



Original: **French**

No.: **ICC-01/05-01/08**
Date: **3 November 2008**

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

**Confidential
Including 3 Confidential Annexes**

Urgent

Application for Interim Release

Source: Mr Jean-Pierre Bemba Gombo's Defence Team

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

The Office of the Prosecutor

Fatou Bensouda

Petra Kneuder

Counsel for the Defence

Mr Nkwebe Liriss

Mr Tjarda E. Van Der Spoel

Mr Aimé Kilolo Musamba

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Daniel Pereira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

SUBJECT-MATTER OF THE APPLICATION

1. The Applicant hereby requests, as his primary relief, to be released unconditionally and, in the alternative, to be granted interim release with conditions.

APPLICABLE LAW

2. Articles 60(3) and 60(4) of the *Rome Statute*:

60(3): The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

3. 60(4): The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

4. Article 9(3) of the *International Covenant on Civil and Political Rights*:

It shall not be the general rule that persons awaiting trial shall be detained in custody, but [that] release may be subject to guarantees to appear for trial.

5. Article 5(3) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

Release may be conditioned by guarantees to appear for trial.

- 6.

CONSIDERING THAT

7. The Applicant requests to be released on the basis of article 60(4) of the *Rome Statute*;

8. The Applicant's request is grounded in the fact that he has been detained for an extended period prior to the trial due to unjustified delay by the Prosecutor in the conduct of the proceedings.

9. In its decision of 15 September 2008, Pre-Trial Chamber III stated:

The Single Judge would take this opportunity to recall that any inexcusable delay which can be ascribed to the Prosecutor might have consequences in respect of the Chamber's examination of any request for interim release by Mr Jean-Pierre Bemba pursuant to article 60(4) of the Statute.

I. With respect to the delay:

10. It should be recalled that on 13 April 2006, the Court of Cassation of the Central African Republic referred the situation in the Central African Republic to the International Criminal Court;

11. On 22 May 2007, the Prosecutor of the International Criminal Court announced the initiation of an investigation into crimes in the Central African Republic;

12. Further to an international warrant of arrest issued on 23 May 2008 by Chamber III of the International Criminal Court, the Office of the Prosecutor of the International Criminal Court addressed a request for the arrest and surrender of Mr Bemba Gombo to the State of Belgium;

13. On Sunday, 25 May 2008, a Belgian judge issued a warrant of arrest for Mr Bemba Gombo who has since then been deprived of his liberty for more than 5 months;

14. On 31 July 2008, Pre-Trial Chamber III issued the decision on the evidence disclosure system and setting a timetable for the disclosure of evidence in order to enable the confirmation hearing to be held on 4 November 2008;

15. The said decision emphasized two fundamental legal principles, namely the right to a fair trial and the expeditiousness of the proceedings such that from the first appearance hearing on 4 July 2008 until proceedings ended (confirmation hearing initially scheduled for 4 November 2008), the pre-trial detention of the Applicant would not exceed 4 months;

16. In view of the Office of the Prosecutor's failure to adhere to the timetable, in disregard of the court decision of 31 July 2008, the Pre-Trial Chamber was forced to issue the *Decision on the Postponement of the Confirmation Hearing* on 17 October 2008;

17. In its decision of 17 October, the Court stated that "the Prosecutor is required to disclose information concerning prosecution witnesses to the Defence sufficiently in advance to enable the adequate preparation of the defence; ⁽¹⁾

18. The Defence observes that the Chamber found that the Office of the Prosecutor had failed to disclose information concerning prosecution witnesses sufficiently in advance;

19. In that same decision of 17 October 2008, Pre-Trial Chamber III found that the Office of the Prosecutor "[TRANSLATION] filed its Second Request on 30 September 2008, that is long after 3 September 2008, the deadline set by the Chamber in its Decision of 31 July 2008 for the filing of any request for redactions;" ⁽²⁾

20. In the same decision, the Chamber found that the Prosecutor's Third Request was again filed just three days before 20 October 2008, the fifteen-day deadline prior to the date of the confirmation hearing; ⁽³⁾

21. On 31 October 2008, Pre-Trial Chamber III issued a further decision "setting the date of the confirmation hearing" for 8 December 2008, the result being that pre-

⁽¹⁾ ICC-01/05-01/08-170 17-10-2008 6/9, para. 18.

