

**Cour
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**International
Criminal
Court**



Original: **English**

No.: **ICC-01/05-01/08 OA8**

Date: **07 September 2011**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Akua Kuenyehia
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

Confidential

**Prosecution's Response to the "Document à l'appui de l' Acte d'Appel de la
Défense contre la décision de la
Chambre de Première Instance III du 30 Août 2011 intitulée " Summary of the
Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba
Gombo afin d'accomplir ses devoirs civiques en République Démocratique du
Congo" et sa version complète notifiée le 2 Septembre 2011"**

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Introduction

1. On 30 August and 2 September 2011 Trial Chamber III issued a summary and a reasoned decision, respectively, whereby it rejected the request of Mr Bemba ("the Appellant") for temporary provisional release for a total period of 15 hours, to allow him to return to the DRC to obtain a voting card and register his candidacy for the upcoming presidential and parliamentary elections ("the Decision").¹ The Chamber considered the purported new facts advanced by the Appellant and concluded that there continued to be a risk of the Appellant absconding. Accordingly, the Chamber found no change in the circumstances which led to the Chamber's prior 27 June denial of interim release.
2. On 5 September 2011 the Appellant filed his document in support of appeal against the Summary and the Decision, in which he alleges that the Trial Chamber committed two errors of fact ("Appeal Brief").² First, the Chamber allegedly erred by (a) failing to find that the letter of the president of the DRC Senate ("Senate Letter") constituted a change of circumstances, and (b) failing to request additional information from the DRC authorities. Second, the Appellant argues that the Chamber also erred by failing to consider the elements advanced by the Appellant as conditions for release under Rule 119.
3. The Prosecution submits that the Appeal Brief should be dismissed. The Trial Chamber made no factual errors in concluding that the circumstances justifying the Appellant's detention remain unchanged. Firstly, the Trial Chamber correctly assessed that the Senate Letter does not signify a change, because it did not demonstrate either willingness or ability on behalf of the DRC to enforce surveillance or monitoring measures should the Appellant be allowed to return there. Moreover, and as recognized by the Appellant, the president of the DRC

¹ ICC-01/05-01/08-1691-Conf. A public redacted version of the Decision has been filed (ICC-01/05-01/08-1691-Red); and the Appellant's Request is ICC-01/05-01/08-1639-Conf.

² ICC-01/05-01/08-1702-Conf. Note that the Appellant indicates in an introductory paragraph that the Chamber committed procedural, legal and factual errors (para.2); however, he only refers to factual errors when it presents the two grounds of appeal.

Senate has no identifiable authority to bind the DRC government to implement such measures. In sum, the Letter has no bearing on the Appellant's risk of flight. Secondly, since the Trial Chamber considered that its prior ruling on release from 27 June remained unchallenged and the Appellant still posed a risk of flight, it did not need to consider whether any conditions under Rule 119 could eliminate such risk. Regardless of this fact, most of the purported conditions listed by the Appellant had either been considered by the Chamber in its June decision or had not been presented before the Trial Chamber in the Appellant's Request.

Procedural Background

4. On 27 June 2011 the Trial Chamber issued its "Decision on Applications for Provisional Release" whereby it rejected three different applications by the Appellant for interim release. Among them, the Chamber rejected the Appellant's request to travel to the Democratic Republic of the Congo ("DRC") to register for the upcoming elections on the ground that Appellant failed to provide a sufficient legal and factual basis and because it found that he remained a flight risk ("the June Decision").³
5. On 28 June 2011 the Appellant sent a letter to the vice-prime minister - Minister of Interior requesting that he be allowed to register to vote in the DRC and inquiring whether the DRC might be prepared to implement security measures, including permanent surveillance and ensure the Appellant's return to The Netherlands ("the 28 June Letter").⁴

³ ICC-01/05-01/08-1565-Red, paras.68-72.

⁴ ICC-01/05-01/08-1639-Conf-AnxA.

