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

Date: 3 October 2011

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
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
Urgent
With confidential annex 1**

**Document in support of Defence appeal against Trial Chamber III's decision of
26 September 2011 entitled: *Decision on the accused's application for provisional
release in light of the Appeals Chamber's judgment of 19 August 2011***

Source: The Defence team for Mr Jean-Pierre Bemba Gombo

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

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I. BACKGROUND

1. On 6 June 2011, the Defence filed an application for Mr Bemba's provisional release to [REDACTED] during Court recesses and periods when the Chamber does not sit for at least three consecutive days, including long weekends.¹ This was filed in advance of the summer judicial recess.
2. Three weeks later, on 27 June 2011, Pre-Trial Chamber III ("the Chamber") denied the Defence request.²
3. The Defence appealed the Chamber's decision, and on 19 August 2011, the Appeals Chamber rendered its *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release"*.³
4. On 22 September 2011, the Defence was informed for the first time, by way of an e-mail from a Legal Officer of the Chamber, that the Prosecution had lost contact with at least the two next witnesses.⁴ On 23 September 2011, by way of an e-mail from the Prosecution to the Chamber, the Defence received further details on the Prosecution's inability to call witnesses on the list, putting the Defence and the Chamber on notice of likely breaks in the proceedings.⁵
5. On 26 September 2011, Pre-Trial Chamber III ("the Chamber") rendered its *Decision on the accused's application for provisional release in light of the Appeals Chamber's Judgment of 19 August 2011 ("the Impugned Decision")*.⁶

¹ ICC-01/05-01/08-1479-Conf-tENG.

² ICC-01/05-01/08-1626-Red.

³ ICC-01/05-01/08-1626-Conf.

⁴ E-mail from [REDACTED] to the Defence team, 22 September 2011, entitled: Bemba case – witness schedule.

⁵ E-mail from [REDACTED] to the Chamber, 23 September 2011, entitled: Bemba case – witness schedule.

⁶ ICC-01/05-01/08-1789-Conf.

6. On 27 September 2011, the Defence filed its notice of appeal against the Impugned Decision, and hereby urgently appeals pursuant to article 82(1)(b) of the Rome Statute, rule 154 of the Rules of Procedure and Evidence, and regulation 64 of the Regulations of the Court.
7. The Defence notes that the next recess in the proceedings is scheduled for 7 to 17 October 2011, and as such requests that determination of this appeal be expedited.

II. SUBMISSIONS

Ground I: The Impugned Decision is based on a manifest error of law and procedure

First limb: The Trial Chamber itself has not identified the appropriate conditions of release although this is a matter which falls within its competence and not that of [REDACTED]

Second limb: The Trial Chamber itself limited the observations of [REDACTED] to the conditions set forth in rule 119 of the Rules of Procedure and Evidence.

Third limb: The Trial Chamber did not invite [REDACTED] to provide information on its willingness and ability to implement additional conditions over and beyond those listed in rule 119 of the Rules of Procedure and Evidence.

Fourth limb: The Trial Chamber did not invite [REDACTED] to provide information on its willingness and ability to implement additional conditions beyond those proposed by [REDACTED] itself on its own initiative in its various letters, particularly those of [REDACTED] and [REDACTED], which were notified only on [REDACTED]

Fifth limb: The Trial Chamber committed a manifest error of appraisal in analysing the various letters from [REDACTED] as containing final details on all the practical steps that that State is able to take, whereas the details of security

arrangements cannot be revealed in correspondence from [REDACTED] which will be notified to all parties and participants, including the Defence.

