01/08-164-US-Exp.
[23] ICC-01/05-01/08-170.
[24] ICC-01/05-01/08-199.

related documents, specified in the Annex to that decision, no later than 7 November 2008.[25]

26. On 7 November 2008, the Prosecution disclosed to the Defence, the items specified in the Annex to the Third Decision on Redactions.[26]

27. On 12 November 2008, the Prosecution disclosed to the Defence, all outstanding items of exculpatory and Rule 77 of the Rules evidential material, which had been previously collected under Article 54(3)(e) of the Statute and for which the Prosecution had obtained consent to disclose from information providers.[27]

28. On the same day, the Prosecution filed the "Prosecution's Fourth Report on the status of documents referred to in Article 54(3)(e) of the Rome Statute and Related Documents," informing the Chamber that it had disclosed the totality of documents in its possession, including those initially collected under Article 54(3)(e) of the Statute.[28]

Prosecution's submission

29. As the Appeals Chamber has reiterated in its Judgement 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", where the conditions under Article 58(1) of the Statute continue to be met, Article 60(2) of the Statute requires that the detained person must continue to be detained.[29] Pursuant to Article 58(1) of the Statute, a warrant of arrest shall be issued and detention ensue (i) to ensure a person's appearance at trial; (ii) to prevent obstruction of criminal proceedings; or (iii) to prevent continuing criminal conduct by the same person.

30. The Prosecution submits that that there has been no substantial change in any of these considerations or in any other circumstances since the Decision on interim release, issued

[25] ICC-01/05-01/08-215-Conf, p. 34.
[26] ICC-01/05-01/08-229.
[27] ICC-01/05-01/08-239-Conf. In this Report, the Prosecution notified the Chamber that it had disclosed to the Defence, all outstanding documents collected under Article 54(3)(e) of the Statute in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*.
[28] *Ibid.*
[29] ICC-01/04-01/06-824, para 139

by the Chamber on 20 August 2008 (hereinafter referred to as the "20 August 2008 Decision").[30] Accordingly, the statutory grounds for considering interim release advanced by the Defence pursuant to Articles 60(3) and (4) of the Statute, are not satisfied, and should consequently be dismissed.

31. In the 20 August 2008 Decision, the Chamber found that there are reasonable grounds to believe that the suspect had committed crimes within the jurisdiction of the Court.[31] Additionally, the Prosecution submits that the Defence has not put forward any material fact or argument to rebut this finding in its application for interim release.[32]

32. The Chamber further found in the 20 August 2008 Decision that the arrest of the suspect was necessary under Article 58(1)(b)(i) and (ii) of the Statute in order to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.[33] With respect to the suspect's attendance at trial, if released, the Chamber assessed and determined the suspect's past and present political position, international contacts, financial and professional background, availability of the necessary network and financial resources and concluded that those considerations were relevant and valid as at date of that decision.[34]

33. Furthermore, the Chamber concluded in the 20 August 2008 Decision that the gravity of the charges with which the suspect is charged, are of such a nature that there is a substantial likelihood that he may abscond from the jurisdiction of the court, if released.[35] The Chamber further held that this consideration was valid as of the date of that decision.[36]

34. In compliance with its disclosure obligation, the Prosecution has to date disclosed the names and identities of 21 witnesses, some of whom are victims of crimes allegedly attributed to the suspect. In the 20 August 2008 Decision, the Chamber concluded that some of these victims are destitute, and have suffered grave consequences of crimes

[30] ICC-01/05-01/08-73-Conf.
[31] ICC-01/05-01/08-73-Conf, para. 52.
[32] ICC-01/05-01/08-200-Conf.
[33] ICC-01/05-01/08-73-Conf, para. 54.
[34] ICC-01/05-01/08-73-Conf, para. 55.
[35] Ibid., para. 56
[36] Ibid., para. 59

allegedly attributed to the suspect. In these circumstances, it is submitted that, were the suspect to be released, he would be in a position to exert pressure on those victim/witnesses, thereby obstructing investigations and consequently, court proceedings. These considerations are still valid and have remained unchanged since the 20 August 2008 Decision.

35. The afore-mentioned considerations were deemed relevant by the Chamber on 10 June and 20 August 2008, at a time when the Prosecution had not disclosed the identities of any of the witnesses it intended to rely upon. At present, the Prosecution has disclosed the identities of 21 witnesses to the suspect. Granting the suspect interim release would significantly increase his ability to interfere with these witnesses. It is submitted in these circumstances, that the release of the suspect would pose greater risk to the security of witnesses.[37]

36. Between 16 October[38] and 7 November 2008,[39] the Prosecution notified the Chamber of instances of Defence's interferences with two prosecution witnesses. These states of affairs persist, notwithstanding the current detention of the suspect in The Hague. It is reasonable to conclude in these circumstances, that the release of the suspect would only serve to heighten concerns relating to the protection of witnesses.

