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**International
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PRE-TRIAL CHAMBER II

Before: Single Judge, Ekaterina Trendafilova

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

Public document

**Prosecution's Additional Observations on Interim Release pursuant to Rule
118(3) of the Rules of Procedure and Evidence**

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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Background

1. At the conclusion of the public hearing held on 29 June 2009 (hereinafter the “29 June hearing”)¹ in accordance with Rule 118(3) of the Rules of Procedure and Evidence (hereinafter the “Rules”), the Single Judge granted the Parties an opportunity to develop any argument they deem necessary, relative to the issue of interim release of Mr. Jean-Pierre Bemba (hereinafter “the Accused”). The Office of the Prosecutor (hereinafter the “Prosecution”) respectfully submits its observations on the matter.

Scope of this Submission

2. The Prosecution adopts and incorporates by reference the entirety of its oral submissions made at the 29 June 2009 hearing opposing the Defence’s request for interim release.² The Prosecution further notes that most of the arguments advanced by the Defence at the 29 June hearing have been previously raised in their First, Second and Third Applications for Interim Release. For the avoidance of repetition, the Prosecution incorporates its previous responses to those Defence’s applications by reference.³ Consequently, the Prosecution confines the scope of this submission to the new issues raised by the Defence in the course of the 29 June hearing.

New Issues raised by the Defence in support of Interim Release

3. In support of its request for interim release, the Defence raised for the first time the following issues, not addressed in its previous requests; (i) that the Article

¹ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT.

² ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT pages 30-35.

³ ICC-01/05-01/08-65-Conf, Dated 11 August 2008; ICC-01/05-01/08-262 Dated 18 November 2008; ICC-01/05-01/08-354-Conf Dated 9 January 2009. The Prosecution notes further that most of these issues have been litigated and adjudicated by the Chamber in its First, Second and Third Decisions on Interim Release

28(a) finding contained in the Decision pursuant to Article 61(7)(a) and (b) of the Statute on the Charges⁴ (hereinafter the “Confirmation Decision”) constitutes a change in circumstances within the meaning of Article 60(3) of the Rome Statute (hereinafter the “Statute”) given that it is of less gravity and attracts lighter sentence in comparison to the previously pleaded Article 25(3)(a) mode of liability contained in the Prosecution’s Charging Document (hereinafter the “ADCC”);⁵ (ii) that the Confirmation Decision has significantly reduced the scope of the charges against the Accused;⁶ (iii) that the Prosecution must prove that the risk of the Accused absconding is real and not just a probability or supposition;⁷ (iv) that the weight of legal authorities cited from the International Criminal Tribunal for the former Yugoslavia (“ICTY”) demonstrate that interim release is granted, mostly in cases of command responsibility under Article 7(3) of the ICTY’s Statute and;⁸ (v) finally, the Defence advanced twenty (20) guarantees pursuant to Rule 119 of the Rules as conditions for the grant of interim release⁹.

Prosecution’s Response to New Issues Raised by the Defence

4. The Prosecution submits that the continued detention of the Accused be maintained for the reasons set out below. First, the Prosecution submits that the conditions set forth in both Article 58(1)(a) and (b) of the Statute continue to be met. As the Appeals Chamber has reiterated, 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 continue to be detained.¹⁰ Pursuant to Article 58(1)(b) of the Statute, a warrant of arrest shall be issued and detention ensue (i) to ensure the

⁴ ICC-01/05-01/08-424.

⁵ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT at pages 12,13, 39 and 40.

⁶ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT at page 39.

⁷ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT at page 47-48.

⁸ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT at pages 27 and 29.

⁹ ICC-01/05-01/08-T-13-ENG RT 29-06-2009 PT at pages 24-25.

¹⁰ ICC-01-04-01/07-717, paras. 541 and 544.

person's appearance at trial; (ii) to prevent the obstruction of court proceedings or the investigation; or (iii) to prevent continuing criminal conduct by the same person. The Prosecution submits that there has been no substantial change in any of the conditions motivating the conclusions reached by the Single Judge in her Third Decision on Interim Release¹¹ that warrants a variation or interruption of the current detention regime.

