Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/08**
Date: **6 September 2011**

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 Version of the Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo" of 2 September 2011

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
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Counsel for the Defence
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Legal Representatives of the Applicants

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Unrepresented Applicants for Participation/Reparation

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States Representatives

Amicus Curiae

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka
Judge Daniel David Ntanda Nsereko
Mr Volker Nerlich

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo".

I. Background

1. On 24 August 2011, the defence filed its "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo" ("Request for Provisional Release"),[1] which requested the accused's provisional release, to be limited to a single day, to travel to the Democratic Republic of the Congo ("DRC") before 5 September 2011 to obtain a voting card and register as a candidate for the upcoming presidential and parliamentary elections.[2]

2. At the defence's request,[3] the Request for Provisional Release was heard on an expedited schedule,[4] with the Office of the Prosecutor ("prosecution"), the legal representatives of victims and the Office of Public Counsel for Victims ("OPCV") filing their observations on 29 August 2011.[5] While the Chamber gave the defence the option to file a

[1] Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo, 24 August 2011, ICC-01/05-01/08-1639-Conf and four confidential annexes. An English translation was filed on 26 August 2011: Application for the interim release of Mr Jean-Pierre Bemba Gombo to allow him to perform his civic duties in the Democratic Republic of Congo, ICC-01/05-01/08-1639-Conf-tENG.
[2] ICC-01/05-01/08-1639-Conf-tENG, paragraphs 25 and 36.
[3] ICC-01/05-01/08-1639-Conf-tENG, paragraph 36.
[4] *See* Decision requesting observations on, and setting a briefing schedule for, the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", 25 August 2011, ICC-01/05-01/08-1649-Conf, paragraph 6.
[5] Observations on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo" filed by Mr. Bemba on 24 August 2011, 29 August 2011, ICC-01/05-01/08-1659-Conf; Observations de Maître Zarambaud Assingambi, Représentant légal de victimes, sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo, en date du 24 août 2011, 29

reply on 30 August 2011 before 10 am,[6] the defence reply was filed late.[7] The defence did not apply for a variation of the time limit and has not attempted to demonstrate that it was unable to file a timely reply due to reasons outside its control, in accordance with Regulation 35(2) of the Regulations of the Court ("Regulations"). As such, the Chamber did not consider the defence reply in its deliberations and will not refer to it in this decision.

3. Because the defence had requested that a decision on the Request for Provisional Release be rendered by the end of August,[8] the Chamber issued a summary order on 30 August 2011, which contained the Chamber's disposition and explained that an opinion containing the Chamber's full reasoning would follow.[9] This decision serves that purpose.

II. Submissions

4. The defence bases the Request for Provisional Release on a 22 August 2011 letter from the President of the Senate of the DRC ("Senate Letter").[10] The defence asserts that the Senate Letter constitutes "a material change in the circumstances" that warrants a modification, pursuant to Article 60(3) of the Rome Statute ("Statute"), of the Chamber's earlier decisions regarding

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August 2011, ICC-01/05-01/08-1660-Conf; Prosecution's Response to the Defence "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", 29 August 2011, ICC-01/05-01/08-1661-Conf; Observations de la Représentante légale de victimes relatives à la demande de mise en liberté provisoire de Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo, 29 August 2011 2011 (notified on 30 August 2011), ICC-01/05-01/08-1670-Conf.

[6] *See* ICC-01/05-01/08-1649-Conf, paragraph 6(b).

[7] Réplique de la Défense aux observations du Procureur et des représentants légaux de victimes sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo en République Démocratique du Congo, 30 August 2011, ICC-01/05-01/08-1671-Conf.

[8] ICC-01/05-01/08-1639-Conf-tENG, paragraph 3.

[9] Summary of the Decision on the "Demande de mise en liberté provisoire de M.Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", 30 August 2011, ICC-01/05-01/08-1672.

[10] ICC-01/05-01/08-1639-Conf-AnxB.

the accused's detention.[11] Framing the Senate Letter as "an agreement in principle" by the DRC Government to "eliminate[e] any risk of abscondment in the event of interim release into Congolese territory",[12] the defence argues that the Senate Letter requires the Chamber "to seek the views of Congo" and the United Nations mission in Congo, MONUSCO, on the measures that could be put in place to ensure the accused's return to the seat of the Court.[13] The defence also notes that the accused "has signed an undertaking confirming his willingness to appear at his trial if he is granted interim release into Congolese territory".[14]

5. The prosecution, the legal representatives and the OPCV oppose the accused's provisional release. Each argues that there are no changed circumstances that would justify the provisional release sought and that the Senate Letter does not bear on the question of whether Mr Bemba continues to pose a flight risk.[15] For these reasons, the prosecution and Mr Zarambaud argue that the Chamber was not required to seek the views of the DRC.[16] The prosecution also asserts that the Request for Provisional Release should be denied because it "amounts to a request for reconsideration" of the Trial Chamber's 27 June 2011 decision on the same issue ("June 2011 Decision"),[17] [REDACTED].[18]

