

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 16 December 2008

**PRE-TRIAL CHAMBER III**

**Before: Judge Ekaterina Trendafilova, Single Judge**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
*v. JEAN-PIERRE BEMBA GOMBO***

**Public**

**Decision on Application for Interim Release**

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

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

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**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

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Victims**

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**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber III (the “Chamber”) of the International Criminal Court (the “Court”)<sup>1</sup> received on 3 November 2008 an application for interim release (the “Application”)<sup>2</sup> from the Defence of Mr Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”).

### **I. Procedural History**

1. On 23 May 2008 the Chamber issued a warrant of arrest against Mr Jean-Pierre Bemba,<sup>3</sup> and on 24 May 2008 he was arrested in the Kingdom of Belgium.
  
2. On 10 June 2008 the Chamber issued the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo” (“10 June 2008 Decision”).<sup>4</sup> On the same date, the Chamber issued a new warrant of arrest, which entirely replaced the one of 23 May 2008 (“Warrant of Arrest”).<sup>5</sup>
  
3. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered and transferred to the seat of the Court where his first appearance took place before the Chamber on 4 July 2008.<sup>6</sup>
  
4. On 23 July 2008 the Defence filed an “Application for interim release” in which it requested *inter alia* the Chamber to “grant interim release to Mr Jean-Pierre Bemba and to designate a host country for him (...) and if the Pre-Trial Chamber deems appropriate to impose on Mr Jean-Pierre Bemba any other conditions”.<sup>7</sup>
  
5. On 20 August 2008 Judge Hans-Peter Kaul, acting as a Single Judge on behalf of the Chamber, issued the “Decision on application for interim release” in which he

<sup>1</sup> “Decision Designating a Single Judge”, ICC-01/05-01/08-293.

<sup>2</sup> ICC-01/05-01/08-200-Conf and its annexes.

<sup>3</sup> ICC-01/05-01/08-1.

<sup>4</sup> ICC-01/05-01/08-14-tENG.

<sup>5</sup> ICC-01/05-01/08-15.

<sup>6</sup> ICC-01/05-01/08-T-3-ENG ET.

<sup>7</sup> ICC-01/05-01/08-49, p. 17.

rejected the Defence's application and decided that Mr Jean-Pierre Bemba shall continue to be detained (the "20 August 2008 Decision").<sup>8</sup>

6. On 3 November 2008 the Defence filed the "Requête de Mise en Liberté Provisoire" (the "Defence's Application") in which it requested the release of Mr Jean-Pierre Bemba or alternatively his interim release, under conditions deemed appropriate by the Chamber, the Kingdom of Belgium or, in the alternative, the Republic of Portugal or the Kingdom of the Netherlands, and to declare this decision immediately enforceable.<sup>9</sup>

7. On 12 November 2008 the Chamber issued the "Decision Requesting Observations on the Defence's Application for Interim Release".<sup>10</sup> In that decision, the Chamber requested *inter alia* that the Prosecutor, the Kingdom of Belgium, the Republic of Portugal and the Kingdom of the Netherlands submit observations on the Defence's Application and the "conditions, if any, that would have to be met to enable the States, to which Mr Jean-Pierre Bemba Gombo seeks to be released, to accept him on their territory".

8. On 18 November 2008 the Prosecutor submitted the "Prosecution's Response to Defence's 'Requête de Mise en Liberté Provisoire'"<sup>11</sup> (the "Prosecution's Response"), and on 24 November 2008 the Defence filed a "Request for leave to reply in relation to the motion for provisional release" (the "Defence's Request").<sup>12</sup> On 27 November 2008 the Single Judge granted the Defence's Request ("Decision Granting the Request"),<sup>13</sup> and the Defence filed its response to the Prosecution's Response on 1 December 2008 (the "Defence's Response").<sup>14</sup> On 4 December 2008 the Prosecutor

<sup>8</sup> ICC-01/05-01/08-73-Conf.

<sup>9</sup> ICC-01/05-01/08-200-Conf, paras. 59 and 67 to 68.

<sup>10</sup> ICC-01/05-01/08-238.

<sup>11</sup> ICC-01/05-01/08-262.

<sup>12</sup> ICC-01/05-01/08-276.

<sup>13</sup> "Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008", ICC-01/05-01/08-294.

