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Date: 24 August 2010

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

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

Public Document

**Observations of the OPCV as Legal Representative of the Victims on the Defence's
Interlocutory Appeal Against the Decision on the Continued Detention of the
Accused**

Source: Office of Public Counsel for Victims, legal representative of Victims
a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08,
a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08,
a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09,
a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09,
a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08,
a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08,
a/0572/08, a/0651/09, a/0652/09 and a/0653/09

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

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**Unrepresented Applicants for
Participation/Reparations**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL HISTORY

1. On 28 July 2010, Trial Chamber III issued the *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence* (the “Decision”), ordering the accused’s continued detention.¹

2. On 29 July 2010, the Defence filed a notice of appeal against the said Decision.²

3. On 30 July 2010, the Appeals Chamber designated Judge Akua Kuenyehia as Presiding Judge in the said interlocutory appeal lodged by the Defence.³

4. On 4 August 2010, the Defence filed its Document in support of the appeal against the Decision on the continued detention of the accused.⁴

5. On 5 August 2010, Principal Counsel of the Office of Public Counsel for Victims, as the legal representative of Victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09

¹ See *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence* (Trial Chamber III), ICC-01/05-01/08-843, 28 July 2010.

² See “Defence Notice of Appeal Against the Decision of Trial Chamber III of 28 July 2010 entitled *Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*”, ICC-01/05-01/08-844-tENG, 19 July 2010.

³ See *Decision on the Presiding Judge of the Appeals Chamber in the appeal of Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rule (Appeals Chamber)*, ICC-01/05-01/08-845, 30 July 2010.

⁴ See “Document in Support of the Defence Appeal against the Decision of Trial Chamber III of 28 July 2010 entitled *Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant to rule 118(2) of the Rules of Procedure and Evidence*”, ICC-01/05-01/08-847-tENG, 4 August 2010.

and a/0653/09 (the “Legal Representative”), filed an Application to participate in the said appeal.⁵

6. On 10 August 2010, the Office of the Prosecutor filed its Response to the Document submitted by the Defence in support of its appeal.⁶

7. On 11 August 2010, the Appeals Chamber issued an Order inviting the Office of the Prosecutor and the Defence to respond to the Legal Representative’s Application for participation in the said appeal.⁷

8. On 16 August 2010, the Defence⁸ and the Office of the Prosecutor⁹ filed their Responses to the Legal Representative’s Application to participate in the said appeal.

9. On 18 August 2010, the Appeals Chamber issued a Decision granting leave to the victims represented by the Office of Public Counsel for Victims to participate in the Defence appeal by submitting their views and concerns in writing by 24 August 2010.¹⁰

⁵ See “Application by the OPCV in its Capacity as Legal Representative of the Victims for Participation in the Interlocutory Appeal Filed by the Defence Challenging the Decision of Trial Chamber III of 28 July 2010”, ICC-01/05-01/08-848-tENG, 5 August 2010.

⁶ See “Prosecution response to Defence Document in support of the Appeal against ‘Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, ICC-01/05-01/08-850-Conf and -Red, 10 August 2010 (the “Response of the Office of the Prosecutor”).

⁷ See *Order on the filing of a response to the application by victims for participation in the appeal against the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” of Trial Chamber III* (Appeals Chamber), ICC-01/05-01/08-851 OA 4, 11 August 2010.

⁸ See “Réponse de la Défense à la requête du Bureau du Conseil Public pour les Victimes (BCPV) du 5 Août 2010”, ICC-01/05-01/08-853, 16 August 2010.

⁹ See “Prosecution’s response to request by victims to participate in appeal against the ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, ICC-01/05-01/08-854, 16 August 2010.

¹⁰ See *Decision on the Participation of Victims in the Appeal against the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” of Trial Chamber III* (Appeals Chamber), ICC-01/05-01/08-857 OA 4, 18 August 2010.

10. Accordingly, the Legal Representative respectfully submits to the Chamber the following Observations on the Defence appeal against the Decision of Trial Chamber III on the accused's continued detention.

II. THE CHAMBER DID NOT ERR IN FACT OR IN LAW IN ITS ASSESSMENT OF THE CRITERIA RELEVANT TO THE REVIEW OF THE ACCUSED'S DETENTION

11. The Legal Representative would first of all indicate that she concurs with all of the points raised by the Office of the Prosecutor in its Response to the Defence's notice of appeal¹¹ and, accordingly, will revisit only some of the arguments submitted by the Defence, following the sequence of the grounds as set out in its Document in Support of the Appeal.¹²

1. The Defence's first ground of appeal

12. In respect of the Defence's first ground of appeal,¹³ the Legal Representative submits, firstly, that Trial Chamber III conducted a review of the facts before it, as required by article 60(3) of the Rome Statute and rule 118(2) of the Rules of Procedure and Evidence, and, secondly, that there is no provision in the Court's basic documents stipulating a change in the composition of the Chamber as a factor to be taken into account in the review under rule 118(2).

