

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13

Date: 11/12/2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

***IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ
KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Confidential

Mr. Bemba's Request for Provisional Release

Source: Defence for Jean-Pierre Bemba Gombo

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

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A. PROCEDURAL HISTORY

1. On 20 November 2013, the Single Judge issued a warrant of arrest for Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido on the basis of Prosecution allegations that they had committed offences against the administration of justice pursuant to Article 70 of the Rome Statute ("Article 70 case").¹

2. 11 months later, on 26 September 2014, the Single Judge requested observations from certain States for the purpose of his review of the detention of the suspects in the Article 70 case, pursuant to Regulation 51 of the Regulations of the Court.²

3. On 10 and 15 October 2014, the Kingdom of Belgium, the Kingdom of The Netherlands, France, the United Kingdom,³ and the Democratic Republic of Congo⁴ transmitted their views for the purpose of the review of the detention of the suspects in the Article 70 case.

4. On 21 October 2014, the Single Judge ordered the release of four of the five suspects, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido, to their respective countries ("Release Decision").⁵

5. The Release Decision did not address the question Mr. Bemba's provisional release, simply noting that at the time of the issuance of the arrest warrant in the Article 70 case, he was "already detained at the Detention Centre of the Court in connection with ongoing proceedings in case ICC-01/05-01/08".⁶

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-683.

³ ICC-01/05-01/13-691+Conf-Anxs.

⁴ ICC-01/05-01/13-694+Anxs.

⁵ ICC-01/05-01/13-703.

⁶ ICC-01/05-01/13-703, p.4.

6. On 22 October 2014, Aimé Kilolo Musamba and Narcisse Arido were released to Belgium and France.⁷ On 23 October 2014, Fidèle Babala reached his final destination in Kinshasa.⁸ On 31 October 2014, Jean-Jacques Mangenda was temporarily released to the Kingdom of The Netherlands, pending his transfer to a third country.⁹ On 12 November 2014, the Registry transmitted a report informing the Chamber that it had established contact with each of the recently released suspects.¹⁰

7. On 14 November 2014, the case against Mr. Jean-Pierre Bemba, ICC-01/05-01/08, ("Main Case") entered the deliberation phase.¹¹

8. In light of the above, the Defence for Mr. Bemba submits an application for conditional release pursuant to Article 60(2), or in the alternative, Article 60(4).

9. In light of the Presidency decision ICC-RoC85-01/13-31 and Notification to the Suspect ICC-RoC-85-01/13-32-Anx ("the Notification"), this application was prepared by and forwarded at the express instruction of the Suspect and his Counsel on case ICC-01/05-01/08. Herein undersigned Counsel remains unpaid on case ICC-01/05-01/13 and reiterates the contents of the Notification. Nothing in this filing, therefore, is to be understood as acquiescence in a *pro bono* representation of the Suspect. Given, however, that issues of funding are, nevertheless, subordinate to the liberty of the individual, herein undersigned Counsel fully endorses the contents of this application and submits it with the respectful request that the learned Pre-Trial Chamber adjudicate upon it forthwith shortening the time limit for any Prosecution response in order not to defeat the purpose thereof.

⁷ ICC-01/05-01/13-722-Conf, paras. 11-15.

⁸ ICC-01/05-01/13-722-Conf, paras. 16-21.

⁹ ICC-01/05-01/13-751-Conf, paras. 1-5.

¹⁰ ICC-01/05-01/13-751-Conf, p.6.

¹¹ ICC-01/05-01/08-T-365-Red-ENG-ET, p.68, lines 1-2.

B. SUBMISSIONS

(i) *Release Pursuant to Article 60(2)*

10. Pursuant to the regulatory regime of the International Criminal Court, Mr. Bemba enjoys a presumption of innocence both in respect of the Article 70 proceedings, and the proceedings in the Main Case.

11. He also enjoys a presumption of liberty, which must be rebutted by the Prosecution.¹² The burden never falls on Mr. Bemba to justify why he should be released.

12. The Pre-Trial Chamber's assessment as to whether detention in the Article 70 case is justified must be determined solely by reference to the facts and evidence on the record in the Article 70 case; the Chamber cannot rely on findings issued by a different Chamber. The first time a defendant files an application for release, the Chamber must also consider the issue with completely fresh eyes:¹³

in reaching a decision under article 60 (2) of the Statute, the Pre-Trial Chamber has to "inquire anew into the existence of facts justifying detention"; the Pre-Trial Chamber's power is "not conditioned by its previous decision to direct the issuance of a warrant of arrest." The Pre-Trial Chamber's decision must be taken "in light of the material placed before it". Thus, the decision under article 60 (2) of the Statute is a decision *de novo* [...].

13. Mr. Bemba is not, and has never been a flight risk. When rumours of an arrest warrant were circulating in 2008, he remained resident in an ICC State party, and was publicly available.¹⁴ The issuance of an *ex parte* warrant deprived him of the opportunity to demonstrate his willingness to surrender. Mr. Bemba's subsequent actions (such as his full

¹² ICC-01/05-01/08-475, para. 77; ICC-01/04-01/10-163, para. 33.

¹³ ICC-02/11-01/11-278-Red, para. 23.

¹⁴ ICC-01/05-01/08-323, para. 44.

compliance with the terms of his provisional release to attend his father's funeral)¹⁵ have nonetheless confirmed his willingness to abide by any conditions of release.

14. Mr. Bemba's primary motivation to be released is to be with his family in Belgium or Portugal, which are both State parties. Belgium has signed an agreement on provisional release with the ICC, and has in the past demonstrated both its capacity to arrest him and its willingness and ability to enforce the conditions of temporary release.