<sup>14</sup> "Réponse de la Défense aux observations du Procureur du 18 Novembre 2008 intitulées : Prosecution's Response to Defence's Requête de Mise en Liberté Provisoire", ICC-01/05-01/08-302 (quotations omitted).

requested that the Single Judge dismiss the Defence's Response (the "Prosecution's Request").<sup>15</sup>

9. On 24 and 25 November 2008, the Registrar filed respectively, its second report concerning the observations received from the Kingdom of Belgium<sup>16</sup> and the additional observations in relation to this report including the views received from The Netherlands without any reply from the Republic of Portugal.<sup>17</sup>

## II. Submissions of the Parties

### *The Defence's Application*

10. The Defence submitted that in its "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" issued on 31 July 2008 ("Decision on Disclosure"),<sup>18</sup> the Chamber set out a timetable for the purpose of organising the process of disclosure between the Parties and to ensure that the confirmation of charges hearing takes place on 4 November 2008.<sup>19</sup> In the Defence's opinion, because the Prosecutor failed to adhere to the established timetable, the Chamber was prompted to issue two decisions on 17 and 31 October 2008 postponing the initial date for the confirmation hearing and scheduling it to take place on 8 December 2008.<sup>20</sup> Such postponement resulted in Mr Jean-Pierre Bemba's pre-trial detention lasting for more than 5 months, from the suspect first appearance's hearing and more than 6 months as of his deprivation of liberty. These "changes in circumstances" during the proceedings "warrant[ed] a review on an

<sup>15</sup> "Prosecution's Request to Dismiss the « Réponse de la Défense aux observations du Procureur du 18 Novembre 2008 intitulées : 'Prosecution's Response to Defence's Requête de Mise en Liberté Provisoire' », ICC-01/05-01/08-308.

<sup>16</sup> "Second report of the Registrar concerning the Observations Received on the Defence's Application for Interim Release of Mr. Jean-Pierre Bemba Gombo", ICC-01/05-01/08-280 and its annexes.

<sup>17</sup> "Additional Observations received in relation to the 'Second report of the Registrar concerning the Observations Received on the Defence's Application for Interim Release of Mr. Jean-Pierre Bemba Gombo'", ICC-01/05-01/08-280 and its annex.

<sup>18</sup> ICC-01/05-01/08-55.

<sup>19</sup> ICC-01/05-01/08-200, para. 14.

<sup>20</sup> ICC-01/05-01/08-200, paras. 16, 21, 38, 42, 50.

entirely new basis of the previous decision to maintain the Applicant provisional detention".<sup>21</sup>

11. In substantiating its submission, the Defence referred to several decisions issued by the Chamber which highlighted the lack of diligence and full compliance on the part of the Prosecutor during the process of disclosure.<sup>22</sup> It contended that on 17 October 2008 the Prosecutor filed "new charges" under rule 121 of the Rules of Procedure and Evidence (the "Rules"). In the Defence's view, "there are hardly any substantial amendments in relation to the previous charges (...) [and] it rather appears as though the Prosecutor, (...) is trying in vain to cover up the improper disclosures made after the deadline."<sup>23</sup>

12. The Defence also pointed to the Prosecutor's failure to meet some of the deadlines set by the Chamber with respect to the requests for authorisation of redactions in witness statements.<sup>24</sup> It claimed that the Prosecutor's mistakes caused "unwarranted" delay and a prolongation of Mr Jean-Pierre Bemba's detention which justifies the release of the suspect under article 60(4) of the Rome Statute (the "Statute").<sup>25</sup> The Defence finally concluded that if the Pre-Trial Chamber granted the applicant "temporary release", his desire would be to reside in Belgium, Portugal, or The Netherlands. He would also comply with any conditions that may be imposed by the Chamber and offered different modalities to ensure his cooperation with the Court.<sup>26</sup>

### *The Prosecution's Response*

13. The Prosecutor submitted that in the 20 August 2008 Decision, the Single Judge, after having examined the requirements of article 58(1)(a), (b)(i) and (ii) of the

<sup>21</sup> ICC-01/05-01/08-200, paras. 21-22.

<sup>22</sup> ICC-01/05-01/08-200, paras. 26, 36, 53, 55.

<sup>23</sup> ICC-01/05-01/08-200, paras. 44-45.

<sup>24</sup> ICC-01/05-01/08-200, paras. 19-20, 31, 43, 46-47.

<sup>25</sup> ICC-01/05-01/08-200, paras. 7-9.

<sup>26</sup> ICC-01/05-01/08-200, paras. 58-63.

Statute, found that they were satisfied for the purpose of the continued detention of Mr Jean-Pierre Bemba.