⁽²⁾ ICC-01/05-01/08-170 17-10-2008 6/9, para. 19.

⁽³⁾ ICC-01/05-01/08-170, para 2.

trial detention would last in excess of 5 months, from the first appearance hearing to the close of the proceedings or, even, well in excess of 6 months since he was effectively deprived of his liberty;

22. These changes in circumstances in the course of the proceedings warrant a review on an entirely new basis of the previous decision to maintain the Applicant in provisional detention;

23. In this respect, consideration should be given to the jurisprudence of the Appeals Chamber of the International Criminal Court which issued an authoritative judgment on release stating that: “[TRANSLATION] articles 60(2) and 60(4) constitute separate grounds for release. Accordingly, article 60(4) of the Statute is independent of article 60(2) in the sense that even if a detainee is detained pursuant to article 60(2), the Pre-Trial Chamber shall consider releasing the detainee under article 60(4) if the detainee is detained for an extended period due to inexcusable delay by the Prosecutor;”⁽⁴⁾

24. It follows from all the foregoing that the delay in the conduct of the proceedings caused the prolongation of the Applicant’s detention;

II. With respect to the responsibility of the Office of the Prosecutor for the delay:

25. It should be recalled that the burden of proof lies with the Prosecutor, and it is therefore incumbent on him to make timely disclosure of both the incriminating and exonerating evidence in order to enable the Defence to prepare under conditions which meet the requirements of the right to a fair trial and of the expeditiousness of proceedings;

⁴ *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo” ICC-01/04-01/06-824.*

26. It is unquestionable in this regard that the delay in the conduct of the proceedings resulting from the lack of diligence in the disclosure of evidence is attributable to the Prosecutor;

27. The Applicant has never been questioned [by] the ICC Prosecutor's investigators even though having settled with his entire family on Schengen territory for more than a year and a half with his arrest, he was reasonably expecting to be questioned as part of the Prosecutor's obligation to investigate incriminating "and exonerating" circumstances equally, which would have expedited the Prosecutor's investigations initiated at least since 22 May 2007;

28. At the first appearance hearing before Pre-Trial Chamber III on 04 July 2008, the date of the confirmation hearing was communicated to all parties, including the Prosecutor;

29. The latter, who was questioned on this matter by the Presiding Judge of the Chamber, did not deem it necessary to express the slightest reservation about the date of 04 November 2008 which was announced by the Court;

30. On 31 July 2008, Pre-Trial Chamber III issued its *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties* which became final in the absence of any appeal;

31. The above-mentioned decision sets 03 September 2008 as the deadline for filing of any requests for redactions from the Prosecutor and decides that the Prosecutor must disclose the evidence he intends to use at the confirmation hearing no later than 03 October 2008;

32. On 09 September 2008, the Defence submitted its observations on the Prosecutor's request to convene a status conference;

33. The Defence recalled, *inter alia*, that;

14. [TRANSLATION] the Office of the Prosecutor was seized of a complaint by the Court of Cassation of the Central African Republic on 13 April 2006 and the Prosecutor officially announced he was opening an investigation into the situation in the Central African Republic on 22 May 2007. It would be reasonable to consider that after more than two years, he has collected all the evidence to be disclosed to the Defence and that his case is ready.

15. That the Defence regrets that to date, less than one month from 4 October 2008, no evidence entailing Mr Jean Pierre Bemba Gombo's responsibility has been disclosed to it.

16. That no delaying tactic seeking to delay the confirmation hearing or the trial will be accepted by the Defence.

34. On 15 September 2008, the Pre-Trial Chamber issued its *Decision on the Prosecutor's Request to Convene a Status Conference*;

35. In paragraph 15 of that decision, the Court "*like the Defence, [found] it particularly disturbing that the Prosecutor, ha[d] yet to begin disclosing his evidence, whether incriminatory or exculpatory*";

36. In its Decision of 17 October 2008, [the Chamber stated that] "[TRANSLATION] In light of the foregoing, the Chamber notes the existence of significant problems that have emerged so far in the evidence disclosure system especially regarding the Prosecutor's obligation to disclose this material to the Defence correctly, fully and diligently in accordance with the timetable set in the Decision of 31 July 2008";

