

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **6 December 2010**

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

Prosecution's Observations on the Review of the Pre-Trial Detention of 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 Nkwebe Liriss

Mr Aimé Kilolo Musamba

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

Defence Support Section

Victims and Witnesses Unit

Ms Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section Other

I. Introduction

1. Preliminarily, the Office of the Prosecutor (“Prosecution”) notes the recent judgment of the Appeals Chamber delivered on 19 November 2010,¹ which reversed a 28 July 2010 ruling on interim release issued by Trial Chamber III (“Chamber”).² This judgment directed the Chamber to carry out a new review under Article 60(3) of the Rome Statute (“Statute”). The Appeals Chamber observed that although the Prosecution had put before the Chamber relevant submissions on whether a modification of the detention of Mr Jean-Pierre Bemba Gombo (“Accused”) was warranted,³ the Chamber restricted itself to only assessing the alleged new circumstances presented by the Accused.⁴ Consequently, a review emanating from the directions of the Appeals Chamber should consider the arguments advanced by the parties and participants in the release litigation culminating in the Chamber’s 28 July Decision.⁵ The most recent observations of the Defence mount a fresh review pursuant to Rule 118 of the Rules of Procedure and Evidence (“Rules”). As such, the Prosecution will treat the Defence observations as a request for a new review, rather than a review pursuant to the judgment of the Appeals Chamber of 19 November 2010.

2. The Prosecution submits that the Chamber’s 1 April 2010 decision⁶ is the baseline decision against which the Chamber should determine whether “changed circumstances” require a modification of the current detention of the Accused,

¹ 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.

² 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.

³ ICC-01/05-01/08-1019 OA4, at para. 51.

⁴ *Ibid.*, at para. 55.

⁵ *Ibid.*, at para. 2. The Appeals Chamber directed Trial Chamber III to carry out a new review under article 60(3) of the Statute... in light of paragraphs 40 to 56 of the present judgment.

⁶ ICC-01/05-01/08-743, 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, 1 April 2010.

pursuant to Article 60(3) of the Statute. Thus the Prosecution's present submission will address whether there has been a change in some or all of the circumstances underlying that decision as well as any other relevant information proffered by the Defence that relates to the matter of detention or release.⁷

3. As the Prosecution demonstrates below, the facts motivating the Chamber's findings in its 1 April 2010 Decision have not changed to warrant a modification in the Accused's detention at the seat of the Court.

II. Procedural History

4. On 1 April 2010, the Chamber issued a decision ("Last Review")⁸ ordering the continued detention of the Accused as necessary to ensure his appearance at trial due to the fact that there had been no change of circumstances, either viewed separately or together, to modify the previous ruling on detention.

5. On 28 July 2010, the Chamber issued a decision⁹ whereby it ordered the continued detention of the Accused. The Defence appealed. On 19 November 2010, the Appeals Chamber remanded the matter to the Chamber to conduct a new review and directed that the "Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute."¹⁰ The Appeals Chamber also directed that "the Chamber should not restrict itself to only considering the arguments raised by the detained person. The Chamber must weigh the Prosecutor's submissions against the

⁷ ICC-01/05-01/08-1019 OA4, at paras. 2 and 51.

⁸ ICC-01/05-01/08-743.

⁹ ICC-01/05-01/08-843.

¹⁰ ICC-01/05-01/08-1019 OA4, at para. 52.

submissions, if any of the detained person...the Chamber must also consider any other information which has a bearing on the subject.”¹¹.

6. The trial commenced on 22 November 2010.¹² Between 23 November and 3 December 2010, three Prosecution witnesses testified in the case against the Accused.

7. On 30 November 2010, the Defence filed observations on the review of the detention of the Accused (“Defence Application”).¹³ On 1 December 2010, the Chamber requested the Prosecution and the Legal Representatives of Victims to file their responses by 6 December 2010.¹⁴

III. Prosecution’s Submissions

8. The Prosecution submits that the continued detention of the Accused be maintained for the following reasons:

- (i) the conditions justifying detention under Article 58(1) of the Statute continue to be met;
- (ii) there has been no substantial change to these conditions or any related factors as stipulated by Article 60(3) of the Statute since the Last Review in April 2010;
- (iii) there has been no material change in circumstances that justify release of the Accused; and

¹¹ *Ibid.*

¹² See, ICC-01/05-01/08-T-30-ENG, 21 October 2010, page 4, line 18 to page 5, line 5.

¹³ ICC-01/05-01/08-1068, Observations de la Défense sur la révision de la détention de M. Jean-Pierre Bemba Gombo, 30 November 2010.

¹⁴ Email sent by the Chamber’s Legal Officer to the parties and participants on 1 December 2010 at 18:54.

- (iv) there has been no inexcusable delay by the Prosecution in the conduct of its case as stipulated by Article 60(4) of the Statute, nor has the Accused been detained for an unreasonable period.

