

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/05-01/08
Date: **12 November 2012**

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO

Public Redacted Document

**Prosecution's observations on the Defence Application for the interim release of
Mr Jean-Pierre Bemba Gombo**

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 Gombo

Mr. Aimé Kilolo Musamba

Mr. Peter Haynes

Legal Representatives of Victims

Ms. Marie-Edith Douzima Lawson

Mr. Assingambi Zarambaud

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms. Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. Introduction

1. On 12 May 2011, Trial Chamber III (“Chamber”) requested¹ the Office of the Prosecutor (“Prosecution”) to submit its observations on the “Application for the interim release of Mr Jean-Pierre Bemba Gombo” (“Defence Application”) filed by the Defence on 3 May 2011.² The Defence argues that changed and new circumstances warrant a modification of the Chamber’s Decision on detention. It requests Mr Jean-Pierre Bemba Gombo (“Accused”)’s “interim release, to be limited to weekends and the Court’s judicial recess, subject to a guarantee from a State Party that he will appear at trial”.³ The Defence’s arguments are primarily based on the alleged “willingness” of the Belgian authorities to “respond” to the Defence’s request to receive the Accused on its national territory and to propose a protocol for securing his appearance at trial, in the event that the Court directs an inquiry into the matter.⁴ The Prosecution submits that contrary to the Defence suggestions, there has been no material change of circumstances that would justify interim release of the Accused. On the contrary, since the commencement of the trial, a significant portion of the Prosecution’s incriminating evidence has been presented against the Accused, increasing the risk of absconding and the need for his continued detention.

2. The Prosecution submits that the Defence Application should be rejected and that the detention of the Accused should be maintained for the following reasons:

- (i) The conditions justifying detention under Article 58(1) of the Rome Statute (“Statute”) continue to be met;

¹ ICC-01/05-01/08-1398-Conf, Decision requesting observations on the « Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo », 12 May 2011.

² ICC-01/05-01/08-1387-Conf+Anxs, Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo, 3 May 2011. On 4 May 2011, the Defence filed a corrigendum to the Defence Application (ICC-01/05-01/08-1387-Conf-Corr-tENG).

³ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 2 and 34.

⁴ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 10-15.

- (ii) There has not been any material change in the circumstances underpinning the Chamber's prior ruling on detention and there are no new circumstances that may have a bearing on the conditions under Article 58(1) of the Statute;⁵
- (iii) There has been no inexcusable delay by the Prosecution nor has the Accused been detained for an unreasonable period within the meaning of Article 60(4) of the Statute.

II. Procedural background

3. Following the Defence appeal⁶ of the Chamber's decision of 28 July 2010 which ordered the continued detention of the Accused,⁷ on 19 November 2010, the Appeals Chamber reversed the impugned decision and ordered a new review under Article 60(3) of the Statute as to whether the Accused should remain in detention or whether he should be released, with or without conditions ("Appeals Judgment").⁸

4. On 22 November 2010, the trial commenced as had been scheduled at a status conference on 21 October 2010.⁹

5. On 17 December 2010, the Chamber reviewed the detention of the Accused

⁵ ICC-01/05-01/08-1019 OA4, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo 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", 19 November 2010, at paras. 51-52. In this context, the Appeals Chamber clarified that "while [...] the Prosecutor does not have to re-establish circumstances that have already been established, he must show that there has been no change in those circumstances (ICC-01/05-01/08-1019 OA4, at para. 51).

⁶ ICC-01/05-01/08-844 OA4, Acte d'Appel de la Défense contre la décision de la Chambre de Première Instance III du 28 Juillet 2010 intitulée "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", 29 July 2010; and ICC-01/05-01/08-847 OA4, Mémoire à l'Appui de l'Acte d'Appel de la Défense contre la décision de la Chambre de Première Instance III du 28 Juillet 2010 intitulée « 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 », 4 August 2010.

⁷ ICC-01/05-01/08-843, 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, 28 July 2010.

⁸ ICC-01/05-01/08-1019 OA4.

