

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 17 December 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 detention of Mr Jean-Pierre Bemba Gombo pursuant to
the Appeals Judgment of 19 November 2010**

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
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

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* hereby delivers the following Decision on the review of detention of Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) pursuant to the Appeals Judgment of 19 November 2010.

I. Background and Submissions

1. Following an appeal by the defence¹ of the Chamber’s decision of 28 July 2010² which ordered the continued detention of Mr Bemba (“Decision of 28 July 2010”), on 19 November 2010, the Appeals Chamber reversed the Chamber’s Decision of 28 July 2010 and ordered a new review under Article 60(3) of the Rome Statute (“Statute”) as to whether Mr Bemba should remain in detention or whether he should be released, with or without conditions (“Appeals Judgment”).³ The Appeals Chamber further decided that Mr Bemba shall remain in detention until the Chamber conducts this new review.⁴
2. On 22 November 2010, the trial commenced as had been scheduled at a status conference on 21 October 2010.⁵
3. In light of the Appeals Judgment, the Chamber invited the defence to file its observations on the review of detention by 30 November 2010.⁶ Accordingly,

¹ Defence notice of Appeal Against the Decision of Trial Chamber III of 28 July 2010 entitled *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*, 29 July 2010, ICC-01/05-01/08-844-tENG (OA 4) and Document in Support of the Defence Appeal against the Decision of Trial Chamber III of 28 July 2010 entitled *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*, 4 August 2010, ICC-01/05-01/08-847-tENG-Corr (OA 4).

² 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, 28 July 2010, ICC-01/05-01/08-843.

³ Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “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”, 19 November 2010, ICC-01/05-01/08-1019 OA4, paragraphs 40 to 56.

⁴ ICC-01/05-01/08-1019 OA4, paragraph 2.

⁵ Transcript of hearing, 21 October 2010, ICC-01/05-01/08-T-30-ENG ET, page 4, lines 18 to 20.

⁶ Email to the defence on 23 November 2010, 12h17.

the defence filed the “Defence Submissions on the Review of the Detention of Mr Jean-Pierre Bemba Gombo” (“defence Submissions” or “Submissions”).⁷

4. The Office of the Prosecutor (“prosecution”) and the legal representatives for victims (“legal representatives”) were ordered to file their responses to the defence Submissions by 6 December 2010 and the defence was authorised in advance by the Chamber to file any reply thereto by 13 December 2010.⁸
5. The prosecution duly filed the “Prosecution’s Observations on the Review of the Pre-Trial Detention of Jean-Pierre Bemba Gombo” (“prosecution Observations” or “Observations”) as ordered.⁹
6. On 6 December 2010, the legal representatives for victims requested a seventy-two hour extension of time in which to file their responses due to technical difficulties, which the Chamber authorised.¹⁰ On 9 December 2010, the Chamber received an email from the legal representatives attaching their unsigned responses, which were not formally filed with the Registry.¹¹ The legal representatives’ observations were only officially notified by the Registry on 10 December 2010 (“Observations by the Legal Representatives”),¹² after the extended time-limit authorised by the Chamber had expired.

⁷Observations de la Défense sur la révision de la détention de M. Jean-Pierre Bemba Gombo, 30 November 2010 (notified on 1 December 2010), ICC-01/05-01/08-1068 together with confidential Annex A to the Defence observations on the review of the detention of Mr Jean-Pierre Bemba Gombo, 30 November 2010, ICC-01/05-01/08-1068-Conf-AnxA and confidential Annex B to the Defence observations on the review of the detention of Mr Jean-Pierre Bemba Gombo, 30 November 2010, ICC-01/05-01/08-1068-Conf-AnxB; Defence Submissions on the Review of the Detention of Mr Jean-Pierre Bemba Gombo, 8 December 2010, ICC-01/05-01/08-1068-tENG.

⁸ Email to the prosecution and legal representatives from the legal officer to the Chamber on 1 December 2010, 18h54.

⁹ Prosecution’s Observations on the Review of the Pre-Trial Detention of Jean-Pierre Bemba Gombo, 6 December 2010, ICC-01/05-01/08-1080.

¹⁰ Email sent by the Legal Representatives to the Legal Officer to the Chamber on 6 December 2010 at 15h59 and response by Legal Officer to the Chamber to the Legal Representatives on 7 December 2010 at 14h43.

¹¹ Email from the legal representatives to the Legal Officer to the Chamber, 9 December 2010, 15h37.

