

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 July 2010

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

Public Document

**Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo
pursuant to Rule 118(2) of the Rules of Procedure and Evidence**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy
Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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States Representatives

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod Jacome

Detention Section

Mr Anders Backman

**Victims Participation and
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Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, (“Bemba case”) issues the following Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo (“Mr Bemba”).

I. Background and Submissions

1. On 1 April 2010 the Chamber ordered Mr Bemba's continued detention.¹
2. On 24 June 2010 the Chamber issued its Decision on the Admissibility and Abuse of Process Challenges (“Admissibility Decision”)² rejecting the defence challenge to the admissibility of the case and its request to dismiss the case for abuse of process.³
3. On 28 June 2010 the defence filed its “Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée ‘Decision on the Admissibility and Abuse of Process Challenge’”.⁴
4. On 5 July 2010 the defence filed an application with the Appeals Chamber to suspend the proceedings before Trial Chamber III pending the Appeals Chamber’s decision on the merits of the appeal.⁵
5. On 7 July 2010 the Chamber issued an order postponing the commencement of the trial in view of the pending appeal and the defence request for

¹ Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, 1 April 2010, ICC-01/05-01/08-743, paragraph 34.

² ICC-01/05-01/08-802.

³ ICC-01/05-01/08-802, paragraphs 261 – 262.

⁴ ICC-01/05-01/08-804. The defence subsequently filed two corrigenda on 28 June 2010, ICC-01/05-01/08-804-Corr, and 29 June 2010 (notified 30 June 2010), ICC-01/05-01/08-804-Corr2-tENG.

⁵ Demande de l’effet suspensif relatif à l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 juin 2010 intitulée “Decision on the Admissibility and Abuse of Process Challenge”, 5 July 2010, ICC-01/05-01/08-809.

suspensive effect.⁶ As a result, the Chamber vacated the trial date and set a status conference for 30 August 2010, when, *inter alia*, the Chamber would hear submissions on re-fixing the trial date.⁷

6. Pursuant to Articles 60(3) and 61(11) of the Rome Statute ("Statute") and to Rule 118(2) of the Rules of Procedure and Evidence ("Rules"), the Trial Chamber reviews its rulings on detention at least every 120 days. On 30 July 2010, Mr Bemba will have been detained for 120 days since the last review of his detention on 1 April 2010. Accordingly, in its 7 July 2010 order the Chamber requested that the Office of the Prosecutor ("prosecution") and the legal representatives for victims ("legal representative") file their submissions addressing detention by 15 July 2010 and that the defence file its submissions by 22 July 2010.⁸

Submissions of the prosecution

7. On 15 July 2010 the prosecution filed the "Prosecution's Observations on the Review of the Pre-Trial Detention of Jean-Pierre Bemba Gombo".⁹ The prosecution submits that the accused's detention should be maintained for the following reasons:¹⁰
 - (i) the conditions justifying detention under Article 58(1) of the Statute continue to be met;
 - (ii) there has been no substantial change to these conditions or any related factors as stipulated by Article 60(3) of the Statute since the last review in April 2010;

⁶ Order postponing the commencement of the trial, 7 July 2010, ICC-01/05-01/08-811, paragraphs 5 and 6. On 9 July 2010 the Appeals Chamber denied the defence request for suspensive effect: Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", 9 July 2010, ICC-01/05-01/08-817.

⁷ ICC-01/05-01/08-811, paragraph 6.

⁸ ICC-01/05-01/08-811, paragraph 7.

⁹ ICC-01/05-01/08-828-Conf-Exp. A public redacted version was filed at the same time: ICC-01/05-01/08-828-Red.

¹⁰ ICC-01/05-01/08-828-Red, paragraph 2.

- (iii) there has been no material change in circumstances that require or justify interim release; and
- (iv) there has been no inexcusable delay by the prosecution in the conduct of its case as stipulated by Article 60(4) of the Statute, nor has the accused been detained for an unreasonable period.

