

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

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:

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REGISTRY

Registrar

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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 II of the International Criminal Court (the “Court”) renders this decision on an application for interim release¹ received from the Defence of Mr Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”).

I. Procedural History

1. On 23 May 2008 Pre-Trial Chamber III (the “Chamber”) issued a warrant of arrest against Mr Jean-Pierre Bemba,² 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” (the “10 June 2008 Decision”).³ On the same date, the Chamber issued a new warrant of arrest, which entirely replaced the one of 23 May 2008.⁴

3. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered to the seat of the Court, where his first appearance took place before the Chamber on 4 July 2008.⁵

4. On 23 July 2008 the Defence filed an “Application for interim release” in which it requested the Chamber to *inter alia* “grant interim release to Mr Jean-Pierre Bemba and to designate a host country for him [...] and if the Pre-Trial Chamber deem[ed] appropriate, to impose on Mr Jean-Pierre Bemba any other conditions” (the “First Application”).⁶

5. On 20 August 2008 Judge Hans-Peter Kaul, acting as Single Judge on behalf of the Chamber, issued the “Decision on application for interim release” in which he

¹ “Demande de Mise en Liberté Provisoire”, ICC-01/05-01/08-333-Conf and its annexes.

² ICC-01/05-01/08-1.

³ ICC-01/05-01/08-14-tENG.

⁴ ICC-01/05-01/08-15.

⁵ ICC-01/05-01/08-T-3-ENG ET.

⁶ 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").⁷

6. On 3 November 2008 the Defence filed the "Requête de Mise en Liberté Provisoire" (the "Second Application"), in which it requested the release of Mr Jean-Pierre Bemba or alternatively his interim release, under conditions deemed appropriate by the Chamber, to the Kingdom of Belgium, the Republic of Portugal or the Kingdom of the Netherlands, and to declare this decision immediately enforceable.⁸

7. On 16 December 2008 Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Chamber, issued the "Decision on Application for Interim Release" in which she *inter alia* rejected the Second Application and decided that Mr Jean-Pierre Bemba shall continue to be detained (the "16 December 2008 Decision").⁹

8. On 22 December 2008 the Defence filed the "Demande de Mise en Liberté Provisoire".¹⁰ On 23 December 2008 the Defence filed the "Corrigendum Demande de Mise en Liberté Provisoire" (the "Third Application"), in which it requested the interim release of Mr Jean-Pierre Bemba to the Republic of Portugal or to the Kingdom of Belgium, subject to conditions to be determined by the Chamber, and to declare the decision issued "immediately enforceable notwithstanding any appeal".¹¹

9. On 23 December 2008 Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Chamber, issued the "Decision Requesting Observations on the Defence's Application for Interim Release", in which she *inter alia* requested the Prosecutor's observations on the Third Application and invited the Republic of

⁷ ICC-01/05-01/08-73-Conf.

⁸ ICC-01/05-01/08-200-Conf, paras. 59 and 67 to 68.

⁹ Pre-Trial Chamber III, ICC-01/05-01/08-321.

¹⁰ ICC-01/05-01/08-333-Conf and its annexes.

¹¹ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 66, 69, 70, 77, 78 and its annexes.

Portugal, the Kingdom of Belgium, and the Kingdom of the Netherlands as the Host State, to submit their observations on 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.¹²

10. On 9 January 2009 the Prosecutor submitted the “Prosecution’s Observations on the Defence’s Third Application for Interim Release” (the “Prosecution’s Observations”).¹³

11. On 16 and 19 January 2009 the Registrar filed the observations received from the Kingdom of Belgium, the Kingdom of the Netherlands and the Republic of Portugal respectively.¹⁴

12. On 19 March 2009 the Presidency issued the “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation”, in which it was decided to dissolve Pre-Trial Chamber III and to assign the situation in the Central African Republic (the “CAR”) to Pre-Trial Chamber II.¹⁵

13. On 23 March 2009 Pre-Trial Chamber II issued the “Decision Designating Single Judges”, in which *inter alia* it designated Judge Ekaterina Trendafilova as Single Judge of this chamber with respect to the situation in the CAR and the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, except for all victims’ issues, until decided otherwise.¹⁶

¹² Pre-Trial Chamber III, ICC-01/05-01/08-334.

¹³ ICC-01/05-01/08-354-Conf.