8. According to the jurisprudence of the Appeals Chamber, the Trial Chamber holds a discretionary power to determine, in the instant case, whether conditional release could make it possible to minimise or eliminate the risks of abscondment or witness intimidation referred to in article 58(1) of the Statute.
9. Once that determination has been made, the Trial Chamber has the procedural obligation to identify such conditions itself, and to seek from the State in question information as to its willingness and capacity to enforce these conditions on its territory.⁷ The Trial Chamber erred in failing to identify the conditions itself, and in failing to inquire from [REDACTED] about its willingness and capacity to enforce them. The procedure followed did not make it possible to collect all the relevant observations which would have enlightened the Bench on all the conditions that this State Party would be able to implement on its territory.
10. The jurisprudence of the Appeals Chamber emphasises that it is the responsibility of the Chamber, rather than the State Party, to set the conditions.⁸ It follows therefore that the Trial Chamber should have provided [REDACTED] with a concrete and exhaustive list of conditions which can be applied in the instant case – which concerns Mr Jean Pierre Bemba – based on the Chamber's analysis of the situation. [REDACTED] should then have been required to make a decision based on these conditions determined in advance by the

⁷ *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release"*, ICC-01/05-01/08-1626-Conf of 19 August 2011, p. 18, para. 53.

⁸ *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release"*, ICC-01/05-01/08-1626-Conf of 19 August 2011, p. 18, para. 53.

Judges themselves. This approach would have allowed the Trial Chamber to make an informed decision, guided by the unanimous jurisprudence of the Court which emphasises that liberty is the rule, and detention the exception.

11. Indeed, the various letters from [REDACTED] including those of [REDACTED] and [REDACTED] (notified only on [REDACTED], by no means contain an exhaustive list of all conditions that [REDACTED] is able to implement, should Mr Jean-Pierre Bemba Gombo be released onto its territory.

12. The Trial Chamber never requested [REDACTED] to provide a such a complete list, nor could it have made such a request *in abstracto*, given that the Chamber has a responsibility to set the conditions itself and then to ascertain the State's willingness and capacity to implement them on its territory. States Parties are not provided with a frame of reference containing a complete list of conditions for release on which they can rely to make a definitive statement on their willingness and capacity to implement such conditions for release. On this point, it should be noted that neither the Rome Statute nor the Rules of Procedure and Evidence provide an exhaustive list of conditions for release.

13. Moreover, in its list of conditions proposed on 28 July 2011, [REDACTED] pledges to take "all measures necessary" to prevent the intimidation of witnesses.⁹ The Trial Chamber had a responsibility to seek clarifications from [REDACTED] by inviting further submissions which would have edified the Judges on the meaning of "all measures necessary".

14. In fact, the list of measures set out in [REDACTED]'s letter of [REDACTED] is a response to a Trial Chamber order of 8 June 2011¹⁰ inviting observations from [REDACTED] solely in respect of the conditions set out in rule 119 of the Rules of

⁹ ICC-01/05-01/08-1621-Conf-Anx1, 4 August 2011, p. 3.

¹⁰ ICC-01/05-01/08-1492-Conf.

Procedure and Evidence. The Trial Chamber never sought to ascertain [REDACTED]'s willingness or capacity to apply other conditions over and beyond those listed in the abovementioned rule 119.

15. The Trial Chamber committed a manifest error of law and procedure in evaluating only those conditions set out in [REDACTED]'s letters, whereas it should instead have invited [REDACTED] to provide information on its willingness and capacity to implement additional conditions identified by the Judges themselves.

16. Beyond [REDACTED]'s broad statements of principle as to the conditions to be implemented pursuant to rule 119 of the Rules of Procedure and Evidence, the Chamber cannot reasonably expect [REDACTED] to communicate all details of security measures through correspondence, notably the letter of [REDACTED] which is communicated to all parties and participants, including the Defence. Evidently, this is for security reasons, since these measures are aimed specifically at frustrating any potential attempts by the Accused to abscond or intimidate witnesses, but also because of aspects related to State defence mechanisms, or State imperium over the national territory. Such details which could be of assistance to the Judges cannot, by their very nature, be disclosed in documents which will be read by all parties. Rather, the Chamber had an obligation to request additional information from [REDACTED] through the appropriate internal communication channels of the Court to which the parties do not have access, or even via an *ex parte* status conference with [REDACTED] and the Registry.