6. On 19 August 2011, the Appeals Chamber confirmed in part the June Decision and upheld the Trial Chamber's ruling with respect to the DRC trip to register to vote.⁵
7. On 22 August 2011 the President of the DRC Senate responded to another letter from the Appellant dated 15 August and stated the following ("Senate Letter"):

J'ai bien reçu votre lettre du 15 août 2011 relative à l'objet repris en concerne. A ce sujet, j'ai conféré avec le Vice-Premier Ministre, Ministre de l'Intérieur et Sécurité, Monsieur Adolphe LUMANU BWANA SEFU. Il a bien reçu votre lettre. Il estime que votre client peut venir s'enrôler au moment où il viendra déposer sa candidature.⁶
8. On 24 August 2011 the Appellant renewed his request to travel to DRC to register to vote and submitted an urgent filing requesting that the Appellant be granted temporary provisional release to the DRC, prior to 5 September 2011, for a total period of 15 hours in order to obtain a voting card and register his candidacy for the upcoming presidential and parliamentary elections ("Defence Request").⁷ The Appellant argued, inter alia, that a change in circumstances – his own personal undertaking to return to the seat of the Court, and the letter issued by the president of the DRC Senate – justified his new request for temporary release.
9. The Prosecution, the legal representatives and the OPCV opposed the Defence Request.⁸
10. Because the Appellant had requested that a decision be rendered by the end of August, the Chamber issued a summary order on 30 August denying the request and explaining that a decision setting out its full reasoning would follow.⁹

⁵ ICC-01/05-01/08-1626-ConfOA7, paras.82-85.

⁶ ICC-01/05-01/08-1639-Conf-AnxB. Note that neither the Prosecution nor the Trial Chamber have been provided with the Appellant's 15 August letter. See Decision, fn.27.

⁷ ICC-01/05-01/08-1639-Conf.

⁸ ICC-01/05-01/08-1659-Conf; ICC-01/05-01/08-1660-Conf; ICC-01/05-01/08-1661-Conf.; ICC-01/05-01/08-1670-Conf.

⁹ ICC-01/05-01/08-1672.

11. On 1 September 2011 the Appellant filed its notice of appeal against the Summary.¹⁰
12. On 2 September 2011 Trial Chamber III issued a fully reasoned decision rejecting the Appellant's application. It accepted that the Appellant's undertaking that he would return to The Hague and would not interfere with witnesses was new, and thus constituted a changed circumstance. Nonetheless, it adhered to its earlier finding that, notwithstanding the Appellant's new (but unverifiable) promise to return, he continued to pose a flight risk ("the Decision").¹¹ As to the Senate Letter, it found that that was not a changed circumstance under Article 60(3). The Chamber stated that the Senate Letter only served to confirm that the Appellant could enrol (and obtain a *carte d'électeur*) at the time he submitted his candidature, but it had no bearing on whether the Appellant posed a flight risk. According to the Chamber, the Letter was a response to a letter of the Appellant dated 15 August – and not to a prior letter sent by the Appellant in June that had requested security and monitoring measures if the Appellant was to be released. In that regard, it noted that the Senate Letter did not constitute an agreement by the DRC to implement any surveillance measures. The Chamber also found that it was unclear whether the author of the Senate Letter, the president of the Senate, could bind the DRC authorities. The Chamber finally declined to seek observations from the DRC and MONUSCO as it was not considering the release of the Appellant.
13. On 5 September 2011 the Appellant filed his Document in Support of Appeal against the Summary and the Decision ("Appeal Brief").¹² Pursuant to the Appeals Chamber's order,¹³ the Prosecution hereby responds to the Appeal Brief.¹⁴

¹⁰ ICC-01/05-01/08-1690.

¹¹ ICC-01/05-01/08-1691-Red.

¹² Appeal Brief, para.11. The Prosecution notes that the Appellant filed no Notice of Appeal against the Decision, but he did against the Summary.

¹³ ICC-01/05-01/08-1705OA8.

¹⁴ Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Prosecution files this appeal confidential as it follows the same confidential level of the filings before the Trial Chamber and that of the Appeal Brief.

Standard of Review

14. In its recent Judgment OA7, rendered in this same case, the Appeals Chamber reiterated the standard of review for appeals against decisions on release. It also set the standard of review for factual errors raised in such appeals.
15. In relation to the standard of review for appeals on release, the Appeals Chamber held that “[it] will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.”¹⁵ Regarding errors of fact alleged in appeals related to interim release, the Appeals Chamber held that a Chamber commits a factual error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues.¹⁶ The Appeals Chamber further found that the appraisal of evidence lies in the first place with the Chamber considering the request for interim release. Therefore, “in determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will ‘defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention’ and will intervene ‘only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’”¹⁷

¹⁵ ICC-01/05-01/08-1626-ConfOA7, para.44 quoting ICC-01/05-01/08-631-RedOA2, para.62.