The prosecution contends that consequently the statutory grounds for interim release or release pursuant to Articles 58(1), 60(3) and 60(4) of the Statute are not met.¹¹

8. The prosecution further submits that the continued detention of the accused remains necessary to ensure his appearance at trial and to ensure that he does not obstruct court proceedings.¹² The prosecution relies on the Appeals Chamber decision of 2 December 2009¹³ confirming that the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo" ("Confirmation Decision")¹⁴ increased the incentives for, and the likelihood of, the accused absconding, in light of the gravity of the charges and the possibility of a lengthy sentence, if convicted.¹⁵
9. The prosecution contends that the facts forming the basis of the Chamber's assessment of the relevant circumstances in its last review of detention in April 2010 remain unchanged, and that consequently no variation in detention is warranted.¹⁶

¹¹ ICC-01/05-01/08-828-Red, paragraph 3.

¹² ICC-01/05-01/08-828-Red, paragraph 16.

¹³ Judgment on appeal of the Prosecutor against Pre-Trial Chamber II's "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 December 2009, ICC-01/05-01/08-631-Red.

¹⁴ ICC-01/05-01/08-424, 15 June 2009.

¹⁵ ICC-01/05-01/08-828-Red, paragraph 17, referring to ICC-01/05-01/08-631-Red, paragraph 70.

¹⁶ ICC-01/05-01/08-828-Red, paragraph 19.

10. The prosecution submits that there is a continued need to protect witnesses from intimidation or interference, especially since the accused is aware of the names and identities of all of the witnesses the prosecution intends to call at trial.¹⁷ The prosecution further submits that there have been threats or violence against witnesses committed by supporters of the accused in the past.¹⁸ It is suggested that in these circumstances, the release of the accused would lead to a foreseeable risk of intimidation and harm to witnesses.¹⁹
11. It is submitted that there has been no inexcusable delay attributable to the prosecution, and that the prosecution has fully discharged its disclosure obligations in a timely manner and sufficiently in advance of trial.²⁰ The prosecution notes that in rejecting the defence abuse of process challenge, the Chamber concluded that there had been no material irregularity or impropriety in the proceedings.²¹ The prosecution also relies on the Chamber's statement in its last review of detention in April 2010 that "[t]he defence has not identified any categories of evidence or individual documents disclosed since the last review of detention that together or separately constitute a material change in circumstances"²² and suggests that since the last review there are no circumstances justifying a changed assessment.²³
12. The prosecution further submits that the postponements to the initial trial date of 27 April 2010 were attributable to the defence admissibility challenge, the pending appeal, and the defence application to suspend the trial pending resolution of the appeal.²⁴

¹⁷ ICC-01/05-01/08-828-Red, paragraph 20.

¹⁸ ICC-01/05-01/08-828-Red, paragraph 20.

¹⁹ ICC-01/05-01/08-828-Red, paragraph 20. See also ICC-01/05-01/08-828-Conf-Exp, paragraph 20.

²⁰ ICC-01/05-01/08-828-Red, paragraphs 21 – 22.

²¹ ICC-01/05-01/08-828-Red, paragraph 21, quoting ICC-01/05-01/08-802, paragraph 262.

²² ICC-01/05-01/08-743, paragraph 30.

²³ ICC-01/05-01/08-828-Red, paragraph 22.

²⁴ ICC-01/05-01/08-828-Red, paragraph 23.

13. Finally, the prosecution submits that the length of the accused's detention has been reasonable based on the particular facts and circumstances of the case. The accused has been in detention for just over two years, which the prosecution submits is neither unusual nor unreasonable in the context of a complex international criminal trial. The prosecution concludes that against the background of this case and in light of the alleged responsibility of the accused for the continued delays, the length of detention does not warrant release pending trial.²⁵

Submissions of the legal representative for victims

14. On 15 July 2010 the legal representative filed her observations, arguing that there have been no changes in the circumstances regarding the detention of the accused which would merit a modification of the Chamber's last detention order.²⁶ The legal representative submits that the postponement of the trial until a status conference is held on this issue on 30 August 2010 does not constitute a change in circumstances as required by the Court's jurisprudence.²⁷

15. The legal representative further submits that the postponement of the trial is related to the defence's appeal against the Admissibility Decision.²⁸ Further, in the view of the legal representative, the risk of the accused absconding should he be released is greater as a result of the Chamber's decision dismissing the challenges of the defence and the Appeals Chamber's denial of the defence application for suspensive effect.²⁹ Consequently, it is argued that the continued detention of the accused is necessary to ensure his appearance at trial.³⁰

²⁵ ICC-01/05-01/08-828-Red, paragraph 24.