¹² Observations de Maître Zarambaud Assingambi, relative a la demande de révision de la détention de Monsieur Jean-Pierre Bemba Gombo, 9 December 2010 (notified on 10 December 2010), ICC-01/05-01/08-1083 and Observations de Maître Douzima-Lawson Marie-Edith relative à la révision de la détention de

7. On 13 December 2010, the defence filed its confidential “Réplique de la Défense aux réponses du Bureau du Procureur et des représentants légaux des victimes sur la révision de la détention de Mr Jean-Pierre Bemba Gombo” (“defence Reply”),¹³ together with four confidential annexes. A public redacted version of the defence reply was notified on 14 December 2010.¹⁴

Defence Submissions

8. In its Submissions, the defence requests the immediate release of Mr Bemba;¹⁵ or alternatively:
- i. the release of Mr Bemba with conditions as the Court deems appropriate pursuant to Rule 119 of the Rules of Procedure and Evidence (“Rules”), restricting such release to all periods of judicial recess. The defence mentions as possible host States, the Republic of Senegal (“Senegal”) or the Republic of South Africa (“RSA”) and requests that a new arrest warrant be issued pursuant to Article 60(5) of the Statute;¹⁶ or,
 - ii. a more lenient detention regime for Mr Bemba, placing him in a safe house on the territory of the Netherlands, where he could spend nights

Monsieur Jean-Pierre Bemba Gombo, 9 December 2010 (notified on 10 December 2010), ICC-01/05-01/08-1084.

¹³Réplique de la Défense aux réponses du Bureau du Procureur et des représentants légaux des victimes sur la révision de la détention de Mr Jean-Pierre Bemba Gombo, 13 December 2010, ICC-01/05-01/08-1085-Conf and confidential annexes A to D to the Réplique de la Défense aux réponses du Bureau du Procureur et des représentants légaux des victimes sur la révision de la détention de Mr Jean-Pierre Bemba Gombo, 13 December 2010, ICC-01/05-01/08-1085-Conf-AnxA to D.

¹⁴ Public redacted version of the Réplique de la Défense aux réponses du Bureau du Procureur et des représentants légaux des victimes sur la révision de la détention de Mr Jean-Pierre Bemba Gombo, 13 December 2010 (notified on 14 December 2010), ICC-01/05-01/08-1085-Red.

¹⁵ ICC-01/05-01/08-1068-tENG, paragraph 63.

¹⁶ ICC-01/05-01/08-1068-tENG, paragraphs 64 and 65.

with his wife, children and grand-mother, all exclusively at his own expense.¹⁷

9. The defence argues that pre-trial detention can only be maintained if it is the only means to secure Mr Bemba's appearance at trial and that the risk of absconding referred to in Article 58(1)(b)(i) of the Statute is not established by the prosecution to the required legal standards.¹⁸ The defence submits that, while the Appeals Chamber stated that the argument advancing the risk of absconding involves an element of prediction,¹⁹ there needs to be a concrete risk of flight, as established in the jurisprudence of the European Court of Human Rights,²⁰ for the Chamber to maintain detention.
10. The defence advances several arguments in support of Mr Bemba's release by way of reassessing the circumstances and grounds underpinning the last decision on detention, seeking to show a "material change of circumstances" as required.²¹ These arguments relate to (i) the commencement of trial;²² (ii) Mr Bemba's residence and significant family ties in Belgium, Portugal and the Democratic Republic of the Congo ("DRC") which are "likely to deter him from absconding in the country to which he would be released", in particular the deteriorating health of his grand-mother;²³ (iii) the prosecution's failure to disclose concrete information as to the risk of absconding at the time of the issuance of the initial arrest warrant on 23 May 2008, information which, according to the defence, the prosecution has so far withheld;²⁴ (iv) the fact that Mr Bemba gave his word of honour to cooperate with the Court, and this was an accepted factor in another matter before the Court concerning Mr Abu

¹⁷ ICC-01/05-01/08-1068-tENG, paragraph 66.

¹⁸ ICC-01/05-01/08-1068-tENG, paragraphs 4 to 7.

¹⁹ ICC-01/05-01/08-1068-tENG, paragraph 5 and Appeals Chamber, *Prosecutor v. Lubanga*, Judgment of the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber, ICC-01/04-01/06-824, 13 February 2007, paragraph 137.

²⁰ ICC-01/05-01/08-1068-tENG, paragraphs 6 and 7, footnotes 4 and 5.

²¹ ICC-01/05-01/08-1068-tENG, paragraphs 8 and 9.