¹⁴ “Third Report of the Registrar concerning the observations received on the Defence’s Application for Interim Release of Mr. Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-370; ICC-01/05-01/08-370-Conf-Anx 1 and 2; “Transmission of the Observations of the Republic of Portugal in relation to the ‘Third Report of the Registrar concerning the Observations Received on the Defence’s Application for Interim Release of Mr. Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-372; ICC-01/05-01/08-372-Conf-Anx.

¹⁵ Presidency, ICC-01/05-22; ICC-01/05-01/08-390.

¹⁶ Pre-Trial Chamber II, ICC-01/05-24; ICC-01/05-01/08-393.

II. Submissions of the Parties

The Defence's Third Application

14. The Defence submitted that it had received full disclosure of the Prosecutor's evidence and thus it is currently in a position to put forward, in a new application, different arguments in favour of Mr. Jean-Pierre Bemba's interim release.¹⁷ In support of its contention that the Third Application should be admitted, the Defence referred to several paragraphs of the Appeals Chamber's judgment of 16 December 2008 (the "16 December 2008 Judgment").¹⁸

15. Referring to article 58(1) of the Rome Statute (the "Statute"), which governs the issuance of a warrant of arrest and continued detention, the Defence acknowledged that the evidentiary threshold required under sub-paragraph 1(a) of this provision "is not very high". It argued that "indicia of guilt" not reaching the "requisite threshold" for confirming the charges is sufficient for its satisfaction.

16. The Defence made reference to certain materials, in particular a statement and an email including information that "raise[d] questions about what clearly appear[ed] to be a procedural machination designed to crush" a political opponent of President Joseph Kabila (i.e. Mr Jean-Pierre Bemba).¹⁹ In supporting its claim, the Defence highlighted that President Kabila paid for an air ticket for a Central African Republic's lawyer to conduct investigations into a situation that is not related to the Democratic Republic of the Congo (the "DRC").²⁰ The Defence also alleged that President Kabila paid Congolese journalists to investigate in the CAR, disregarding "basic journalistic ethics and rules of conduct".²¹

¹⁷ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 11

¹⁸ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 8-10; Appeals Chamber, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", ICC-01/05-01/08-323.

¹⁹ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 18.

²⁰ ICC-01/05-01/08-333-Conf-Corr-tENG, para.18.

²¹ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 18.

17. The Defence further contended that unless Mr Patassé appears in joint proceedings “at the same time” as Mr Jean-Pierre Bemba, it “will be impossible” to establish the existence of a common criminal plan, which is one of the elements required to prove the alleged responsibility under article 25 of the Statute.²² Moreover, referring to some press articles in support of its claim,²³ the Defence argued that the international community preferred a political rather than a judicial settlement, by establishing a truth and reconciliation commission to deal with the CAR conflict and victims’ reparations.²⁴ The political solution and the initiation of a peace process in the CAR suggest that Mr Patassé “will not be called to appear” before the Court and that this new development leads to a violation of the applicant’s right to a fair trial.²⁵

18. In relation to the grounds that justify continued arrest or detention under article 58(1)(b) of the Statute, the Defence submitted that, in light of the new material available, the risk of absconding and obstructing the investigations is no longer valid.²⁶ In substantiating its contention, the Defence attempted to challenge the four factors relied upon by the Chamber in its previous decisions on interim release.²⁷

19. In this regard, the Defence stated that the applicant has no financial means since the Chamber ordered the seizure of “his bank assets and property”. For the Defence, this is supported by the fact that the Chamber decided to release a certain amount of money to pay for legal fees and another monthly amount to cover his family living expenses.²⁸ The Defence further claims that evidence indicates that prior to the applicant’s arrest Mr Jean-Pierre Bemba was preparing for his defence before the Court and this demonstrates that he did not intend to abscond.²⁹

²² ICC-01/05-01/08-333-Conf-Corr-tENG, para. 19.

²³ ICC-01/05-01/08-333-Conf-Corr-tENG, p. 6 n.9.

²⁴ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 20.

²⁵ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 21-23.

²⁶ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 28-29.

²⁷ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 31-33.

²⁸ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 33.

²⁹ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 36-38.