17. In its letter of [REDACTED], [REDACTED] stated that it would set up a system to ensure both the safety and round-the-clock surveillance of Mr Jean Pierre Bemba Gombo. In the same letter, [REDACTED] added that it guaranteed the instant return of the Accused to appear at his trial upon request of the International

Criminal Court.¹¹

18. [REDACTED]
[REDACTED]
[REDACTED]¹² [REDACTED]
[REDACTED]
[REDACTED]

19. The Trial Chamber should have explored [REDACTED]'s willingness to cooperate with the Court, as expressed in its various letters, and invited further information on its capacity to apply conditions other than those set out in [REDACTED]'s letter.

20. For example, when the Accused was twice released to go to Belgium, the Belgian state met confidentially with the relevant organs of the Registry, as directed by the Trial Chamber, to discuss the details of the security measures that Belgium would accept and would have the capacity to implement as a condition of release. These details were never disclosed to the Defence, but were transmitted solely to the Registry through notes verbales.

21. Given that [REDACTED] has expressed its willingness to cooperate with the Court should the Accused be released on its territory, the Trial Chamber should have invited [REDACTED] to an *ex parte* hearing, in the absence of the Defence if need be, or communicated with that State Party through the internal channel of the Registry (to which the parties and participants do not have access, as was the case for the two previous provisional releases of the Accused into

¹¹ ICC-01/05-01/08-1621-Conf-Anx1, 4 August 2011, p. 4

¹² ICC-01/05-01/08-1621-Conf-Anx1, 4 August 2011, p. 2.

Belgium) on the additional conditions to be implemented in order to negate the risks of abscondment and witness intimidation.

22. Speculating on [REDACTED]'s willingness or capacity to implement additional conditions not specifically listed in its various letters, or minimising the effect of [REDACTED]'s guarantee, or even refraining from considering the guarantee as a new circumstance, amounts to unequal treatment of State Parties to the Rome Statute, and ultimately would violate article 21 of the Statute which prohibits all forms of discrimination in the application of its provisions.

Ground II: The Impugned Decision is based on a manifest error of appraisal, in that the Trial Chamber finds that the conditions proposed by [REDACTED] are not sufficient to mitigate or negate the risk of abscondment under article 58 of the Statute.

23. The decision on the review of Mr Bemba's detention of 17 December 2010, which maintained him in detention, is the starting point for the current review of Mr Jean Pierre Bemba Gombo's application for interim release. Relying on that decision, the Trial Chamber recalled that the Accused had personal motives for absconding given the seriousness of the charges confirmed against him, the ongoing trial, and the possibility of receiving a long prison sentence. Furthermore, the Chamber also based its decision to maintain the Accused in detention on the financial resources purportedly available to the Accused which he could use to abscond.

24. In fact, although in the decision of 17 December the Chamber found that the Accused could activate the means to abscond if released, this finding was made in the absence of a State guarantee. The situation has now changed dramatically, and it cannot reasonably be held that the State measures proposed by a State Party – namely [REDACTED] a great [REDACTED] state which commands respect within the community of nations, and [REDACTED] ratify the Rome Statute – to eliminate the risk of flight would be incapable of

negating such risk. The financial and other means which the Accused, a mere individual, could activate against the public might of a State would hardly jeopardise the success of the operation which [REDACTED] has pledged to implement.

25. In its letter of [REDACTED] [REDACTED] stated that if he made any attempt to abscond, the Accused would be arrested, detained, and transferred to The Hague, accompanied by police officers from [REDACTED] to the airport in the Netherlands. This necessarily implies round-the-clock use of a monitoring system which will allow Mr Bemba to be arrested at any attempt to abscond. [REDACTED] itself has unequivocally stated that it provides the Court with guarantees that the Accused would appear at his trial.

26. Moreover, subsequent to the detention order of 17 December 2010, the Defence actually offered to defray the financial costs of Mr Jean Pierre Bemba Gombo's travel and security in the event of release. However, it is not reasonable to conclude, without the least shred of evidence, that the creditors of the Accused, who are willing to provide him with assistance or lend him money within the legitimate and legal framework of a release decided by the Court, would agree to lend the same support within the totally illegal framework of abscondment. Such a conclusion which is based on prejudiced assumptions is a manifest misappraisal of the facts. In any event, in the unlikely event that such means were to be used, they could not prevail against the financial might of a State, and no evidence to the contrary has been provided.