²² ICC-01/05-01/08-1068-tENG, paragraphs 10 to 20.

²³ ICC-01/05-01/08-1068-tENG, paragraphs 21 to 28.

²⁴ ICC-01/05-01/08-1068-tENG, paragraphs 29 to 33.

Garda's undertaking to appear voluntarily before the Court as regards the situation in Sudan;²⁵ and, (v) Mr Bemba's lack of financial means and network of contacts.²⁶ Finally, if provisionally released, the defence submits that there is a possibility for some States to host Mr Bemba²⁷ or alternatively the defence requests a modification of the detention regime.²⁸

Prosecution Observations

11. In its Observations, the prosecution submits that the accused's continued detention should be maintained for the following reasons:

- (i) the conditions justifying detention under Article 58(1) of the Statute continue to be met;
- (ii) there has been no substantial change in these conditions or any other related factors under Article 60(3) of the Statute since the last review in April 2010;
- (iii) there has been no material change in circumstances that justify release of the Accused; and
- (iv) there has been no inexcusable delay by the prosecution in the conduct of its case and nor has the accused been detained for an unreasonable period.²⁹

12. The prosecution submits that the continued detention of the accused is necessary to ensure his presence at trial and to guarantee that he will not intimidate witnesses or obstruct court proceedings.³⁰ Further, the prosecution argues that subsequent events, namely the commencement of the trial have increased the risk of absconding.³¹ In addition, the prosecution submits that

²⁵ ICC-01/05-01/08-1068-tENG, paragraphs 34 to 39.

²⁶ ICC-01/05-01/08-1068-tENG, paragraphs 40 and 41.

²⁷ ICC-01/05-01/08-1068-tENG, paragraphs 42 to 52.

²⁸ ICC-01/05-01/08-1068-tENG, paragraphs 53 to 59.

²⁹ ICC-01/05-01/08-1080, paragraph 8.

³⁰ ICC-01/05-01/08-1080, paragraphs 10 and 11.

³¹ ICC-01/05-01/08-1080, paragraph 12.

the accused's personal circumstances, his financial means and his social network do not show a change of circumstances such as to justify interim release.³² Given that the accused now knows the names and identities of all prosecution witnesses, the prosecution contends the security of some of those witnesses may be at risk should the accused be released.³³

13. The prosecution states further that release is not justified on the grounds of inexcusable delay attributable to the prosecution, as the prosecution has fully discharged its disclosure obligations in a timely fashion, and any delays to the start of trial are attributable to the defence.³⁴ Finally, the prosecution maintains that the length of the accused's detention has been reasonable, taking into account the facts and circumstances of this case.³⁵

14. The prosecution submits that in its decision, the Appeals Chamber found that the prosecution needs only to show that there has been no change in the circumstances that previously justified detention.³⁶ The prosecution argues that because the only new factors since the last review of detention are the commencement of the trial and the final dismissal of the accused's admissibility challenge, which favour continued detention, the conditions justifying detention continue to be met.³⁷

15. The prosecution argues that the defence fails to raise any arguments to demonstrate a change in circumstances or justifying release.³⁸ In relation to the defence argument that the prosecution is required to show a concrete risk of flight, the prosecution submits that this argument is without merit and that the risk of flight has been sufficiently established by previously identified

³² ICC-01/05-01/08-1080, paragraphs 14 and 15.

³³ ICC-01/05-01/08-1080, paragraph 17.

³⁴ ICC-01/05-01/08-1080, paragraphs 19 to 21.

³⁵ ICC-01/05-01/08-1080, paragraph 22.

³⁶ ICC-01/05-01/08-1080, paragraph 26 and Appeals Judgment, ICC-01/05-01/08-1019 OA4, paragraph 51.

³⁷ ICC-01/05-01/08-1080, paragraphs 11 and 31.

³⁸ ICC-01/05-01/08-1080, paragraph 24.

factors.³⁹ The prosecution submits that there is no clear connection between the defence argument regarding the legality of the accused's arrest in May 2008 and the release of the accused at this time; this factor was not a consideration in the last review nor is it a new factor for considering interim release.⁴⁰

16. Regarding the comparison made by the defence between the accused and Mr Abu Garda, the prosecution suggests this is neither a relevant consideration nor a new factor for consideration of interim release.⁴¹ The prosecution submits that the defence request for modification of the accused's detention as an alternative to his release is not supported by the Court's legal framework.⁴² Further, the prosecution submits that the possibility of one or more States being willing to host the accused is not a factor to be considered in determining whether the accused should be released and it is premature and immaterial at this stage.⁴³

Submissions of the Legal Representatives

17. Mr Zarambaud opposes the release of Mr Bemba, on the basis that, *inter alia*, the crimes allegedly committed by Mr Bemba are particularly serious; the number of victims is extremely high; additional victims' applications are still pending consideration by the Chamber and Mr Bemba does not give sufficient guarantees to ensure his appearance at trial if he were to be provisionally released.⁴⁴

³⁹ ICC-01/05-01/08-1080, paragraph 26.