[11] ICC-01/05-01/08-1639-Conf-tENG, paragraph 5.
[12] ICC-01/05-01/08-1639-Conf-tENG, paragraph 5.
[13] ICC-01/05-01/08-1639-Conf-tENG, paragraphs 18-20.
[14] ICC-01/05-01/08-1639-Conf-tENG, paragraph 23; ICC-01/05-01/08-1639-Conf-AnxC.
[15] ICC-01/05-01/08-1659-Conf, paragraph 5; ICC-01/05-01/08-1660-Conf, paragraphs 28-29; ICC-01/05-01/08-1661-Conf, paragraphs 5-6; ICC-01/05-01/08-1670-Conf, paragraphs 12-14.
[16] ICC-01/05-01/08-1660-Conf, paragraph 33; ICC-01/05-01/08-1661-Conf, paragraph 6.
[17] Decision on Applications for Provisional Release, 27 June 2011, ICC-01/05-01/08-1565-Conf. A public redacted version was filed on 16 August 2011: Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, 16 August 2011, ICC-01/05-01/08-1565-Red.
[18] ICC-01/05-01/08-1661-Conf, paragraph 2 ([REDACTED]).

III. Relevant Provisions

6. In accordance with Article 21(1) of the Statute, the Chamber has considered Articles 58(1)(b) and 60(3) of the Statute and Rule 118 of the Rules of Procedure and Evidence ("Rules") in ruling on the Request for Provisional Release.

IV. Analysis

The June 2011 Decision Is The Starting Point for The Chamber's Analysis

7. In its June 2011 Decision, the Chamber denied, *inter alia,* the accused's request for provisional release to travel to the DRC to register for the upcoming elections. [19] That decision was based on the Chamber's conclusions that (i) the accused remained a flight risk and was therefore subject to detention under Article 58(1)(b)(i) of the Statute;[20] (ii) electoral registration did not constitute an "exceptional circumstance" justifying the proposed release on humanitarian grounds; [21] and (iii) the accused's interest in participating in the democratic process did not outweigh the concerns regarding the flight risk that the accused posed.[22]

8. [REDACTED].[23]

9. The June 2011 Decision constitutes the baseline decision against which the Request for Provisional Release is to be assessed. The question for the Chamber is whether the Senate Letter and the accused's personal undertaking constitute "changed circumstances" that bear on the

[19] ICC-01/05-01/08-1565-Red, paragraphs 68-72.
[20] ICC-01/05-01/08-1565-Red, paragraphs 55-61 and 71.
[21] ICC-01/05-01/08-1565-Red, paragraph 69.
[22] ICC-01/05-01/08-1565-Red, paragraphs 70-72.
[23] [REDACTED]

conditions justifying detention under Article 58(1)(b)(i) of the Statute – namely, the Chamber's finding that the accused poses a flight risk.

The Senate Letter Does Not Constitute a Changed Circumstance under Article 60(3) of the Statute

10. The Senate Letter does not constitute a changed circumstance under Article 60(3) of the Statute because, irrespective of the context in which it is read, it has no bearing on the question of whether the accused poses a flight risk.

11. There is no basis for the defence's assertion that the Senate Letter constitutes "an agreement in principle of the Congolese Government in response to a request from the applicant for the purpose of eliminating any risk of abscondment in the event of interim release into Congolese territory".[24] On its face, the Senate Letter does not express any agreement – in principle or otherwise – to eliminate the risk of flight if the accused were released into the territory of the DRC.

12. The defence tries to remedy this problem by suggesting that the Senate Letter is a response to a 28 June 2011 letter that the accused's counsel sent to the DRC Minister of the Interior ("June Letter"), and must therefore be read together with the June Letter.[25] Among other matters, the June Letter asks the DRC Minister of the Interior to (i) put in place measures to ensure the accused's security while in the DRC; and (ii) guarantee to ensure that the accused will return to The Netherlands immediately after his enrolment.[26]

[24] ICC-01/05-01/08-1639-Conf-tENG, paragraph 5.
[25] ICC-01/05-01/08-1639-Conf-AnxA.
[26] ICC-01/05-01/08-1639-Conf-AnxA, page 3.

13. It is unclear whether the Senate Letter is a response to the June Letter. The Senate Letter refers to correspondence sent by the accused's counsel to the President of the DRC Senate on 15 August 2011, and on its face, appears to be a response to that correspondence, rather than the defence's June Letter.[27]

14. Whether or not the Senate Letter can be understood as a response to the June Letter, it does not provide the specific assurances sought by the defence in the June Letter. As stated above, the June Letter requests the implementation of security mechanisms and a State guarantee. [28] The Senate Letter simply says "your client can enrol when he comes to register his candidacy".[29] The two letters thus talk past each other, and this lack of responsiveness supports the inference that the Senate Letter is not a response to the June Letter. As such, there is no merit to the defence's suggestion that the Senate Letter constitutes "an agreement in principle" to provide the security measures and State guarantee requested in the June Letter.

