



Original: English

No.: ICC-01/05-01/08

Date: 9 January 2009

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 Redacted Version of ICC-01/05-01/08-354-Conf

**Prosecution's Observations on the Defence's Third 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	Counsel for the Defence of Jean-Pierre Bemba Mr Nkwebe Liriss Mr Karim Khan 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	Defence Support Section
--------------------------------------	--------------------------------

Victims and Witnesses Unit	Detention Section
-----------------------------------	--------------------------

Victims Participation and Reparations Section	Other
--	--------------

On 23 December 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 Third Application for Interim Release (hereinafter referred to as the “Defence’s Third Application”). The Prosecution respectfully submits its observations on the matter, 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 “Bemba”) on four counts of crimes against humanity and six counts of war crimes.²
2. On 23 May 2008, the Chamber issued a warrant of arrest against Bemba,³ and on 24 May 2008, he was arrested in the Kingdom of Belgium.
3. On 10 June 2008, the Chamber issued the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo” (hereinafter referred to as the “10 June 2008 Decision”).⁴ On the same day, the Chamber issued a new warrant of arrest, which entirely replaced the one of 23 May 2008.⁵
4. On 23 July 2008, the Defence filed its first Application for Interim Release, in which it requested the Chamber “to grant interim release to Mr. Jean-Pierre Bemba Gombo and to designate a host country for him (...) and if the Chamber deems it appropriate to impose on Mr. Jean-Pierre Bemba any other conditions”.⁶

¹ ICC-01/05-01/08-334. The Decision requested the Prosecution to file its observations no later than 9 January 2009.

² ICC-01/05-01/08-26-US-Exp.

³ ICC-01/05-01/08-1.

⁴ ICC-01/05-01/08-14-tENG.

⁵ ICC-01/05-01/08-15.

⁶ ICC-01/05-01/08-49, p. 17.

5. On 20 August 2008, the Single Judge issued the “Decision on application for interim release” which rejected the Defence’s Application and decided that Bemba shall continue to be detained (hereinafter referred to as the “20 August 2008 Decision”).⁷

6. On 3 November 2008, the Defence filed the “Requête de Mise en Liberté Provisoire” (hereinafter referred to as the “Defence’s Second Application for Interim Release”), in which it requested the release of Bemba, or alternatively his interim release under conditions deemed appropriate by the Chamber to the Kingdom of Belgium or, in the alternative, the Republic of Portugal or the Kingdom of Netherlands, and to declare a decision arising there from immediately enforceable.⁸

7. On 18 November 2008, the Prosecution submitted the “Prosecution’s Response to Defence’s Requête de Mise en Liberté Provisoire” opposing in entirety the Defence’s Second Application for Interim Release.⁹

8. On 24 November 2008, the Defence filed a “Request for leave to reply in relation to the motion for provisional release” seeking leave to reply to an issue which came into existence after the Defence had submitted its Second Application for Interim Release and which the Prosecution had recited in its response.¹⁰

9. On 27 November 2008, the Single Judge granted the Defence’s Request¹¹ and the Defence filed its reply to the Prosecution’s response on 1 December 2008.¹²

10. On 4 December 2008, the Prosecution filed its “Request to Dismiss the Defence’s Reply to the Prosecution’s Response” on the basis that the Defence had exceeded both the framework of its request and the Decision granting the request.¹³

11. On 16 December 2008, the Single Judge issued the Decision on Application for Interim Release (hereinafter referred to as the “Decision on the Defence’s Second Application

⁷ ICC-01/05-01/08-73-Conf.

⁸ ICC-01/05-01/08-200-Conf, paras. 59 and 67 to 68.

⁹ ICC-01/05-01/08-262.

¹⁰ ICC-01/05-01/08-276.

¹¹ ICC-01/05-01/08-294.

¹² ICC-01/05-01/08-302.