20. As to the international contacts of the applicant referred to in the Prosecutor's disclosed material, the Defence asserted that it would be "absurd and unreasonable" that they could help Mr Jean-Pierre Bemba to abscond since they are "key figures" from States Parties to the Statute.³⁰

21. The Defence also alleged that the applicant has no means to intimidate witnesses in the DRC as they are all members of the government or army and as such protected by the Government in Kinshasa.³¹ The Defence argued that the applicant does not have the "human means" to intimidate witnesses in DRC, since the military branch of the *Mouvement de Libération du Congo* (the "MLC") was gradually dismantled after the Lusaka Agreements and integrated into the Congolese national army. The Defence further contended that, former MLC members, supporters and soldiers were summarily arrested and executed by the Government and therefore "neutralized".³² As to witnesses in the CAR, the Defence asserted that, due to the existence of the peace and reconciliation process, which involved the applicant's former allies in the CAR, he would not be able to "count on" them to exert pressure on the witnesses. The Defence further stated that the names of those witnesses were not disclosed and thus they could not be reached.³³

22. The Defence finally concluded that if the Chamber granted the applicant "interim release", his desire would be to reside in Portugal under house arrest or alternatively in the Kingdom of Belgium. He also offered various guarantees to ensure his continuing cooperation with the Court.³⁴

The Prosecution's Observations

23. As a preliminary procedural objection, the Prosecutor submitted that the Defence's Third Application contradicts rule 118(2) of the Rules of Procedure and

³⁰ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 39-43.

³¹ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 45-46, 52-57.

³² ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 47-51.

³³ ICC-01/05-01/08-333-Conf-Corr-tENG, para. 60.

³⁴ ICC-01/05-01/08-333-Conf-Corr-tENG, paras. 61-70.

Evidence (the “Rules”) and the interpretation given to it in the 16 December 2008 Decision, since the applicant should have waited 120 days from the notification of that decision before filing his new application.³⁵ Moreover, the Defence erroneously relied on an *obiter dictum* “factual statement” made by the Appeals Chamber in the 16 December 2008 Judgment indicating that the Defence was not aware of the material relied upon by the Single Judge in the 20 August 2008 Decision, in particular that essential to “effectively challenge” the lawfulness of the applicant’s detention.³⁶ In the Prosecution’s opinion, such a statement did not relieve the applicant from complying with the 120 days time-limit set out in rule 118(2) of the Rules.³⁷ The Prosecution also contended that it reflected the situation at the time the Defence filed the First Application, and that when it submitted the Second Application, the necessary material was already disclosed. Thus, the Defence had the opportunity to challenge the applicant’s detention, as it did in the Second Application. Accordingly, the Prosecutor requested that the Chamber either dismiss the Third Application or “reserve” it until the 120 days time-limit has expired.³⁸

24. As to the merits, the Prosecutor argued that no substantial change of circumstances had occurred since the 16 December 2008 Decision was issued.³⁹ The Prosecutor considered that an assessment by the Chamber of the evidence submitted by the Defence for the purpose of the confirmation of charges hearing would be premature, as the reliability of such evidence was to be tested during the oral sessions of the hearing, which took place from 12-15 January 2009.⁴⁰ The Prosecutor further argued that the Defence had failed to show how the new evidence disproved the existence of the conditions specified in article 58(1) of the Statute and that “there

³⁵ ICC-01/05-01/08-354-Conf, para. 15.

³⁶ ICC-01/05-01/08-354-Conf, para. 16.

³⁷ ICC-01/05-01/08-354-Conf, para. 17.

³⁸ ICC-01/05-01/08-354-Conf, paras. 15, 17-18.

³⁹ ICC-01/05-01/08-354-Conf, paras. 19, 21.

⁴⁰ ICC-01/05-01/08-354-Conf, para. 26.

is nothing warranting a change in the Chamber's finding contained in both the 20 August 2008 and 16 December 2008 Decisions".⁴¹

25. The Prosecutor further contended that the reference by the Defence "to the activities of President Kabila and other named individuals as well as to former President Patassé are not pertinent considerations under articles 58(1) and 60(2) of the Statute".⁴² Similarly, the reference to the exchange of letters between the applicant and Javier Solana and Louis Michel was deemed irrelevant for the present determination.⁴³

26. The Prosecutor also submitted that to claim that witnesses in the DRC enjoy government protection which places them beyond the applicant's reach contradicts the "facts and evidence" as well as the Chamber's decision of 21 October 2008 granting protection to victims on the basis that the applicant may still locate the victims/applicants through the MLC.⁴⁴

27. The Prosecutor finally challenged the Defence's argument that the applicant's former allies in the CAR are no longer able to exert pressure on the witnesses because of their involvement in the political dialogue. In the Prosecutor's view, most of his witnesses in CAR are "destitute victims and easily identifiable" and thus, if released, the applicant could interfere with them.⁴⁵

III. The Applicable Law

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

⁴¹ ICC-01/05-01/08-354-Conf, paras. 19, 26.