15. Even if the Senate Letter constituted "an agreement in principle" to guarantee the accused's return to the seat of the Court – which it does not appear to be – the Chamber would not afford it significant weight because it is not convinced the letter's author has the authority to bind the Government of the DRC. The Senate Letter appears to be signed by the President of the DRC Senate. It is not at all clear that he has the authority to speak for or bind the Government of the DRC and the defence has not provided the Chamber with any information in this regard. For this reason, the Chamber would not attach significant weight to the letter even

[27] The Chamber has not been provided with the defence's 15 August 2011 letter.
[28] ICC-01/05-01/08-1639-Conf-AnxA, page 3.
[29] ICC-01/05-01/08-1639-Conf-AnxB.

if it guaranteed the accused's return to the seat of the Court – which it does not.

16. The key point is thus: no matter the context in which the Senate Letter is read, it provides the Chamber with no new information on the question of whether the accused constitutes a flight risk. It simply takes the position that the accused can register to vote at the same time as he registers his candidacy. This is irrelevant. The Chamber's June 2011 Decision was premised on a finding that the accused posed a flight risk, not the modalities of electoral registration in the DRC. For this reason, the Senate Letter does not constitute a relevant "changed circumstance" that would warrant a modification of the Chamber's June 2011 Decision pursuant to Article 60(3) of the Statute.

17. Indeed, to the extent that the Request for Provisional Release is based upon the Senate Letter, it is effectively an unsupported request for reconsideration of the June 2011 Decision. As the Chamber has previously held, the Chamber will not revisit its previous decisions in the absence of new facts or circumstances that may influence that decision.[30]

The Accused's Undertaking Constitutes a Changed Circumstance under Article 60(3) of the Statute but Does Not Warrant a Modification of the Chamber's June 2011 Decision

18. In a document dated 22 August 2011, the accused undertakes that if granted provisional release into the territory of the DRC, he will (i) return voluntarily to The Netherlands immediately after completing his electoral registration; and (ii) not attempt to intimidate witnesses or victims.[31]

[30] Transcript of hearing on 2 December 2010, ICC-01/05-01/08-T-42-CONF-ENG ET, page 2, line 2, to page 4, line 13; Decision on the "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", 16 November 2010, ICC-01/05-01/08-1010, paragraphs 9-10.
[31] ICC-01/05-01/08-1639-Conf-AnxC.

19. The undertaking constitutes a changed circumstance that bears on the issue of the accused's risk of flight because (i) it speaks directly to the accused's willingness to return to complete his trial if granted provisional release; and (ii) the accused's previous request for provisional release into the DRC – ruled upon in the June 2011 Decision – was not supported by a personal undertaking. The question is whether the undertaking alters the factual underpinning of the June 2011 Decision to such an extent that a modification of that decision is warranted. In the Chamber's view, it does not.

20. In the present context, the Chamber adds the accused's undertaking to the mix of factors weighing for and against a conclusion under Article 58(1)(b)(i) of the Statute that the accused's detention is necessary to ensure his appearance at trial. As identified in the Chamber's June 2011 Decision, the factors that support such a conclusion are: (i) the gravity of the charges against the accused; (ii) the fact that those charges have been confirmed; (iii) the potential for a substantial sentence in case of conviction; (iv) the fact that a significant portion of the prosecution's incriminatory evidence has been presented against the accused; (v) the accused's network of international contacts; (vi) the accused's past and present political position; and (vii) the financial resources apparently at the accused's disposal.[32] As explained in the June 2011 Decision, these factors provide the accused with the motive and means to abscond.[33]

21. The June 2011 Decision also identified the factors that cut against a finding that the accused presents a flight risk, namely: (i) the willingness of a certain State to accept the accused into its territory; (ii) the accused's compliant behaviour during his travel to Belgium in July 2009 and January

[32] ICC-01/05-01/08-1565-Red, paragraphs 55-56.
[33] ICC-01/05-01/08-1565-Red, paragraphs 55-56.

2011; (iii) the accused's apparent desire to live as a public figure rather than as a fugitive; and (iv) the fact that the accused seeks provisional release for a discrete period as opposed to release for an undetermined time.[34] To these factors, the Chamber now adds the accused's personal undertaking.

