

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 04 December 2008

PRE-TRIAL CHAMBER III

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

Prosecution's Request to Dismiss the «Réponse de la Défense aux observations du Procureur du 18 Novembre 2008 intitulées : "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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REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Background

1. On 12 November 2008, the Pre-Trial Chamber III (“the Chamber”) issued the “Decision Requesting Observations on the Defence’s Application for Interim Release” requesting the Office of the Prosecutor (“the Prosecution”) to submit its observations, no later than 18 November 2008.¹
2. On 18 November 2008, the Prosecution submitted its response to the Defence’s Application for interim release (“Prosecution’s response”).²
3. On 24 November 2008, the Defence filed its “Request for leave to reply in relation to the motion for provisional release” (“Request”) seeking leave of the Chamber to reply to a confined issue raised in the Prosecution’s response.³
4. On 27 November 2008, the Single Judge issued the “Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008” (“Decision Granting the Request”).⁴ In this decision, the Single Judge granted the Request and gave the Defence until 1 December 2008 to file its reply to the Prosecution’s response.⁵
5. On 1 December 2008, the Defence submitted its «Réponse de la Défense aux observations du Procureur du 18 Novembre 2008 intitulées: “Prosecution’s Response to Defence’s Requête de Mise en Liberté Provisoire”» (“Reply”).⁶ In its Reply, the Defence addressed the entirety of the Prosecution’s response, not confining itself to its Request and the Decision Granting the Request.⁷ The Prosecution hereby files its response to the Defence’s reply.

¹ ICC-01/05-01/08-238.

² ICC-01/05-01/08-262.

³ ICC-01/05-01/08-276

⁴ ICC-01/05-01/08-294

⁵ *Ibid* p. 4.

⁶ ICC-01/05-01/08-302

⁷ *Ibid*. The Prosecution refers to the entirety of the Defence’s Reply, which seeks to address the totality of the issues raised in the Prosecution’s Response.

Prosecution's Response

6. For the reasons elaborated below, the Prosecution objects to the Defence's Reply and requests that the Single Judge dismiss it in entirety on the ground that the Reply has exceeded the framework of both the Defence's Request and the Decision Granting the Request. As a consequence, the Prosecution has suffered prejudice as the Defence has re-litigated all the issues raised in its response, without the Prosecution having the opportunity of being heard on those issues. This prejudice, the Prosecution submits, has impacted upon its ability to present its argument in a fair manner. Finally, the Prosecution submits that its response placing all the facts and circumstances before the Single Judge in response to an Application for Interim Release is consistent with the direction of the Appeals Chamber in addressing matters of this nature.⁸

Submissions

7. The Defence's Request was confined to a specific issue arising from the Prosecution's response. This specific issue that the Defence sought leave to address was framed in the following terms: "*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 'jeopardize the interests of public safety or the rights or freedom of any person.'*"⁹ The Defence justified its Request on the basis that this issue arose after it had submitted its Application for Interim Release.¹⁰
8. As a consequence, the Single Judge issued the Decision Granting the Request.¹¹ The Single Judge framed the order to read as follows: "grants the Defence's Request". The Prosecution submits that the only request before the Single Judge at the time of issuing the decision was the Defence's Request for leave to reply to the confined issue relating

⁸ *Prosecutor v. Lubanga, Judgment on Interim Release Appeal*, ICC-01/04-01/06-824, 13 February 2007, p. 44, paras. 136 & 137.

⁹ ICC-01/05-01/08-276, p. 4, paras. 5-6 and also para. 9.

¹⁰ *Ibid.*, paras. 6 and 9.

¹¹ ¹¹ ICC-01/05-01/08-294

to the Registrar's decision on monitoring the visitation rights of the suspect, which the Prosecution had recited in its response.¹²

9. By the submissions contained in the Request, the Defence has re-litigated all the issues arising from the Prosecution's response including those not arising out of its specific Request. The Defence only refers to the Registrar's decision in passing in paragraph 4, and has framed its Reply outside the ambit of the Prosecution's response. For ease of reference, the Prosecution recalls that in its response to the Interim Release Application, it had made reference to the Registrar's decision for the limited purpose of showing that other organs had found the suspect capable of interfering with "other persons" and "the administration of justice", in proceedings independent of any Prosecution's participation.¹³