⁴² ICC-01/05-01/08-354-Conf, para. 27.

⁴³ ICC-01/05-01/08-354-Conf, para. 29.

⁴⁴ ICC-01/05-01/08-354-Conf, para. 30.

⁴⁵ ICC-01/05-01/08-354-Conf, para. 31.

Preliminary Procedural Objection

29. The Single Judge recalls the preliminary procedural objection invoked in the Prosecution's Observations and finds it necessary to initially rule on it in order to consider whether the Third Application should be examined on the merits.

30. The Prosecutor contended that by submitting its Third Application before the expiry of the period of 120 days, the Defence "has advanced a position which is inconsistent with [the time-limit set out in] rule 118(2) of the Rules, and also the expressed finding of the Single Judge" in the 16 December 2008 Decision (see paragraph 20 above).

31. The Single Judge wishes to clarify her position as to the appropriate interpretation of article 60(3) of the Statute and rule 118(2) of the Rules. According to the first part of article 60(3) of the Statute and of rule 118(2) of the Rules, the Pre-Trial Chamber is duty bound to review its previous ruling undertaken pursuant to article 60(2) of the Statute on the release or detention of a person "at least every 120 days".⁴⁶ The reference to the phrase "at least every 120 days" makes it clear that the relevant Chamber is obliged to carry out such review at least once prior to the expiry of this period.⁴⁷ The second part of article 60(3) of the Statute and of rule 118(2) of the Rules, which states that "[the Chamber] may do so at any time on the request of the person or the Prosecutor" demonstrates that a party's application for review is not subordinated to a time restriction. Should the Pre-Trial Chamber deem it appropriate to conduct this review, the 120-day period would start running anew from the date of issuing a decision to that effect. Consequently, the Pre-Trial

⁴⁶ 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". Rule 118(2) of the rules stipulates: "The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor".

⁴⁷ 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-01/04-01/07-572, para. 14.

Chamber would be mandated to proceed with the next review within the 120-day period.

32. Thus, in the context of the present case, the Single Judge is of the view that the Prosecutor misinterpreted these provisions and that the Defence had the right to submit its application at any time, no matter the proximity between the date of the previous review and the date of filing a new application. Nonetheless, although the statutory provisions secure such right to the Defence, they equally provide the Single Judge with a margin of discretion to decide on whether the Defence's Third Application should be admitted for the sake of conducting a review on the release or detention of the applicant.

33. The Single Judge recalls that in the 16 December 2008 Judgment, the Appeals Chamber stated that "[a]s soon as the Appellant had received full disclosure, he had the right to apply for interim release again which would have allowed him to make full arguments [...] and at which point the Chamber shall consider the matter and take all relevant factors into consideration".⁴⁸ Since the applicant had received full disclosure between the time of lodging his Second Application and Third Application, the Single Judge is satisfied that a review under article 60(3) of the Statute and rule 118(2) of the Rules is warranted.

34. Moreover, the last time the Chamber ruled on the "release or detention" of Mr Jean-Pierre Bemba was on 16 December 2008, when it was decided that he should continue to be detained.⁴⁹ Accordingly, the next deadline for the review by the Chamber under article 60(3) of the Statute is 15 April 2009. In light of this approaching deadline and for the sake of expediting the proceedings, it is appropriate that the Single Judge review Mr Jean-Pierre Bemba's detention on the basis of the Third Application.

⁴⁸ ICC-01/05-01/08-323, paras. 38-40.

⁴⁹ ICC-01/05-01/08-321.

35. In view of the above, the Single Judge finds that the Prosecutor's request raised in the preliminary procedural objection is without merit and must be rejected.

Article 60(3)

36. At the outset the Single Judge wishes to recall the 16 December 2008 Decision in which it was stated that when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule.⁵⁰ This is one of the guiding principles upon which the present review will be based.