5. As stated, the condition set forth in Article 58(1) (a) of the Statute continues to be met as supported by the Confirmation Decision. The conditions stipulated under Article 58(1)(b)(i) and (ii) of the Statute were found to be applicable by the Chamber before the issuance of the Confirmation Decision¹². Now that charges against the Accused have been confirmed, there exists a firmer evidential basis for maintaining the current detention regime. Pursuant to Article 58(1)(b) of the Statute, the continued detention of the Accused remains necessary both to ensure his appearance at trial now that charges against the Accused have been confirmed and that the Accused does not obstruct or endanger the investigation or the court proceedings, scheduled to commence once a Trial Chamber is constituted.
6. As will be elaborated below, the Prosecution submits that the Defence's new submissions are either misguided, misplaced or lack merit in light of the requirements contained in Articles 58(1) and 60 of the Statute, which collectively regulate the grant or refusal of interim release.
7. First the Prosecution submits that the Article 28(a) finding contained in the Confirmation Decision does not constitute a change of circumstance within the meaning of Article 60(3) of the Statute to warrant a variation or interruption of

¹¹ ICC-01/05-01/08-403.

¹² ICC-01/05-01/08-321 and ICC-01/05-01/08-403.

the Accused's current detention regime. The Chamber, having reviewed the evidence presented by both Parties at the confirmation hearing, concluded by raising the evidential threshold in its finding that; (a) there were substantial grounds to believe that Jean-Pierre Bemba was the *de jure* President of the MLC and the Commander-in-chief of the ALC and had *de facto* ultimate control over MLC commanders;¹³ and (b) Jean-Pierre Bemba was criminally responsible within the meaning of Article 28(a) of the Statute for the following crimes; the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging.¹⁴ In these circumstances, the Prosecution submits that Confirmation Decision has established a firmer evidential threshold in support of the Prosecution's case.

8. The Defence's submission that Article 28(a) responsibility is of less gravity, consequently attracting lighter sentences lacks merit.¹⁵ Under Article 78(1) of the Statute, the pertinent considerations for sentencing are gravity of the crime and the individual circumstances of the convicted person, after the Trial Chamber would have evaluated all evidence submitted at trial. Moreover, as stated in the *Lubanga case*¹⁶, the Trial Chamber is not bound by the findings of the Pre-Trial Chamber, and pursuant to Regulation 55 of the Regulations of the Court (hereinafter the "Regulations"), may modify the legal characterization of facts, having regard to the fact that it is uniquely placed to do so, once it has received and evaluated all the evidence submitted in the case.
9. Most importantly, the Defence's submission simply discounts developments on the law relating to sentencing for commanders in the ad-hoc tribunals. Whilst recognizing at the tribunals that the length of sentence is to be determined by the

¹³ ICC-01/05-01/08-424.

¹⁴ ICC-01/05-01/08-424.

¹⁵ The charges that the Accused is facing are numerous and may result in multiple convictions leading to an overall lengthy sentence.

¹⁶ ICC-01/04-01/06-1084.

nature and gravity of the crime, case law of the international criminal tribunals seems to suggest that the status as a commander will in itself be considered an aggravating factor. The reasoning in the case law is that a command position may justify a higher sentence, in particular, if the Accused held a high position within the civilian or military command structure. The jurisprudence is clear in that a position of authority, whether civilian or military, gives rise to both duty and trust which, if broken or abused, would tend to aggravate the sentence.¹⁷ Additionally, the tribunals have explained that commanders, who fail in their duties to prevent the crime or to punish the perpetrator, should receive a heavier sentence than the subordinates who committed the crime. The justifications in imposing a heavier sentence stem from the fact that such commanders convey the impression of tolerance/approval of the commission of such crimes by their subordinates.¹⁸ As the Trial Chamber in *Blaskic* puts it;

“Therefore, when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime in so far the failing conveys the tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes towards encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal to or greater to that of the commander.”¹⁹

10. Second, the Defence’s submission that the Confirmation Decision has significantly reduced the scope of the charges is misguided, given both the circumstances as well as the reasoning advanced by the Chamber for the non-

¹⁷ *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998. *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Sentence, Case No. ICTR-95-I-T, 21 May 1999 at p. 15.

¹⁸ *Prosecutor v. Tihomir Blaskic*, Judgment, Case No. IT-95—14-T, 3 March 2000, at p. 789.

¹⁹ *Prosecutor v. Tihomir Blaskic*, Judgment, Case No. IT-95—14-T, 3 March 2000, at p. 789.

confirmation of the three counts contained in the ADCC which constitute torture (both as a war crime and a crime against humanity) and outrages upon personal dignity (as a war crime).²⁰ The Confirmation Decision declined to confirm these charges on the basis that they were either cumulative of rape counts and/or failed to give sufficient notice to the Accused of the underlying elements, in respect of torture as a war crime. At no point did the Confirmation Decision purport to have evaluated the sufficiency or otherwise of the evidence submitted in declining to confirm the three counts referred to.²¹ The declination to confirm these three counts (torture and outrages upon personal dignity) was based exceptionally on reasons relating to cumulative charging and sufficient notice to the Accused, rather than on the basis of the evaluation of evidence, as the Defence submitted.