¹⁶ ICC-01/05-01/08-1626-ConfOA7, para.45; see authorities cited in fn.69.

¹⁷ ICC-01/05-01/08-1626-ConfOA7, para.45 quoting ICC-01/04-01/07-572OA4,para.25 and ICC-01/04-01/10-283OA, para.17.

Submissions

16. The Prosecution submits that the Chamber committed no error in the Decision: the Chamber correctly took the June Decision as starting point; it then assessed whether the Senate Letter and the Appellant's undertaking constituted a change of circumstances; it found that while the Letter was not a changed circumstance, the undertaking was; however, it concluded that, in light of all relevant factors, the Appellant still posed a risk of flight. Since the Chamber declined to consider the conditional release of the Appellant because of the risk of flight, it determined that it was not necessary to solicit observations from the DRC authorities and MONUSCO.

1. The Trial Chamber did not err when it found that the Senate Letter was not a changed circumstance under Article 60(3)

17. The Appellant submits that the Senate Letter is a changed circumstance because of its sender (the president of the DRC Senate) and its content. The Appellant argues that it was appropriate for the president of the Senate to issue the Letter because the Appellant was a member of the Senate. He also claims that that the President could have not issued the Letter without the prior authorization from the government or, at least, the vice-prime minister - Minister of the interior – who purportedly is the best placed authority to confirm which surveillance and security measures can be taken.¹⁸ Second, the Appellant contends that his 28 June Letter to the vice-prime minister - Minister of the interior set out monitoring/security measures and that the Senate Letter constituted a preliminary agreement of the DRC to implement the measures, as it purportedly also deals with measures of “monitoring and protection”.¹⁹

18. Thus, according to the Appellant, the Chamber erred when it found that the Senate Letter was not a response to his earlier 28 June Letter. He contends that

¹⁸ Appeal Brief, paras.16,21-22.

¹⁹ Appeal Brief, paras.18-19.

the Chamber erred in failing to read the Senate Letter together with the 28 June Letter.²⁰ And he further argues that the Chamber also erred when it failed to request observations from the DRC with respect to the measures that the DRC could implement and to inquire whether the president of the Senate had the authority to bind the DRC.²¹

(i) The Trial Chamber reached the correct inferences and correctly concluded that the Senate Letter did not constitute an agreement on the implementation of surveillance/security measures

19. The Prosecution submits that the Chamber committed no factual error and drew the correct inferences when it concluded that the Senate Letter was not a response to the 28 June Letter, but rather to the Appellant's subsequent letter dated 15 August.²² The text of the Senate Letter leaves no margin of doubt – "J'ai bien reçu votre lettre du 15 août 2011 relative à l'objet repris en concerne".²³

20. Additionally, the Senate Letter does not express a "general willingness and ability [of the competent DRC authorities] to accept [the Appellant] and enforce conditions".²⁴ And contrary to what the Appellant contends, the Letter does not constitute an agreement to the Appellant's June request seeking to mitigate the risk of abscondment if he was to be released to the DRC.²⁵ The president of the Senate stated simply that, "[...] after conferring with the vice-prime minister, Minister of Interior and Security [...], he considers that [the Appellant] can enrol at the time he submits his application".²⁶ In other words, it confirms that the trip would not be a wasted effort, but says nothing about the possibility of flight or conditions to prevent flight.

²⁰ Appeal brief, para.11.

²¹ Appeal Brief, paras.12-13.

²² Decision, paras.13-14.

²³ Senate Letter, Annex B.

²⁴ ICC-01/05-01/08-1626OA7, para.55.

²⁵ Decision, para.11.