⁴⁰ ICC-01/05-01/08-1080, paragraph 27.

⁴¹ ICC-01/05-01/08-1080, paragraph 28.

⁴² ICC-01/05-01/08-1080, paragraph 29.

⁴³ ICC-01/05-01/08-1080, paragraph 30.

⁴⁴ ICC-01/05-01/08-1083, paragraphs 1 to 5.

18. Ms Douzima opposes the defence arguments on the length of pre-trial detention;⁴⁵ the accused's strong family ties,⁴⁶ and the accused word of "honour".⁴⁷ She considers, *inter alia*, that the argument relating to the accused's family circumstances is not new and is untenable as the same argument has already been rejected on appeal by the Appeals Chamber in its judgment of 2 December 2009.⁴⁸ Further she argues that giving a word of honour is not a sufficient guarantee to ensure Mr Bemba's appearance at trial given the gravity of the charges confirmed against him and the fact that none of the States mentioned by the defence have concretely accepted to host Mr Bemba.⁴⁹

Defence Reply

19. In its Reply the defence requests that two preliminary issues are addressed before any determination of the issue of release or detention ("defence's Preliminary Requests"), namely (1) that the Chamber orders the prosecution to disclose within twenty-four hours to the defence evidence showing the risk of absconding;⁵⁰ and (2) that consultations with Senegal and the RSA are held in relation to their ability to host Mr Bemba if provisionally released and the guarantees these States would offer to ensure Mr Bemba's appearance at trial.⁵¹

20. The defence further submits that the commencement of trial does not in any way constitute a change in circumstances such as to increase the risk of

⁴⁵ ICC-01/05-01/08-1084, paragraphs 2 to 7.

⁴⁶ ICC-01/05-01/08-1084, paragraphs 8 to 13.

⁴⁷ ICC-01/05-01/08-1084, paragraphs 14 to 19.

⁴⁸ ICC-01/05-01/08-1084, paragraphs 8 to 11.

⁴⁹ ICC-01/05-01/08-1084, paragraphs 16 to 19.

⁵⁰ ICC-01/05-01/08-1085-Red, paragraph 49.

⁵¹ ICC-01/05-01/08-1085-Red, paragraph 50.

absconding since the prosecution raised this issue during the last review of detention when the trial date had already been fixed.⁵²

21. The defence submits that the risk of absconding is unproven⁵³ and that the argument that Mr Bemba is likely to flee due to the potentially long sentence he may receive if convicted is untenable. The defence supports this position by citing exculpatory evidence (including the testimonies of two witnesses who have already testified) which it submits undermines the prosecution evidence, rendering an acquittal possible.⁵⁴ The defence submits that this considerably reduces the risk that Mr Bemba may abscond since it would be in his interests to appear at trial to prove his innocence. In addition, as to the possible States that may be able to host Mr Bemba during the winter recess, the defence emphasises the particular willingness of Senegal and the RSA in this regard.⁵⁵ The defence also adds one more State as a potential host country.⁵⁶
22. The defence reiterates its previous arguments on the deteriorating health of Mr Bemba's grand-mother and expressly requests that Mr Bemba is given permission to visit his grand-mother in the DRC.⁵⁷ The defence also makes further submissions regarding the psychological effect on Mr Bemba's children.⁵⁸
23. Relying on the jurisprudence of the International Criminal Tribunal for former Yugoslavia ("ICTY"), the defence substantiates its alternative request for provisional release in the DRC during the forthcoming winter recess on compassionate and humanitarian grounds, providing medical certificates and

⁵² ICC-01/05-01/08-1085-Red, paragraph 13.

⁵³ ICC-01/05-01/08-1085-Red, paragraphs 8 to 12.

⁵⁴ ICC-01/05-01/08-1085-Red, paragraphs 16 to 28.

⁵⁵ ICC-01/05-01/08-1085-Red, paragraphs 29 to 31.

⁵⁶ ICC-01/05-01/08-1085-Red, paragraph 31.