10. The Defence has not confined itself to the issue it sought leave to reply and has used the Reply as a means to re-litigate all other issues raised by the Prosecution. The Prosecution submits that those other issues, raised in the Reply, have no bearing on the Defence's Request and the Decision Granting the Request. As an example, the Prosecution refers to paragraphs 5-13 of the Reply,¹⁴ which address substantive issues outside the framework of the Request and the Decision Granting the Request. In particular, the Prosecution refers to paragraph 8 which states in pertinent part that "The Prosecution has not responded to the 3 essential questions posed by the Defence's Request...."¹⁵

11. Consequently, the Prosecution has been prejudiced and the Reply as it presently stands has impacted on its ability to present its argument in a fair manner. First, the Prosecution was not heard on the issue of the Request before the Single Judge issued the Decision Granting the Defence's Request.¹⁶ Second, the Defence has used the Reply as a means to address all the issues raised by the Prosecution response, and on occasions incorrectly constructing the Prosecution's submissions. As an example, the Prosecution refers to paragraph 4, where the Defence states that the Prosecution had

¹² See ICC-01/05-01/08-302. The Prosecution refers to the entirety of the Defence's Request and finds no other issue apart from the one relating to the Registrar's decision, for which the Defence sought leave to reply.

¹³ ICC-01/05-01/08-262, para. 37.

¹⁴ ICC-01/05-01/08-302

¹⁵ Ibid., p. 4, para. 8

¹⁶ ICC-01/05-01/08-294.

formulated its response solely on the basis of Article 60(2) of the Rome Statute (“the Statute”), when in fact the Prosecution had responded comprehensively to the issue of inexcusable delay raised by the Defence on the basis of Articles 60(3) and (4) of the Statute. For ease of reference, the Prosecution refers the Single Judge to paragraphs 30 to 51 of the response to the Defence’s Application for Interim Release.¹⁷

12. The Prosecution recalls that the Appeals Chamber has ruled that fairness requires that the procedural and substantive rights and obligations of all participants, including the Prosecution’s be respected.¹⁸ Fairness has also been linked to the ability of a party, including the Prosecution to present its case.¹⁹ In the circumstances recounted above, the Defence has left the Prosecution in an uncertain footing, especially when the Defence has used the Reply as a mechanism to re-litigate the issues raised by the Prosecution’s Response, in circumstances where the Prosecution was not heard by the Single Judge.

13. Finally, the Prosecution submits that its approach in placing before the Single Judge all the material facts and circumstances relative to the issue of detention/release in the case is consistent with the Appeals Chamber’s directions in matters of this nature. In the *Lubanga* case, the Appeals Chamber tacitly approves of the approach of the Pre-Trial Chamber basing a decision for interim release on the circumstances of the defendant as they presently were when the Pre-Trial Chamber made its decision.²⁰ Additionally in the *Katanga and Ngudjolo* cases, the Appeals Chamber held that “The Pre-Trial Chamber must inquire anew into the existence of facts justifying detention.”²¹ “Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it.”²²

¹⁷ ICC-01/05-01/08-262.

¹⁸ See *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48. See further *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

¹⁹ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

²⁰ *Prosecutor v. Lubanga*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824, 13 February 2007, p. 44, paras. 136 & 137

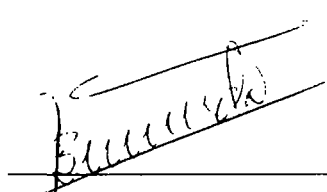
²¹ *Prosecutor v. Katanga & Ngudjolo*, Judgment on Ngudjolo’s Interim Release Appeal ICC-01/04-01/07-572 OA6, 9 June 2008, p. 6, para. 10

²² *Ibid.*, p. 7, para. 12.

Prosecution's Request

14. In light of the foregoing, the Prosecution respectfully requests the Single Judge:

- (i) to give effect to the Decision Granting the Request by striking out the entirety of the Defence's Reply on the ground that the Defence has made submissions outside the framework of the Single Judge's decision;
- (ii) in the alternative to grant the Prosecution leave to respond to the Defence's Reply in order to ensure fairness in the proceedings.


Fatou Bensouda, Deputy Prosecutor
On Behalf Of
Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of December 2008

At The Hague, The Netherlands