9. Consequently, the Prosecution submits that the statutory grounds for granting interim release or release pursuant to Articles 58(1), 60(3) and 60(4) of the Statute are not met and the continued detention of the Accused must be maintained.

Continued detention is necessary to ensure that the Accused will be present at the trial and that he will not intimidate witnesses or obstruct court proceedings

10. As stipulated by the Appeals Chamber,¹⁵ if the Last Review established that the Accused's detention was necessary to avoid flight or prevent obstruction, the Prosecution only needs to show that there has been no change in the circumstances underpinning that decision.¹⁶

11. Those circumstances have not changed in the Accused's favour. As the Appeals Chamber confirmed in its judgment reversing the 2009 order of conditional release,¹⁷ the Confirmation Decision increased the likelihood and provided further incentive that the Accused would abscond, if released, given both the gravity of the charges and possibility of a lengthy sentence if convicted.¹⁸ Subsequent events have not diminished that risk; indeed, the risk of flight can only have been exacerbated by

¹⁵ ICC-01/05-01/08-1019 OA4, at para. 51.

¹⁶ *Ibid*, at para. 51. The Appeals Chamber recalled in its judgment that “the requirement of changed circumstances imports either a change in some or all the facts underlying a previous decision on detention, or a new fact...”

¹⁷ ICC-01/05-01/08-631-Red 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 *Ibid*, at para. 70.

the final dismissal of the Accused's admissibility challenge¹⁹ and, thereafter, the commencement of the trial.

12. In that regard, the concerns about the likelihood of conviction are greater now that trial has started. In the Prosecution's view, the three witnesses who have testified to date - an expert witness, an overview witness, and a crime-based witness - have been strong; indeed, in certain respects their evidence is more incriminatory than their previous statements. Thus, the strength of the evidence against the Accused is at least as compelling a factor now as it was before trial began.

13. Nor has there been a change in the Accused's favour with respect to the other circumstances on which the Chamber relied. In its review of the Accused's detention in April 2010, the Chamber rejected claims centered on the Accused's alleged diminished political status and possibly worsening financial circumstances: "... these matters have all been considered as relevant factors during earlier reviews of his detention, and although there may have been incremental changes since the last review - reflecting largely the inevitable consequences of the passage of time - none of them, at this stage, constitutes a material or substantive change in circumstances."²⁰ Notwithstanding the Defence disagreement with the resolution of that point, the circumstances are unchanged and the finding remains as valid today as it was eight months ago.

14. In particular, the Defence arguments regarding the Accused's financial means and social network do not show a change in circumstances justifying interim release. As this Chamber observed, "Although monies are not necessarily immediately available to fund this accused's defence (as this Chamber has found in an earlier

¹⁹ ICC-01/05-01/08-962-Corr OA3, Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010.

²⁰ ICC-01/05-01/08-743, at para. 29.

decision), given his general contacts and his position prior to his arrest, the Chamber considers that he would have access to funds if he wished to flee. He is a man who has had considerable power and influence and it is a proper inference that he could easily find financial support to flee.²¹”

15. Accordingly, the Court has rejected the Defence’s arguments related to the Accused’s personal circumstances, and the Defence presents no new circumstances that justify revisiting those earlier conclusions. The Chamber found that “for instance, his offer to cooperate with any court-approved regime on release, his continued political engagement, his family ties, his good behaviour whilst in detention - these have all been considered as relevant factors during earlier reviews of his detention, and accordingly none of them constitute a material change in circumstances.²²”

16. The Prosecution submits that the facts forming the basis of the Chamber’s assessment of the Accused’s personal circumstances in April 2010 remain unchanged. As such, no variation in the Accused’s current detention regime is warranted.

17. A further concern is the fact that the Accused knows the names and identities of all witnesses, upon whose evidence the Prosecution relies at trial. The security of some of these witnesses may be at risk. Since the trial commenced on 22 November 2010, the Accused has had face-to-face contact with three Prosecution witnesses and has access to their personal identifying information. These Prosecution witnesses have confirmed their exact residence as well as personal identifying information of other Prosecution witnesses. A combination of the Accused’s deep knowledge of these witnesses and well as the nature of the evidence provided thus far establishes a

²¹ See, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 29, lines 4 to 8. This was further noted by the Chamber in its Last Review, see ICC-01/05-01/08-743, at para. 29.

²² See, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 29, lines 9 to 14.

firmer evidential basis to protect these witnesses, whose exposure to risk is now higher, given their face-to-face contact with the Accused. Thus the need to protect witnesses from intimidation or interference, though not previously a basis for denying release, nonetheless also favours the continued detention of the Accused.