⁵⁷ ICC-01/05-01/08-1085-Red, paragraphs 32 to 35 and paragraphs 37 to 52.

⁵⁸ ICC-01/05-01/08-1085-Red, paragraphs 36 and 37.

information on where Mr Bemba could potentially be under surveillance at all times by the United Nations Organisation Stabilisation Mission in the DRC (“MONUSCO”).⁵⁹

II. Relevant Provisions

24. 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

[...]

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

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.

⁵⁹ ICC-01/05-01/08-1085-Red, paragraph 35.

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.

Regulation 33 of the Regulations of the Court**Calculation of time limits**

[...]

2. Documents shall be filed with the registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies.

[...]

Regulation 24 of the Regulations of the Registry**Filing of documents, material, orders and decisions with the Registry**

1. Documents, material, orders and decisions may be filed with the registry by hand, by post, or by electronic means, provided that an electronic signature is inserted in the latter case.

[...]

3. The Presidency, a Chamber or a participant filing a document or material which requires urgent measures to be taken shall insert the word "URGENT" on the cover page in capital letters. Outside the filing hours described in regulation 33, sub-regulation 2, of the Regulations of the Court, the Presidency, the Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 39.

Regulation 177 of the Regulations of the Registry**Visiting hours**

The Registry sets the daily visiting hours for all visitors, taking into account the demands of the daily schedule of the detention centre and the facilities and staff available.

III. Analysis

Preliminary Remarks

25. Regarding the Observations of the legal representatives, the Chamber recalls the responsibility of the parties and participants to file documents in accordance with the Regulations of the Court and of the Registry, especially as regards the timing of filings. The Chamber notes that although it received a copy of the Observations by email on 9 December 2010, within the extended time-limit granted by the Chamber, these Observations were not officially filed with the Registry until 10 December 2010 and the legal representatives did not provide a justification in their Observations. Therefore, the Chamber has decided not to consider the legal representatives Observations.

26. In relation to the defence submission that the 120 day deadline for review of detention under Article 60(3) of the Statute expired on 28 November 2010,⁶⁰ the Chamber considers that the timing for a review of detention according to Rule 118(2) of the Rules applies to detention during the “initial proceedings before the Court” as stated in the title of Article 60 of the Statute, namely before the start of trial.⁶¹ The trial commenced on 22 November 2010, therefore, by the present Decision, the Chamber is not “periodically” reviewing the accused’s detention within the meaning of Article 60(3) of the Statute but is rather implementing the Appeal Judgment, which expressly requested the Trial Chamber to review its previous Decision of 28 July 2010 pursuant to Article 60(3) of the Statute as this decision has been reversed.

⁶⁰ ICC-01/05-01/08-1068-tENG, paragraph 3.

⁶¹ See for a similar approach before Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, where no periodic review of detention was made once the trial has started: Trial Chamber II, Fifth Review of the Pre-Trial Chamber’s Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to Rule 118(2) of the Rules of Procedure and Evidence, 19 November 2009, ICC-01/04-01/07-1651, the last review of detention pursuant to Rule 118(2) of the Rules took place on 19 November 2009 before the start of trial on 24 November 2009.

Appeal Judgment

27. By its judgment of 19 November 2010, the Appeals Chamber concluded that the Chamber erred in carrying out a periodic review under Article 60(3) of the Statute in that it restricted itself to assessing only the alleged new circumstances raised by the accused.⁶² The Appeals Chamber stated that the Chamber should rather weigh the prosecution's submissions against the submissions, if any, of the detained person. The Chamber must also consider any other information which has a bearing on the subject.⁶³ The Appeals Chamber stated as follows:

46. The Appeals Chamber thus notes that it is the initial ruling under article 60 (2) of the Statute that establishes the grounds justifying continued detention. However, **given that this ruling may be subsequently modified under article 60 (3) if "changed circumstances so require" it is necessary to construe the "ruling on detention" as being the initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute (*emphasis added*).**

[...]

50. Turning to the context of article 60 (3) of the Statute read with rule 118 (2) of the Rules of Procedure and Evidence, the Appeals Chamber notes that article 60 (2) refers to the "conditions set forth in article 58, paragraph 1". Under article 58 (1) of the Statute, it is on the basis of the "evidence and other information submitted by the Prosecutor" that the Pre-Trial Chamber will determine whether to issue a warrant of arrest. **In respect of periodic reviews of detention under article 60 (3) of the Statute, this indicates that the Prosecutor must also provide information to enable the Chamber to satisfy itself that continued detention is warranted (*emphasis added*).**

[...]