37. The Single Judge stresses that the revision of a decision on release or detention of a person depends on the criterion "changed circumstances" as set out in article 60(3) of the Statute. In the present context, this requires revisiting the conditions on the basis of which it was decided in the earlier 16 December 2008 Decision that Mr Jean-Pierre Bemba would continue to be detained. Thus, the Single Judge will have to examine whether the conditions set forth in article 58(1) of the Statute are still fulfilled.

38. Article 58(1)(a) generally requires an assessment of whether there are reasonable grounds to believe that the person committed a crime which falls within the jurisdiction of the Court. In the context of this review, it is essential to consider whether such grounds still exist.

⁵⁰ Pre-Trial Chamber III, ICC-01/05-01/08-321, para. 31; 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; European Court of Human Rights ("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. There was also an acknowledgment of its importance in a number of the decisions of the *ad hoc* tribunals. See Special Court for Sierra Leone ("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; International Criminal Tribunal for the Former Yugoslavia ("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.

39. In the 10 June 2008 Decision the Chamber found that “there [were] reasonable grounds to believe that Mr Jean-Pierre Bemba [was] 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]”.⁵¹ In the 16 December 2008 Decision, the Single Judge relied on *inter alia* this information and the detailed explanation provided in the 10 June 2008 Decision, the failure of the Defence to refute these grounds as well as on the parties’ submissions, and considered that “there ha[d] been no change in the circumstances [...] [and] accordingly, the requirement of article 58(1) continue[d] to be met”.

40. With respect to the current review, the Single Judge has examined the parties’ submissions in light of the facts, evidence and materials available before her and still considers that there has been no substantial change in the circumstances warranting a modification to her previous ruling. The Defence failed to refute the grounds on the basis of which the Single Judge made her previous determination that the requirements of article 58(1) remained valid. In particular, the Single Judge does not consider that the alleged behaviour of President Kabila directly pertains to the elements of article 58(1)(a) of the Statute or negates the earlier finding of the Single Judge in that respect. The Defence’s allegation that President Kabila had certain political goals to achieve and accordingly paid Congolese journalists to conduct investigations into the CAR or bought an air ticket for an investigator, does not mean *per se* that there are no reasonable grounds to believe that the applicant was involved in the commission of the crimes charged by the Prosecutor.

41. Moreover, the Defence’s assertion that the physical appearance of Mr Patassé in joint proceedings with the applicant is indispensable to establish the latter’s responsibility under article 25(3)(a) is certainly misleading. In this respect, the Single Judge considers that what matters for the purpose of establishing the criminal

⁵¹ ICC-01/05-01/08-14-tENG, paras. 29-68, 84.

responsibility of a person before the Court in general is, ultimately, the sufficiency, relevance and probative value of the evidence presented to the Chamber. Hence, the question at stake is whether the evidence submitted is sufficient to satisfy the requirements of article 25(3)(a) of the Statute in relation to Mr Jean-Pierre Bemba on the basis of the evidentiary threshold set out in article 58(1) of the Statute. Accordingly, the assessment of the criminal responsibility of the other co-perpetrator is irrelevant and therefore there is no issue of unfairness of the proceedings in this context.

42. The Single Judge also recalls the Chamber's recent decision adjourning the hearing, in which it requested the "Prosecutor to consider submitting to the Chamber [...] an amended document containing the charges addressing article 28 of the Statute as possible mode of criminal liability [...]".⁵² The Single Judge underlines that this was without "any predetermination on the possible application of the form of participation invoked by the Prosecutor (article 25(3)(a) of the Statute)". Accordingly, the Chamber's earlier finding in the 10 June 2008 Decision with respect to the applicant's responsibility under article 25(3)(a) of the Statute still stands, until the Chamber has made its final determination on whether to confirm the charges against him in its upcoming decision.

43. In light of the foregoing, the Single Judge considers that the requirement of article 58(1) (a) continues to be satisfied.

44. As to the conditions set forth in article 58(1)(b) of the Statute, the Single Judge is of the view that continued detention cannot be maintained, unless she 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

⁵² Pre-Trial Chamber III, "Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute", ICC-01/05-01/08-388.

which is within the jurisdiction of the Court and which arises out of the same circumstances. In its judgment of 13 February 2007 (the “13 February 2007 Judgment”), the Appeals Chamber confirmed that these conditions are “in the alternative”.⁵³ Accordingly, the Single Judge considers that the fulfilment of one of them is sufficient to negate the need to address the others.