27. [REDACTED]
[REDACTED]
[REDACTED]



Ground III: The Impugned Decision is based on a manifest error of appraisal in that the Trial Chamber considers that the conditions proposed by the State of [REDACTED] are not sufficient to mitigate or negate the risk of witness intimidation referred to in article 58 of the Statute

28. The approach of the Chamber in the Impugned Decision cannot be reconciled with jurisprudence from the international tribunals on the specific issue of intimidation. At the ICTY, for example, the Appeals Chamber held that:

The Appeals Chamber notes also that despite the Prosecution's protestations, before it submitted the Rule 115 Motion, which is inadmissible in any event, it had not given a single concrete example of witness intimidation in this case. Even the example adduced with the Rule 115 motion, while they do discuss intimidation of witnesses in this case, show only a tenuous link to the accused... **A showing that a witness in a case has been intimidated does not equate to a showing that the Accused in this case did the intimidating.**¹³

29. The Chamber has heard from 29 witnesses in the present case. In the Impugned Decision, the Chamber relies on allegations that two of these witnesses – Witness 0173 and Witness 0179 – have been threatened as a result of their testimony.

30. There is absolutely no evidence that these threats in any way originated from the Defence. Both of these witnesses reside outside of the Democratic Republic of the Congo, the country in which the Chamber alleges the Accused continues to wield influence.

¹³ *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84-AR65.1, *Decision on Ramush Haradinaj's modified provisional release*, 10 March 2006, footnote 101.

31. The Chamber itself notes that it is not in a position at this stage to reach conclusions as to “who is responsible for the alleged incidents of witness interference”, but then leaps to the conclusion that “it is a reasonable inference, however, that some may have originated from individuals who support the accused”.¹⁴ No basis is given for this “reasonable inference”.
32. The Defence is aware that the requirement set forth in article 58(1)(b)(ii) of the Statute may be satisfied if there is a “possibility” of witness interference. However, the Defence submits that such a “possibility” cannot be founded on pure speculation, but rather must have some basis or grounds. The Appeals Chamber has previously found that a Chamber is not obliged to take into consideration hypothetical arguments which are not supported by concrete evidence.¹⁵ The Chamber cannot apply a more lenient standard to factors which militate against provisional release than it applies to factors which militate in favour of it.
33. The Chamber failed to refer to any basis for its conclusion that it was the Accused, or supporters of the Accused, who were responsible for the alleged interference. There is no evidence before the Chamber that Mr Bemba has sought, either personally, or through others, to intimidate witnesses. There is no evidence before the Chamber that associates of Mr Bemba have ever sought to do so on their own behalf. There is no evidence before the Chamber from the United Nations Detention Centre that Mr Bemba has used the telephone available to him to intimidate or direct others to intimidate witnesses. The Chamber’s hasty inference which blames and accuses Mr Bemba and his unnamed associates has absolutely no basis. As such, the Defence submits that there is no sufficient basis for the Chamber’s inference, which should rightly be quashed.

¹⁴ Impugned Decision, para. 31.

¹⁵ ICC-01/05-01/08-323, para. 55.

34. On this point, the Chamber did not consider that: (a) the threats could come from the person whom the Chamber has previously been informed has threatened Prosecution witnesses in the present case;¹⁶ (b) the interference could have stemmed from the witnesses themselves having compromised their protection by revealing to friends, or neighbours in their small communities that they would be testifying against Mr Bemba in The Hague; (c) the threats could have been fabricated by Witness 0173 and Witness 0179 in order to support claims for compensation; (d) the threats could have been fabricated by the witnesses in furtherance of their underlying bias against Mr Bemba demonstrated during their testimony; or (e) the threats could have been made by the political opponents of Mr Bemba who have a direct and significant interest in his provisional release being denied.