52. In light of the above, **a Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must satisfy itself that the conditions under article 58 (1) of the Statute, as required by article 60 (2) of the Statute, continue to be met (*emphasis added*).**

[...]

⁶² ICC-01/05-01/08-1019 OA4, paragraph 55.

⁶³ ICC-01/05-01/08-1019 OA4, paragraph 52.

28. As the Appeals Chamber has ordered the Chamber to review its Decision of 28 July 2010, the Chamber concurs with the prosecution Observations that the “baseline decision” against which the Chamber should determine whether a change of circumstances requires a modification of the current detention of Mr Bemba is the Chamber’s Decision on the review of detention dated 1 April 2010 (“April Review”).⁶⁴

29. In reaching its conclusion on the detention or release of the accused, the Chamber may modify its ruling “if it is satisfied that changed circumstances so require” pursuant to Article 60(3) of the Statute, taking into account observations by both parties as well as examining whether the conditions set forth in Article 58(1) of the Statute as stated in Article 60(2) of the Statute continue to be met or not. The Chamber also notes that both the defence and the prosecution make, either expressly or indirectly, opposing arguments as to whether there has been an inexcusable delay caused by the prosecution in the conduct of its case pursuant to Article 60(4) of the Statute.⁶⁵ Therefore, the Chamber will also address these arguments.

Review of detention as ordered by the Appeals Judgment pursuant to Article 60(3) of the Statute and new requests for interim release by the defence pursuant to Article 60(2) of the Statute

30. The arrest and confinement of the accused are governed by Articles 58 and 60(2) of the Statute; and particularly, pre-trial detention can be justified to ensure the individual's appearance at trial, to ensure he or she does not obstruct or endanger the investigation or the Court proceedings, or to prevent him or her committing crimes within the jurisdiction of the Court arising out

⁶⁴ 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.

⁶⁵ ICC-01/05-01/08-1068-tENG, paragraphs 10 and 11 and ICC-01/05-01/08-1080, paragraphs 18 to 23 respectively.

of the same circumstances as the case which the Chamber is considering. As no submissions have been made by the parties regarding this last condition under Article 58(1)(b)(iii) of the Statute, and given that this condition was not contemplated as a factual or legal basis for the continued detention of the accused in the Chamber's previous rulings, it is not therefore necessary for the Chamber to consider this in reviewing its Decision of 28 July 2010.

31. In support of Mr Bemba's interim release, the defence suggests that there are several factors that constitute "a change in circumstances" pursuant to Article 60(3) of the Statute. The Chamber will address the suggested "changed" circumstances below.

(i) Commencement of trial

32. Pursuant to Article 60(3) of the Statute, the Chamber may modify its previous ruling on detention only if it is satisfied that the changed circumstances so require. The Chamber finds that the final dismissal by the Appeals Chamber of the defence challenge to the admissibility of the case and the subsequent the start of trial do constitute changes in circumstances within the meaning of Article 60(3) of the Statute. However, these changes do not favour a modification of the Chamber's ruling on the accused's detention. The trial process is now underway which creates an obligation for Mr Bemba to attend court regularly. The Chamber therefore considers that the final dismissal of the accused's admissibility challenge and the subsequent start of the trial have introduced a greater level of certainty that Mr Bemba must stand trial which increases the risk of absconding.

(ii) Mr Bemba's residence and significant family ties in Belgium, Portugal and the DRC

33. For the first time, the defence mentions the fragile state of health of Mr Bemba's grandmother, and produces a medical certificate in support thereof, seeking to rely on ICTY jurisprudence whereby interim release was granted for humanitarian reasons when the health of detainees' family members was deteriorating.⁶⁶ This Chamber previously concluded that personal circumstances are "[d]evelopments [...] capable of constituting a material change in circumstances, but on these facts they fail to reach the necessary threshold".⁶⁷ Given that Mr Bemba's grand-mother resides in the DRC, and the Court is likely to be unable to ensure the accused's presence at trial⁶⁸ if he is released for visiting his grand-mother in the DRC, and taken together with counter submissions made by the prosecution such as the start of trial, the personal circumstances for humanitarian grounds invoked by the defence continue not to represent any change of circumstances that would warrant a modification of the Chamber's previous ruling as to Mr Bemba's detention.

(iii) Existence of Exculpatory material

34. Regarding the existence of exculpatory evidence relied on by the defence in its submissions as reducing the risk of Mr Bemba absconding due to its potential to support an acquittal, the Chamber notes that this material had already been disclosed either at the pre-trial stage or at the very latest on 1 March 2010⁶⁹ and therefore would not constitute a "change of circumstance" since the April Review.