13. Thus the Legal Representative notes that the only criterion mentioned in article 60(3) of the Rome Statute for the periodic review of a ruling on a person's release or continued detention is that the Chamber must be satisfied that changed circumstances require modification of its previous decisions on the issue. Any change in circumstances is assessed in light of the conditions set out in article 58(1) of the Rome Statute, which stipulates that arrest and, *a fortiori*, detention of the accused must be necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct the investigation or the court proceedings, *or* to prevent the

¹¹ See Response of the Office of the Prosecutor, *supra*, footnote 6.

¹² See Document in Support of the Defence Appeal, *supra*, footnote 4.

¹³ *Idem*, paras. 11 to 26.

person from continuing with the commission of the crime or crimes of which he or she is accused. Furthermore, under article 60(4) of the Statute, the Chamber may also consider releasing the accused if it finds that there has been an inexcusable delay attributable to the Prosecutor.

14. In the instant matter, not only did the Chamber take into account the arguments submitted by each of the participants to the proceedings in order to assess whether the circumstances have changed, but it did so, moreover, in light of the pertinent facts governing the assessment of the criteria of article 58(1) of the Statute, to which the Chamber refers in the first part of its Decision. It is the Legal Representative's submission that assessment of the criteria under article 60 of the Rome Statute necessarily goes hand in hand with the article 58 criteria, since the assessment of changed circumstances cannot take place *in abstracto* and must be based on an examination of the facts of the matter.

15. Furthermore, and contrary to what the Defence appears to suggest in its Document, the criteria set out in rule 119 of the Rules of Procedure and Evidence in relation to the conditional release of an accused relate to a different legal regime from that of rule 118(2). It therefore follows that a Chamber's periodic review pursuant to the latter rule does not include the matters referred to in rule 119 and does not represent the same form of assessment.

16. As far as the change in the composition of the Chamber is concerned, and in view of the Defence's reference to the jurisprudence of the Appeals Chamber, the Legal Representative notes that that jurisprudence is not directly transposable to the current matter, since, notwithstanding the fact that – contrary to what the Defence alleges – the Chamber reviewed its decision on continued detention in accordance with the applicable provisions, the impugned decision was, moreover, issued in the same case, and in the course of the same proceedings. The Legal Representative further submits – contrary to what the Defence contends – that not only may a trial chamber endorse a decision issued by the pre-trial chamber, namely at a previous

stage of the proceedings,¹⁴ but, *a fortiori*, it may also endorse the decisions it has already issued itself, even if there has been a change in its composition.

17. Furthermore, as to the Defence's contention that the Chamber did not take account of the new facts presented to it as constituting a change in circumstances warranting modification of the decision on the continued detention of the accused, and that it is not incumbent upon the Defence to set out those facts and thereby risk a reversal of the burden of proof, which would be inconsistent with the rights of the accused, the Legal Representative submits that not only do the two limbs of this argument appear to be mutually contradictory, but also, since the Defence is seeking to submit an application by relying on such changed circumstances, it is not sufficient for it to refer to rule 118(2) of the Rules of Procedure and Evidence without providing any evidence in support of its claims. The fact that the Defence is obliged to substantiate its request in no way constitutes a reversal of the burden of proof to its detriment, but rather an obligation as a participant in the proceedings to file well-argued submissions containing the reasons justifying its requests. Furthermore, it seems obvious that the Chamber can only assess an alleged change in circumstances in light of the facts presented to it; insofar as the Defence is arguing that there are indeed changed circumstances, it is then for the Defence to explain them and for the Prosecutor to respond as necessary, since the opposite makes no sense in light of the respective mandates and objectives of the participants in the proceedings.

18. Lastly, the Legal Representative challenges the Defence's allegation that it is unaware of the facts on which the Chamber based its review, since it is precisely those facts to which the Chamber refers in the first part of its Decision, and, furthermore, as the Office of the Prosecutor notes in its Response,¹⁵ those facts correspond to the arguments previously submitted by the participants in the

¹⁴ See *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, (Trial Chamber I), ICC-01/04-01/06-1084, 13 December 2007, para. 6: "[...] the Trial Chamber should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so".

¹⁵ See Response of the Office of the Prosecutor, *supra*, footnote 6, paras. 12 and 15.

proceedings – arguments of which the Defence is aware, having already challenged them on several occasions.¹⁶

19. Lastly, the Legal Representative emphasises the erroneous nature of the Defence's assertion that the Chamber cannot continue the accused's detention *solely* on the basis of the *risk* that he might abscond, and refers in this regard to the decision of Pre-Trial Chamber II of 14 August 2009, which, referring to an Appeals Chamber judgment, made it clear that article 58(1) of the Rome Statute had to be read as requiring only that the *possibility*, not the inevitability, of an occurrence of one of the criteria be shown.¹⁷

2. The Defence's second ground of appeal

20. In respect of the Defence's argument that the Chamber erred in not taking into account, as a factor supporting a *manifest* change in circumstances, the possibility of contacting States which, in the event of the accused's release, *might* agree to host him on their territory and which *would provide* the requisite guarantees for his provisional release, the Legal Representative recalls the Chamber's decision of 1 April 2010 whereby: "the availability of potential host States is an irrelevant consideration if the decision of the Chamber is that there has been no material change since 8 December 2009. It follows that the theoretical possibility that unspecified countries may be

