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Date: **11 August 2008**

PRE-TRIAL CHAMBER III

Before: Judge Hans-Peter Kaul (Single Judge)

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

Public Redacted Version of ICC-01/05-01/08-65-Conf

Prosecution's Observations on the "Defence's Application for Interim Release"

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Bemba
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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

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REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Other

Procedural Background

1. On 9 May 2008, the Office of the Prosecutor ("hereinafter referred to as "the Prosecution") filed its application (hereinafter referred to as "the Arrest Warrant Application") in the situation in the Central African Republic (hereinafter referred to as "CAR") requesting, *inter alia*, for the issuance of a warrant of arrest for Jean-Pierre Bemba (hereinafter referred to as "Bemba") under Article 58 (1) of the Rome Statute (hereinafter referred to as "Statute").¹

2. On 21 May 2008, the Pre-Trial Chamber III (hereinafter referred to as "PTC") rendered the "Decision Requesting Additional Information in Respect of the Prosecutor's Application for Warrant of Arrest under Article 58".² In the Decision, the PTC requested that the Prosecution provide additional information and supporting materials concerning the Arrest Warrant Application as soon as possible, but no later than 27 May 2008.

3. On 23 May 2008, the Prosecution submitted "the Prosecutor's Application for Request for Provisional Arrest under Article 92"³ requesting *inter alia*, the issuance of a warrant and a request for provisional arrest against Bemba pursuant to Article 92 of the Statute. In this application, the Prosecution provided information relating to movement of Bemba from his base in Portugal to Belgium, with his final destination unknown.⁴

4. On the same day, 23 May 2008, the PTC issued a warrant of arrest (hereinafter referred to as "first warrant of arrest")⁵ and the "*Demande d'arrestation provisoire de M.*

¹ ICC-01/05-13-US-Exp.

² ICC-01/05-01/08-27.

³ ICC-01/05-01/08-28.

⁴ *Ibid.*, p. 4, para. 8

⁵ ICC-01/05-01/08-1.



Jean-Pierre Bemba Gombo adressée au Royaume de Belgique”⁶ requesting the provisional arrest and detention of Bemba by Belgian authorities. The warrant of arrest contained six charges, which did not include the charges of murder(s). The PTC further reserved its position and noted that the analysis of the evidence and other information submitted by the Prosecution will be set out in a decision to be issued later.

5. On 27 May 2008, the Prosecution submitted further information and material in respect of the Arrest Warrant Application submitted pursuant to Article 58 of the Statute. In this submission, the Prosecution attached selected witness statements and Non-Governmental Organisation (“NGO”) reports, which were referred to in the Arrest Warrant Application, in order to present a complete and accurate representation of the events in question to the PTC.⁷

6. On 26 May and 2 June 2008 respectively, the Registrar filed the “*Demande du Greffier pour une audience urgente*”⁸ and the “*Information relative à la procédure d’arrestation dans l’État de détention et transmission par le Greffier de documents reçus dudit État*”.⁹ In these reports, the Registrar provided an update to the PTC regarding the judicial processes relating to the arrest, surrender and transfer of Bemba.

7. On 10 June 2008, the PTC issued a warrant of arrest (hereinafter referred to as “second warrant of arrest”) for Bemba replacing the arrest warrant which it had issued on 23 May 2008.¹⁰ In this warrant of arrest, the PTC added the crimes of *murder, as a crime against humanity, punishable under Article 7(1)(a) and murder as a war crime punishable under Article 8(2)(c)(i) of the Statute*, which were not included in the

⁶ ICC-01/05-01/08-3.

⁷ ICC-01/05-16-US-Exp.

⁸ ICC-01/05-01/08-6-US-Exp.

⁹ ICC-01/05-01/08-12-US-Exp.

¹⁰ ICC-01/05-01/08-15.

first warrant of arrest. On that same day, the PTC issued a request for the arrest and surrender of Bemba to the Kingdom of Belgium.¹¹

8. On 19 June 2008, the Registrar submitted the *“Rapport du Greffier sur la notification de la demande d’arrestation et de remise”*.¹² In this Report, the Registrar informed the PTC of developments in regards to the domestic procedure relating to the arrest and the surrender of Bemba in Belgium.