45. In the 16 December 2008 Decision the Single Judge also relied on the Chamber’s earlier findings of the 10 June 2008 Decision, which 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 [...]”.⁵⁴ On the basis of her review, the Single Judge considered that such “considerations ha[d] not changed” and they were “equally applicable”. In the context of the present review, the Single Judge believes that the risk of absconding remains a valid possibility since most of these factors are relevant and have not experienced any significant change.⁵⁵ In this regard, it is worth quoting the 16 December 2008 Judgment of the Appeals Chamber, in which it stated with respect to the 20 August 2008 Decision that “repeating findings already made in the Decision of 10 June 2008 [in relation to the conditions of article 58(1)(b)(i) of the Statute] and concluding that these findings were ‘still valid’ [...] did not detract from the correctness and adequacy of [the Pre-Trial Chamber’s] finding”.⁵⁶

46. In the Third Application, the Defence argued that the issue of absconding is no longer valid because the applicant has no financial means since the Chamber

⁵³ 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. 139.

⁵⁴ ICC-01/05-01/08-14-tENG, para. 87.

⁵⁵ See for e.g. a recent letter signed by the members of the MLC proving that Mr Jean Pierre Bemba as a Congolese political leader continues to be the “National President of the MLC”, ICC-01/05-01/08-200-Anx2-tENG; Pre-Trial Chamber III, “Third Decision on the Question of Victims’ Participation Requesting Observations from the Parties”, ICC-01/05-01/08-253, para. 13 (considering the authority and influence of Mr Jean-Pierre Bemba as President of the MLC).

⁵⁶ ICC-01/05-01/08-323, para. 53.

ordered the seizure of “his bank assets and property”. The Single Judge wishes to point out that a decision on continued detention is not generally made with reference to one sole element. The Appeals Chamber’s jurisprudence is instructive on this point. In the 16 December 2008 Judgment, the Appeals Chamber stated that “[t]he apparent necessity of continued detention in order to ensure the detainee’s appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together”.⁵⁷ Thus, regardless of the weight to be given to the Defence’s argument, the Single Judge’s determination will not be confined to this specific factor. Rather, her finding will be dependent on various factors (such as those referred to in paragraph 45 above) to be assessed collectively.⁵⁸

47. With regard to the Defence’s assertion that the risk of absconding is contradicted by the applicant’s prior knowledge that he was the subject of the Court’s investigations and was accordingly preparing his defence in case of his arrest,⁵⁹ the Single Judge observes that the Defence invoked this factual submission before the Appeals Chamber in relation to the First Application and that the latter found it was unnecessary to decide on it in the 16 December 2008 Judgment. This indicates that the Defence was aware of this information before filing its Second Application and yet failed to raise it at that time. Nonetheless, in response to the Defence’s contention, it cannot be inferred from the fact that the applicant was preparing for his defence prior to his arrest that he lacked the intention to remain at large if he had such opportunity. The risk of absconding increases after arrest, especially when the applicant learns about the charges he is facing and the possible sentence that may

⁵⁷ ICC-01/05-01/08-323, para. 55.

⁵⁸ This line of reasoning also finds support in the *Tarculovski et al* case before the ICTY, where the Appeals Chamber stated “[i]t is well within the Trial Chamber’s discretion to determine that this factor [i.e., the appellant’s financial resources] was not determinative, given that many other factors were involved in making a final determination on provisional release”. See, ICTY, *Prosecutor v Johan Tarculovski et al*, “Decision on Johan Tarculovski’s Interlocutory Appeal on Provisional Release”, Case No. (IT-04-82-AR65.1), 4 October 2005.

⁵⁹ The Defence asserted that it learned about such information through an item disclosed to it after filling the First Application.

result if found guilty.⁶⁰ The charges that Mr Jean-Pierre Bemba is facing are various and of such gravity that they might result in multiple convictions leading to an overall lengthy sentence.⁶¹ If this is taken into consideration,⁶² in view of other existing factors such as his ties, international contacts and political position, which may provide him with the means to flee, and the proximity of the date on which a decision on whether to confirm the charges against him will be issued, the risk of him absconding becomes more likely.⁶³ This line of argument also finds support in the jurisprudence of the Court.⁶⁴

48. Furthermore, according to the observations received from the Republic of Portugal and the Kingdom of Belgium, none of the countries seemed willing to accept the applicant if conditionally released and accordingly they offered no guarantees which ensure the applicant's appearance at trial.⁶⁵ As the ICTY stated on several occasions:

[T]he Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. [It] must also rely on the co-operation of States for the

⁶⁰ See in the same vein, ICTY, *Prosecutor v Ljube Boskoski et al*, "Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release", Case No. (IT-04-82-AR65.2), 28 September 2005.