⁹ ICC-01/05-01/08-T-30-ENG ET, 21 October 2010, p. 4, lines 16 to 20.

and ordered that the Accused shall remain in custody on the grounds that there has not been a change of circumstances sufficient to justify a modification of its ruling as to detention pursuant to Article 60(3) of the Statute; the requirements of Article 58(1)(b)(i) of the Statute continued to apply; there has been no inexcusable delay by the Prosecution pursuant to Article 60(4) of the Statute (“Decision”).¹⁰

6. On 3 May 2011, the Defence filed its Application seeking interim release of the Accused.¹¹

7. On 12 May 2011, the Chamber issued a decision requesting the Prosecution, legal representatives of victims and the Office of the Public Counsel for Victims to submit their observations on the Defence Application by 19 May 2011.¹² The Chamber also invited Belgium and the host State to submit their observations by 27 May 2011.¹³

III. Request for confidentiality

8. The Prosecution requests that pursuant to Regulation 23*bis* (2) of the Regulations of the Court, this filing be received by the Chamber as “Confidential” as it refers to confidential portions of the Defence Application.

IV. Prosecution’s observations

9. The Prosecution submits that there has been no change in the circumstances underlying the Decision ordering continued detention of the Accused, nor are there

¹⁰ ICC-01/05-01/08-1088, Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, 17 December 2010; see in particular para. 46.

¹¹ ICC-01/05-01/08-1387-Conf+Anxs, Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo, 3 May 2011. On 4 May 2011, the Defence filed a corrigendum to the Defence Application (ICC-01/05-01/08-1387-Conf-Corr-tENG).

¹² ICC-01/05-01/08-1398-Conf, at para. 8.

¹³ *Ibid.*

new facts or circumstances sufficient to satisfy the Chamber that a modification of its prior ruling is necessary. Therefore, the conditions of Article 58(1) of the Statute continue to be met and the detention of the Accused must continue.

The conditions justifying detention under Article 58(1) of the Statute continue to be met

10. In its Decision of 17 December 2010, the Chamber found that the detention of the Accused to ensure his appearance at trial pursuant to Article 58(1)(b)(i) of the Statute was necessary.¹⁴ The grounds underpinning this ruling were a) the gravity of the charges confirmed against the Accused; b) the potentially substantial sentence in case of conviction; and c) the financial and material support from which the Accused still benefits.¹⁵ The grounds continue to be met. There has not been any material change in these circumstances that would warrant a modification of the Chamber's ruling pursuant to Article 60(3) of the Statute.

11. To the contrary, while the gravity of the charges remain unaltered, the concerns about the likelihood of conviction and the related risk of non-appearance at trial have increased now as a significant portion of the Prosecution's incriminating evidence has been presented against the Accused. To date 20 out of the 40 witnesses scheduled to testify for the Prosecution have given evidence. In the Prosecution's view, the evidence presented against the Accused is strong; indeed, in certain respects the evidence of the Prosecution witnesses presented in this case is more incriminatory than their previous statements. Both this Chamber¹⁶ and the Appeals

¹⁴ ICC-01/05-01/08-1088, at paras. 46 and 48. The Prosecution agrees with the Defence that the ruling of detention to be reviewed is the Decision of 17 December 2010 (ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 3; see also ICC-01/05-01/08-1088; at para. 28).

¹⁵ ICC-01/05-01/08-1088, at para. 40.

¹⁶ ICC-01/05-01/08-1088, at para.40.