9. On 20 June 2008, the Registrar submitted the *“Information relative à la procédure d’arrestation dans l’État de detention et transmission par le Greffier de documents reçus dudit État”*¹³ updating the PTC of developments relating to Bemba’s transfer proceedings in Belgium.

10. On 3 July 2008, Bemba was transferred from the detention centre of Saint-Gilles in Brussels to the ICC Detention Centre in The Hague.

11. On 4 July 2008, Bemba had his initial appearance before the PTC.¹⁴ At the conclusion of the initial appearance, the Presiding Judge scheduled 4 November 2008 as the date for the confirmation of charges hearing.¹⁵

12. On that same day, 4 July 2008, the Registrar submitted the *“Report from the Registrar on the Surrender and Transfer of Jean-Pierre Bemba Gombo”*.¹⁶ In this Report, the Registrar provided a procedural background on the process leading to

¹¹ ICC-01/05-01/08-16.

¹² ICC-01/05-01/08-18-Conf.

¹³ ICC-01/05-01/08-22-US-Exp.

¹⁴ ICC-01/05-01/08-T-3-ENG ET WT, p. 1.

¹⁵ *Ibid.*, p. 9, lines 1-4.

¹⁶ ICC-01/05-01/08-38-Conf-Exp.

the arrest and transfer of Bemba and in particular attached documentation provided by the Belgian Authorities.¹⁷

13. On 23 July 2008, the Defence for Bemba (“Defence”) submitted an application for interim release (hereinafter referred to as “Application”).¹⁸ In the application, the Defence sought a declaration that the arrest warrants issued by the PTC on 23 May and 10 June 2008 are null and void and to order the immediate release of Bemba.¹⁹ The basis for this request is that Bemba was deprived of his right to legal representation by the relevant Belgian authorities at his initial interview.²⁰ In the alternative, the Defence for Bemba requested that he be granted interim release and for this purposes designated the States of Belgium, Portugal and Switzerland as countries to which Bemba seeks to be released.²¹

14. On 4 August 2008, the PTC issued the “Decision Requesting Observations of the Prosecutor on the Defence’s Application for Interim Release”.²² In this Decision, the PTC requests the Prosecutor to submit his observations on the Defence’s Application for interim release by no later than 11 August 2008.²³ The Prosecution hereby submits its observations on the Defence’s application for interim release.

Request For Receipt of Filing as Confidential

15. The Prosecution requests that this filing be received by the PTC as confidential because it relates to material which is currently treated as confidential.²⁴

¹⁷ *Ibid.*, The Prosecution refers to the various annexes appended to the Registrar’s Report.

¹⁸ ICC-01/05-01/08-49.

¹⁹ *Ibid.*, p.17, para. 36.

²⁰ *Ibid.*, p. 9, paras.13-15.

²¹ *Ibid.*, p.17, para. 36

²² ICC-01/05-01/08-60.

²³ *Ibid.*, p. 4.

²⁴ The filing has made extensive reference to Registry reports on proceedings in Belgium which are currently filed as confidential by the Registry. The Prosecution will file a public redacted version of the document as soon as practicable.

Prosecution's Submissions

16. The Prosecution submits that according to the "Report from the Registrar on the Surrender and Transfer of Jean-Pierre Bemba Gombo"²⁵ the arrest proceedings in Belgium were conducted in full compliance with the domestic procedures in Belgium and the procedure envisaged by Article 59(2) of the Statute.²⁶ The Defence alleges that the right to legal representation in the initial phase of national proceedings, which essentially involved determining the identification of Bemba, was violated by the Belgian authorities.²⁷ The Prosecution submits:

(i) first, that such allegations should have been made by the Defence before the competent Belgian authorities ;

(ii) second, that should the PTC consider that the Defence's complaint necessitates a review of the arrest and surrender procedure of Bemba applied by the Belgian authorities and a violation would be established, the said violation would not be grave enough to warrant a nullification of the arrest warrant, surrender and as a consequence the release of Bemba, this remedy appearing disproportionate.