15. The risk of flight is also linked to the gravity of the charges in this case. As underscored by the Appeals Chamber, Article 70 concerns offences, not crimes.¹⁶ The maximum sentence is five years. Mr. Bemba has already served one year, which is almost half the maximum time that can be served for a five-year sentence. Mr. Bemba has always made clear his wish to run for public office in the future, in a country which is a State party to the ICC (the Democratic Republic of Congo). There is not even a remote prospect that Mr. Bemba would risk either his future prospects for public office or his family life by fleeing justice, due the possibility that he could eventually be sentenced to a further two years of detention.

16. Moreover, Mr. Bemba's financial resources have been identified and frozen by the ICC. The political connections Mr. Bemba is alleged to enjoy have not been sufficiently identified in order to ascertain their relevance to the question of Mr. Bemba's flight in the Article 70 case. Mr. Bemba is in possession of neither a passport nor a Schengen visa, so he cannot travel either from Portugal or Belgium, nor are any witnesses resident in these countries which precludes any risk of intimidation or interference.

¹⁵ ICC-01/05-01/08-437-Red.

¹⁶ ICC-01/05-01/13-560, para. 1.

17. In this connection, the Single Judge found that the initial risk of interference with evidence had dissipated due to the fact that the case is predicated on documentary evidence (rather than witness testimonies), which had already been collected.¹⁷

18. Mr. Bemba also undertakes to the Single Judge to meet any of the pre-conditions imposed on the other four suspects prior to their provisional release, such as signing an individual declaration (i) stating his commitment to appear at trial, or whenever summoned by the Court, and (i) indicating the address at which he would be staying. He would also be willing to comply with further conditions, such as regularly reporting to the authorities. As this case has demonstrated, the ICC possesses the same capacity to monitor Mr. Bemba's communications *via* State cooperation as it does *via* the detention unit.

(ii) *Release pursuant to Article 60(4)*

19. The Appeals Chamber has confirmed that even if the criteria under Article 58(1) continue to be met, the Chamber must still consider whether to release the detainee due to inexcusable delay.¹⁸ The Appeals Chamber and the Single Judge have both clarified that the Chamber's independent obligation to ensure that the detainee is not detained for an unreasonable length of time creates a separate basis to release the detainee, i.e. even if the delay is not attributable to the Prosecution.¹⁹

20. As set out above, Mr. Bemba has already served more than half of the maximum sentence that can be imposed on him. The United Nations Human Rights Committee has found that:²⁰

The holding in detention of accused persons pending trial for a maximum duration of a third of the possible sentence facing them, irrespective of the risk that they may fail to appear for trial is

¹⁷ ICC-01/05-01/13-703, p.4.

¹⁸ ICC-01/04-01/06-824, p.3.

¹⁹ ICC-01/04-01/06-824, para. 98; ICC-01/05-01/13-703, p.4.

²⁰ Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286.

incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail.

21. The Single Judge has already made a determination in this case that approximately one year of detention, when viewed in the context of an Article 70 case, constitutes unreasonable delay for the purposes of Article 60(4).²¹

22. In particular, in granting provisional release to the other four suspects, the Single Judge held that “the duration of pre-trial detention – as enshrined inter alia in article 60(4) of the Statute - shall not be unreasonable”.²² Furthermore, the Single Judge ruled that:²³

[t]he advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has by now been acquired in the record, all of which - contrary to what stated by the Prosecutor – also result in reducing the risks that these proceedings or the investigations might be obstructed or endangered, that the alleged crimes be continued or related offences be committed...

23. This analysis is also directly applicable to Mr. Bemba, there being no distinction in the stage of the proceedings, the nature of the relevant evidence, and the reduced risk of proceedings or investigations being obstructed or endangered. Nor can it be discounted that the pre-trial proceedings will be even more protracted than anticipated, particularly given that five co-defendants are likely to continue to file multiple requests, motions and responses. In such circumstances, for Mr. Bemba to be the only one of the five suspects subject to an arrest warrant, without reasons having been given for this detention, both appears, and is, discriminatory.

24. With the other four suspects having been released for more than six weeks, fairness dictates that Mr. Bemba, who stands trial for almost identical modes of liability and counts

²¹ ICC-01/05-01/13-703.

²² ICC-01/05-01/13-703, p.4.

²³ ICC-01/05-01/13-703, p.4.

of alleged crimes,²⁴ also be granted provisional release in the Article 70 case. This would have the practical effect of the question of Mr. Bemba's detention falling within the purview of Trial Chamber III, who have now been seized with a request,²⁵ and are in positioned to adjudicate whether changed circumstances of the conditions stipulated in Article 58(1)(b)(i) of the Rome Statute warrant his release in the Main Case.

(iii) *Request for expedited response from the Prosecution*

25. As noted above, Mr. Bemba's primary, if not sole motivation to be released is to be with his family. This is of particular significance over the holiday period and Christmas. The Defence therefore requests the Chamber to expedite the time period for the Prosecution's response so that the motion can be adjudicated before Christmas.

C. RELIEF REQUESTED

26. Based on the above submissions, the Defence accordingly requests that the Single Judge:

GRANT Mr. Bemba's conditional release in the present proceedings.



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Thursday, December 11, 2014

²⁴ ICC-01/05-01/13-749.

²⁵ ICC-01/05-01/08-3211; See also ICC-01/05-01/08-3212, Order shortening the time limit for observations on "Urgent Motion for Provisional Release".