¹³ ICC-01/05-01/08-308.

for Interim Release”).¹⁴ In this Decision, the Single Judge *inter alia*; rejected the said application, decided that Bemba shall continue to be detained and that the 120 days period of review set out in Rule 118(2) of the Rules of Procedure and Evidence (hereinafter referred to as the “Rules”) shall start running anew as of the date of notification of the Decision on the Defence’s Second Application.¹⁵

12. On the same day, the Appeals Chamber issued its Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III entitled “Decision on the application for interim release”. The Appeals Chamber by a majority, with Judge Pikis dissenting, confirmed the decision of the Chamber and dismissed the appeal.¹⁶

13. On 22 December 2008, the Defence lodged its Third Application for Interim Release in which it requested *inter alia*; the interim release of Bemba, with conditions, to the Republic of Portugal, or alternatively, to the Kingdom of Belgium.¹⁷ On 23 December 2008, the Defence filed a corrigendum to its Third Application (hereinafter referred to as “the Corrigendum”).¹⁸

Request for Confidentiality

14. The Prosecution requests that this filing be received by the Chamber as “Confidential” on the basis that the Decision Requesting Observations on the Defence’s Application for Interim Release determined that the Defence’s Third Application should be filed confidentially.¹⁹

Prosecution’s Main Submissions

Preliminary Procedural Objection

15. For the reasons set out below, the Prosecution raises a preliminary procedural objection to the Defence’s Third Application for interim release, and on this basis, requests

¹⁴ ICC-01/05-01/08-321.

¹⁵ ICC-01/05-01/08-321.

¹⁶ ICC-01/05-01/08-323.

¹⁷ ICC-01/05-01/08-333-Conf-Corr.

¹⁸ ICC-01/05-01/08-333-Conf.

¹⁹ ICC-01/05-01/08-334, p. 5, para. 13.

the Chamber to declare that the Defence's application is premature and consequently, inadmissible. Firstly, the Prosecution notes that the Defence's Third Application is inconsistent with Rule 118(2) of the Rules and the Decision of the Single Judge on the Defence's Second Application for Interim Release. In that Decision, the Single Judge determined *inter alia*; that Bemba shall continue to be detained and that the 120 days period of review set out in Rule 118(2) of the Rules shall start running anew as of the date of notification of the Decision on the Defence's Second Application, which is 16 December 2008.²⁰ The Prosecution submits that by filing its Third Application, a week after the Decision on the second request for interim release, the Defence has advanced a position which is inconsistent with the provisions of Rule 118(2) of the Rules, and also the expressed finding of the Single Judge.

16. The Prosecution notes that the Defence has selectively used portions of the Appeals Chamber judgment, not within proper context to support its third request for interim release. In particular, the Defence relied on a factual statement contained in the judgment which indicated that the Defence was not aware of all of the material on which the Pre-Trial Chamber relied on for the 20 August 2008 Decision, especially those material that were essential in order for the Defence to effectively challenge the lawfulness of the suspect's detention.²¹ The Prosecution submits that this statement is an *obiter dictum*, one of fact not amounting to a *ratio decidendum* in the Appeals Chamber's judgment.

17. Moreover, this factual statement by the Appeals Chamber does not relieve the Applicant of the need to comply with the time-limit stipulated by Rule 118(2) of the Rules. The Prosecution submits that this factual statement by the Appeals Chamber reflects the position at the time of the Defence's submission of the first application for interim release. A study of the procedural history discloses that at the time of the Defence's submission of the second application for interim release, the Prosecution had disclosed the necessary material relative to the lawfulness of Bemba's detention. In these circumstances, the Prosecution submits that at the time of filing its second application, the Defence had the requisite material and the opportunity to challenge the lawfulness of Bemba's detention, which it did in its second application for interim release, filed on 3 November 2008.

²⁰ ICC-01/05-01/08-321.

²¹ ICC-01/05-01/08-323, para. 34.

18. In light of the foregoing considerations, the Prosecution requests the Chamber to either dismiss the Defence's Third Application or to reserve the said application until the expiration of the period of 120 days, running from the date of the notification of the Second Decision on the Defence's Application, which is 16 December 2008.

Submissions on the Merit

19. Alternatively, for the reasons provided below, the Prosecution opposes the Defence's Third Application on the merits and requests the Chamber to dismiss it and maintain the detention of Bemba. First, the Prosecution submits that the Defence's third application lacks merit in light of the fact that there has been no substantial change in any of the considerations underlying the Second Decision on the Defence's Request for Interim Release. Second, the Prosecution submits that the material adduced by the Defence in support of its request do not disprove the existence of the conditions specified in Article 58(1) of the Rome Statute (hereinafter referred to as the "Statute") in order to warrant the granting of interim or conditional release, as requested. Third, the Prosecution submits that the conditions specified in Article 58(1) of the Statute continue to be met. Accordingly, the statutory grounds for considering interim or conditional release pursuant to Article 58(1) of the Statute continue to be satisfied, and the Defence's third request should consequently be dismissed. In light of the foregoing considerations, the Prosecution requests the Chamber to continue maintaining the detention of Bemba.