14. In supporting his claim, the Prosecutor referred to the analysis undertaken by the Single Judge in the 20 August 2008 Decision and contended that since the decision was issued there had not been a “substantial change in any of the considerations underlying the continued detention of the suspect”.<sup>27</sup>

15. The Prosecutor further argued that hitherto the names and identities of 21 witnesses have been disclosed, some of whom are victims of crimes allegedly attributed to Mr Jean-Pierre Bemba.<sup>28</sup> Those victims and their sufferings have been referred to in the Warrant of Arrest and in the 20 August 2008 Decision.<sup>29</sup> The risk of exerting pressure on them “was also deemed relevant” in the Single Judge’s determination in the 20 August 2008 Decision and these considerations were still valid since this decision was issued.<sup>30</sup> Currently, since the names and identities of the 21 witnesses have already been disclosed, releasing Mr Jean-Pierre Bemba would “pose greater risk to the security of witnesses” and “increase his ability to interfere” with them.<sup>31</sup>

16. In order to substantiate his arguments, the Prosecutor referred to two alleged incidents of Defence interference with prosecution witnesses that were notified to the Chamber on 16 October and 7 November 2008 as well as to a Registry’s report suggesting the possible interference of Mr Jean-Pierre Bemba with the “administration of justice” and jeopardising the “interests of public safety or the rights or freedom of any person”.<sup>32</sup> He also noted a recent decision issued by the Chamber authorising redactions in victims’ applications for participation in the case

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<sup>27</sup> ICC-01/05-01/08-262, paras. 30-33, 51.

<sup>28</sup> ICC-01/05-01/08-262, para. 34.

<sup>29</sup> ICC-01/05-01/08-262, para. 35.

<sup>30</sup> ICC-01/05-01/08-262, paras. 34-35.

<sup>31</sup> ICC-01/05-01/08-262, para. 35.

<sup>32</sup> ICC-01/05-01/08-262, paras. 36-37.

on the basis that Mr Jean-Pierre Bemba still enjoys “significant influence over the MLC and (...) [thus] would be able to locate and reach the victims/applicants”.<sup>33</sup>

17. With respect to the delays in the process of disclosure, the Prosecutor submitted that it had discharged its obligations “in a timely manner” in compliance with the statutory provisions and the timetables set out by the Chamber. It has also disclosed all material in its possession including those obtained under article 54(3)(e) of the Statute.<sup>34</sup>

18. As to the requests for redactions in witness statements and related documents, the Prosecutor asserted that they were consistent with “Articles 54(1)(a) and 61(9), Rules 121(3), (4) and 5 and the Appeals Chamber’s decision on the duration of proceedings at the pre-trial phase”<sup>35</sup> and that he is under a continuing obligation to investigate incriminatory and exculpatory evidence for the sake of establishing the truth and reflecting the “victimization suffered by victims” in the Central African Republic.<sup>36</sup> In his view, the Defence’s contention that he had not respected the time limits for submitting these requests was “misguided”, because three of the witnesses, whose statements were requested to be redacted, were only interviewed after 3 September 2008, the initial deadline set by the Chamber in the Decision on Disclosure. Accordingly, excluding these statements on the basis that the Prosecutor’s requests for their redaction were submitted after this deadline, finds “no basis in the Statute and Rules”.<sup>37</sup>

19. The Prosecutor further claimed that the delay in the pre-trial process and in particular, in carrying out the confirmation of charges hearing on time resulted from factors beyond his control.<sup>38</sup> He referred to statements made by the Chamber in earlier decisions to sustain his position.<sup>39</sup> He also argued that given the “complexity

<sup>33</sup> ICC-01/05-01/08-262, para. 37.

<sup>34</sup> ICC-01/05-01/08-262, paras. 40, 42.

<sup>35</sup> ICC-01/05-01/08-262, paras. 41, 44.

<sup>36</sup> ICC-01/05-01/08-262, paras. 44-46.

<sup>37</sup> ICC-01/05-01/08-262, para. 47.

<sup>38</sup> ICC-01/05-01/08-262, para. 48.

<sup>39</sup> ICC-01/05-01/08-262, para. 48.



of the disclosure regime” created by the Decision on Disclosure, an approximate period of 4 months and 15 days of pre-trial detention as of the date of Mr Jean-Pierre Bemba’s transfer to The Hague was not excessive<sup>40</sup> and that, the request for interim release, sought in accordance with article 60(3) and (4) of the Statute, is a measure of last resort only applicable “if other remedies [had] been unsuccessfully attempted, or [were](...) not available.”<sup>41</sup>

20. The Prosecutor finally concluded that the proceedings had not suffered an unreasonable delay that might be attributed to the Prosecutor and that in light of the foregoing facts, the statutory requirements under article 60(3) and (4) of the Statute had not been fulfilled for considering the suspect’s release.<sup>42</sup>

#### *The Defence’s Response*

21. In its submission, the Defence recalled that the Application was not based on article 60(2) of the Statute, as allegedly referred to in the Prosecution’s Response, rather it was based on article 60(4) of the Statute.<sup>43</sup> In support of its view, the Defence argued that its Application was mainly motivated by a decision issued by the Chamber on 15 September 2008 which referred to the possibility of considering an interim release on the basis of article 60(4) of the Statute.<sup>44</sup>

22. The Defence contended that the Prosecutor did not “adequately address” whether the suspect experienced a prolonged pre-trial detention.<sup>45</sup> It also asserted that the Prosecutor failed to “satisfactorily dispute” whether the delay was inexcusable and attributed to him as a result of his “abusive filing of last minute requests for redactions”, untimely disclosure of both incriminating and exonerating evidence he intends to rely on at the confirmation hearing and failure to comply

<sup>40</sup> ICC-01/05-01/08-262, para. 49.