⁶¹ 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, International Criminal Tribunal for Rwanda ("ICTR"), *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); 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. (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).

⁶² See for e.g., ICTY, *Prosecutor v. Dragomir Milosevic*, "Decision on Defence Motion for Provisional Release", Case No. (IT-98-29/1-PT), 13 July 2005; SCSL, *Prosecutor v Moinina Fofana et al*, " Decision on Application for Bail Pursuant to Rule 65", Case No. (SCSL-04-14-T), 5 August 2004, para. 71.

⁶³ As the Appeals Chamber stated: in order for article 58(1)(b) of the Statute to be fulfilled, "the detention of the suspect must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence", ICC-01/04-01/07-572, para. 21; ICC-01/04-01/08-323, para. 55.

⁶⁴ 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; ICC-01/04-01/06-824, para. 136; ICC-01/04-01/07-572, para. 18.

⁶⁵ ICC-01/05-01/08-370-Anx2; ICC-01/05-01/08-372-Anx.

surveillance of accused who has been released. This calls for a more cautious approach in assessing the risk that an accused will abscond (...). The situation could alternatively call for (...) a request of detailed guarantees by the government in question.⁶⁶

49. This is equally true with respect to the situation of the Court, since it lacks the direct means to re-arrest a suspect/accused if he/she has absconded, and depends primarily on the cooperation of States, without which the applicant's trial might be compromised. Moreover, in *Boskoski*, the ICTY Appeals Chamber upheld the finding of the Trial Chamber when it considered that the failure of the Croatian government to "issue guarantees of the Appellant's appearance for trial", combined with other factors, "weigh[ed] heavily" against his provisional release.⁶⁷ These reasons justify a cautious approach by the Single Judge.

50. Although the Defence stated that Mr Jean-Pierre Bemba is willing to adhere to any forms of restriction on his liberty, such as "plac[ing] his residence under round-the-clock police surveillance" or wearing "an electronic monitoring bracelet", these options cannot be taken into account in the present case, where the two said countries in which the applicant requested to reside did not offer any guarantees. Moreover, the Single Judge does not consider that the suggested restrictions by the Defence are sufficient *per se* to grant the suspect interim release. They may only count as a factor that ought to be weighed alongside other factors (such as those referred to in paragraph 45 above) before coming to a decision.⁶⁸ In considering all factors collectively, the Single Judge cannot reach a finding other than that there would be a possible risk that Mr Jean-Pierre Bemba, if released, would not return to appear at trial in the event that the charges against him are confirmed. The Single Judge considers accordingly that the requirement of article 58(1)(b)(i) of the Statute is satisfied as the continuing detention of Mr Jean-Pierre Bemba remains necessary to

⁶⁶ ICTY, *Prosecutor v Jadranko Prlic*, "Order On Provisional Release", Case No. (IT-04-74-PT), 30 July 2004, para. 17.

⁶⁷ ICTY, *Prosecutor v Ljube Boskoski et al*, "Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release", Case No. (IT-04-82-AR65.2), 28 September 2005.

⁶⁸ *Prosecutor v Nikola Šainović et al*, "Decision on Provisional Release", Case No. (IT-99-37-AR65), 30 October 2002, paras. 6-7, 9; *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.

ensure his appearance at trial if the Chamber confirms the charges against him. As the conditions of article 58(1)(b) are in the alternative, the Single Judge deems it unnecessary to examine the remaining conditions.

FOR THESE REASONS, THE SINGLE JUDGE

- a) **decides** to reject the Prosecutor's request raised in the preliminary procedural objection.
- b) **rejects** the Defence's Third Application.
- c) **decides** that Mr Jean-Pierre Bemba shall continue to be detained.
- d) **decides** that the 120-day 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.



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 14 April 2009

At The Hague, The Netherlands