35. Regarding the allegations that pressure has been exerted on witnesses, the Defence has never been invited at any time to respond to or make submissions on this point. As such, it would be inconsistent with the right to a fair trial to maintain the Accused in detention on the basis of facts to which the Defence has never be given the opportunity to respond, in breach of article 67 of the Statute.

36. There is a wealth of jurisprudence both at the ICC and internationally which requires that parties should be given the opportunity to make submissions prior to the Chamber making an adverse finding against them. At the ICC, this was most recently stated by Presiding Judge Steiner as follows:¹⁷

If there is anything that implicates directly or indirectly the Defence in such report, of course the Defence will be communicated [sic] and will be given the opportunity to give its reasons or make its observations and even if need be the witness can be called again to clarify in case any point has been not clarified yet.

¹⁶ ICC-01/05-01/08-1002-Conf-Red, 24 January 2011

¹⁷ Transcript, 29 August 2011, p. 47, lines 2 – 5.

37. In failing to give the Defence an opportunity to comment on these allegations, despite a direct undertaking from the Bench on this point, the Chamber was in error, warranting the intervention of the Appeals Chamber.

38. The Defence was made aware, during the testimony of Witness 0173, that there were concerns as to interference with this witness. The Defence raised the issue with the Bench, asking whether it could be furnished with any relevant reports of the Victims and Witnesses Unit (VWU) on this subject.¹⁸ In responding, the Chamber was clear that the Defence was not in any way involved. The Presiding Judge stated:¹⁹

What I can ensure in advance to the Defence is that apparently the issue has been clarified, but without consulting VWU I cannot share with the Defence right now the conversations held between VWU and the Defence in that respect, but I can assure to the Defence that the Chamber sees no reason at all until now to infer any interference of the Defence with the witness.

39. This assertion from the Presiding Judge cannot be reconciled with the subsequent arbitrary finding that “it is a reasonable inference, however, that some may have originated from individuals who support the accused”.²⁰ The Defence submits that such disparate rulings from the same bench undermine the principle of judicial finality, and warrant the intervention of the Appeals Chamber.

40. The Trial Chamber acknowledges that it does not know who is responsible for this intimidation. As such, the Chamber cannot reasonably continue to detain the Accused based on alleged intimidation by persons unknown.

41. As regards the regime for monitoring the Accused’s telephone calls, the Trial Chamber had the option of transmitting daily transcripts of the Accused’s telephone conversations to the Registry, thereby enabling the Registry to

¹⁸ Transcript, 29 August 2011, p. 45, lines 17-21.

¹⁹ Transcript, 29 August 2011, p. 47.

²⁰ Impugned Decision, para. 31.

monitor any confidential information on vulnerable witnesses when analysing such transcripts. In this respect, [REDACTED] has indicated its willingness to cooperate fully with the International Criminal Court to ensure the proper conduct of the proceedings before it.

42. It is clear that the Chamber committed a manifest error of appraisal when assessing the extent of [REDACTED]'s commitment to cooperate fully with the International Criminal Court, which includes the possibility of providing the Registry with daily transcripts of the Accused's private telephone calls for analysis.

43. The Defence has attached an English version of the present document to its submission.²¹

FOR THESE REASONS,

44. In light of the abovementioned flaws in the Impugned Decision, and given the urgency of the situation with respect to upcoming breaks in the trial schedule (none of which can be imputed to the Defence), the Defence respectfully requests the Appeals Chamber to:

- a. reduce to a minimum the time within which the other parties and participants may submit their observations;
- b. quash the Impugned Decision;

²¹ Confidential Annex 1

- c. order that the Accused be provisionally released into [REDACTED]
[REDACTED] for breaks of over three days in the proceedings;
- d. order the immediate scheduling of a status conference and the attendance of the relevant parties, including representatives from the Registry of the Court, in order to put in place the logistical arrangements for the interim release of the Accused.

[signed]

Aimé Kilolo Musamba
Associate Counsel

Dated this 3 October 2011

At The Hague, The Netherlands