²⁶ Senate Letter, Annex B. See Decision, para.14

21. Hence, the Chamber's conclusion that the Senate Letter did not provide the assurances sought by the Appellant in the 28 June Letter is factually correct.²⁷ This finding further indicates that – contrary to the Appellant's claim – the Chamber did read the Senate Letter along with Appellant's earlier 28 June Letter. As it specifically explained, the "two letters thus talk past each other, and this lack of responsiveness supports the inference that the Senate Letter is not a response to the June Letter".²⁸

(ii) The Trial Chamber correctly found that it did not need to seek observations from the DRC authorities

22. The Trial Chamber was also correct when it stated that it was unclear whether the author of the Senate Letter – the president of the Senate – had the authority to bind or to speak for the government of the DRC (and that no information had been provided in that regard).²⁹ In fact, the Appellant himself concedes this fact when he argues in the Appeal Brief that the relevant authority to assess which measures can be taken in matters of security and surveillance is the vice-prime minister, Minister of interior.³⁰

23. Without addressing his own failure to meet his burden of proving that the government of the DRC backed the statements in the Senate Letter, the Appellant argues that the Trial Chamber should have contacted the DRC to clarify this aspect. He refers to the recent OA7 Appeals Judgment as supporting authority, citing this Chamber's statement that in certain cases a Trial Chamber should seek further information from States in order to issue an informed decision on conditional release.³¹ This argument is flawed, and the Appellant's reliance on the Bemba OA7 Judgment is misplaced. First, the Appeals Judgment found that national authorities should be approached only if (1) the Chamber is considering

²⁷ Decision, para.14.

²⁸ Decision, para.14. A contrario Appeal Brief, para.11.

²⁹ Decision, para.15.

³⁰ Appeal Brief, paras.21-22.

³¹ ICC-01/05-01/08-1626-ConfOA7, para.2.

conditional release, and (2) the State has indicated its general willingness and ability to accept the detained person and enforce conditions.³² Neither of those premises apply to the instant case, since the Trial Chamber stated that the Senate Letter was *not* a changed circumstance that might require modification of its prior June Decision and in particular concluding that the Senate Letter did nothing to affect the finding that Appellant posed a flight risk.

24. As a result, having rejected the possibility of conditional release, and the DRC authorities having not indicated their ability to enforce conditions if the Appellant was granted release³³ – the two predicate factors that the Appeals Judgment identified – the Chamber did not need to explore whether the State could enforce conditions to enable the release.³⁴

25. In any event, and as noted above, the Bemba OA7 Judgment was issued in the context of a specific factual scenario and should not be construed as imposing a duty on Chambers of the Court to consult with national authorities each time that an irrelevant or incomplete application is filed by a person seeking release. It is the Appellant's burden to demonstrate that there has been a genuine change of circumstances pertaining to his detention and to ensure that the documents that supposedly demonstrate the alleged change are clear in that respect.

26. In sum, as it correctly found, the Senate Letter actually dealt with a different matter, namely the enrolment and registering of Bemba's candidacy.³⁵ The Trial Chamber also correctly found that the Senate Letter was not a changed circumstance that impacted on the Appellant's risk of abscondment and required the Chamber to revisit its June Decision.³⁶

³² ICC-01/05-01/08-1626-ConfOA7, para.55.

³³ Decision, paras.16-17.

³⁴ Decision, para.26.

³⁵ Decision, para.14. This conclusion is in line with the Appeals Chamber's jurisprudence that requires that changed circumstances have a bearing on the conditions under article 58(1). See ICC-01/05-01/08-1019OA4, para.52).

³⁶ Decision, paras.17,23.

2. The Trial Chamber did not err when it decided not to consider additional factors purportedly advanced by the Defence

27. The Appellant argues that the Trial Chamber committed an error of fact since it did not consider measures proposed by the Appellant that supposedly could diminish his risk of abscondment, in particular the following: (1) the Registry could choose an air company that the Appellant would use should he be authorized to fly to DRC; (2) the Chamber, together with the DRC authorities, could choose the Congolese province where Bemba would exercise his civic duties; (3) Dutch policemen could escort Bemba to the DRC; and (4) the decision granting release and its execution would be secret.³⁷

28. The Prosecution submits that the Appellant's second ground of appeal should be dismissed *in limine*. Indeed, as the Trial Chamber correctly found that the Appellant continued to pose a risk of flight and that the June Decision remained untouched, it did not need to assess whether release subject to conditions under Rule 119(1) would mitigate or eliminate such risk.³⁸ Hence, the Appellant's submissions that the Chamber had to consider the conditions advanced in his Request are misguided.³⁹