17. In relation to the Defence's request for interim release, the Prosecution submits that the conditions set forth in Article 58(1) continue to be met. Bemba should remain in detention pursuant to Article 58(1) of the Statute in order to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or court proceedings.

Alleged violation of Articles 55(2) and 59 of the Statute arising from Bemba's arrest and transfer proceedings before the Belgian Authorities

²⁵ICC-01/05-01/08-38-Conf-Exp.

²⁶*Ibid.*, Annex 3, a statement by the Kingdom of Belgium confirming compliance with Article 59 of the Statute by the relevant Belgian authorities.

²⁷ ICC-01/05-01/08-49, p. 9, para. 13.

Relationship between the first and second warrants of arrest issued by the PTC on 23 May and 10 June 2008 respectively

18. Bemba challenges his arrest, surrender and the validity of the warrant of arrest issued by the PTC on 10 June 2008 on the ground that he was not summoned before judicial authorities in respect of this second warrant of arrest.²⁸ Contrary to the Defence's suggestion that the second arrest warrant of 10 June 2008 is a new warrant of arrest meriting a new judicial process, the Prosecution submits that this second warrant of arrest is essentially informed by the same set of facts underlying the Prosecution's factual allegations underpinning the first arrest warrant issued by the PTC on 23 May 2008. The first arrest warrant was informed by the Prosecution's Urgent Request for Provisional Arrest and transfer pursuant to Article 92 based on information relating to the movement of Bemba at the time of the submission. On the basis of this urgency, the PTC reserved its position to consider the full extent of the Prosecution's submission of evidence and other information in a decision to be issued later.²⁹ The witness statements and NGOs' Reports submitted in the Prosecution's further information to the PTC were referred to in the Prosecutor's Application for a warrant of arrest. The PTC having considered the totality of the Prosecution's evidence and other information rendered a decision issuing the second warrant of arrest adding two counts of murder(s), as a crime against humanity and war crimes.³⁰ In light of the above, the Prosecution submits that the facts underlying the Prosecution's Request and the issuance of the two arrest warrants are the same.

²⁸ ICC-01/05-01/08-49, p. 9, para.14.

²⁹ ICC-01/05-01/08-1-tENG, p. 4, para.7.

³⁰ ICC-01/05-01/08-15, p. 4, para.6. The PTC reiterated its statement that it had reserved its position to analyse in full detail the Prosecutor's Application and further Information in support of its arrest warrant application.

Article 59 Proceedings in Belgium

19. According to the Reports from the Registrar on Bemba's arrest and transfer proceedings in Belgium, Bemba was arrested and surrendered to the Court in compliance with the provisions outlined in Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence (hereinafter referred to as "Rules"). In particular the complaints by the Defence that he was not brought before judicial authorities in respect of the second warrant of arrest and the fact that he was deprived of legal representation at his initial interview by the Belgian investigating magistrate lack merit.

20. The Pre-Trial Chamber in Article 59(2) Proceedings does not supervise national authorities of the country requested to effect the arrest and surrender of the suspect to the Court. The Prosecution submits that the Court's legal framework envisages deference to the national authorities' interpretation of their laws and procedures. The provisions of Article 59(2) refer to the law of the State and Article 99(1) provides that "[...] requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process."

Impact of alleged irregularities in the Belgian national procedure on the legality of the ICC proceedings

21. The Prosecution submits that the alleged violations of the law governing domestic proceedings, do not impact on the legality of the courts' proceedings against Bemba. On the facts, apart from the very initial stage of the proceedings, the

Defence does not contest that Bemba was legally represented at all other stages of the domestic proceedings.³¹ The Defence's complaint relates to the initial stage of the proceedings, which is essentially limited to confirming the identity of the suspect and informing him of his rights. Furthermore, should the PTC consider this lack of legal representation at Bemba's initial questioning to be a violation of domestic procedure, the Prosecution submits that the Defence has not demonstrated that Bemba suffered prejudice. The basis for this submission is that Bemba was fully represented at all other stages of the domestic proceedings, thereby having the opportunity to exhaust all domestic remedies available by way of appeals.³²

