

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 August 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public Document

**Decision on the Requests of the Prosecutor and the Legal Representatives of
Victims for Re-classification of the Document Submitted by the Authorities of the
Republic of South Africa and for Notification of Other Documents**

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

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Karim A.A.Khan
Aimé Kilolo Musamba
Pierre Legros

Legal Representatives of the Victims

Marie Edith Douztma-Lawson
Paolina Massidda

Legal Representatives of the 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

Competent authority of the Republic of
South Africa

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier D. Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the "Court"), is seized of the "Prosecution request for re-classification of submissions by the authorities of the Republic of South Africa" (the "Prosecutor's Request"),¹ and the "Demande des représentants légaux des victimes aux fins de communication des documents confidentiels liés à la procédure de mise en liberté de l'accusé" (the "Legal Representatives' Requests").²

2. On 23 May 2008 Pre-Trial Chamber III issued a warrant of arrest against Mr Jean-Pierre Bemba Gombo ("Mr Jean-Pierre Bemba"),³ and on 24 May 2008 he was arrested in the Kingdom of Belgium.

3. On 10 June 2008 Pre-Trial Chamber III issued the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo".⁴ On the same date, Pre-Trial Chamber III issued a new warrant of arrest, which entirely replaced the one of 23 May 2008.⁵

4. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered to the seat of the Court where his first appearance took place before Pre-Trial Chamber III on 4 July 2008.⁶

5. On 20 August and 16 December 2008 the Single Judge acting on behalf of Pre-Trial Chamber III issued two decisions on the Defence's applications concerning Mr Jean-Pierre Bemba's interim release, in which, it was decided that the suspect shall continue to be detained.⁷

¹ ICC-01/05-01/08-477.

² ICC-01/05-01/08-478.

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-T-3-ENG ET.

⁷ Pre-Trial Chamber III, ICC-01/05-01/08-73-Conf; ICC-01/05-01/08-321.

6. On 19 March 2009 the Presidency decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the Central African Republic (the "CAR") to Pre-Trial Chamber II (the "Chamber").⁸

7. On 23 March 2009 the Chamber issued the "Decision Designating Single Judges" in which it, *inter alia*, designated Judge Ekaterina Trendafilova as Single Judge of this Chamber with respect to the situation in the CAR and the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.⁹

8. On 14 April 2009 Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Chamber issued the "Decision on Application for Interim Release", in which, she, *inter alia*, rejected the Defence's third application for interim release.¹⁰

9. On 15 June 2009 the Chamber issued the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", in which it was decided, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that the accused is criminally responsible under article 28(a) of the Statute for two counts of crimes against humanity and three counts of war crimes, and to commit him to a Trial Chamber.¹¹

10. On 16 June 2009 the Single Judge issued the "Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence".¹²

11. On 29 June 2009 the Single Judge held the hearing, during which the Defence requested Mr Jean-Pierre Bemba's interim release to the Kingdom of Belgium, the Republic of France and the Republic of Portugal.¹³ Accordingly, the Single Judge

⁸ Presidency, ICC-01/05-01/08-390.

⁹ Pre-Trial Chamber II, ICC-01/05-01/08-393.

¹⁰ Pre-Trial Chamber II, ICC-01/05-01/08-403.

¹¹ Pre-Trial Chamber II, ICC-01/05-01/08-424.

¹² ICC-01/05-01/08-425.