¹⁶ See inter alia the facts to which the Office of Public Counsel for Victims refers in its capacity as legal representative and those to which the Office of the Prosecutor refers in, respectively: "Observations of the Legal Representative regarding the review of the detention of Mr Jean-Pierre Bemba Gombo", ICC-01/05-01/08-825, 15 July 2010, and "Prosecution's Observations on the Review of the Pre-Trial Detention of Jean-Pierre Bemba Gombo", ICC-01/05-01/08-828-Red, 15 July 2010 – as reflected by Trial Chamber III in its impugned Decision, at paragraphs 15 and 16, and 8 to 10 respectively, *supra*, footnote 1.

¹⁷ See *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa* (Pre-Trial Chamber II, Single Judge), ICC-01/05-01/08-475, 14 August 2009, para. 40: "The criterion of 'appearance' within article 58(l)(b) of the Statute, as interpreted by the Appeals Chamber, revolves around the possibility, not the inevitability, of a future occurrence".

prepared to assist is irrelevant, given the Chamber's overall conclusion that there has been no material change in circumstances".¹⁸

21. Accordingly, the Legal Representative submits that the Defence's second ground has no relevant basis in law, and recalls that, in the Defence's own words, the fact that it "[sought] to present new evidence [...] to Trial Chamber III"¹⁹ (in a subsequent alternative application) is indeed confirmation of the fact that the guarantees to which it refers are currently theoretical and, what is more, represent a rehearsal of arguments already formulated by the Defence in the past, and as such are not a concrete factor indicating a change in circumstances which the Chamber ought to have taken into account in the review it undertook pursuant to rule 118(2) of the Rules of Procedure and Evidence.

22. Lastly, the Legal Representative recalls that the criteria set out in article 58(1) of the Statute are alternative, not cumulative, and that therefore a finding by the Trial Chamber that the continued detention of the accused is necessary in order to ensure his appearance at trial is thus sufficient for it to decide to uphold its decision on the matter and not to release the accused.²⁰ Moreover, since the Chamber considers that there is a risk that the accused might abscond, it is apparent in this respect, as the Office of the Prosecutor submits,²¹ that such a risk is not contingent upon the day of the week and that, accordingly, temporarily releasing the accused each weekend is clearly incompatible with such an assessment.

¹⁸ See *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence* (Trial Chamber III), ICC-01/05-01/08-743, 1 April 2010, para. 32. See also *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"* (Appeals Chamber), ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 106 *et seq.*: "It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release".

¹⁹ See Document in Support of the Defence Appeal, *supra*, footnote 4, para. 29.

²⁰ See Appeals Chamber Judgment of 2 December 2009, *supra*, footnote 18, para. 89.

²¹ See Response of the Office of Prosecutor, *supra*, footnote 6, para. 31 *inter alia*.

23. As to the Defence's argument concerning the Registry's responsibility under rule 20 of the Rules of Procedure and Evidence,²² the Legal Representative simply submits that, at the present time, not only is there no such responsibility deriving directly from the said rule, but also that, if such were the case, it would be for the Chamber, should it deem it necessary, to ask the Registry to make provision for such support to the Defence. However, it is clear from the Chamber's decisions pertaining to the review of the accused's continued detention that it does not consider that it need do so for the time being.

3. The Defence's third ground of appeal

24. In this regard, the Legal Representative fully concurs with the reasoning of the Office of the Prosecutor as to the distinction to be made between the legal regimes applicable, on the one hand, to continued detention and, on the other, to the release of the accused and to the "modified" detention regime²³ to which the Defence refers.

25. Accordingly, the Legal Representative would merely note that the Defence is unclear in its requests, since it submits arguments in support of its alternative application for release, yet which are rather relied on in practice in support of a "conditional detention" regime, and not of release.²⁴ Furthermore, over and above this confusion in relation to the relevant legal regimes, the Legal Representative observes that the Defence has not informed the Chamber of any concrete guarantees which would effectively "obviate the risk that he might abscond, on which the Chamber relies in order to dismiss the application for interim release of the accused", or would constitute "[a] detention regime [...] respond[ing] directly to the issue of the risk of flight".²⁵

²² See Document in Support of the Defence Appeal, *supra*, footnote 4, paras. 35 *et seq.*

²³ See Response of the Office of Prosecutor, *supra*, footnote 6, paras. 26 *et seq.*

²⁴ See Document in Support of the Defence Appeal, *supra*, footnote 4, paras. 51 *et seq.*

²⁵ *Idem*, paras. 59 *et seq.*

FOR THE FOREGOING REASONS, the Legal Representative of Victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 respectfully requests the Chamber to dismiss the Defence appeal and to uphold the Decision of Trial Chamber III ordering the continued detention of the accused.

[signed]

Paolina Massidda
Principal Counsel

Dated this 24 August 2010

At The Hague, The Netherlands