20. As the Appeals Chamber has reiterated in its Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber 1 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.²² 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.

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

²² ICC-01/04-01/06-824, para 139.

issued by the Chamber on 16 December 2008.²³ With respect to the existence of reasonable grounds to believe that the suspect committed crimes within the jurisdiction of the Court or otherwise, the Single Judge upheld the findings of the 20 August 2008 Decision and determined that there has been no substantial change in circumstances to warrant reaching a different conclusion.²⁴ With respect to the conditions stipulated in Article 58 (b) (i) and (ii) of the Statute, the Single Judge conducted a separate analysis and upheld the findings of the 20 August 2008 Decision. The Single Judge concluded that though the stipulated conditions are in the alternative, both conditions continue to be met and accordingly decided to maintain the detention of Bemba.²⁵ In particular, the Single Judge found that Bemba, if released, would not appear at the confirmation of charges hearing and by implication, the trial.²⁶

22. Moreover, the Single Judge concluded that there has not been any change of circumstances related to the detention of Bemba that would require modification of the Chamber's previous ruling on Bemba's detention.²⁷ As a practical illustration, the Single Judge determined that apart from the question of the safety of victims and witnesses, release of Bemba could result in exerting pressure on witnesses to change their testimonies.²⁸ The Prosecution submits that these considerations are still valid and have remained unchanged since the Second Decision on the Defence's Application for interim release.

Overview of Defence's Submissions

23. In support of its application for interim release, the Defence submitted that it has adduced evidence comprising 926 pages of written material and audio-video material which calls for a reconsideration of the Prosecution's allegations regarding the Applicant's supposed responsibility. In particular the Defence submitted that the testimony given by [REDACTED] and the email correspondence sent by [REDACTED] plainly resemble a judicial arrangement whose purpose is to destroy President Kabila's political opponent, in this case, Bemba. Additionally, the Defence alleges that President Kabila has paid the plane ticket of a Central African Lawyer, Mr. Nganatouwa GOUNGAYE WANFIYO, supposedly conducting

²³ ICC-01/05-01/08-321.

²⁴ Ibid., p. 13-14.

²⁵ Ibid., p. 14-17.

²⁶ Ibid., p. 15, para. 37.

²⁷ Ibid., pps 17-18, para. 43.

²⁸ Ibid., p. 14, para. 41.

investigations into a situation outside of the Democratic Republic of Congo (hereinafter referred to as “DRC”).

24. Furthermore, the Defence submitted that it will be impossible to establish existence of a criminal common plan between Bemba and Patasse, if the latter does not appear in joint proceedings along with the suspect. The Defence also submitted that the establishment of a truth and reconciliation commission in the Central African Republic (hereinafter referred to as “CAR”), a political process has been given preference over a judicial process; in this context, Patasse is unlikely to be called before the ICC, and this new circumstance constitutes a violation of a right to a fair trial that Bemba must be able to enjoy. Moreover, the Defence referred to the various Decisions of the Chamber and submitted that those decisions did not consider the ground stipulated in Article 58 (b) (iii) of the Statute relating to the risk of a commission of crime, and advanced reasons why the suspect would not be in a position to commit further crimes, if released. Finally, the Defence submitted that both DRC and CAR witnesses either enjoy government protection or are considered for protection in the ongoing national dialogue in the CAR, and Bemba would in these circumstances not be in a position to intimidate or interfere with these witnesses. Last, the Defence stipulated conditions to which Bemba would submit himself, should the Chamber grant the request with conditions.

Prosecution’s Response to Defence’s Submissions

25. For the reasons elaborated below, the Prosecution disputes the Defence’s submission in its entirety and submits that the Defence’s Request be dismissed for failure to disprove the applicability of statutory grounds stipulated in Article 58(b) (i) to (iii) and 60(2) of the Statute, upon which the Defence’s Third Application is based.