<sup>41</sup> ICC-01/05-01/08-262, para. 50.

<sup>42</sup> ICC-01/05-01/08-262, para. 51.

<sup>43</sup> ICC-01/05-01/08-302, paras. 4-5.

<sup>44</sup> ICC-01/05-01/08-302, paras. 6-7.

<sup>45</sup> ICC-01/05-01/08-302, para. 8.

with the timetable set by the Chamber in the Decision on Disclosure.<sup>46</sup> It finally argued that the Prosecutor did not address the “unreasonable nature of the prolongation to the detention” in view of the fact that Mr Jean-Pierre Bemba remains a suspect “whose detention (...) is exceptional”.<sup>47</sup>

### *The Prosecution’s Request*

23. The Prosecutor requested that the Single Judge either “strik[e] out” the Defence’s Response in its entirety or alternatively grant him leave to respond to it in order to ensure fairness in the proceedings.<sup>48</sup> In his opinion, the Defence’s Response “exceeded the framework of both the Defence’s Request and the Decision Granting the Request”.<sup>49</sup> The Defence had not confined itself to the issue it sought leave to reply on and took the opportunity to respond as a means to re-litigate “all the issues” amounting from the Prosecution’s Response,<sup>50</sup> which have “no bearing on the Defence’s Request and the Decision Granting the Request”.<sup>51</sup> The Prosecutor referred to paragraphs 5-13 of the Defence’s Response in support of his claim.<sup>52</sup>

24. The Prosecutor concluded that the Defence’s Response caused prejudice and “as it presently stands has impacted [his Office’s] ability to present its argument in a fair manner” for two reasons: First, he was not heard before the Decision Granting the Request was issued in order to ensure that all the facts and circumstances were placed before the Single Judge; and second, apart from re-litigating the issues raised, the Defence “on occasions incorrectly” constructed the Prosecutor’s submissions.<sup>53</sup> With respect to the latter reason, the Prosecutor referred the Single Judge to paragraphs 30 to 51 of the Prosecution’s Response as evidence to refute the Defence’s assertions.<sup>54</sup> The Prosecutor finally submitted that its desire to furnish all the

<sup>46</sup> ICC-01/05-01/08-302, paras. 8-11.

<sup>47</sup> ICC-01/05-01/08-302, para. 9.

<sup>48</sup> ICC-01/05-01/08-308, para. 14.

<sup>49</sup> ICC-01/05-01/08-308, para. 6.

<sup>50</sup> ICC-01/05-01/08-308, paras 9-10.

<sup>51</sup> ICC-01/05-01/08-308, para. 10.

<sup>52</sup> ICC-01/05-01/08-308, para. 10.

<sup>53</sup> ICC-01/05-01/08-308, paras. 6, 11-12.

<sup>54</sup> ICC-01/05-01/08-308, para. 11.

material facts and circumstances concerning the question of detention of the suspect before the Single Judge was consistent with the Appeals Chamber's jurisprudence.<sup>55</sup>

### III. The Applicable Law

25. The Single Judge notes articles 21(1)(a),(b),(2) and (3), 58 (1), 60(2), (3) and(4) and 67(1) of the Statute and rules 118 of the Rules.

26. It should be noted at the outset that the subject-matter of the Prosecution's Request pertains to issues that are essential for the final determination on the Defence's Application. Accordingly, the Single Judge deems it necessary to rule on that request before delving into the merits of the Defence's Application.

27. In the Defence's Request, it stated that the Prosecutor relied in his response on a "Registry Decision",<sup>56</sup> which was filed after the Defence's Application. In the Defence's view, because of the Registry's late filing, "fairness" dictates that Mr Jean-Pierre Bemba be given an opportunity to respond "to the effect of [this decision] on the determination of [his interim release]".

28. The Chamber granted the Defence's Request on the basis of this cause. However, having reviewed the submissions of the parties and in particular, the Defence's Response, the Single Judge considers that the Defence *de facto* went beyond what was authorised in the Decision Granting the Request. Therefore, the Single Judge will not take into consideration any information in the Defence's Response that fell outside the framework of the Decision Granting the Request. This finding also deems the Prosecutor's alternative request unnecessary.

