

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original English

No.: ICC-01/05-01/08 OA 2
Date 3 September 2009

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR

v.

JEAN-PIERRE BEMBA GOMBO

Public Document

Decision on the Request of the Prosecutor for Suspensive Effect

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Mr Nkwebe Liriss
Mr Karim A A Khan

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor dated 14 August 2009 and entitled “Prosecution’s Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” (ICC-01/05-01/08-476) against the decision of Pre-Trial Chamber II dated 14 August 2009 entitled “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” (ICC-01/05-01/08-475),

Having before it the request for suspensive effect by the Prosecutor¹,

Renders unanimously the following

DECISION

The request for suspensive effect of the appeal against the “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” is granted in respect of operative paragraph (a) of the decision

¹ ICC-01/05-01/08-476, p. 3 and para. 8 and the “Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo” dated 24 August 2009, ICC-01/05-01/08-483-Conf-Exp, a public redacted version of the latter document was registered on 25 August 2009 (ICC-01/05-01/08-485)

REASONS

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1 On 14 August 2009, Judge Ekaterina Trendafilova, acting as Single Judge of Pre-Trial Chamber II, issued the “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”² (hereinafter “Impugned Decision”), deciding, *inter alia*, that the Appellant shall be granted conditional release, but that the implementation of this decision would be deferred pending a decision in which State Jean-Pierre Bemba Gombo will be released and which set of conditions shall be imposed on him.³

2 On the same day the Impugned Decision was filed, the Prosecutor filed the “Prosecution’s Appeal against ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”⁴ (hereinafter “Appeal”)

3 On 24 August 2009, the “Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo” (hereinafter “Document in Support of the Appeal”) was filed.⁵

4 In the introduction to the Appeal, the Prosecutor “hereby [] applies for suspensive effect of that appeal, pursuant to article 82(3) of the Statute and Rule 156(5) of the Rules” (hereinafter “Request for Suspensive Effect”). Thereafter, he states that “[i]n a separate motion, [he] will also request that the Appeals Chamber grant suspensive effect to [his] appeal pursuant to Article 82(3) of the Statute and Rule 156(5) of the Rules”⁶ In the Prosecutor’s Document in Support of the Appeal, under the heading “Request for Suspensive Effect”, he argues that affording suspensive effect to his Appeal is necessary

² ICC-01/05-01/08-475

³ Impugned Decision, p. 35

⁴ ICC-01/05-01/08-476

⁵ ICC-01/05-01/08-483-Conf-Exp and ICC-01/05-01/08-485 (public redacted version)

⁶ Appeal, para. 8

to avoid 'pre-empting the subject of the appeal and rendering its outcome moot' or that the Court's jurisdiction is "irreversibly frustrated"⁷

5 On 31 August 2009, the Appeals Chamber received a request from Mr Bemba for extension of time⁸, which was rejected on the same day⁹ Also on 31 August 2009, the Defence filed its "Réponse de la Défense à l'acte d'appel du Procureur ainsi que sa demande de l'effet suspensif"¹⁰ (hereinafter "Response to the Document in Support")

6 In the Response to the Document in Support, Mr Bemba argues that the Prosecutor's application for suspensive effect lacks basis as it is based mainly on the conditions of article 58 (1) (b) of the Statute, despite that the Pre-Trial Chamber determined that the conditions for article 58 (1) (b) had not been met¹¹ Mr Bemba also points out that the request for suspensive effect is premature insofar as Pre-Trial Chamber II has scheduled hearings with the concerned States, but has not yet decided on the conditions of release or the State into which Mr Bemba would be released¹²

II. DETERMINATION BY THE APPEALS CHAMBER

7 For the following reasons, the Appeals Chamber has decided to grant the request for suspensive effect to the extent that the Impugned Decision grants conditional release of Mr Jean-Pierre Bemba Gombo (dispositive, operative paragraph (a))

A. Preliminary Issue

8 The Appeals Chamber notes that pursuant to rule 156 (5) of the Rules of Procedure and Evidence, "[w]hen filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3 "

9 The Appeals Chamber notes that the Prosecutor requests suspensive effect both in the Appeal and in the subsequent Document in Support of the Appeal However, his

⁷ Document in Support of the Appeal, paras 7 and 8

⁸ ICC-01-05-01/08-487

⁹ ICC-01-05-01/08-490

¹⁰ ICC-01-05-01/08-493

¹¹ Response to the Document in Support, para 24

¹² Response to the Document in Support, para 27

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statements in the Appeal are unclear he states that he “hereby [] applies for suspensive effect”, but thereafter states that he will request suspensive effect ‘in a separate motion’¹³ In the Document in Support, under the heading ‘Request for suspensive effect’ the “Prosecution requests that suspensive effect be attached to this appeal” and provides reasons in support of his request