²⁶ Observations of the Legal Representative regarding the review of the detention of Mr Jean-Pierre Bemba Gombo, 15 July 2010, ICC-01/05-01/08-825, paragraphs 11 – 12.

²⁷ ICC-01/05-01/08-825, paragraph 13.

²⁸ ICC-01/05-01/08-825, paragraph 14.

²⁹ ICC-01/05-01/08-825, paragraph 14.

³⁰ ICC-01/05-01/08-825, paragraph 14.

16. The legal representative submits that the victims and witnesses face concrete security risks due to the wealth of the accused and the prominent position he holds in the community that supports him, and also because many victims and witnesses are easily reachable, particularly now that details about these individuals are known to the defence.³¹
17. The legal representative requests that for these reasons the Chamber find that there has been no change in the circumstances which would require a modification of its previous ruling and that accordingly Mr Bemba should remain in custody.³²

Defence submissions

18. The defence filed its submissions on the review of Mr Bemba's detention on 22 July 2010.³³ The defence argues that since the last review of detention on 1 April 2010, there has been a substantial change in conditions justifying detention under Article 58(1)(b)(i).³⁴ The factors involved are said to be (1) the postponement of the trial until an undetermined date; (2) the lack of a valid document containing the charges; and (3) inexcusable delay by the prosecution resulting in an unreasonable delay.³⁵ It is submitted that these conditions justify the release of the accused or modification of the current detention regime.³⁶ The defence suggests that the prosecution has failed to demonstrate that, in light of the change in conditions since 1 April 2010, continued detention is necessary to ensure Mr Bemba's presence at trial.³⁷ The defence also submits that in the event that release is ordered, if no State Party

³¹ ICC-01/05-01/08-825, paragraph 15.

³² ICC-01/05-01/08-825, pages 8 – 9.

³³ Requête de la Défense sur la révision de la détention de M. Jean-Pierre Bemba Gombo, 22 July 2010, ICC-01/05-01/08-840.

³⁴ ICC-01/05-01/08-840, paragraph 14.

³⁵ ICC-01/05-01/08-840, paragraphs 14 – 29.

³⁶ ICC-01/05-01/08-840, paragraphs 14 – 37 and 106 – 112.

³⁷ ICC-01/05-01/08-840, paragraphs 18 – 19.

were willing to accept Mr Bemba on its territory, this would constitute a violation of his right to a fair trial.³⁸

19. The defence submits firstly that since the transfer of the accused to the Hague on 3 July 2008, the trial date has been fixed and then deferred for various reasons, and is currently postponed until an undetermined date.³⁹ It is submitted that this postponement constitutes a material change in conditions since the last review of detention on 1 April 2010.⁴⁰
20. Secondly, as regards the document containing the charges, the defence argues that although the Confirmation Decision was issued on 15 June 2009,⁴¹ Mr Bemba has not yet been provided with the document containing the charges upon which the prosecution intends to base its case at trial.⁴² The defence submits that according to the Trial Chamber's oral order of 7 October 2009,⁴³ the prosecution was obliged to provide an amended document containing the charges in order for the defence to be fully informed during the preparation of its case.⁴⁴
21. The defence observes that since the last review of detention, the Chamber has issued the "Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges" ("Decision on the Second Amended DCC"),⁴⁵ ordering the prosecution to modify and re-file its Second Amended Document Containing the Charges in conformance with the Confirmation Decision.⁴⁶ The defence submits that this decision constitutes a

³⁸ ICC-01/05-01/08-840, paragraphs 95 – 96.

³⁹ ICC-01/05-01/08-840, paragraphs 15 and 35.

⁴⁰ ICC-01/05-01/08-840, paragraphs 16 – 17.

⁴¹ ICC-01/05-01/08-424.

⁴² ICC-01/05-01/08-840, paragraph 20.

⁴³ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 13 lines 5 – 10.

⁴⁴ ICC-01/05-01/08-840, paragraph 21.

⁴⁵ ICC-01/05-01/08-836, 20 July 2010.