Chamber¹⁷ have found that there is a higher risk of flight due to the progress of the proceedings against the Accused.¹⁸

12. Similarly, there is no reason to depart from the prior finding of the Chamber with respect to the financial and material support available to the Accused, which he could use to abscond. In fact, contrary to prior submissions,¹⁹ in its Application the Defence corroborates the Chamber's conclusion that the Accused has access to significant financial means. It submits that any costs for the Accused's protection and monitoring, as indicated by the [REDACTED] can be covered by his family members.²⁰

13. The Defence further submits that the fact that almost all the vulnerable witnesses have already given testimony before the Chamber and that the remaining Prosecution witnesses do not meet the vulnerability criteria of the Victims and Witnesses Unit constitutes a material change in the circumstances.²¹ It also notes that there has been no suggestion that vulnerable witnesses have been intimidated by the Defence or any person associated with the Defence.²² It also suggests that at this late stage of the Prosecution case and during the Court recess it is impossible that the Accused's absence from the seat of the Court may disrupt the effective conduct of the proceedings.²³ These arguments are irrelevant for the Chamber's review of its Decision on detention. While these arguments could at most be considered to

¹⁷ ICC-01/05-01/08-631-Conf OA2, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's decision "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", 2 December 2009, at para.70.

¹⁸ See arguments by the Defence in ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 6-7.

¹⁹ ICC-01/05-01/08-1068-tENG, Defence submission on the review of the detention of Mr Jean-Pierre Bemba Gombo, 30 November 2010, at paras.40-41.

²⁰ ICC-01/05-01/08-1387-Conf-Corr-tENG, at para.17.

²¹ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 6-8.

²² ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 9.

²³ ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 32.

determine whether any conditions under Article 58(2)(b)(ii) of the Statute apply,²⁴ the Prosecution notes that in the Decision the Chamber ordered the continued detention of the Accused exclusively based on the application of the requirements of Article 58(1)(b)(i) of the Statute.²⁵ Consequently, any considerations as to whether the conditions under Article 58(1)(b)(ii) of the Statute continue to apply are, in this case, beyond the scope of the Chamber's determination pursuant to Article 60(3) of the Statute.²⁶

14. The Accused can only be released if none of the requirements of Article 58(1)(b) of the Statute are met. In this regard, the Prosecution notes that the Decision is based only on the requirements under Article 58(1)(b)(i) of the Statute.²⁷ Hence, even if the Chamber at this stage finds that the conditions under Article 58(1)(b)(i) of the Statute no longer apply, before ordering the release of the Accused it must then consider the requirements under subsection (ii). Accordingly, the Chamber should grant the Prosecution an opportunity to renew its arguments with respect to Article 58(1)(b)(ii) of the Statute and enter findings to that end. This is particularly the case since prior decisions on detention were also based on Article 58(1)(b)(ii) of the Statute and there is no finding that these requirements no longer apply.

There are no new circumstances that have a bearing on the conditions under Article 58(1) of the Statute

²⁴ In the view of the Prosecution, issues concerning the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses pursuant to Article 68(1) of the Statute may be relevant for the Chamber's determination as to whether it is necessary to detain a person to ensure that he or she does not obstruct or endanger the investigation or court proceedings.

²⁵ ICC-01/05-01/08-1088, at para. 46. See also ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 4.

²⁶ The Prosecution nevertheless notes that the Defence arguments are also misconceived on the merits, as they confuse the vulnerability criteria for persons facing an increased risk of psychological harm with considerations regarding security risks to persons on account of the activities of the Court (see in particular para. 9). Moreover, the Defence disregards that witnesses can be intimidated or harmed also after they have given evidence or at times when no court proceedings are on-going.

²⁷ ICC-01/05-01/08-1088, at para. 46.

15. Contrary to the Defence's contention, there are no new circumstances that have a bearing on the conditions under Article 58(1) of the Statute.²⁸

(i) The letters from the Belgian and Dutch are irrelevant for the review of detention

16. The Defence argues that the letter from the Belgian authorities dated 25 October 2010²⁹ demonstrates the "willingness" of the Belgian authorities to "respond" to the Defence's request to receive the Accused on its national territory and, should the Court invite it, to propose a protocol for securing his appearance at trial.³⁰ According to the Defence, the fact that the Belgian authorities have indicated that they are reserving their response for the Court constitutes a new development.³¹ In addition, the Defence argues that the letter from the [REDACTED] dated 8 April 2011³² also constitutes a new development.³³ [REDACTED].