29. The Single Judge is mindful of the fact that the Defence's Request was mainly based on article 60(4) of the Statute and that paragraphs 3 and 4 of this provision

<sup>55</sup> ICC-01/05-01/08-308, para. 13.

<sup>56</sup> "Decision of the Registrar on the monitoring of the non-privileged communications and visits of Mr. Jean-Pierre Bemba Gombo", ICC-01/05-01/08-231-Conf.

guarantee two independent procedural remedies, a view that was confirmed in the Appeals Chamber's judgment of 13 February 2007 (the "13 February 2007 Judgment").<sup>57</sup> However, this does not preclude the Single Judge from conducting an article 60(3) review, because according to this provision together with rule 118(2) of the Rules, the Chamber is under an obligation to review its previous ruling undertaken pursuant to article 60(2) of the Statute on the release or detention of Mr Jean-Pierre Bemba "at least every 120 days" and "may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require".<sup>58</sup> The reference to the phrase "at least every 120 days" makes clear that the Single Judge is obliged to carry out such review prior to the expiry of this period.<sup>59</sup>

30. The last time the Chamber ruled on the "release or detention" of Mr Jean-Pierre Bemba on the basis of article 60(2) of the Statute was on 20 August 2008 where it was decided that he should continue to be detained.<sup>60</sup> Accordingly, the next deadline for the review under article 60(3) of the Statute is 20 December 2008. In view of this approaching deadline and for the sake of expediting and organising the proceedings, it is also appropriate that the Single Judge conduct a review under article 60(3) of the Statute on Mr Jean-Pierre Bemba's detention in the present decision before ruling on the Defence's Application based on article 60(4) of the Statute.

31. At the outset the Single Judge highlights that when dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not a rule. This conclusion also finds support in

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<sup>57</sup> Appeals Chamber, "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'", ICC-01/04-01/06-824, para. 98.

<sup>58</sup> Article 60 (3) of the Statute reads: "The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require".

<sup>59</sup> Appeals Chamber, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", ICC-01/04-01/06-572, para. 14.

<sup>60</sup> ICC-01/05-01/08-73-Conf.

the jurisprudence of this Court<sup>61</sup> and that of the European Court of Human Rights (“ECtHR”)<sup>62</sup>. There was an acknowledgement of its significance in some of the decisions of the *ad hoc* tribunals.<sup>63</sup>

*Article 60 (3)*

32. The revision of a decision on release or detention of a person pursuant to article 60(2) of the Statute is dependant on the criterion “changed circumstances” as set out in article 60(3) of the Statute. It necessitates revisiting the conditions on the basis of which it was decided in the earlier ruling of 20 August 2008 that Mr Jean-Pierre Bemba continue to be detained. Thus, the Single Judge will have to examine whether the conditions set forth in article 58(1) of the Statute continue to be fulfilled.

33. Article 58(1)(a) generally requires an assessment of whether there are reasonable grounds to believe that the person committed a crime that falls within the jurisdiction of the Court, and in the context of the present review, it is essential to assess whether these grounds still exist.

34. In the 10 June 2008 Decision, the Chamber found that “there are reasonable grounds to believe that Mr Jean-Pierre Bemba is criminally responsible under article 25(3)(a) of the Statute, jointly with another person, or through other persons, for [three counts of crimes against humanity and five counts of war crimes committed in the context of an internal or non-international armed conflict]”.<sup>64</sup> In the 20 August 2008 Decision, the Single Judge, relying on this decision, reached the same conclusion and noted that the “defence [had] not put forward any material fact or

<sup>61</sup> Pre-Trial Chamber I, “Decision on the Conditions of the Pre-Trial Detention of Germain Katanga”, ICC-01/04-01/07-426, p. 6; “Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga”, ICC-01/04-01/07-330, pp. 6-7.

<sup>62</sup> ECtHR, *Shamayev and others v Georgia and Russia*, no. 36378/02, Judgment of 12 April 2005, para. 396; *Kurt v Turkey*, no. 24276/94, Judgment of 25 May 1998, para. 122.

<sup>63</sup> SCSL, *Prosecutor v Sesay, Kallon and Gbao*, Case No. (SCSL-04-15-PT), “Decision on the Motion by Morris Kallon for Bail”, 23 February 2004, para. 25; ICTY, *Prosecutor v Darko Mrdja*, “Decision on Darko Mrdja’ Request for Provisional Release”, Case No. (IT-02-59-PT), 15 April 2002, para. 29; *Prosecutor v. Hadžihasanović et al.*, Case No. (IT-01-47-PT), “Decision Granting Provisional Release to Enver Hadžihasanović”, 19 December 2001, para. 7.