29. The Prosecution further notes that two of the four purported "conditions" had not been specified – or presented as such - before the Trial Chamber. First, the Appellant never suggested that Trial Chamber III together with the DRC authorities could choose where, within the DRC, the Appellant could exercise his civic duties. The Appellant only explained that after several failed efforts to enroll without traveling to the DRC, the authorities had indicated that he had to travel and that he could enroll in any one of three different provinces or in the city of Kinshasa. The Appellant made those submissions solely in the context of

³⁷ Appeal Brief, para.25.

³⁸ See ICC-01/05-01/08-1626-ConfOA7, para.47 referring to Bemba OA2, para.105. The Appellant refers to this jurisprudence in para.24 of his Brief.

³⁹ Appeal Brief, para.24.

identifying the closest airports into which he could fly if release was granted.⁴⁰

The suggestion that the Chamber could consider the possibility of the Appellant enrolling in a province of the Chamber's choosing as a condition under Rule 119(1), for the purposes of mitigating his risk of abscondment, is made for the first time on appeal. Since the Appellant did not make the argument to the Trial Chamber it necessarily follows that the Chamber did not erroneously refuse to consider it.⁴¹

30. Similarly, the Appellant never argued that the fact that the decision on release and its execution could be issued and executed confidentially constituted a similar condition. He only explained that the confidentiality level of his filing had been chosen "to facilitate the implementation of a decision on interim release, if granted" and referred to a prior Trial Chamber decision where the Appellant was granted interim release to attend his stepmother's funeral.⁴² In this regard, the Chamber correctly concluded that this explanation did not provide a sufficient basis for the marked security classification, in particular since the public redacted version of the June Decision disclosed, *inter alia*, that the Appellant had sought to travel to the DRC to obtain a voting card. The Chamber however maintained the confidential classification as the filings referred to the *Bemba* OA7 Judgment.⁴³

31. In addition, a third factor - the letter from the Host state, which the Appellant uses to base his claim that Dutch policemen would escort him to any State where he is granted interim release - was already invoked by the Appellant in his prior application for release,⁴⁴ and dismissed as "unavailing" by the Chamber in the subsequent June Decision. In that Decision the Chamber noted that the Dutch

⁴⁰ Defence Request, paras.30-33.

⁴¹ The Prosecution accepts the possibility that, in a rare case, a factor may be so obvious that a Pre-Trial or Trial Chamber can be held to a duty to consider it even if the party alleging error on appeal failed to argue the point expressly. If such an exception were to exist, however, this clearly would not qualify.

⁴² Defence Request, para.4. In the decision cited in fn.1 – ICC-01/05 - 01/08 - 1099 - Red – the Trial Chamber merely stated that the parties should respect the confidentiality of *that* decision (para.19).

⁴³ Decision, paras.27-29.

⁴⁴ Appellant's Request, para.22 that refers to ICC-01/05-01/08-1387-Conf-Anx3. The Appellant had already argued the same fact in ICC-01/05-01/08-1387-Conf-Corr, para.24.

authorities did not undertake to ensure the return of the Appellant to trial.⁴⁵ Hence, and as found by the Appeals Chamber, the Chamber “[does not] have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”.⁴⁶ The Trial Chamber was thus correct in not entering into a discussion of this particular issue.

Conclusion

32. For the reasons set out above, the Prosecution requests the Appeals Chamber to dismiss the Appellant’s Document in support of Appeal.



Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of September 2011

At The Hague, The Netherlands

⁴⁵ 28 June Decision, para.58.

⁴⁶ ICC-01/05-01/08-1019OA4, para.53. With respect to a fourth condition raised by the Appellant – namely that the Chamber can choose the air company that he wishes – the Prosecution notes that a similar argument was raised in the prior OA7 appeal where the Appellant indicated that the Chamber could request the UN or another organization the provision of an aircraft for reasons of confidentiality – see ICC-01/05-01/08-1586-ConfOA7, para.37. Although the proposed condition is slightly different, as noted above, the Chamber did not need to consider it as it was not considering the possibility of the Appellant’s release.