There are reasonable grounds to believe that Bemba has committed crimes within the jurisdiction of the Court

22. The Defence for Bemba has not provided any substantive legal or factual basis for challenging the existence of the finding of the PTC that there are reasonable grounds to believe that Bemba is responsible for crimes alleged in the second warrant of arrest.³³ The only reference made by the Defence to this issue is that it is not in possession of the arrest warrant application and supporting materials, and that it notes that this is not the time to make a full defence.³⁴ On the basis of lack of substantive Defence challenge, the Prosecution submits that the Defence has not advanced any legal or factual basis for the PTC to alter its determination that there are reasonable grounds to believe that Bemba is criminally responsible jointly with another for the crimes alleged in the second warrant of arrest.

³¹ ICC-01/05-01/08-49, p.9, para.13.

³² ICC-01/05-01/08-38-Conf-Exp and its Annexes. This is the final report of the Registrar on Bemba's arrest and transfer proceedings in Belgium.

³³ ICC-01/05-01/08-14-tENG, p.35, para. 84.

³⁴ ICC-01/05-01/08-49, p. 5, para. 4 and p. 6, para.6.

23. The PTC's determination regarding the criminal responsibility of Bemba was based on the evidence and other information adduced by the Prosecution in support of the arrest warrant application.³⁵

Standards for determining continued detention under Article 60 of the Statute

24. The Defence for Bemba has articulated the determination of Article 60 (2) of the Statute by reference to European human rights jurisprudence.³⁶ The Prosecution submits that the Appeals Chamber has articulated the standards for determining continuing detention under Article 60(2) referable to Article 58 (1)(b) of the Statute. The Appeals Chamber articulated that Article 60(2) of the Statute does not grant discretion to the PTC on matters relating to interim release. The Appeals Chamber concluded by stating that if the prescribed conditions of Article 58(1) are met, the person shall continue to be detained.³⁷

Reasons for detention under Article 58(1)(b) of the Statute are in the alternative

25. Only one of three alternative reasons for detention listed under Article 58(1)(b)(i) to (iii) of the Statute needs to be found, in order for the PTC to determine pursuant to Article 60(2) of the Statute, that the conditions set forth in Article 58(1) of the Statute continue to be met. Accordingly, these conditions should be read as in the alternative.³⁸ The Prosecution submits that Bemba's detention continues to be necessary firstly; in order to ensure his appearance at trial and secondly; to ensure that Bemba does not obstruct or endanger the investigation or court proceedings.

³⁵ ICC-01/05-01/08-14-tENG, p.4.

³⁶ ICC-01/05-01/08-49, p.10, para.18.

³⁷ ICC-01/04-01/06-824, p. 43, para. 34.

³⁸ *Ibid.*, p. 45, para.139

Detention to ensure Bemba's appearance at trial

26. The PTC determined in the Decision issuing the second warrant of arrest that the arrest of Bemba was necessary both to ensure his appearance at trial and to ensure that he does not interfere with or obstruct investigation or court proceedings.³⁹ Bemba is presently in ICC detention. The Prosecution submits that his detention continues to be warranted to ensure his appearance at trial.

27. The Defence submitted that Bemba would appear for trial. In support, the Defence submitted that Bemba knew that the investigation was initiated about a year ago and would have fled long before his arrest in Belgium. The Defence appends Annexes 6 and 7 to the Defence Application to support its submission.

28. First, the Prosecution disputes that it was public knowledge that the investigation into the situation of the CAR was targeting Bemba in particular. The evidence determines the target of any investigation. As a concrete example of Bemba's lack of knowledge of him being the subject of any ICC investigation, the Prosecution refers to Bemba's interview with Al Jazeera on or about 3 August 2007. In that interview, Bemba claimed that he was unaware of the fact that he was the subject of any investigation.⁴⁰

29. Second, the Defence submitted that Bemba's open living in Europe, where he could readily be apprehended demonstrates that he is not a flight risk. In support, the Defence appends Annexes 8 and 9 to its application. The Prosecution disputes the Defence's submission. [REDACTED]

[REDACTED] The Defence did not inform the PTC in any part of its application of the fact that Bemba is in

³⁹ ICC-01/05-01/08-14-tENG, pps. 36-37, para.90.