37. Similarly, recent findings by the Chamber and the Registry in proceedings independent of any Prosecution's participation suggest a behavior in custody which does not plead for release. As recently as 10 November 2008, the Registrar found that "it appears from the information provided to her on the identity of certain visitors that they may be assisting Mr. Jean-Pierre Bemba to "interfere with the administration of justice" and/or to "jeopardise the interests of public safety or the rights or freedom of any person".[40] Consequently, the Registrar decided not to grant the suspect private visit for a period of 14 days.[41] In another separate proceedings, the Chamber as recently as 21 October 2008, justified granting redactions to victims, who applied to participate in the *Bemba case*, on

[37] ICC-01/05-01/08-162-Conf. This filing supports the Prosecution's proposition and highlights the threats faced by Prosecution witnesses in this case.
[38] ICC-01/05-01/08-162-Conf
[39] ICC-01/05-01/08-217-Conf
[40] ICC-01/05-01/08-231-Conf, p. 4, Decision of the Registrar on the monitoring of the non-privileged communications and visits of Mr. Jean-Pierre Bemba Gombo.
[41] Ibid. The Registrar also imposed further measures on the suspect.

the ground that Mr. Bemba still wields significant influence over the MLC and in these circumstances, would be able to locate and reach the victims/applicants.[42]

Defence's submissions

38. In support of its application for interim release, the Defence submitted that the Prosecution has delayed the pre-trial process by failing to disclose evidence and submit witness statements and related items for redactions within the time-limit set by the Chamber.[43] In particular, the Defence submitted that the Prosecution has not respected the cut off date of 3 October 2008 for the disclosure of all incriminatory evidence and 3 September 2008, for the submission of all items/witness statements for authorization to apply redactions, as stipulated in the Chamber's Decision on Disclosure of 31 July 2008.[44] In addition, the Defence cited procedural errors by the Prosecution in implementing the disclosure process.[45] In concluding, the Defence submitted that all these factors have caused unjustifiable delay in the pre-trial process and consequently, a postponement of the confirmation hearing.[46] They pleaded a violation of Articles 60(3) and (4) of the Statute, seeking an interim or conditional release of the suspect to the States of Netherlands, Belgium or Portugal.[47]

39. For the reasons elaborated below, the Prosecution disputes the Defence's submissions in its entirety and submits that those submissions lack merit in light of the facts relevant to the timetable for disclosure and submission of statements for authorization to apply redactions in this case.

40. First, the Prosecution submits that it has discharged its disclosure obligations in a timely manner in accordance with the Statute, the Rules and in compliance with the timetables set out in the various decisions of the Chamber.[48] As recently as 12 November 2008, the Chamber recognized this position. On that date, the Chamber issued the "Decision

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[42] ICC-01/05-01/08-184, p. 6, para. 13.
[43] ICC-01/05-01/08-200-Conf. The Defence also noted in *para. 33*, that the Prosecutor announced the opening of investigations into the Central African Republic since 22 May 2007.
[44] *Ibid*, p. 5, paras. 18-21
[45] *Ibid*, p. 8, para. 40
[46] *Ibid*, p. 5, paras. 18-21
[47] *Ibid*, p. 12, para. 59
[48] ICC-01/05-01/08-55, ICC-01/05-01/08-170, ICC-01/05-01/08-199, ICC-01/05-01/08-T-8-Conf-ENG

Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence",[49] in which the Chamber acknowledged that the Prosecution had filed its disclosure communications and in-depth analysis charts in accordance with the Chamber's decision.[50]

41. Second, the Prosecution submits that its requests for redactions to witness statements and related documents are in compliance with Articles 54(1)(a) and 61(9), Rules 121 (3), (4) and (5) and the Appeals Chamber's decision on the duration of proceedings at the pre-trial phase.[51]

42. Third, the Prosecution submits that it has disclosed all material in its possession, including those that were previously collected under Article 54(3)(e) of the Statute.[52],

43. Finally, the Prosecution submits that the suspect's detention is reasonable, having regard to the overall facts and circumstances of this case.

44. The Prosecution supports the Chamber's efforts to move these proceedings expeditiously. Accordingly, it has submitted all its evidence within the deadlines set by the Statute and Rules, while respecting also its duty to conduct its investigations in accordance with the Statute, Rules and guidelines set by the Appeals Chamber.

45. On the duration of investigations at the pre-trial stage, the Appeals Chamber ruled in the *Lubanga case*, that "it must be possible for the Prosecutor to continue his investigations in respect of crimes that are not covered by the Document Containing the Charges. [] Limiting the right of the Prosecutor to investigate other alleged crimes of the suspect would conflict with Article 61(9) of the Statute".[53]

46. Based on article 54(1) (a) and Article 61(9) of the Statute, the Prosecution has a continuing obligation to investigate both incriminatory and exculpatory evidence equally

[49] ICC-01/05-01/08-241
[50] *Ibid*, p. 4, para. 4.
[51] ICC-01/04-01/06-568, para. 51
[52] ICC-01/05-01/08-239-Conf
[53] ICC-01/04-01/06-568, para. 51.

in order to establish the truth, reflecting the full extent of the victimization suffered by victims in the Central African Republic (hereinafter referred to as the "CAR").