⁴⁶ ICC-01/05-01/08-840, paragraph 23.

material change in circumstances justifying the interim release of Mr Bemba, and maintains that there is presently no document containing the charges ("DCC ").⁴⁷ The defence suggests that the Decision on the Second Amended DCC leads to further uncertainty about the trial date, because the prosecution might appeal the decision or might not file its amended document containing the charges by the 18 August 2010 deadline.⁴⁸

22. Thirdly, the defence submits that regardless of whether the Chamber finds that there has been a material change in circumstances justifying detention under Article 58, there has been inexcusable delay by the Prosecutor pursuant to Article 60(4) resulting in the indefinite postponement of the trial and that as a consequence, the accused has been detained for an unreasonable period prior to trial.⁴⁹ The defence submits that the detention of the accused for more than two years without the trial having commenced, together with the fact that other pleadings (such as the appeal against the Admissibility Decision and the prosecution's re-filing of the Second Amended DCC) may reasonably delay the start of the trial, justifies the release of the accused. The defence relies on jurisprudence from the International Criminal Tribunal for the former Yugoslavia stating that a period of three years in pre-trial detention, coupled with the real possibility of a further delay to the start of the trial by several months, is a factor to be weighed in favour of the accused.⁵⁰

23. The defence sets out a detailed history of disclosure during the pre-trial stage of the case.⁵¹ The defence submits that the current postponement of the commencement of the trial is attributable to the fact that the prosecution did

⁴⁷ ICC-01/05-01/08-840, paragraphs 24 – 25.

⁴⁸ ICC-01/05-01/08-840, paragraph 25.

⁴⁹ ICC-01/05-01/08-840, paragraphs 26 – 28.

⁵⁰ ICC-01/05-01/08-840, paragraph 29 and footnote 15.

⁵¹ ICC-01/05-01/08-840, paragraphs 33 – 34, 37, and 43 – 90.

not disclose the evidence in its possession to the defence in a timely manner.⁵² It is further submitted that due to the prosecution's delays in disclosing evidence relating to admissibility, the defence had to wait six additional months to begin work on its admissibility challenge.⁵³ The defence also submits that the prosecution has disclosed additional evidence to the defence since the last review of detention on 1 April 2010.⁵⁴

24. The defence reiterates that Mr Bemba would comply with all orders and conditions which might be attached to his potential interim release, including his voluntary appearance at all status conferences and at trial.⁵⁵ The defence submits that the willingness of the accused to abide by the necessary conditions is relevant to the decision on interim release.⁵⁶

25. The defence suggests that the conditions of Mr Bemba's detention could be modified as it is contended that his detention is not based on preventing his obstruction of investigations or proceedings but rather on the risk that he might abscond.⁵⁷ It is suggested that the accused could be placed under house arrest on the territory of the Netherlands.⁵⁸ The defence submits that the jurisprudence of the European Court of Human Rights indicates that where the only justification for detention is risk of flight, the accused must be released if his appearance before the court can be guaranteed.⁵⁹ The defence further submits that the detention of the accused on the basis of the risk that he might abscond cannot be maintained unless it is founded on "concrete and relevant information concerning the reality of the risk".⁶⁰ The defence argues that the prosecution has advanced no concrete submission concerning the risk

⁵² ICC-01/05-01/08-840, paragraphs 58 and 77.

⁵³ ICC-01/05-01/08-840, paragraphs 65 – 66.

⁵⁴ ICC-01/05-01/08-840, paragraph 37.

⁵⁵ ICC-01/05-01/08-840, paragraph 91.

⁵⁶ ICC-01/05-01/08-840, paragraph 92.

⁵⁷ ICC-01/05-01/08-840, paragraphs 9 and 100.

⁵⁸ ICC-01/05-01/08-840, paragraph 100.

⁵⁹ ICC-01/05-01/08-840, paragraph 101.