⁶⁶ ICC-01/05-01/08-1068-tENG, paragraphs 26 and 27.

⁶⁷ ICC-01/05-01/08-743, paragraph 29.

⁶⁸ See for a similar approach, Trial Chamber I, Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, ICC-01/04-01/06-1359, paragraph 18.

⁶⁹ Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 March 2010, 2 March 2010, ICC-01/05-01/08-711 and confidential Annex A to the Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 March 2010, 2 March 2010, ICC-01/05-01/08-711-Conf-AnxA.

35. In addition, the evidence referred to in the defence Reply was part of the evidence that lead to the confirmation of charges and the confirmation decision has always been, in the prosecution's submission and as noted in the previous decisions on review of detention,⁷⁰ one of the elements rendering the risk of flight more real. The Chamber finds that the defence argument that the existence of exculpatory evidence reduces the risk of absconding is irrelevant to the review of detention at this stage since it relates more to the merits of the case rather than to the issue of detention or release; this evidence, if relied upon by the defence, will have to be tested during the course of the trial and, at this early stage of presentation of evidence, it cannot be argued that a hypothetical acquittal reduces the risk of absconding. This is equally true for the prosecution's counter argument that the risk of absconding has increased as there is a greater "likelihood of conviction" now that the trial has started.⁷¹ It is the seriousness of the charges that have been confirmed combined with the other factors considered herein which determine the level of risk of absconding.

(iv) Lack of financial means and network of contacts

36. As to Mr Bemba's lack of financial means and network of contacts,⁷² the defence submits that the Chamber recently decided to fund the defence team as it acknowledged that Mr Bemba "does not have the financial means to meet the expenses and fees of the team" (sic). According to the defence, this argument applies equally to the lack of financial means available for Mr Bemba to abscond. However, the Chamber notes that in its alternative request for a more lenient detention regime, the defence proposes Mr Bemba could be placed in a safe house on the territory of the Netherlands and that all related expenses incurred will be paid by private means through friends and family

⁷⁰ See for example, transcript of hearing, 8 December 2010, ICC-01/05-01/08-T-18-Red-ENG, page 28, line 17.

⁷¹ ICC-01/05-01/08-1080, paragraph 12.

⁷² ICC-01/05-01/08-1068-tENG, paragraphs 40 and 41.

members of the accused. The Chamber is therefore unpersuaded that the accused lacks financial means and contacts to assist him should he wish to abscond.

(v) Remaining arguments

37. Finally, the remaining defence arguments as to Mr Bemba's family situation, the defence submission that it was not provided with relevant information on the risk of absconding at the time of the arrest,⁷³ his word of honour to cooperate with the Court and comparison with the situation of Mr Abu Garda giving his word to appear voluntarily before the Court in the situation in the Sudan⁷⁴ are all arguments that have already been raised and subsequently decided upon by this Chamber.

38. Consequently, in keeping with paragraph 53 of the Appeals Judgment, the Chamber does not need "to enter findings on the circumstances already decided upon in the ruling on detention" nor does it "have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions".⁷⁵

39. Having considered both parties submissions, the only potential changes in circumstances since the April Review are the commencement of trial and the Appeals Chamber Judgment confirming the admissibility of the case.⁷⁶ However, these two changes tend to favour Mr Bemba's continued detention rather than mitigate in favour of his release.

⁷³ Transcript of hearing, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 26 lines 13 to 17.

⁷⁴ Transcript of hearing, ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 27 lines 23 to 25 and page 28, lines 1 to 4.

⁷⁵ ICC-01/05-01/08-1019 OA4, paragraph 53.

⁷⁶ Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 26 October 2010, ICC-01/05-01/08-962-Corr.

40. The reasons underpinning the previous Chamber's ruling on detention as submitted by the prosecution, namely the gravity of charges confirmed against the accused, the related potential substantial sentence in case of conviction, the financial and material support from which the accused still benefit are, in the Chamber's view, still in existence and increase the risk of non-appearance at trial in particular now that the trial has started. These reasons are not outweighed by the defence arguments in support of release as the Chamber does not consider these arguments as constituting changed circumstances such as would warrant either Mr Bemba's release or a modification of his detention regime.

41. Considering all of the abovementioned factors, the Chamber is not satisfied that the changed circumstances require the modification of its previous ruling on the accused's detention and it is not persuaded that the guarantees given by the defence will ensure Mr Bemba's appearance at trial.