There has been no inexcusable delay by the Prosecution

18. Nor is release justified on the ground of inexcusable delay attributable to the Prosecution. Though the Defence argued, in its abuse of process challenge, that the Prosecution failed to discharge its disclosure obligations *vis-à-vis* admissibility in a timely fashion, the Chamber rejected that complaint. After reviewing the relevant facts, the Chamber concluded that “there has been no material irregularity or impropriety in the proceedings, and the abuse of process challenge is without foundation.”²³

19. The Defence suggests that the Prosecution is responsible for delay because it has been tardy in disclosing necessary evidence. To the contrary, the Prosecution has fully discharged its disclosure obligations in a timely fashion and sufficiently in advance of trial. Much of the evidence was disclosed to the Defence well over a year ago. With respect to evidence provided subsequent to the Confirmation Hearing, the Chamber noted in its Last Review of April 2010 that “the prosecution substantively met the deadline [for disclosure] of 30 November 2009.”²⁴ The Chamber also stated that “[t]he defence has not identified any categories of evidence or individual documents disclosed since the last review of detention that together or separately constitute a material change in circumstances.”²⁵ There are no circumstances

²³ ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, at para. 262.

²⁴ ICC-01/05-01/08-743, at para. 30.

²⁵ ICC-01/05-01/08-743, at para. 30.

justifying a changed assessment since the Chamber's last review of the Prosecution's compliance with its disclosure obligations.

20. Indeed, all delays to the start of the trial (from its scheduled start date of 27 April 2010) are occasioned by Defence actions: its late-filed admissibility challenge,²⁶ and subsequent appeal. In that regard the Prosecution notes that the Defence expressly requested that trial be suspended until the appeal is resolved.²⁷ And, had the Defence had its way, the trial would have been further delayed, since as recently as 1 November 2010 the Defence continued to seek postponement of the trial.²⁸

21. In short, although the Defence appears to disavow any responsibility for delay, the record reflects that the Defence in fact repeatedly sought to delay the case and never made any affirmative efforts to expedite the proceedings.²⁹ At the same time, the Prosecution repeatedly noted, in filings and on the record, that it was ready for trial;³⁰ in contrast to the Defence, the Prosecution never requested delay or endorsed Defence requests to slow the proceedings.

The Accused's length of detention has been reasonable

22. The length of detention thus far has not been unreasonable. The Appeals Chamber, in the *Lubanga* case, stated that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined

²⁶ ICC-01/05-01/08-743, at para. 31.

²⁷ ICC-01/05-01/08-811, Order postponing the commencement of the trial, 7 July 2010, at para. 5.

²⁸ ICC-01/05-01/08-987, Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010, 1 November 2010.

²⁹ *Ibid.*, at para. 5.

³⁰ ICC-01/05-01/08-1000, Prosecution's Response to the Defence's "Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010", 8 November 2010.

on the basis of the circumstances of each case.³¹” The Accused’s detention is reasonable, having regard to the facts and circumstances of this case.

23. Moreover, the Prosecution notes that trial has commenced, and the Court has issued rulings designed to render the process more expedited and efficient.

Prosecution’s observations on Defence Arguments

24. The arguments raised in the Defence Application show neither change in the circumstances nor new facts justifying interim release. Essentially they are old grounds - some also of marginal relevance to the issue of release - that have been repeatedly rejected by the Pre-Trial, Trial, and Appeals Chambers.

25. As the Appeals Chamber stated in defining the scope of the review:

“... the periodic review of a ruling on detention under article 60(3) of the Statute does *not* require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention ... Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions ... the emphasis of the review is whether there has been a change in any of the circumstances.³²”

26. First, the Defence argument that the Chamber should not maintain the Accused’s detention unless the Prosecution presents relevant information proving a

³¹ ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, at para. 122.

³² ICC-01/05-01/08-1019 OA4, at para. 53.

concrete risk of flight is without merit. Assessing flight risk is necessarily predictive. Here, the combination of factors identified previously - the gravity of the charges, the possibility of a substantial penal sentence (and restitution order) if the Accused is convicted, the financial capacity and influence of the Accused, and his ability to find supporters willing to shield him from the reach of the Court - are sufficient to show "risk" of flight.³³

27. Second, the Defence contends that the Prosecution's failure to provide it with information in its possession, which led the Pre-Trial Chamber III to issue a provisional arrest warrant against the Accused, should result in interim release as the Accused was denied the opportunity to appear voluntarily and the Defence is unable to challenge this information.³⁴ The relationship of this argument to an application for release is unclear; a renewed complaint about the legality of the Accused's arrest in May 2008 is not relevant to release and in any event does not establish a change in circumstances that now requires his release in 2011. Moreover, this issue has previously been rejected by the Pre-Trial Chamber, whose decision was followed thereafter by Trial Chamber I.³⁵ In addition to rejecting the factual premise of the argument, Judge Fulford also stated that "In our Judgment, even if there was a lack of information provided to the Defence on this issue, or even if there was incorrect information provided to the Pre-Trial Chamber at the relevant stage in these proceedings, neither of those two factors would invalidate any of the reasons underpinning the Pre-Trial Chamber's decision on the issue of detention as issued on

³³ ICC-01/05-01/08-631-Red OA2, at para. 70.