⁶⁰ ICC-01/05-01/08-840, paragraph 103.

that the accused may abscond, nor explained why detention is necessary to ensure Mr Bemba's appearance at trial.⁶¹

26. The defence requests the Chamber to order the immediate unconditional release of Mr Bemba.⁶² In the alternative, the defence requests the conditional release of Mr Bemba pursuant to Rule 119 of the Rules, for a limited period of time (until the Appeals Chamber decision on the admissibility challenge and the start of trial).⁶³ The defence suggests that if the Chamber considered it necessary, it could issue a warrant of arrest pursuant to Article 60(5) to secure the presence of the accused at trial.⁶⁴

27. In the event that the Chamber should decide not to grant either unconditional or conditional release, the defence suggests that the Chamber could instead order a modification of the conditions of Mr Bemba's detention, permitting the accused to leave the detention centre from Friday mornings to Sunday evenings, limited to the territory of the Netherlands, and authorising him to spend those nights with his wife and children at his own expense.⁶⁵

28. The defence also requests that the Chamber order the Registry to assist in obtaining a guarantee that the accused will appear at trial and to open negotiations with States Parties with a view towards obtaining such a guarantee.⁶⁶ Finally, the defence requests the Chamber to suspend the proceedings should it become impossible for the ICC to obtain the release of Mr Bemba on the territory of Belgium, the Netherlands, the Congo, or another State Party to the Rome Statute.⁶⁷

⁶¹ ICC-01/05-01/08-840, paragraph 105.

⁶² ICC-01/05-01/08-840, paragraphs 106 – 107.

⁶³ ICC-01/05-01/08-840, paragraphs 108 – 109.

⁶⁴ ICC-01/05-01/08-840, paragraph 110.

⁶⁵ ICC-01/05-01/08-840, paragraphs 94 and 111.

⁶⁶ ICC-01/05-01/08-840, paragraph 113.

⁶⁷ ICC-01/05-01/08-840, paragraph 114.

II. Relevant Provisions

29. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 58 of the Statute

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

[...]

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Article 60 of the Statute

Initial proceedings before the Court

[...]

3. 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.

4. 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.

Article 61 of the Statute

Confirmation of the charges before trial

[...]

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Rule 118 of the Rules
Pre-Trial detention at the seat of the Court

[...]

2. 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.

III. Analysis and Conclusions

30. Although the Statute refers only to review of detention by the Pre-Trial Chamber, under Article 61(11) of the Statute, the Trial Chamber "may exercise any function of the Pre-Trial Chamber that is relevant and capable of application" in the trial proceedings. As the Trial Chamber stated in its previous reviews of Mr Bemba's detention on 8 December 2009⁶⁸ and 1 April 2010,⁶⁹ it considers it appropriate, in fairness to the accused, to review his detention under Articles 58(1) and 60 of the Statute and Rule 118(2) of the Rules during the entirety of the pre-trial proceedings before the Court.

31. Article 60(3) of the Statute requires the Chamber to periodically review its ruling on the release or detention of the accused, and states that upon such review, the Chamber may modify its ruling "if it is satisfied that changed circumstances so require". As the Chamber has indicated previously, "to order the release of the accused at this stage the Chamber would need to identify either a change in some or all of the facts underlying the previous decision on detention or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber's last decision ordering the detention of the accused is necessary."⁷⁰

32. Articles 58 and 60 of the Statute regulate the arrest and detention of the accused. Pre-trial detention can be justified to ensure the individual's

⁶⁸ Transcript of hearing on 8 December 2009, ICC-01/05-01/08-T-18-Red-ENG WT, page 24, lines 10 – 17.

⁶⁹ ICC-01/05-01/08-743, paragraph 25.

⁷⁰ ICC-01/05-01/08-743, paragraph 26, quoting ICC-01/05-01/08-T-18-Red-ENG WT, page 25, lines 13 – 17.

appearance at trial, to ensure that he does not obstruct or endanger the investigations or the Court proceedings, or to prevent him from continuing with the commission of the crimes being considered by the Chamber or with related crimes arising out of the same circumstances and within the jurisdiction of the Court.

33. In support of Mr Bemba's interim release, the defence submits that there has been a material change in circumstances since the last review of detention on 1 April 2010, as a result of (1) the postponement of the trial to an undetermined date; (2) the lack of a valid document containing the charges; and (3) inexcusable delay by the prosecution resulting in an unreasonable delay.
34. Although no trial date has been set, a status conference is scheduled for 30 August 2010, at which time the Chamber will hear submissions on re-fixing the trial date.⁷¹ Accordingly, there has not been an indefinite suspension of the trial. In the view of the Chamber, the temporary postponement of the commencement of the trial (until the issue is the subject of further submissions by the parties and participants on 30 August 2010) is not sufficient, in itself, to justify the release of the accused.
35. The defence submits that the result of the Decision on the Second Amended DCC, which orders the prosecution to modify and re-file the document containing the charges, is that there is currently no valid DCC. According to the defence, this constitutes a material change in circumstances justifying interim release. Although in the Decision on the Second Amended DCC the Chamber discussed the importance of the DCC,⁷² it also found that, in keeping with the approach of Trial Chamber II, "the Confirmation Decision is the

⁷¹ ICC-01/05-01/08-811, paragraph 6.