¹³ ICC-01/05-01/08-T-13-ENG WT 29-06-2009, p. 22, line 6 and p. 31, lines 5-8.

requested that these States, as well as the Kingdom of the Netherlands, as a host State, submit their observations on "[...] Mr. Jean-Pierre Bemba's interim release; and [...], the conditions if any, that would need to be imposed pursuant to Rule 119 of the Rules of Procedure and Evidence to enable the states in which Mr. Bemba seeks to be released to accept him on their territory", no later than 10 July 2009.¹⁴ The Single Judge also ordered the Registrar to "notify the relevant authorities of [...] [these States] of [the] hearing and to transmit [to them][...][the] public transcript in its original language" as well as the Defence's written submissions that was filed on 2 July 2009.¹⁵

12. On 2 July 2009 the Defence and the Prosecutor filed their additional written submissions on Mr Jean-Pierre Bemba's request for interim release,¹⁶ and on the same date, the Single Judge received the "Requête aux fins d'extension de la demande initiale en rapport avec les pays d'accueil dans le cadre de la demande de mise en liberté de Mr Jean-Pierre Bemba Gombo lors de l'audience du 29 Juin 2009" submitted by the Defence (the Defence's Request"), in which it requested adding the Federal Republic of Germany, the Italian Republic and the Republic of South Africa to the list of States where Mr Jean-Pierre Bemba seeks to be released.¹⁷

13. On 10 July 2009 the Single Judge filed a decision on the Defence's Request, which was notified on 13 July 2009.¹⁸ According to this decision, the Single Judge, *inter alia*, granted the Defence's Request and requested the relevant authorities of the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, to submit observations no later than Friday 7 August 2009, at 16h00 on: (i) the request for interim release, and (ii) the conditions, if any, that would have to be met to

¹⁴ ICC-01/05-01/08-T-13-ENG WT 29-06-2009, p. 64, lines 11-20.

¹⁵ ICC-01/05-01/08-T-13-ENG WT 29-06-2009, p. 64, lines 21-25 and p. 65, line 1.

¹⁶ "Notes supplétives aux Soumissions Orales de la Défense lors de l'Audience du 29 Juin 2009", ICC-01/05-01/08-432; "Prosecution's Additional Observations on Interim Release pursuant to Rule 118(3) of the Rules of Procedure and Evidence", ICC-01/05-01/08-431.

¹⁷ ICC-01/05-01/08-433.

¹⁸ Pre-Trial Chamber II, "Decision Seeking observations on the Defence's Request for Interim Release", ICC-01/05-01/08-446.

enable the States, to which Mr Jean-Pierre Bemba seeks to be released, to accept him on their territory.¹⁹

14. On 5 August 2009 the Republic of South Africa submitted a request for extension of time to submit its observations until 28 August 2009,²⁰ which was granted in part on 6 August 2009.²¹

15. On 12 August 2009 the Registrar submitted its document on the "Transmission of the observations of the Republic of South Africa received on the Defence request for interim release of Mr Jean-Pierre Bemba Gombo", along with annex 1 classified as confidential and annex 2 as confidential *ex parte* only available to the Registry, stating the reasons for such classification.²²

16. On 14 August 2009 the Single Judge issued the "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" (the "14 August 2009 Decision"), in which she, *inter alia*, decided that the accused be granted conditional release, until decided otherwise.²³ On the same date, the Prosecutor filed an appeal against the 14 August 2009 Decision.²⁴

17. On 14 August 2009 the Single Judge also received the Prosecutor's Request,²⁵ in which he stated that in order to be in a position to properly elaborate on the reasons in support of his appeal against the 14 August 2009 Decision, he must have access to the observations made by each State where the accused seeks to be released,

¹⁹ Pre-Trial Chamber II, ICC-01/05-01/08-446.

²⁰ ICC-01/05-01/08-468.

²¹ Pre-Trial Chamber II, ICC-01/05-01/08-470.

²² ICC-01/05-01/08-473 and its annexes.

²³ Pre-Trial Chamber II, ICC-01/05-01/08-475.

²⁴ ICC-01/05-01/08-476.

²⁵ ICC-01/05-01/08-477.

including those from South Africa. Accordingly, he requested the reclassification of annex 2 of the Registry's submission as provided in document (ICC-01/05-01/08-473-Conf-Exp-Anx2).