26. First, it is premature to consider the 926 pages of Defence evidence, which has been disclosed to the Prosecution and the Chamber for the purpose of the confirmation of charges hearing. The Chamber is yet to undertake an analysis of the Defence evidence, whose reliability will be tested in the upcoming confirmation of charges hearing. The Prosecution submits that at the hearing, the Defence has ample opportunity to demonstrate how its disclosed evidence disproves the evidential threshold required for both Article 58 of the Statute and the confirmation hearing. Finally, the Prosecution submits that the Defence has not undertaken any analysis in its application, as to how its disclosed evidence disproves the

existence of reasonable grounds to believe that Bemba committed the alleged crimes, which fall within the jurisdiction of the Court. Consequently, there is nothing warranting a change in the Chamber's findings contained in both the 20 August 2008 and 16 December 2008 Decisions.

27. Second, the Prosecution submits that the other points made by the Defence and relating to the activities of President Kabila and other named individuals, as well as former President Patasse are not pertinent considerations under Articles 58(1) and 60(2) of the Statute to be taken into account by the Chamber in the determination of an application for interim release. Additionally, the Defence has not made any showing as to how these considerations are relevant factors to be considered for interim release under Articles 58(1) and 60(2) of the Statute.

28. Third, the Prosecution submits that the Chamber in its determination of an application for interim release need not rely on all the three substantive grounds under Article 58(1) (b) of the Statute. It has been held by the Appeals Chamber that the reasons for detention pursuant to Article 58(1) (b) (i) to (iii) of the Statute are in the alternative.²⁹ In the determination of an application for interim release, any of the three conditions under Article 58(1) of the Statute is sufficient to warrant the continued detention of the suspect. As to the Defence's submission that Bemba is not in a position to commit crimes as stipulated under Article 58 (b) (iii) of the Statute, the Prosecution refers to the direction of the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. In that case, the Appeals Chamber determined inter alia; "that what justifies arrest and continued detention under article 58(1) (b) of the Statute is that it must appear to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence".³⁰

29. Fourth, the Prosecution submits that the Defence's references to the letters of Javier Solana and Jean-Louis Michel do not in any way address any of the grounds for interim release under Article 58 of the Statute. In these circumstances, the referred letters are not pertinent considerations for a determination for interim release stipulated under Articles 58 and 60(2) of the Statute.

²⁹ Appeals Chamber, "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, para 139 and ICC-01/04-01/07-572, para. 20.

³⁰ ICC-01/04-01/07-5732, para. 21.

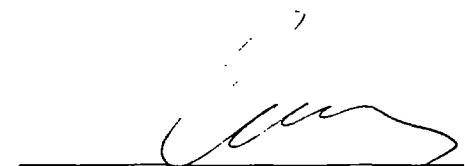
30. Fifth, the Defence's reference to the fact that DRC witnesses enjoy [REDACTED] protection and would therefore not be in a position to interfere with them does not accord with facts and evidence in the Court's possession. As an illustration, the Prosecution refers to the Chamber's finding on 21 October 2008, in proceedings, independent of any prosecution's participation. On that date, the Chamber justified granting protection to victims who applied to participate on the ground that the suspect still wields significant influence over the Mouvement de Libération du Congo (hereinafter referred to as the "MLC") and in these circumstances, would be able to locate and reach the victims/applicants.³¹

31. Last, with respect to CAR, the Defence's submission that his former allies in the CAR are no longer in a position to exert pressure on CAR witnesses because of their inclusion in the political dialogue lacks merit. [REDACTED]

[REDACTED] In these circumstances, it is reasonable to conclude that if released, Bemba would be in a position to interfere with Prosecution witnesses in the CAR.

Conclusion

32. In light of the foregoing, the Prosecution respectfully requests the Chamber to dismiss the Defence's Third Application for interim release in its entirety, both on the ground of procedural violation and also on the basis that the conditions stipulated in Article 58(1) (b) (i) and (ii) of the Statute continue to be met. Additionally, the Defence has not undertaken any in-depth analysis as to how it's disclosed 926 pages of evidence disproves the existence of both reasonable grounds to believe that Bemba had committed the alleged crimes within the jurisdiction of the Court and the applicability of the conditions specified in Article 58(1) of the Statute. Accordingly, the Prosecution submits that Article 58(1) conditions continue to be met. Consequently, the detention of Bemba must be maintained at the ICC Detention Unit in The Hague.



Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of January 2009

At The Hague, The Netherlands

³¹ ICC-01/05-01/08-184, p. 6, para. 13.