17. The Prosecution submits that both letters are irrelevant for the Chamber's review of the Decision pursuant to Article 60(3) of the Statute. They do not have an impact on the grounds underpinning the Chamber's prior Decision on detention,³⁴ or on the conditions under Article 58(1) of the Statute. First and foremost, they do not provide any guarantees with respect to the Accused's appearance at trial.³⁵ Neither do they indicate that the Belgian authorities would be inclined to provide any such guarantees. Moreover, bearing in mind that the Belgian authorities have previously expressed a neutral position regarding the possibility of interim release of the

²⁸ Apart from the arguments of the Defence, there is no information that the Prosecution would need to bring to the Chamber's attention in furtherance of its duty to that effect as imposed by the Appeals Chamber (ICC-01/05-01/08-1019 OA4, at para. 50).

²⁹ ICC-01/05-01/08-1387-Conf-Anx1-tENG.

³⁰ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras.10-15.

³¹ ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 13. The Defence argues that the letter of 25 October 2010 was notified to the Defence only in March 2011, which is the reason why it constitutes a "new" development with respect to the Decision of 17 December 2010 (see ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 11).

³² ICC-01/05-01/08-1387-Conf-Anx2-tENG.

³³ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 16-18.

³⁴ See para. 10 above.

³⁵ The submission included in paragraph 23 of the Defence Application is further irrelevant to the argument submitted by the Defence.

Accused to their territory,³⁶ these letters do not constitute new circumstances. Rather, they continue to take no position in favour of release. Notwithstanding the Defence misreading of the content of the two letters, in fact the Belgian authorities and the [REDACTED] provide only general responses without any commitment or indication of their position.

18. In the letter of 25 October 2010, the Belgian authorities indicate that the Court is the only authority who can address a request to a State and that they will not express views in response to a Defence request. Further, as they explicitly explain, “the matter of the conditions to be imposed on conditional release is decided after the Pre-Trial Chamber has ruled in favour of conditional release [and therefore] it would be premature for the Belgian authorities to impart their views on any conditions which may be imposed on a conditional release of Mr Jean-Pierre Bemba Gombo”.³⁷

19. Similarly, the letter of the [REDACTED] does not provide a guarantee that it can establish a monitoring and protection system if the Accused is allowed interim release, nor that such a system would provide sufficient safeguards. To the contrary, it refers to [REDACTED]. Moreover, it only expresses the hypothetical possibility that [REDACTED] if the necessary support was provided, but it does not give any indication that it *would* actually do so. In addition, the letter does not indicate [REDACTED] to provide the required support.

³⁶ ICC-01/05-01/08-461-Conf-Anx2, Transmission of the Observations of the Kingdom of Belgium Received on the Defence's Application for Interim Release of Mr. Jean-Pierre Bemba Gombo, 24 July 2009; see also ICC-01/05-01/08-475, 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, 14 August 2009, at paras. 10 and 90.

³⁷ ICC-01/05-01/08-1387-Conf-Anx1-t-ENG. It is immaterial that the position of the Belgian authorities appears to be inconsistent with the jurisprudence of the Appeals Chamber on this matter (see ICC-01/05-01/08-631-Conf OA2, at paras. 2 and 105-106; see also para. 22 below). All that matters for the purposes of the issue before the Chamber is that the Belgian authorities do not provide any guarantee or indication that they are inclined to do so in the future.

20. The letter from the Dutch authorities³⁸ is also irrelevant for the Chamber's review of detention pursuant to Article 60(3) of the Statute.³⁹ First, it pre-dates the Decision of 17 December 2010 and therefore does not constitute a new development. Second, it does not have any bearing on the grounds underpinning that Decision or the conditions under Article 58(1) of the Statute, nor does it indicate that Dutch authorities are willing to accept the Accused on their territory or to guarantee his appearance at trial if granted interim release. To the contrary, it strongly suggests otherwise, by acknowledging that the Netherlands would, in accordance with the Headquarters Agreement between the Court and the host State [REDACTED]. It also expressly states that [REDACTED].⁴⁰