18. On 17 August 2009 the Single Judge received the Legal Representatives' Requests,²⁶ in which they applied for notification of documents (ICC-01/05-01/08-448-Conf-Anx1-3 ;ICC-01/05-01/08-461-Conf-Anx2 ;ICC-01/05-01/08-465-Conf-Anx2 ; and ICC-01/05-01/08-472-Conf-Anx1-2) as well as the reclassification of document (ICC-01/05-01/08-473-Conf-Exp-Anx2).

19. The Single Judge notes articles 58(1), 60(2) and (3) of the Rome Statute, rule 119(3) of the Rules, regulation 23 *bis* (1), 23 *bis* (3) of the Regulations of the Court (the "Regulations"), and regulation 14 of the Regulations of the Registry.

20. The Single Judge recalls that in the Prosecutor's Request, he submitted that "in order to fully elaborate on the legal and factual reasons of [...] [his] appeal, [...] [he] must be able to examine the observations made by [...] the Republic of South Africa".

21. The Single Judge is not persuaded by the Prosecutor's argument and does not consider that elaborating on the legal reasons in support of the appeal against the 14 August 2009 Decision necessarily requires reviewing the observations received from the Republic of South Africa. The subject-matter of the 14 August 2009 Decision, which the Prosecutor seeks to overturn, was based on a review of whether the requirements of article 58(1) of the Statute continue to be satisfied. Since the observations requested by the Prosecutor do not *strictly* pertain to the legal requirements of article 58(1) of the Statute – the core issue underlying this appeal – the Single Judge finds that, in this context, the Prosecutor's Request is without merit, and accordingly, the classification of the document (ICC-01/05-01/08-473-Conf-Exp-

²⁶ ICC-01/05-01/08-478.

Anx2) should be maintained, considering that the basis for the classification continue to exist.

22. The Single Judge is also not swayed by the arguments presented in the Legal Representatives' Requests and wishes to recall the "Fourth Decision on Victims' Participation", in which it was decided that the legal representatives of victims:

[M]ust be granted access to all public [...] documents contained in the record of the case effective as of the date of their recognition to participate in the present proceedings [...]. The right of access to [...] documents does not extend to those filed on a confidential basis or, if applicable, under seal and/or *ex parte*.²⁷

23. Moreover, the fact that the legal representatives of victims do not have access to confidential or *ex parte* documents does not mean *per se* that they are deprived of their right to effectively express their views before the Single Judge imposes conditions restricting the accused's liberty. On the contrary, in the 14 August 2009 Decision, the Single Judge stated that, "[a]t the conclusion of [the] public hearings [to be held with States in early September 2009], [...] the victims that have communicated with the Court [...] will be given the opportunity to present their views regarding the conditions restricting liberty, or any other condition, if deemed necessary".²⁸ Thus, they will be in a position to discuss any issue related to the imposition of conditions restricting liberty, but only in due course and within the legal framework established so far by the practice of the Chamber.

24. With respect to the reclassification of document (ICC-01/05-01/08-473-Conf-Exp-Anx2), the Single Judge considers that the basis for the classification still exists and therefore it should not be reclassified at this stage. That said, the Single Judge considers that the Legal Representatives' Requests are also without merit.

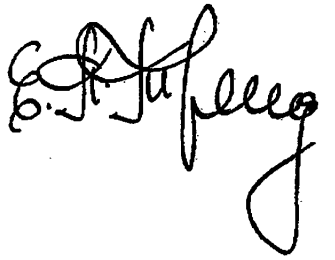
²⁷ Pre-Trial Chamber III, ICC-01/05-01/08-320, para. 103; "Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims", Pre-Trial Chamber III, ICC-01/05-01/08-349, para. 2.

²⁸ Pre-Trial Chamber II, ICC-01/05-01/08-475, para. 96.

FOR THESE REASONS, THE SINGLE JUDGE

- a) rejects** the Prosecutor's Request.
- b) rejects** the Legal Representatives' Requests.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday 19 August 2009

At The Hague, The Netherlands