<sup>64</sup> ICC-01/05-01/08-14-tENG, paras. 29-68, 84.

argument to rebut these grounds and [considered] that they still stand”.<sup>65</sup> In the present case, after reviewing the parties’ submissions, the Single Judge also considers that there has been no change in the circumstances since then that merit reaching a different conclusion, and accordingly, the requirement of article 58(1)(a) continues to be met.

35. With respect to the conditions set forth in article 58(1)(b) of the Statute, continued detention cannot be ordered, unless the Single Judge is satisfied that it appears necessary (i) to ensure Mr Jean Pierre-Bemba’s appearance at trial; (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings, or (iii) where applicable, to prevent him from continuing with the commission of the crimes referred to in the Warrant of Arrest or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. These conditions are “in the alternative”, and thus, the fulfilment of one of them is sufficient to negate the need to address the remaining conditions. However, in view of the submissions of the parties, the Single Judge still deems it appropriate to tackle them in turn.

36. In the 10 June 2008 Decision, the Chamber recognised that, “in light of Mr Jean-Pierre Bemba’s past and present political position, his international contacts, his financial and professional background, and the fact that he has the necessary network and financial resources, he may abscond (...)”.<sup>66</sup> Thus far, these considerations have not changed and the Single Judge considers that they are equally applicable in the present context. Moreover, the charges that Mr Jean-Pierre Bemba is facing are quite numerous and of such gravity that might result in multiple convictions amounting to an overall lengthy sentence.<sup>67</sup> If this is considered in light

<sup>65</sup> ICC-01/05-01/08-73-Conf, para. 52

<sup>66</sup> ICC-01/05-01/08-14-tENG, para. 87.

<sup>67</sup> See Article 78(3) of the Statute. The practice of the *ad hoc* tribunals shows that a sentence was passed either as a separate sentence in respect of each conviction or as a single sentence and either of them were served concurrently. See, ICTY, *Prosecutor v. Anto Furundzija*, “Judgment”, Case No. (IT-95-17/1-T), 10 December 1998, pp. 110,112 (where he had double conviction for rape and outrages upon personal dignity, including rape and received multiple sentences of 18 years); *Prosecutor v. Dragoljub Kunarac et al.*, “Judgment”, Case No.

of other existing factors such as, his financial resources, ties and international contacts, political position, which can provide him with the means to flee and the possible date scheduled for the confirmation of charges hearing, the risk of him absconding becomes a real possibility. This line of reasoning is consistent with the jurisprudence of the Court<sup>68</sup> and was specifically upheld by the Appeals Chamber in the 13 February 2007 Judgment and more recently in its judgment of 9 June 2008.<sup>69</sup>

37. In the Defence's Application, it was asserted that Mr Jean-Pierre Bemba is ready to cooperate and provide the Chamber with "any travel document in his possession" and promised to abide by the Court's orders and conditions if his interim release was ordered. The Single Judge does not consider that such a statement is sufficient *per se* to grant the suspect interim release. This may be only regarded as a factor that needs to be assessed alongside other factors, such as those outlined above, before coming to a decision. This view was also confirmed in *Šainović*<sup>70</sup> and *Gvero*<sup>71</sup> before the ICTY. In weighing these factors, the Single Judge cannot reach a finding other than that there would be an inevitable risk that Mr Jean-Pierre Bemba, if released, would not appear at the confirmation of charges hearing and by implication at trial. Thus, having regard for these factors, the Single Judge considers that the requirement of article 58(1)(b)(i) of the Statute is satisfied and the continuing detention of Mr Jean-Pierre Bemba remains necessary to ensure his appearance at trial.

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(IT-96-23-T & IT-96-23/1-T), 22 February 2001, pp. 281-282 (where Kunarac was convicted for rape and torture as crimes against humanity and war crimes and sentenced to a single sentence of 28 years); *Prosecutor v Jean- Paul Akayesu*, "Sentencing Decision", Case No. (ICTR-96-4-T), 2 October 1998 (where he was convicted for *inter alia* murder, rape and torture as a crime against humanity and was sentenced to a single sentence of life imprisonment).

<sup>68</sup> Pre-Trial Chamber I, "Decision on the application for Interim Release of Mathieu Ngudjolo Chui", ICC-01/04-01/07-344-Conf, p. 7; Pre-Trial Chamber I, "Review of the 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui'", ICC-01/04-01/07-694, pp. 5-6.

<sup>69</sup> ICC-01/04-01/06-824, para. 136; ICC-01/04-01/06-572, para. 18.

