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

Date: 27/11/2014

**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*

**Public Document**

**Request for Interim 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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**Unrepresented Victims**

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**Detention Section**

1. Jean-Pierre Bemba Gombo ("the Suspect") hereby requests that the Pre-Trial Chamber release him from detention in case ICC-01/05-01/13, thereby remanding him into the custody of the International Criminal Court ("the Court") in case ICC-01/05-01/08 alone (the "main case").

2. The Suspect asserts that such release is necessary in order to secure his fundamental right not to be subjected to the arbitrary deprivation of his liberty in the present case despite his detention in the main case. This right, it is submitted, must be exercised independently of his right to release in the main case.

### **I. The Suspect must be released pursuant to Article 60**

3. Pursuant to Article 60(2) of the Statute, an accused "*person shall continue to be detained*" if "*the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met*". This Article 60(2) analysis requires the Pre-Trial Chamber to "*inquire anew into the existence of facts justifying detention*", an analysis which "*is not conditioned by its previous decision to direct the issuance of a warrant of arrest*".<sup>1</sup> Such a reexamination of the criteria warranting detention is two-fold. Firstly, pursuant to Article 58(1)(a) of the Rome Statute, the Pre-Trial Chamber will examine if there exist reasonable grounds to believe "*that the person has committed a crime within the jurisdiction of the Court*". Secondly, pursuant to Article 58(1)(b) of the Rome Statute, the Pre-Trial Chamber will reexamine the risk factors the occurrence of which detention is designed to prevent.

*Article 58(1)(a)*

4. In light of the confirmation proceedings, the nature of the criminality imputed

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<sup>1</sup> ICC-01/04-01/07-572, para. 10.

to the Suspect has changed. The extremely serious charge of presenting fourteen forged documents to the Court was not confirmed.

5. Accordingly, the facts underlying a potential Prosecution claim that the Suspect is prone to commit offences against the administration of justice have less support in the evidence than they did prior to the confirmation decision.

*Article 58(1)(b)*

6. Regardless of the existence of “reasonable” or even “substantial” grounds to believe that the Suspect committed certain offences against the administration of justice, the Pre-Trial Chamber is, nevertheless, required to proceed with a *de novo* analysis of the risks delineated in Article 58(1)(b) of the Statute.

7. Under this prong of the analysis, the Pre-Trial Chamber will determine whether continued detention is or, rather, “appears”<sup>2</sup> – necessary. As the Appeals Chamber has held: “a decision on interim release [...] is not discretionary. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) (b) of the Statute are not met, it shall release the person, with or without conditions.”<sup>3</sup>

8. None of the risks detailed in Article 58(1)(b) will present themselves in the instant case due to the simple fact that the Suspect will remain in detention in case ICC-01/05-01/08 – a situation which effectively undercuts any potential risk of flight, obstruction or continued re-offending. The Suspect will remain subject to the surveillance of the Court in all things related to the two cases. The Single Judge

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<sup>2</sup> ICC-01/04-01/07-572 (OA 4), para. 21.

<sup>3</sup> ICC-01/05-01/08-631-Red (OA 2), para 105.

himself has stated his preference for continued monitoring of the Suspect's co-accused.<sup>4</sup>

9. As the Single Judge has already intimated, the charges levelled against the Suspect carry a maximum sentence of five years. The maximum penalties and gravity of the charges are an important factor to be considered in determining a person's tendency to abscond from trial.<sup>5</sup> A sensible application of the "gravity" factor is even more important in Article 70 cases precisely in order to avoid the presumption by which all accused face "grave" accusations, are likely to abscond and must therefore be detained indefinitely.<sup>6</sup> The maximum penalty of five years (20% of which the Suspect has already served in pre-trial detention) does not appear to be a realistic factor in rendering the Suspect's flight more likely.

10. Furthermore, the alleged manner of commission of the offences, as confirmed, speaks to a low sentence. Offences against the administration of justice comprise a wide conduct of criminal behavior. It should go without saying that corrupting witnesses with the offer of money to testify for the defence (an allegation strenuously denied in the present instance) is far less serious than threatening a prosecution witness with violence in order to dissuade him from testifying.

11. As for the remaining two factors listed in Article 58(1)(b)(ii)-(iii), the obstruction and/or continued commission of the alleged crimes are nearly impossible in the case at hand. As the Single Judge has already determined:

*"[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*

<sup>4</sup> See, e.g., ICC-01/05-01/13-612, para. 28.

<sup>5</sup> See ICC-02/11-01/11-278-Red, para. 54; ICC-01/04-01/10-283, para. 21.

<sup>6</sup> See generally ICC-02/11-01/11-278-Red, para. 54.

*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...’’<sup>7</sup>*

12. This principle, by which the risk factors justifying pre-trial detention are greatly reduced once evidence has been gathered and produced, is supported by the human rights jurisprudence.<sup>8</sup>

13. Indeed, the investigation in the present case should have been completed; the phone conversations should have been recorded and no further witnesses should be interviewed. In any event, the Suspect will remain in detention in the main case and will not be able to contact any individual – witness or member of the general public – unless that individual is approved by the Custody Officer and placed on his list of those authorized to speak to him at the Court’s detention facility.