10. The Appeals Chamber notes that despite the above-mentioned ambiguity, the Prosecutor requested suspensive effect in the Appeal, meeting the basic requirements of rule 156 (5) of the Rules of Procedure and Evidence In the Document in Support of the Appeal, the Prosecutor repeated his request and provided reasons for it However, the Appeals Chamber considers that, as a practice, it is preferable that a request for suspensive effect – which, given the nature of the request, ought to be decided as expeditiously as possible – should be presented in the appeal together with the reasons in support of the request as prescribed in rule 156 (5) of the Rules of Procedure and Evidence

B. Merits

11 Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect “unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence” Rule 156 (5) of the Rules of Procedure and Evidence provides that “[w]hen filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3 ” The decision on such a request is within the discretion of the Appeals Chamber¹⁴ Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its *discretion under the circumstances*

12 The main issue before the Appeals Chamber in respect of the appeal itself is, in essence, whether the Pre-Trial Chamber has erred in its determination that Mr Bemba should be granted conditional release In the Impugned Decision, the Pre-Trial Chamber

¹³ Appeal, p 3 and para 8 respectively
¹⁴ See ICC-01/04-01/06-1290

sets out its reasons for determining that Mr Bemba should be released, and in the operative paragraphs of the Impugned Decision, *inter alia*, ‘decides to grant’ the conditional release of Mr Bemba. Therefore, in his prayer for relief, the Prosecutor requests the Appeals Chamber to ‘a) suspend enforcement of the Appealed Decision pending its decision in the case, and b) reverse the Appealed Decision and order the continued detention of the Accused.’ The Prosecutor requests suspensive effect because, *inter alia*, ‘if the Accused is released and absconds, even if the Appeals Chamber subsequently overturns the Appealed Decision the exercise of the Court’s jurisdiction could be irreversibly frustrated.’¹⁵

13 The Appeals Chamber notes that Mr Bemba argues in the Response to the Document in Support that a request for suspensive effect is premature insofar as the Impugned Decision merely decides to grant conditional release, but defers release until such time as the State to which Mr Bemba will be released is identified and the conditions of the release are ascertained. The Appeals Chamber considers this argument unpersuasive. In the view of the Appeals Chamber, it was appropriate that the request for suspensive effect of the Pre-Trial Chamber’s decision to release Mr Bemba was made in the Appeal as it was the Impugned Decision which in fact granted conditional release. Since release of the Mr Bemba is the essential issue in an appeal concerning whether a decision on interim release should be reversed or confirmed, the Appeals Chamber also considers that granting suspensive effect in the present case is appropriate.

14 As to the extent to which suspensive effect should be granted, the Appeals Chamber notes that the Prosecutor requests suspension of ‘the Appealed Decision’, apparently in its entirety, even though the Prosecutor’s reasons for his request focus mainly on the consequences of the release of Mr Bemba.¹⁶ The dispositive of the Impugned Decision contains operative paragraphs (a) through (m). Pre-Trial Chamber II, in addition to ‘decid[ing] that Jean-Pierre Bemba Gombo be granted conditional release’ (operative paragraph (a)) also ‘decid[ed] that the implementation of this decision be deferred pending a decision in which State Jean-Pierre Bemba Gombo will be released

¹⁵ Document in Support of the Appeal, paras 7 and 8

¹⁶ Document in Support of the Appeal, paras 7 and 8

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and which set of conditions shall be imposed on him"¹⁷ (operative paragraph (b)), and ordered the notification of the decision and scheduled numerous public hearings with States¹⁸, the parties and the participants, presumably to assist the Pre-Trial Chamber in determining to which State Mr Bemba will be released and the conditions attached thereto (operative paragraphs (c) through (m)) Thus, parts (b) through (m) of the dispositive are related not to the release of Mr Bemba *per se*, but rather to ascertaining the conditions, if any, of release once implemented

15 In light of the above the Appeals Chamber considers it is sufficient to grant suspensive effect in respect of operative paragraph (a) only, which "decides that Jean-Pierre Bemba Gombo be granted conditional release, until decided otherwise"¹⁹ The Appeals Chamber underlines, however, that the fact that it does not suspend operative paragraphs (b) to (m) of the Impugned Decision should not be seen as an expression of a view on the merits of the case, notably in respect of the second ground of appeal raised by the Prosecutor ("The Single Judge erred in ordering conditional release without also deciding the conditions, knowing to which State the Accused will be released, and determining that the State is competent to enforce the conditions"²⁰)

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 3rd day of September 2009

At The Hague, The Netherlands

¹⁷ Impugned Decision, p 35

¹⁸ The States are the Kingdom of Belgium, the Republic of France, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Republic of Portugal and the Republic of South Africa

¹⁹ Impugned Decision, p 35

²⁰ Document in Support of the Appeal, p 15