<sup>70</sup> *Prosecutor v Nikola Šainović et al.*, "Decision on Provisional Release", Case No. (IT-99-37-AR65), 30 October 2002, paras. 6-7, 9.

<sup>71</sup> *Prosecutor v. Milan Gvero et al.*, "Decision Concerning Motion for Provisional Release of Milan Gvero", Case No. (IT-04-80-PT), 19 July 2005, paras. 7, 18.

38. As to the requirement of article 58(1)(b)(ii), the Chamber also stated in the 10 June 2008 Decision that “many of the victims and witnesses are financially destitute and that, in view of their place of residence, Mr Jean-Pierre Bemba could easily locate them, and that this places them at particular risk”.<sup>72</sup> Moreover, “in his capacity as President of the [Movement for the Liberation of the Congo], Mr Jean-Pierre Bemba continues to exercise *de facto* and *de jure* authority over this movement; that he can rely on the movement’s network and his former soldiers to influence the witnesses in his case; and that his past behaviour indicates that he will do so”.<sup>73</sup> This reasoning was also relied upon by the Single Judge in the 20 August 2008 Decision<sup>74</sup> and it remains valid for the purpose of the present review. Consideration of Mr Jean-Pierre Bemba’s authority and influence to locate and reach victims was also noted in one of the Chamber’s recent decisions concerning victims’ participation in the case.<sup>75</sup>

39. In the Defence’s Application, it argued that the Victims and Witnesses Unit (“VWU”) “shed new light on any lingering questions by stating that it saw no problem with the disclosure of the identity of the victims to the Defence, including Mr Jean-Pierre Bemba, and that there was nothing giving reason to fear for the safety of the witnesses whose identities had been mistakenly disclosed on the ICC website”.<sup>76</sup>

40. The Single Judge observes, that most of the Defence’s filings, including the one under consideration, lack precision as they do not refer to the exact source of information. This is the case with the Defence’s present statement and the Single Judge should neither be placed in a position to substantiate the parties’ submissions nor strengthen them. Nonetheless, in response to the Defence’s argument, any assessment that has been made so far by VWU concerning the protection of victims and witnesses was conducted on the assumption that Mr Jean-Pierre Bemba is in

<sup>72</sup> ICC-01/05-01/08-14-tENG, para. 88.

<sup>73</sup> ICC-01/05-01/08-14-tENG, para. 89.

<sup>74</sup> ICC-01/05-01/08-73-Conf, paras. 24-25, 59.

<sup>75</sup> “Second Decision on the question of victims’ participation requesting observations from the parties”, ICC-01/05-01/08, para. 13.

<sup>76</sup> ICC-01/05-01/08-200, para. 57.



detention, which means that the risk to their safety was undoubtedly lower. This would not be the case if Mr Jean-Pierre Bemba's application for interim release was granted. Arguably, the risk to their safety would increase.

41. Apart from the question of safety and protection of the victims and witnesses, one should note that releasing Mr Jean-Pierre Bemba could particularly result in exerting pressure on the witnesses to change their testimony not only for the purpose of the confirmation of charges hearing but also for the sake of the trial proceedings. Hitherto, the identity of 21 witnesses was disclosed to the Defence,<sup>77</sup> and as the Prosecutor rightly indicated in his response, the possibility that Mr Jean-Pierre Bemba may use his authority to locate them and exert the said pressure to "obstruct or endanger" the Court's proceedings cannot be ruled out.

42. The alleged incidents of Defence interference with prosecution witnesses 0037 and 0045 that were notified to the Chamber on 16 October and 7 November 2008 justify these concerns. Although in deciding the matter, the Single Judge rejected the Prosecutor's request to open an inquiry into the circumstances of the allegations,<sup>78</sup> this does not diminish the concern to be given to his complaint, as this was not ruled upon due to the Prosecutor's failure "to follow the appropriate legal path".<sup>79</sup> In light of these considerations, the requirement of article 58(1)(b)(ii) is deemed fulfilled insofar as the continuing detention of Mr Jean-Pierre Bemba remains necessary to ensure that he does not obstruct or endanger the investigation or the Court's proceedings. Finally, as article 58 (1)(b)(iii) does not seem to be applicable in the present context as the situation on the ground has changed and a peace process is underway, the Single Judge shall refrain from addressing it.

43. Having conducted the previous review, the Single Judge is not satisfied that there has been any change of circumstances related to the detention of Mr Jean-Pierre

<sup>77</sup> These are witnesses 0006, 0007, 0009, 0015, 0022, 0023, 0025, 0026, 0029, 0031, 0032, 0036, 0037, 0040, 0042, 0044, 0045, 0046, 0068 and 0080.

<sup>78</sup> ICC-01/05-01/08-295-Conf.