⁷² ICC-01/05-01/08-836, paragraph 30.

authoritative document for all trial proceedings".⁷³ The defence has been notified of the charges as contained in the Confirmation Decision since 15 June 2009. Thus, the Decision on the Second Amended DCC ordering the prosecution to modify the DCC in conformity with the Confirmation Decision does not result in unfairness to the defence, and the fact that the prosecution will re-file its Second Amended DCC does not constitute a changed circumstance justifying the release of the accused.

36. The defence also alleges inexcusable delay by the Prosecutor, in the form of failure to disclose evidence, which the defence contends has resulted in the postponement of the trial. As an initial matter, the Chamber notes that the only evidence specifically referred to by the defence as having been disclosed after the last review of detention⁷⁴ was disclosed pursuant to the Chamber's 7 July 2010⁷⁵ and 9 July 2010⁷⁶ decisions ordering the lifting of certain redactions. Further, the defence has not identified any categories of evidence or individual documents disclosed since the last review of detention that might constitute a material change in circumstances.

37. As to the allegation by the defence that the postponement of the trial is attributable solely to the prosecution's failure to disclose in a timely manner the evidence in its possession, including evidence relating to admissibility, allegedly delaying the defence filing of the admissibility challenge by six months, the Chamber stated in the Admissibility Decision that:

[t]he defence has at all material times been aware of the relevant judicial proceedings. Otherwise, the defence complaints about material nondisclosure as regards the

⁷³ ICC-01/05-01/08-836, paragraph 37.

⁷⁴ See ICC-01/05-01/08-840, paragraph 37, referring to Prosecution's Communication of Incriminatory, Potentially Exculpatory and Rule 77 Evidence Disclosed to the Defence on 20 July 2010, 21 July 2010, ICC-01/05-01/08-838 and Conf-Exp Annexes A, B and C.

⁷⁵ Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, ICC-01/05-01/08-813-Conf-Exp, (reclassified as "confidential" on 20 July 2010). A public redacted version was filed on 20 July 2010, ICC-01/05-01/08-813-Red.

⁷⁶ Decision on the prosecution's applications for redactions (ICC-01/05-01/08-772-Conf, ICC-01/05-01/08-778-Conf and ICC-01/05-01/08-786-Conf), 9 July 2010, ICC-01/05-01/08-815-Conf-Exp. Confidential and public redacted versions were filed on 20 July 2010: ICC-01/05-01/08-815-Conf-Red and ICC-01/05-01/08-815-Red2.

admissibility challenge are essentially speculative, and in the event the accused has failed to provide any evidence or other material to support the argument that the prosecution has breached its disclosure obligations. The defence has failed to establish this element of the abuse of process challenge on a balance of probabilities.⁷⁷

Consequently, the Chamber concludes that there has been no inexcusable delay by the prosecution justifying the interim release of the accused.


38. The defence suggests that if release is not ordered, a modification to the detention regime in order to permit him to leave the detention centre during the weekends is appropriate. However, in the last review of detention, the Chamber held that none of the submissions of the defence “undermine[d] the critical conclusion that detention remains necessary to ensure the accused’s appearance at this trial”.⁷⁸ In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime. Similarly, the defence request concerning guarantees by States Parties is irrelevant, given the Chamber’s finding that there has been no material change since 1 April 2010.

39. In light of the above, the Chamber is satisfied there has been neither a material change of circumstances since the last review of detention nor inexcusable delay attributable to the prosecution, and it is satisfied that the requirements of Article 58(1)(b)(i) of the Statute apply. Accordingly, the accused will remain in custody.

⁷⁷ ICC-01/05-01/08-802, paragraph 216.

⁷⁸ ICC-01/05-01/08-743, paragraph 34.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 28 July 2010

At The Hague, The Netherlands