22. When these factors are considered together, the Chamber is not persuaded that the accused's undertaking is sufficient to warrant a modification of the June 2011 Decision. In part, this is due to the fact that there is no way for a Chamber to know whether a detainee is telling the truth when he or she promises to return to custody if granted provisional release. More fundamentally, the accused's undertaking does not alter the facts underpinning the Chamber's earlier finding, based on the factors identified in paragraph 20 that the accused poses a flight risk. At bottom, the Chamber's basic concerns remain: the accused has a powerful incentive to flee and has the means to do so. While his personal undertaking offers some reassurance, it is insufficient – either by itself or considered together with the factors identified in paragraph 21 – to mitigate the risk of flight to such an extent as to justify a grant of provisional release.

23. For these reasons, the accused's undertaking does not warrant a modification of the June 2011 Decision.

24. As stated in the June 2011 Decision, the Chamber is mindful that participation in the democratic process through voting or running for elections is a fundamental right that may be restricted only where reasonable.[35] To this end, the Chamber has balanced the accused's right to

[34] ICC-01/05-01/08-1565-Red, paragraph 61.
[35] *See* ICC-01/05-01/08-1565-Red, paragraph 70 and note 133.

participate in the upcoming DRC elections against the risk of his flight and has concluded that the accused's continued detention is justified in the circumstances. This conclusion is a necessary consequence of the Chamber's finding that the accused continues to pose a flight risk and as such, cannot be considered an unreasonable restriction on his democratic rights.

The Chamber Is Not Required To Seek The Observations of the DRC or MONUSCO

25. The defence argues that the Senate Letter triggered an obligation on the part of the Chamber to seek observations from the DRC Government and MONUSCO regarding the Request for Release.[36] The Chamber disagrees.

26. Rule 119(3) is the Rule that requires a Chamber, in considering a request for release, to consult with relevant States. However, Rule 119(3) does not apply to all requests for release. [REDACTED].[37] The decision on whether to consider the possibility of conditional release is a matter entrusted to the Chamber's discretion.[38] As with the June 2011 Decision, the Chamber declines to exercise its discretion to consider the possibility of conditional release because it is not persuaded that the imposition of conditions would mitigate the risk of flight to such an extent as to justify the accused's release. [REDACTED].[39]

The Defence Has Failed To Justify Confidential Treatment of the Request for Provisional Release

27. The defence filed the Request for Provisional Release confidentially "to facilitate the implementation of a decision on interim release, if granted, to

[36] ICC-01/05-01/08-1639-Conf-tENG, paragraphs 18-20.
[37] [REDACTED]
[38] [REDACTED]
[39] [REDACTED]

Congolese territory".[40] In the Chamber's view, this explanation does not provide a sufficient basis for confidential treatment.

28. The public redacted version of the June 2011 Decision discloses that the accused has sought provisional release to the DRC to obtain a voting card and to file his candidacy for the upcoming elections.[41] Because this information is already in the public domain and because the Request for Provisional Release seeks the same release for the same purposes, the Chamber is not persuaded that confidential treatment is necessary. For this reason, the Chamber's 30 August 2011 summary was filed publicly.

29. However, some of the filings related to the Request for Provisional Release, as well as this decision, refer to the Appeals' Chamber's 19 August 2011 judgment, which retains a confidential classification as of today's date. For this reason, this decision is being issued confidentially. The Chamber will review this classification promptly upon the Appeals Chamber's filing of a public redacted version of its judgment.

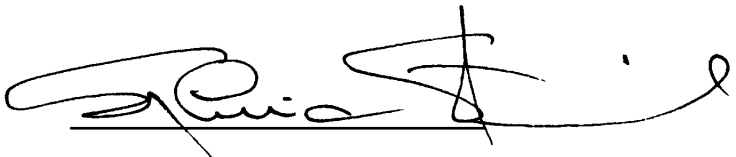
30. In light of the above, the parties and participants shall (i) file public redacted versions of their filings related to the Request for Provisional Release; or (ii) invite the Chamber to reclassify their filings pursuant to Regulation 23*bis*(3) of the of the Regulations if they believe that no redactions are necessary. The parties and participants shall do so within five days of the Chamber issuing a public redacted version of this decision or reclassifying this decision as public.[42]

V. Conclusion

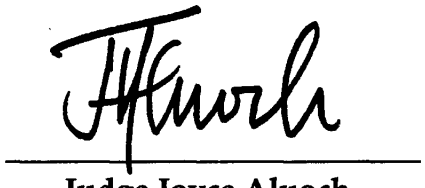
[40] ICC-01/05-01/08-1639-Conf-tENG, paragraph 4.
[41] ICC-01/05-01/08-1565-Red, paragraphs 12-13.
[42] This time limit supersedes that prescribed in paragraph 6(b) of the Chamber's 30 August 2011 summary order.

31. For the reasons above, the Chamber denies the Request for Provisional Release.

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



Judge Sylvia Steiner



Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this 6 September 2011

At The Hague, The Netherlands