<sup>79</sup> ICC-01/05-01/08-295-Conf, para. 15.

Bemba that would require modification of the Chamber's previous ruling on his detention.

*Article 60(4)*

44. The Single Judge recalls that the remedy under article 60(2) and (3) of the Statute is distinct from the one provided in article 60(4) of the Statute in the sense that a ruling in favour of a continued detention of Mr Jean-Pierre Bemba under the former provisions does not affect or prevent the Single Judge from reaching a different finding on the basis of the latter. As stated by the Appeals Chamber in its 13 February 2007 Decision:

[a]rticle 60(4) is independent of article 60(2) in the sense that even if a detainee is appropriately detained pursuant to article 60(2) of the Statute, the Pre-Trial Chamber shall consider releasing the detainee under article 60(4) of the Statute if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.<sup>80</sup>

45. The provision of article 60(4) of the Statute<sup>81</sup> involves two main components, the first is to determine whether the overall period of pre-trial detention has been "unreasonable", and if this is the case, then there is a need to consider the second namely, whether this was caused by an "inexcusable delay" attributed to the Prosecutor.

46. The Single Judge notes that the reasonableness of pre-trial detention cannot be translated into a fixed period of time<sup>82</sup> or assessed *in abstracto*, but as determined on several occasions by the ECtHR, it must be assessed in each case "according to its special features".<sup>83</sup> Due regard should also be given to the complexity of the case.

<sup>80</sup> ICC-01/04-01/06-824, para. 120.

<sup>81</sup> Article 60(4) of the Statute reads: "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions".

<sup>82</sup> ECtHR, *Stögmüller v Austria*, no. 1602/62, Judgment of 10 November 1969, para. 4.

<sup>83</sup> ECtHR, *Wemhoff v Germany*, no. 2122/64, Judgment of 27 June 1968, para. 10.

This approach was adopted by the Appeals Chamber in its 13 February 2007 Decision.<sup>84</sup>

47. Mr Jean-Pierre Bemba was transferred to the seat of the Court on 3 July 2008 and he has presently he has been detained for a period of five months and twelve days. In the 13 February 2007 Decision, the Appeals Chamber considered that generally a period of pre-trial detention of seven months and three days is not “*per se* unreasonably long”. This is equally valid for the present determination, given the circumstances underlying the case of Mr Jean-Pierre Bemba explored earlier in this decision including the seriousness of the charges brought against him, the fear he will influence witnesses, the complexity of the case resulting from *inter alia* the volume of evidence and the disclosure process as well as the number of filings in the case. These and others are considerations that justified longer periods of pre-trial detention by the ECtHR.<sup>85</sup> Moreover, of much significance in assessing the reasonableness of pre-trial detention is the balance between the “public interest”, to ensure the appearance of Mr Jean-Pierre Bemba at trial and the security and protection of victims and witnesses, and the “rule of respect for individual liberty”.<sup>86</sup> After weighing these factors, the Single Judge considers that the duration of pre-trial detention of Mr Jean-Pierre Bemba is not unreasonable and accordingly the question of inexcusable delay raised by the Defence becomes moot.<sup>87</sup>

48. Finally, in view of the conclusion that Mr Jean-Pierre Bemba shall continue to be detained, the Single Judge finds no need to consider the observations received from the States.

<sup>84</sup> ICC-01/04-01/06-824, paras. 122-123.

<sup>85</sup> ECtHR, *Bak v Poland*, no. 7870/04, Judgment of 16 January 2007, paras. 56-65; *W v Switzerland*, no. 14379/88, Judgment of 26 January 1993, paras. 31-43.

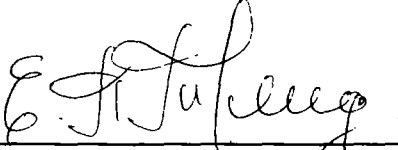
<sup>86</sup> ECtHR, *Dudek v Poland*, no. 633/03, Judgment of 4 May 2006, para. 31; *W v Switzerland*, no. 14379/88, Judgment of 26 January 1993, para. 30.

<sup>87</sup> ICC-01/04-01/06-824, para. 124; ICC-01/04-01/07-694, p. 12; ICC-01/04-01/07-702, p. 13.

**FOR THESE REASONS, THE SINGLE JUDGE**

- a) **decides** to exclude any information in the Defence's Response that fell outside the framework of the Decision Granting the Request.
- b) **rejects** the Defence's Application.
- c) **decides** that Mr Jean-Pierre Bemba shall continue to be detained.
- d) **decides** that the 120 days period for review set out in rule 118(2) of the Rules shall start running anew as of the date of notification of this decision.

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Tuesday, 16 December 2008

At The Hague, The Netherlands