14. Accordingly, none of the risks enumerated in Article 58(1)(b) of the Rome Statute can arise in the instant case.

## **II. The Suspect enjoys the fundamental right to liberty**

15. Detention at the Court is subject to the fundamental right of liberty pursuant to international human rights law.<sup>9</sup> It is now well-established jurisprudence, as recognized by this Chamber, that the Court is beholden to a “*distinct and independent*

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<sup>7</sup> ICC-01/05-01/13-703 at p.4.

<sup>8</sup> ECtHR, *Darvas v. Hungary*, Judgment of 11 January 2011, Application no. 19547/07, para. 26 (“the Court considers that the risk of collusion must be regarded as significantly less relevant once the evidence has been gathered, the investigation terminated and a bill of indictment preferred”); ECtHR, *Szeloch v. Poland*, Judgment of 22 February 2001, Application no. 33079/96, para. 93.

<sup>9</sup> Rome Statute, Article 21(3).

*obligation... to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of the Statute”, which exists as “a corollary of the fundamental right of an accused to a fair and expeditious trial” .<sup>10</sup>*

16. As determined by this and other Chambers, a review of a Suspect’s detention must take into account *“the underlying principle that deprivation of liberty is the exception and not the rule”*.<sup>11</sup> This principle is also firmly established by the human rights jurisprudence<sup>12</sup> and is a central, underpinning tenet of the Chamber’s review of an accused’s detention pursuant to Articles 60(2) and 60(3).<sup>13</sup>

17. Article 60(4) is yet another example of the Rome Statute’s concern to ensure that the right of liberty is not curtailed in a non-proportionate manner. The right to liberty is enshrined in the practice and jurisprudence of the Court via Article 21(3) of the Rome Statute.

18. Contrary to the Prosecutor’s assertions elsewhere,<sup>14</sup> the Appeals Chamber has determined that a Chamber’s obligation to review the Suspect’s detention must be read in accordance with *“other provisions of the Statute”* that *“also have a bearing upon the obligation to ensure that a person subject to a warrant of arrest is not detained for an unreasonable period.”*<sup>15</sup> According to the Appeals Chamber, *“[f]oremost amongst them is the fundamental right, guaranteed by article 67 (1) (c) of the Statute, that an accused shall be*

<sup>10</sup> ICC-01/05-01/13-703 at p.5.

<sup>11</sup> See ICC-01/05-01/08-403 at para. 36; ICC-01/05-01/08-321 at para. 31; ICC-01/04-01/07-330 at pp.6-7; ICC-01/04-01/07-426 at p.6; see also ICC-01/05-01/13-588 at para. 3 (“As stated by the Defence for Mr Arido, the right to liberty is a fundamental human right and pre-trial detention is an exception thereto...”).

<sup>12</sup> IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No 114, para. 106; IACtHR, *Acosta-Calderón v. Ecuador*, Judgment of 24 June 2005, para. 74; IACtHR, *Children's Rehabilitation*, Judgment of 2 September 2004, Series C No. 112, para. 228; Human Rights Committee, Communication 526/1993, *Hill and Hill v. Spain*, 23 June 1997, para. 12.3; ECtHR, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application no. 33977/96, para. 85.

<sup>13</sup> XXX cite to Bemba decision XXXX

<sup>14</sup> ICC-01/05-01/13-727, paras. 5 *et seq.*

<sup>15</sup> ICC-01/04-01/06-824 (OA 7) at para. 98.

*entitled to a fair trial without undue delay(...)*".<sup>16</sup> This right must be read in conformity with Article 21(3) of the Statute.

19. In the instant case, the Single Judge's previous findings in this regard are most apposite. In his *proprio motu* review of the pre-trial detention of the co-suspects, the Single Judge found that "*the paramount need to ensure that the duration of pre-trial detention...shall not be unreasonable makes it now necessary for the Chamber to review such detention*".<sup>17</sup> The Single Judge ruled correctly. The right to be tried without undue delay is a fundamental right under Rule 67(1)(c) and a highly relevant factor in assessing whether a suspect's detention "*appears*" necessary pursuant to the *chapeau* of Article 58(1)(b). This particular right is distinct from the right to a reconsideration of detention on account of a dilatory prosecution pursuant to Article 60(4).

20. In the course of his *proprio motu* review, the Single Judge duly noted that the proceedings in the Article 70 case have been delayed and drawn out due to a number of procedural developments.<sup>20</sup> Moreover, in relation to the co-suspect, the Single Judge found that "*the reasonableness of the duration of the detention has to be balanced inter alia against the statutory penalties applicable to the offences at stake in these proceedings*", and that "*the further extension of the period of the pre-trial detention would result in making its duration disproportionate*".<sup>21</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> ICC-01/05-01/13-703 at p.4.