⁴⁰ Al Jazeera, Interview with Jean-Pierre Bemba, 3 August 2007, CAR-OTP-0008-0435.

⁴¹ [REDACTED]

possession of other travel documents. [REDACTED]

[REDACTED] The Prosecution submits that withholding of such crucial information relating to the full extent of Bemba's travel capabilities is inconsistent with a person who is not a flight risk and intends to cooperate with the Court.

30. The Prosecution's concerns are heightened by the fact that Annex 6 appended to the Defence Application purporting to be Bemba's agenda item has limited probative value. It is not authenticated or signed. In these circumstances, the Prosecution requests that this Annex be dismissed *in limine*. The Prosecution submits further that the Defence's assertion that the Prosecution informed the PTC that Bemba had intention to leave Belgium on 25 May 2008 and would be returning to the DRC does not accord with the Prosecution's submission. In the document at issue, the Prosecution submitted that there were public reports indicating that Bemba would be travelling to the DRC with respect to his political activities.⁴³ However, the Prosecution concluded by reiterating that at the time of the submission, Bemba's final destination remained unknown.⁴⁴

31. The Defence submitted that Bemba had no intention of leaving the Schengen territory except for a planned holiday to the United States with his wife and children. The Prosecution alleges that in these circumstances, it cannot be excluded that Bemba may have planned this trip having learnt of the investigations during this period.

32. The Defence further submitted that Bemba is "willing to collaborate with the ICC to make the truth come to light".⁴⁵ The Prosecution submits that such statement of collaboration is not relevant indicia for the purposes of determining whether the

⁴² [REDACTED]

⁴³ ICC-01/05-01/08-28, p.4, para.8.

⁴⁴ *Ibid.*,

⁴⁵ ICC-01/05-01/08-49, p.16, para.31.

conditions warranting detention under Article 58(1) of the Statute are met. Finally, the Defence's suggestion that material seized from Bemba in Belgium⁴⁶ appears to show Bemba's willingness to appear before the ICC is speculative. The Defence has not made a showing or an indication of what the said material is for the PTC to make an informed decision on the purportedly seized material in question.

33. The Prosecution submits that a number of factors indicate that Bemba's detention is necessary to prevent the risk of his absconding from the Court's jurisdiction. First, Bemba has not put forward all material facts which will ensure his appearance at trial if released. Concrete examples are the fact that Bemba [REDACTED] [REDACTED] and the fact that he appears to pilot airplanes by himself.⁴⁷ The withholding of these facts, the Prosecution submits, are inconsistent with a person who asserts that he is not a flight risk. Second, Bemba has access to resources [REDACTED] which are readily available, should he seek to flee any country in Europe to which he seeks to be released.⁴⁸ Third, the gravity of the crimes levelled against Bemba in the warrant of arrest and the possibility that he faces long prison sentence, if convicted, suggests the existence of a substantial risk of flight from the Court, if released. Fourth, it is submitted that through Bemba's former position as head of MLC, former Vice-President and Senator of the DRC,⁴⁹ he has developed a network of national and international contacts, which could provide him with the necessary means of absconding. Finally, the Prosecution submits that these factors added together support the Prosecution's assertion that Bemba poses a serious flight risk from the Court's jurisdiction, if released.

⁴⁶ *Ibid*, p.15, para.30.

⁴⁷ <http://news.bbc.co.uk/2/hi/africa/6085536.stm>

⁴⁸ <http://news.bbc.co.uk/2/hi/africa/6085536.stm>. The BBC describes Bemba as a business magnate.