Detention for an unreasonable period prior to trial due to an inexcusable delay by the prosecution pursuant to Article 60(4) of the Statute

42. The defence argues that at the start of trial, Mr Bemba had to spend a "particularly long period" in pre-trial detention (thirty months) and that this constitutes a material change of circumstance since the April Review.

43. In the *Lubanga* case, the Appeals Chamber found that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case".⁷⁷

⁷⁷ 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", 13 February 2007, ICC-01/04-01/06-824, paragraph 122.

44. The Chamber does not find any inexcusable delay by the prosecution. On the contrary, the defence itself applied on 5 July 2010 for the suspension of proceedings, pending the Appeals Chamber judgment on the merits of the appeal against the Chamber's "Decision on the Admissibility and Abuse of Process Challenge" of 24 June 2010.⁷⁸ Following the defence request for suspensive effect, the trial date was postponed.⁷⁹ The defence was also put on notice as of 8 March 2010 that it was in the interests of justice for a challenge to admissibility of the case to be resolved prior to the commencement of the trial.⁸⁰ Therefore, the Chamber was in a position to fix the date of trial only after the resolution on appeal of the issue on admissibility of the case, namely after 19 October 2010.⁸¹ As a result, the trial started as scheduled on 22 November 2010⁸² within a reasonable period of time. Therefore, the Chamber finds that the 30 months of detention before the commencement of trial was reasonable in all the circumstances. The Chamber concurs with the prosecution submission relating to Article 60(4) of the Statute and considers that Mr Bemba has not been detained prior to trial for an unreasonable period.

45. Finally, addressing the suggestion by the defence that several States may be willing to host Mr Bemba if provisionally released, the Appeals Chamber considered that "in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary".⁸³ The Chamber notes that the availability of potential

⁷⁸ 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.

⁷⁹ Order postponing the commencement of the trial, 7 July 2010, ICC-01/05-01/08-811, paragraph 5.

⁸⁰ Transcript of hearing on 8 March 2010, ICC-01/05-01/08-T-20-Red-ENG CT2, page 14.

⁸¹ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, ICC-01/05-01/08-962 and Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 26 October 2010, ICC-01/05-01/08-962-Corr.

⁸² Transcript of hearing, ICC-01/05-01/08-T-30-ENG-ET, 21 October 2010, page 4, lines 9-20.

⁸³ Judgment on the 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,

host States, in particular Senegal and the RSA as specifically identified by the defence, is only hypothetical as the defence only alluded to "contacts" with authorities of these two countries and simply mentioned a proposed meeting which did not take place.⁸⁴ No other concrete information has been provided with regard to the willingness of other indicated States to host Mr Bemba, if provisionally released. In any event, the Chamber recalls its previous ruling on detention that the theoretical possibility that unspecified countries may be prepared to assist is irrelevant, given the Chamber's overall conclusion that there has been no material change in circumstances since the last review on 1 April 2010.⁸⁵

IV. Conclusion

46. In all the circumstances, the Chamber is satisfied, firstly, that there has not been a change of circumstances sufficient to justify a modification of its ruling as to detention pursuant to Article 60(3) of the Statute and that the requirements of Article 58(1)(b)(i) of the Statute continue to apply at this stage and that secondly, pursuant to Article 60(4) of the Statute, there has been no inexcusable delay by the prosecution causing the detention of the accused for an unreasonable period prior to the commencement of trial on 22 November 2010.

47. Accordingly, the Chamber rejects the defence's Preliminary Requests.

48. The Chamber decides that the accused will remain in custody.

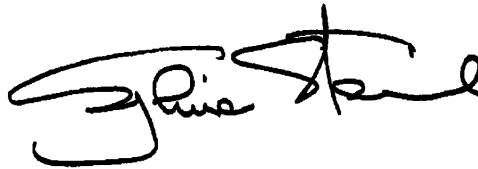
the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red, paragraph 106.

⁸⁴ ICC-01/05-01/08-1068-tENG, paragraphs 48 and 49; See also ICC-01/05-01/08-1068-Conf-AnxA and ICC-01/05-01/08-1068-Conf-AnxB.

⁸⁵ ICC-01/05-01/08-743, paragraph 32.

49. The Chamber instructs the Registry to liaise with the defence and the Detention Centre in order to try to accommodate a more flexible visiting regime to enable, to the extent possible, family to visit also on hearing days so that Mr Bemba can maintain regular contact with his wife and children.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 17 December 2010

At The Hague, The Netherlands