37. It should be noted that despite various difficulties, the Defence has worked day and night, with all due diligence (having expanded its team to 4 lawyers and 1 case manager at this stage of the proceedings), sparing no effort to comply with the Decision of 31 July 2008 and thereby avoid a delay in the proceedings;

38. With respect to the Court's decision to postpone the date of the hearing of 4 November 2008, the Defence has not failed to note that it is the Prosecutor's procedural errors which led to this postponement and the resulting prolongation of Mr Jean-Pierre Bemba Gombo's detention;

39. In consequence, it is to protect the Defence against a violation of its right to a fair trial (protected by article 6 of the European Convention on Human Rights) by the Prosecutor that the Court felt obliged to postpone the confirmation hearing;

40. This is the meaning that should be read into its decision of 21 October 2008 – *Decision on the Implementation of the Second Decision on the Prosecutor's Requests for Redactions* – in which the Chamber observes that:

6. The Chamber recalls its principal responsibility related to redactions prior to the confirmation hearing in ensuring that the proceedings are fair and expeditious and that they are conducted with full respect for the rights of the Defence and with due regard to the protection of victims and witnesses;

41. It follows from the foregoing that the delay in the conduct of proceedings is attributable to the Prosecutor;

III. With respect to the unjustified nature of the delay:

42. Its unjustified nature is evident in the fact that the delay stems from an attitude or dereliction of responsibility which, in itself, constitutes a violation of a court decision that had become *res judicata*, namely the Decision of 31 July 2008 setting the timetable and deadlines for the disclosure of evidence;

43. In defiance of the Decision of 31 July 2008, the Prosecutor did not stop forwarding to the Defence, long after 3 October 2008, the evidence on which he intends to rely at the confirmation hearing of 4 November 2008; the Prosecutor also filed an application for redactions long after the deadline of 3 September 2008; the Office of the Prosecutor kept up this attitude in defiance of the court decision;

44. On 17 October 2008, the Defence received a new document containing the charges from the Office of the Prosecutor allegedly based on rule 121 of the *Rules of Procedure and Evidence*;

45. A careful examination of this new charging document shows that it includes few substantive amendments in relation to the previous document containing the charges, such that one may well wonder whether this is indeed a new document containing the charges within the meaning of rule 121 of the above-mentioned Rules; rather, it appears as though the Prosecutor, through this new unjustified document containing the charges, is trying in vain to cover up the improper disclosures made beyond the deadline; the only amendment is the addition of a new paragraph 50 alleging that theft, rape, pillaging and killings had been committed in the town of Boy-Rabe, Bangui, on 30 October 2002. Rabe Boy is a part of Bangui already mentioned in the initial document containing the charges;

46. Pre-Trial Chamber III noted, *inter alia*, that:

[TRANSLATION] ...the Prosecutor's Second Request was filed just three days before 3 October 2008, the thirty-day deadline prior to the date of the confirmation hearing. Accordingly, the Chamber stated that the Prosecutor put himself in a position where it was materially impossible for him to disclose the redacted versions of the statements of nine additional witnesses to the Defence by 3 October 2008, since requests for redactions must be granted or denied by the Chamber prior to any disclosure to the Defence;⁵

47. This attitude of the Office of the Prosecutor remains unjustified and undermines the principle of a fair trial which underpins sound justice especially when it files the said request on the final date set by the Chamber, knowing fully well that the Chamber will not be able to deal with it on the same day, thereby causing non-compliance with the timetable set by the Chamber on 30 July 2008;

48. The Prosecutor's conduct is even more unjustifiable when he files his requests for redactions of witness statements on 3 October 2008 and 20 October 2008 respectively, thereby causing non-compliance with the timetable set by the Chamber on 3 July 2008 and non-compliance with the 15-day time limit set by rule 121 in case of substantive amendment of the document containing the charges;

⁵ ICC-01/05-01/08-170, para. 20.