47. The Prosecution further submits that the Defence's contention that it has not respected time-limit for the submission of requests for redactions is misguided, based on the facts. There are witnesses who were interviewed before the issuance of the arrest warrant, for whom the deadline of 3 September 2008 could apply. There were other witnesses interviewed after the issuance of the arrest warrant, including 3 additional witnesses, whose statements were submitted for redactions, who were interviewed after the 3 September 2008. Consequently, the Prosecution requested redactions for those witnesses, at a later stage, after the deadline of 3 September 2008. Excluding these statements, on the ground that they were submitted for redactions after 3 September 2008 would have no basis in the Statute and Rules.

Delay in the pre-trial process has been a result of factors beyond the Prosecution's control

48. As recently as 12 November 2008, the Chamber found that preparations for the confirmation hearing have been delayed by factors beyond the Prosecution's control. In particular, the Chamber noted the Defence's submission at the status conference that it "was in the process of exploring all of the disclosure material, after which it will ask the Prosecutor to inspect certain of the materials".[54] Additionally, the Chamber noted that that the Defence had faced technical problems in accessing Ringtail system set up by the Registry, a finding, which necessitated the designation of a Registry Staff dedicated solely to assisting the Defence on disclosure issues.[55]

The length of the suspect's detention has not been unreasonable [56]

49. Comparative international jurisprudence has shown that the period of pre-trial detention is a discretionary consideration which has no bearing upon the assessment as to whether a

[54] ICC-01/05-01/08-241, p. 5, para. 5 citing the transcript of hearing held on 22 October 2008, ICC-01/05-01/08-T-8-Conf-ENG CT, p. 25, lines 16-21.
[55] The Defence has also filed
[56] As set out in the procedural background, the suspect was transferred to The Hague on 3 July 2008.

suspect will appear for trial, if released.[57] In the circumstances of the complexity of the disclosure regime established by the 31 July 2008 Decision in this case, a period of approximately 4 months and 15 days "remains within acceptable limits and the interests of justice".[58] A period of five years pre-trial detention has not been deemed excessive,[59] and in principle, lengthy pre-trial detention has been determined not, in itself, to constitute "good cause for release".[60]

50. Finally, the Prosecution submits that interim release sought by the Defence is in all circumstances, disproportionate to the alleged delay in the Prosecution's disclosure,[61] which the Prosecution disputes in this submission. It is submitted that interim or conditional release pursuant to Articles 60(3) and (4) of the Statute as advanced by the Defence, must always be a measure of last resort. The Prosecution submits that only if other remedies have been unsuccessfully attempted, or are simply not available, should a Chamber take the extra-ordinary step of granting the suspect interim release, where a case has of inexcusable delay has been made out by the Defence.[62]

Conclusion

51. In light of the above, the Prosecution submits that the proceedings have not suffered an unreasonable delay and the alleged delay is not attributable to the Prosecution. Additionally, the facts show that there has been no substantial change in any of the considerations underlying the continued detention of the suspect since the 20 August 2008 Decision. The Defence has not satisfied the statutory requirements under Articles 60(3)

[57] *Prosecutor v. Hardinaj et al*, ICTY Case No. IT-04-84-AR65.2, "Decision on *Lahi Brahimaj's* Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release," 9 March 2006.
[58] *Prosecutor v. Innocent Sagahutu et al*, Case No. ICTR-00-56-T, Decision on *Sagahutu's* Preliminary Provisional Release and Severance Motions, 25 September 2002.
[59] *Prosecutor v. Kayanbashi*, Case No. ICTR-96-15-A, Decision on Application for Leave to Appeal Filed under Rule 65(D) of the Rules of Procedure and Evidence, 13 June 2001.
[60] *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 October 2002, where the pre-trial detention of the accused exceeded 7 years.
[61] The confirmation hearing was adjourned only once, for one month, in circumstances which were due in part to technical, logistical problems and the Defence's admission that it had not fully explored all the material disclosed by the Prosecution .
[62] See: *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 25 November 1999; and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 8 December 1999. In the *Barayagwiza case*, the Appeals Chamber had previously dismissed the indictment with prejudice to the prosecution and ordered the release of the Appellant, finding that "the fundamental rights of the Appellant were repeatedly violated" and that the Prosecutor's failure to prosecute was tantamount to negligence (*see Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 November 1999, para. 106), yet release was still delayed pending determination of the Prosecution's application for revision of the decision.

and (4) of the Statute for considering interim release. Accordingly, the Defence's Application should be dismissed in entirety, and the continued detention of the suspect maintained.

Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of November 2008

At The Hague, The Netherlands