³⁴ ICC-01/05-01/08-1068, at paras. 15 and 16.

³⁵ ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 13, line 24 to page 14, line 6. Trial Chamber I stated that "... the Trial Chamber should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so. Not least for reasons of judicial comity, this Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach...": see ICC-01/04-01/06-1981, Decision on the admission of material from the "bar table", 24 June 2009, at para. 6.

14 April 2009.³⁶ This factor was not a consideration in the Last Review; nor can it be said to be a new fact bearing on interim release.³⁷

28. Third, the comparison between the Accused and Mr Abu Garda, with regard to the Accused's commitment to comply with any condition for his release, is not a relevant consideration for interim release. Nor is it a new consideration. As stated previously, the treatment of defendants and accused persons is a matter squarely within the discretion of the Prosecutor on the basis of the available information – a matter subject to judicial review.³⁸ In dismissing a similar argument in the past, this Chamber stated, "In our Judgment, our decision today on this issue in this case has to be reached on the facts of this case. The decision in another case is irrelevant, unless that other case is nearly identical on its facts to the present matter. No analysis has been put before us that would justify a conclusion that because the material circumstances are so similar between the two cases, it is necessary for us to reach a similar decision on detention as was reached by the Pre-Trial Chamber as regards Mr Abu Garda. These decisions are quintessentially based on the individual facts in the particular trial."³⁹ There has been no "changed circumstances" in this regard, therefore the Accused's promise to attend the court sessions is immaterial or at best an insufficient factor necessitating a modification of detention. This finding still persists.

29. Fourth, the request for a modification of the Accused's detention as an alternative to interim release is unfounded. There is no specific provision under the Court's legal regime regulating modifications of conditions of detention as in the

³⁶ ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 26, lines 13 to 17.

³⁷ ICC-01/05-01/08-631-Red OA2, at para. 75: "On each occasion Mr Bemba's offer to cooperate with the Court was held to be insufficient *per se* to grant the suspect interim release and his offer to surrender was rejected on the ground that it was hypothetical and lacking any concrete evidence. The Appeals Chamber in its Judgment of 16 December 2008 confirmed this approach by the Pre-Trial Chamber."

³⁸ See, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 17, line 21 to page 18, line 11.

³⁹ See, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 27, line 23 to page 28, line 4.

International Criminal Tribunal for the Former Yugoslavia.⁴⁰ Assuming *arguendo* that the Chamber has recourse to this measure, the Defence has failed to show “changed circumstances” that merit a reconsideration of the current detention regime of the Accused, which would support such a modification. Nor does the illness of the Accused’s grandmother justify release of the Accused. While this request carries a humanitarian concern, it is not a ground for interim release under the relevant provisions of the Statute and Rules.

30. Finally, it is both premature and immaterial at this stage that there may be States that are willing and able to host the Accused. As the Appeals Chamber has ruled, the possibility that one or more States might be prepared to host the Accused were interim release to be granted does not color the determination whether release should be ordered; rather, the Chamber considers the possibility of releasing the person to the custody of a State only after it determines that “changed circumstances” justify a modification of detention.⁴¹ Since there have been no material change in the relevant circumstances, it is unnecessary to consider whether any State is available to host the Accused. Moreover, trial has begun. The Statute and Rules do not authorize trial *in absentia*, so at this stage in the proceedings the Accused cannot be released to the custody of another State.

IV. Conclusion

31. The only new factor since the Last Review of relevance to interim release is the commencement of the trial. Contrary to the Defence view, the Prosecution submits that this factor militates in favour of the continued detention of the Accused; it

⁴⁰ International Criminal Tribunal for the Former Yugoslavia, Rule 65 of the Rules of Procedure and Evidence, in particular Rule 65(I) (iii) which provides for special circumstances warranting a release.

⁴¹ ICC-01/05-01/08-631-Red OA2.

establishes a firmer evidentiary basis of the Prosecution's case and provides a greater incentive for flight or obstruction.

32. For all the above-mentioned reasons, the Prosecution submits that the conditions justifying detention continue to be met. Any changes, either taken separately or together, are not sufficiently material to warrant a variation of the *status quo*. Accordingly, the statutory grounds for granting interim release have not been met. The Prosecution therefore requests that the Chamber dismiss the Defence Application in its entirety and maintain the continued detention of the Accused.



Luis Moreno-Ocampo, Prosecutor

Dated this 6th Day of December 2010

At The Hague, The Netherland