49. Such manoeuvres by the Prosecutor show that he has not fulfilled his obligations to appropriately disclose the evidence, thereby making it impossible for the Chamber to analyse in a timely manner the requests for redactions of the witness statements which he had filed. As a result, the Defence did not receive all the witness statements in compliance with the timetable of 31 July 2008 and the time limit set by rule 121 in case of substantive amendment of the document containing the charges;

50. The Prosecutor's attitude constitutes a mistake on his part which caused the postponement of the confirmation hearing, thereby causing an unreasonable prolongation of Mr Jean-Pierre Bemba Gombo's detention;

51. In any event, the requests for redactions or disclosures made beyond the time limit cannot be justified on any other basis than by the procedural errors of the Prosecutor;

52. The dilatoriness described above caused the Pre-Trial Chamber to issue an urgent decision on 17 October 2008 entitled *Decision to Postpone the Confirmation Hearing*;

53. By disregarding the basic principle that court decisions must be complied with, the Office of the Prosecutor caused the Court to observe in its decision of 17 October 2008 that:

Moreover, the Chamber observes with astonishment that the Prosecutor includes in the two lists of evidence accompanying the detailed list of charges and the amended detailed list of charges, respectively, some of the additional witnesses without disclosing their names, without even waiting for the Chamber's decision on the Prosecutor's Second and Third Requests granting or denying the requests for redactions proposed by the Prosecutor";

54. The same decision of 17 October 2008 adds that: "In fact, the Chamber notes with concern that part of the evidence on which the Prosecutor intends to rely at the confirmation hearing is not yet accessible to the Defence";

55. It should be noted that in its *Decision on the Implementation of the Second Decision on the Prosecutor's requests for redaction* of 21 October 2008, the Chamber pointed out the disclosure irregularities committed by the Prosecutor such that he cannot be heard to offer any legitimate excuse for the delay:

8. On the one hand, the Chamber notices that the Prosecutor redacted more information than was initially authorised by the Chamber. In some instances the Prosecutor redacted information without having requested its redaction from the Chamber;

56. It follows from the foregoing that the delay in the conduct of the proceedings is unjustified;

IV. With respect to the additional guarantees:

57. The Victims and Witnesses Unit (VWU) has just shed new light on any lingering questions by stating that it saw no problem with the disclosure of the identity of the victims to the Defence, including Mr Jean-Pierre Bemba, and that there was nothing giving reason to fear for the safety of the witnesses whose identities had been mistakenly disclosed on the ICC website;

58. In a personal letter to the Court, the Applicant undertakes to comply with any conditions that may be set by the Pre-Trial Chamber in regard to his interim release within the meaning of article 60(4) and rule 119 of the *Rules of Procedure and Evidence*;⁶

59. If granted interim release, he would wish to reside in Belgium with his family or, in the alternative, under the protection of the Portuguese authorities in his residence in Portugal, or in the Netherlands and will remain available to appear before the Court during the confirmation hearing and any ensuing proceedings;

60. In a spirit of cooperation, he will supply the Pre-Trial Chamber with any travel document in his possession and would also not object to the requirement

⁶ Annex 1.

that he reside at a particular address and to complying with any order asking him to report to the national authorities of the place of residence in compliance with any timetable that may be set by Pre-Trial Chamber III for the proceedings;

61. He will respond when summoned by an authority or qualified person designated by Pre-Trial Chamber III;

62. He will also comply with the condition that he must not go to certain places or associate with certain persons as specified by Pre-Trial Chamber III;

63. Congolese national figures⁷ as well as high-ranking Belgian authorities working for European Institutions have confirmed that the Applicant will respect any conditions that may be laid down for his release;⁸

FOR THESE REASONS

64. The Defence respectfully urges Your Honours, Judges of Pre-Trial Chamber III, to allow this application and find that it is admissible and has merit in order to:

65. Treat this application as a matter of urgency;

66. Summon Mr Jean-Pierre Bemba, if necessary, to the very next substantive hearing and hear his defence following notification to him of the opinions and submissions of the Office of the Prosecutor and after having been granted enough time to respond to them;

Primary relief sought:

67. An order that the Applicant be released unconditionally;

And, in the alternative:

⁷ Annex 2.

⁸ Annex 3.

68. An order that he be granted interim release subject to conditions left to the discretion of Pre-Trial Chamber III.

And

Declare the decision so taken to be immediately enforceable notwithstanding any appeal.

And justice shall be done.

[signed]

Aimé Kilolo Musamba
Associate Counsel

Dated this 3 November 2008

At The Hague, The Netherlands