⁴⁹ http://en.wikipedia.org/wiki/Jean-Pierre_Bemba

Detention to ensure that Bemba does not obstruct or endanger the investigation or court proceedings

34. The Prosecution submits that the PTC, in its decision issuing the warrant of 10 June 2008, also determined that Bemba's arrest was necessary in order to prevent his obstruction to the investigation or court proceedings. The Prosecution further submits that the Defence has not presented any substantive information or reason for the PTC to alter its finding that his detention appears necessary to prevent interference with the investigation or witnesses. The only reference made by the Defence to this issue is that "there is no indication whatsoever of any attempt on Mr. Jean-Pierre Bemba's behalf to obstruct justice or any investigations".⁵⁰

35. In addition to the fact that the Defence has not made any substantial challenge to the PTC's finding on necessity of Bemba's arrest to prevent interference with investigation or court proceedings, the Prosecution submits that Bemba's detention should be maintained to ensure that he does not interfere with witnesses, obstruct investigation or the court proceedings as spelt out in Article 58(1)(b)(ii) of the Statute for the following reasons : most of the prosecution witnesses are financially destitute and are principally from the DRC and the CAR. If released Bemba's contacts and access to resources (human and material) within the DRC would enable him and his associates to pressurise, threaten or otherwise harm prosecution witnesses. The Prosecution's concerns are heightened by the fact that Bemba has a history of retaliation within his MLC movement. Bemba is known to take serious actions against opposition and dissent to his leadership within the MLC.⁵¹

36. Recent information in the possession of the Prosecution suggests that the threat to Prosecution witnesses have heightened with the arrest of Bemba. Concrete examples

⁵⁰ ICC-01/05-01/08-49, p.16, para.31.

⁵¹ Statement of Witness 0015, CAR-OTP-0006-0491 at 0516 to 0518.

are: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

37. In addition, the Prosecution draws the PTC's attention to recent news that, following the arrest of Bemba, the MLC reaction has been swift and well organized.⁵² Though the MLC has acknowledged using diplomatic means to secure Bemba's release, it has not ruled out using other means to ensure his release from ICC custody.⁵³

38. Further, the Defence notified the PTC that Bemba seeks to be released to the States of Belgium, Portugal or Switzerland, if his request for release is granted, and in addition stated that he would subject himself to any condition imposed by the PTC including a fixed residential address.⁵⁴ The states to which Bemba seeks to be released are fully cooperating with the Court but they have no obligation to guarantee that he appears for trial, and does not interfere with or harm Prosecution witnesses, as a condition for his interim release.⁵⁵ As submitted, Bemba wields the influence and has the necessary connections to interfere with witnesses.

⁵² <http://uk.reuters.com/article/homepageCrisis/idUKL2550628.CH.242020080525>. See further: http://www.issafrica.org/static/templates/tmpl_html.php?node_id=3394&slink_id=6135&slink_type=12&link_id=5

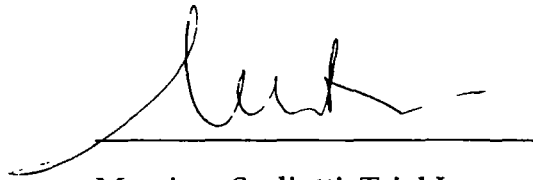
⁵³ *Ibid*

⁵⁴ ICC-01/05-01/08-49, p. 16, paras. 32-36.

⁵⁵ *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>

Request

39. For the foregoing reasons, the Prosecution respectfully requests the PTC to dismiss the Defence's challenge to the validity of the arrest warrants on the ground that his right to legal representation during the very initial phase of domestic proceedings in Belgium was violated. Alternatively, the Prosecution requests the PTC, if it should deem that a violation is established, to declare that the violation is not grave enough to nullify the arrest warrants. Finally, the Prosecution submits that the conditions of Article 58(1)(b)(i) and (ii) continue to be met. Therefore Bemba should continue to be detained at the ICC Detention Unit.

A handwritten signature in black ink, appearing to read 'Scaliotti', is written over a horizontal line.

Massimo Scaliotti, Trial Lawyer

Dated this 11th day of August 2008
At The Hague, The Netherlands