(ii) The letter from the Registry does not constitute a new development

21. The Defence also submits that the letter from the Registrar dated 18 March 2011 constitutes a new development.⁴¹ In this letter, the Registrar states that "should a decision [on interim release] be rendered prior to the signing of [framework agreements on interim release with States], an *ad hoc* request for cooperation could be made to those States which may receive the released person."⁴²

22. The Registrar's letter, which essentially states only that she will take steps to facilitate compliance with an order of the Court pertaining to interim release, does not constitute a relevant new circumstance that could have a bearing on the Chamber's review of detention. The letter does not provide a guarantee for the appearance of the Accused at trial, nor can it be interpreted as having any impact on a State's willingness to provide such guarantees if the Accused is granted interim. The letter expressly states that any action by the Registry is subject to a prior decision

³⁸ ICC-01/05-01/08-1387-Conf-Anx3.

³⁹ ICC-01/05-01/08-1387-Conf-Corr-tENG, at para. 24.

⁴⁰ [REDACTED]

⁴¹ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 21-22.

⁴² ICC-01/05-01/08-1387-Conf-Anx4-tENG.

by the Chamber on interim release. Hence, the Registry has not undertaken to intervene by facilitating or encouraging a State to accept the Accused on its territory or to provide guarantees for his appearance. The Prosecution notes that following the jurisprudence of the Appeals Chamber, a decision on interim release can only be made after a State has declared that it is willing and able to accept a released person on its territory and to implement the conditions imposed by the Chamber.⁴³

23. In this context, the Defence also argues that in the absence of a general framework agreement on interim release the Accused has no real prospect of interim release, which in its view violates the Accused's rights under Articles 3, 5, 6 and 8 of the European Convention on Human Rights.⁴⁴ This is a legal argument that does not identify any change in the circumstances underpinning the reviewed Decision on detention or any new circumstances that could have a bearing on the conditions under Article 58(1) of the Statute. Nor is this legal argument legally sound. The Accused cannot be released if there is a risk of flight or danger to the community or the investigation and if conditions cannot be fashioned to protect against these risks. The Pre-Trial Chamber previously determined that in considering detention it can independently find that the Accused has a right to conditional release and order it even without determining what conditions would suffice and whether the conditions could be enforced.⁴⁵ The Appeals Chamber reversed that decision, explaining that the person has no entitlement to conditional release, but only entitlement to release if sufficient protective conditions can be imposed and enforced.⁴⁶ In so holding, it rejected the premise of the current Defence argument, that it violates the Accused's right to release if there is no existing framework that will guarantee that a State will

⁴³ ICC-01/05-01/08-631-Conf OA2, at paras. 2 and 105-106.

⁴⁴ ICC-01/05-01/08-1387-Conf-Corr-tENG, at paras. 25-31.

⁴⁵ ICC-01/05-01/08-475, at page 35, paras. (a) and (b).

⁴⁶ ICC-01/05-01/08-631-Conf OA2, at paras. 104 and 106.

accept the Accused in its territory and enforce the conditions of his release.⁴⁷

There has not been any inexcusable delay by the Prosecution, nor has the Accused's length of detention been unreasonable

24. In its Decision of 17 December 2010, the Chamber found no inexcusable delay by the Prosecution and considered that the Accused has not been detained prior to trial for an unreasonable period.⁴⁸ Since the commencement of the trial five and a half months ago, the Prosecution case has been progressing smoothly and half of the Prosecution witnesses have already testified. Bearing in mind the significant progress that the Prosecution has made in the presentation of its case during this period, the Prosecution submits that the Accused has not been detained for an unreasonable period, nor has there been any inexcusable delay by the Prosecution within the meaning of Article 60(4) of the Statute.

V. Conclusion

25. For the above reasons, the Prosecution submits that the Defence Application should be rejected and that the detention of the Accused should be maintained.



Fatou Bensouda, Prosecutor

Dated this 12th Day of November 2012

At The Hague, The Netherlands

⁴⁷ *Ibid*, at para. 106: “ ... It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.”

⁴⁸ ICC-01/05-01/08-1088, at para. 44.