11. Third, the Defence submitted that the Prosecution must prove that the risk of the Accused absconding is real and not just a probability or supposition. As the Appeals Chamber stated in the *Lubanga case*, it is not necessary to show that the Accused has actually made use of any contacts to seek to abscond, but that there is an element of predictability that he could use those contacts.²² In this context, the Prosecution re-iterates that because of the Accused's former positions in the Democratic Republic of Congo (hereinafter the "DRC") as well as in the MLC, he benefits from the support of influential networks and numerous and powerful contacts both within and outside of the States to which he seeks to be released, which could facilitate his flight from the Court's jurisdiction.

²⁰ ICC-01/05-01/08-424 paras. 190 and 302.

²¹ The Prosecution has accordingly sought leave to appeal this issue: ICC-01/05-01/08-427.

²² See, ICC-01/04-01/06-824, para. 137. **The Appeals Chamber** stated that it was not persuaded by the Appellant's argument that the PTC 1 should not have taken into account the international contacts of the Appellant because there had been no evidence before the Chamber that the Appellant actually would make use of those contacts to abscond. The Appeals Chamber noted that any determination by the Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction.

12. Fourth, the authorities from the ICTY and the European Court of Human Rights (ECHR)²³, referred by the Defence, fail to take into account the distinct conditions under which the International Criminal Court (hereinafter “ICC”), as opposed to the ICTY and national authorities operate. In most of the ICTY cases in which interim release was granted, the Accused persons were released to states within former Yugoslavia, where these states also gave undertaking to protect witnesses residing on the territory of these states. The circumstances obtaining at the ICC are different. On a practical level, the Accused seeks to be released to the States of Belgium, France and Portugal, which are distinct from the states, in which the Prosecution conducts its investigations, and where its witnesses also reside. The states to which the Accused seeks to be released are fully cooperating with the Court, but they have no obligation to ensure that the Accused appears for trial and does not interfere with or harm prosecution witnesses, found in other countries in Africa, as a condition for his interim release.²⁴ Despite the best intentions of these states, their material ability to prevent interference with prosecution witnesses found in other parts of the world is impaired, given both the geographical proximity as well as the varied locations of prosecution witnesses.

13. Finally, the Prosecution submits that the twenty (20) guarantees advanced by the Defence pursuant to Rule 119 is misplaced as it is premature, given the current stage of the proceedings and further, they are not pertinent considerations for the grant of interim release under both Articles 58(1) and 60 of the Statute. First, the Defence should have established that the conditions stipulated in Article 58(a) and (b) of the Statute are no longer applicable, before requesting the Chamber to consider conditions under which the Accused is to be released pursuant to Rule

²³ Such as *Berislav Pusic in Prlic et al.* (IT-04-74), *Halilovic* (IT-01-48-PT), *Simatovic in Stanisic et Simatovic* (IT-03-69).

²⁴ *Prosecutor v. Blagojevic et al.*, Decision on Application for Dragan Jokic for Leave to Appeal, IT-02—53-Ar65, 18 April 2002, paras. 7-8: <http://www.un.org/icty/blagojevic/trialc/decision-e/020418.pdf>.

119. Having failed to disprove the applicability of Article 58(1) conditions, it is both premature and untimely for the Defence to put forward guarantees under which the Accused could be released to any of the states indicated. Furthermore, the twenty (20) guarantees advanced by the Defence are not pertinent considerations either under Articles 58(1) or 60 of the Statute warranting a variation or the interruption of the Accused's current detention regime.

Conclusion

14. In light of both the foregoing as well as oral submissions presented during the 29 June hearing the Prosecution respectfully requests the Single Judge to maintain the continued detention of the Accused as the conditions stipulated in Article 58(1) of the Statute continue to be met. Furthermore, there has been no substantial change in any of the considerations motivating the findings of the Single Judge contained in her Third Decision on Interim Release. Consequently, the Defence's request for interim release should be dismissed.



Luis Moreno- Ocampo,
Prosecutor

Dated this 2nd day of July 2009

At The Hague, The Netherlands