<sup>20</sup> ICC-01/05-01/13-703 at p.4. See, also, ICCPR, article 9(3); Convention of Human Rights and Fundamental Freedoms, article 5(3); American Convention on Human Rights, article 7(5); ECtHR, Human Rights Committee Communication No. 336/1988, *N. Fillastre v. Bolivia*, UN doc. GAOR, A/47/40, p. 306, para. 6.5; (holding that lengthy written proceedings do not constitute justification for "reasonable" delays); *Wemhoff Case v. the Federal Republic of Germany*, Judgment, 27 June 1968, Series A, No. 7, p. 22, para. 5 and p. 23 (holding that "it is the provisional detention of accused persons which must not ... be prolonged beyond a reasonable time", and that the relevant time period ends on the day "on which the charge is determined, even if only by a court of first instance").

<sup>21</sup> *Ibid.*



21. Furthermore, in the context of the Prosecution's request to suspend the Single Judge's decision to release the co-suspects, the Appeals Chamber noted that the "*suspects are alleged to have committed offences under article 70 of the Statute, which carry a maximum penalty of five years imprisonment, and that they have already spent several months in pre-trial detention.*"<sup>22</sup> The Appeals Chamber thereafter decided that "*on balance, and in these specific circumstances*", it would not be "*appropriate*" to accede to the Prosecution request.<sup>23</sup>

22. Due to the fact that the modes of liability, number of incidents, and counts of alleged crimes are nearly identical for all five of the co-accused (42 or 43 counts each under varying modes of Article 25 liability),<sup>24</sup> such analysis applies equally to all co-suspects in this case. The Suspect has been detained in this case since being served with an arrest warrant on 23 November 2013, constituting nearly one (1) full year of detention. As with the co-suspects, this period of detention is unreasonable in the context of Article 70 proceedings, and violates his fundamental right to a speedy trial and to interim release.

### **III. The Suspect holds independent rights to release in both cases**

23. The simultaneous detention of a suspect in two cases before the Court is unprecedented. Such a situation, nevertheless, does not diminish the Suspect's interest in being released from detention in both of the cases. In fact, the two cases are entirely independent of one another and the Suspect's continuing detention in case ICC-01/05-01/08 should not impact on his right to be released by the Chamber in case ICC-01/05-01/13.

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<sup>22</sup> ICC-01/05-01/13-718 (OA 9) at para. 7.

<sup>23</sup> *Ibid.*

<sup>24</sup> *See generally* ICC-01/05-01/13-526-Conf-AnxB1.

24. Indeed, the Suspect submits that the presumption of innocence which he continues to enjoy before all Chambers of the Court, prevents this Pre-Trial Chamber from factoring any consideration arising out of the main case into its assessment of the need for detention in the present case. Should the Suspect be acquitted in the main case and be released during any appeal process, the Prosecution will be at liberty to petition the Chamber dealing with the Article 70 case with a fresh request for detention. To maintain the Suspect's detention in the interim without any practical purpose, however, is unacceptable.

25. It is well established in human rights law that an arrested person must be afforded the right of effective access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention. This principle is enshrined in all the major human rights instruments.<sup>25</sup> To refuse the Suspect interim release in the present case simply because he is detained in another case would effectively abrogate the Suspect's independent right to a discrete review of the conditions of his detention in the present case.

26. In addition, the Suspect's interest in a speedy trial in the instant case, pursuant to Article 67(1)(c), should not be deemed less critical by virtue of the fact that he is detained in another case. This fundamental interest is certainly at stake in these Article 70 proceedings, as discussed above.

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<sup>25</sup> United Nations General Assembly, GA/RES/217 A(III) of 10 December 1948, article 9; "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", annexed to the General Assembly resolution 45/110 of 14 December 1990, rule II.6; "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", annexed to United Nations General Assembly resolution A/RES/43/173 of 9 December 1988, Principle 32; International Covenant on Civil and Political Rights (ICCPR), UN Treaty Series, vol. 999, p. 171, article 9; Convention of Human Rights and Fundamental Freedoms, UN Treaty Series, vol. 213, p. 221, article 5; African Charter on Human and Peoples' Rights, UN Treaty Series, vol. 1520, p. 217, article 6; American Convention on Human Rights, UN Treaty Series, vol. 1144, p. 143, article 7.

#### IV. Relief Sought

27. In light of recent decisions in the instant case and the fundamental right to a trial without undue delay, the Pre-Trial Chamber is requested to release the Suspect from detention in case ICC-01/05-01/13.

28. Due to his continued detention in case ICC-01/05-01/08, the Suspect poses less of a risk of flight, obstruction or recidivism than the co-suspects who have already been released.

29. Given that the present request concerns the liberty of the individual, "*good cause*" exists pursuant to Regulation 35(2) of the Regulations of the Court to reduce the time limit for any Prosecution response.



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