

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **23 December 2014**

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

**Decision on
“Defence Urgent Motion for Provisional Release”**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

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

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) issues the following Decision on “Defence Urgent Motion for Provisional Release”.

I. Background and submissions

1. On 5 December 2014, the defence for Mr Jean-Pierre Bemba Gombo (“defence”) filed its “Defence Urgent Motion for Provisional Release” (“Provisional Release Motion”),¹ in which it requests that the Chamber:²

GRANT Mr. Bemba’s provisional release for [the] period of the deliberations prior to rendering of a Judgement pursuant to Article 74, to either Belgium or Portugal; or in the alternative

GRANT Mr. Bemba’s provisional release for the period of the judicial winter recess and during the weekends prior to a rendering of a Judgement pursuant to Article 74 to either Belgium or Portugal.

2. The defence submits that “a change in circumstances exists in relation to all aspects of the previous decision on Mr. Bemba’s detention, and each change in circumstances undermines the bases relied upon to justify Mr Bemba’s ongoing detention”.³ In particular, the defence refers to (i) the completion of proceedings in the *Bemba* case in light of the Chamber having retired to deliberate, (ii) the entry into force of an agreement between the Government of Belgium and the ICC on the interim release of detainees into Belgian territory, and (iii) the Chamber’s “Decision on defence request for an extension of the page limit”,⁴ which the defence states delayed the resolution of its request⁵ that Mr Bemba be released into

¹ Defence Urgent Motion for Provisional Release, 5 December 2014, ICC-01/05-01/08-3211.

² ICC-01/05-01/08-3211, paragraphs 11, 31[sic], and 43.

³ ICC-01/05-01/08-3211, paragraph 5.

⁴ Decision on defence request for an extension of the page limit, 26 November 2014, ICC-01/05-01/08-3210.

⁵ Defence Request for Relief for Abuse of Process, 11 November 2014, ICC-01/05-01/08-3203-Conf-Exp with confidential ex-parte Annexes I to III and confidential Annexes IV to IX (“Abuse of Process Request”). The defence filed confidential and public redacted versions of its filing on 25 November 2014, respectively: ICC-

either the Portuguese Republic (“Portugal”) or the Kingdom of Belgium (“Belgium”).⁶ Additionally, the defence alleges that since Witness P169 withdrew his allegations of having been threatened in light of his testimony, “any suggestion that Mr. Bemba’s provisional release would pose a danger to victims, witnesses or any other person” is “further undermin[ed]”.⁷ The defence also argues that since the closure of the evidentiary phase of the case, “there is also no objective incentive to interfere with witnesses or evidence”.⁸ In addition, in the “Background” of the Provisional Release Motion, the defence makes extensive submissions relating to the Chamber’s “Decision on defence request for an extension of the page limit”.⁹

3. In its submissions, the defence states that Mr Bemba is currently being held pursuant to the Appeals Chamber’s “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’””,¹⁰ but argues that “[s]ince this decision, there has been a substantial change in the conditions stipulated in Article 58(1)(b)(i) of the Rome Statute which warrant the granting of provisional release”.¹¹
4. Turning to the alleged changes in circumstances, the defence argues, firstly, that “Mr. Bemba’s detention is no longer warranted to ensure his appearance at trial, given that the trial process has now concluded”.¹² The

01/05-01/08-3203-Conf-Red and ICC-01/05-01/08-3203-Red2 with Annexes IV to VIII-Red. *See* ICC-01/05-01/08-3203-Red2, paragraph 327.

⁶ ICC-01/05-01/08-3211, paragraphs 6 to 9.

⁷ ICC-01/05-01/08-3211, paragraph 10.

⁸ ICC-01/05-01/08-3211, paragraph 10.

⁹ ICC-01/05-01/08-3211, paragraphs 18 to 28.

¹⁰ ICC-01/05-01/08-3211, paragraph 34, referring to “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’””, 5 March 2012, ICC-01/05-01/08-2151-Red.

¹¹ ICC-01/05-01/08-3211, paragraph 34.

¹² ICC-01/05-01/08-3211, paragraphs 35 to 39.

defence also raises arguments relating to detention having a practical effect as a “predetermination of sentence”.¹³ In addition, the defence makes submissions on the “religious and familial significance” of Christmas and the “benefits of provisional release on a human level”.¹⁴

5. Secondly, the defence submits that the existence of an agreement between Belgium and the ICC to accept provisionally released detainees “constitutes a change in circumstances warranting the reconsideration of Mr. Bemba’s detention”.¹⁵
6. Thirdly, the defence argues that the Chamber’s decision to reject its Abuse of Process Request was erroneous and delayed the resolution of the issues raised therein.¹⁶ The defence argues that due to this, “changed circumstances exist which warrant the granting of provisional release”.¹⁷
7. Lastly, the defence submits that Mr Bemba poses no danger to victims, witnesses, or any other person, and that he is not a flight risk.¹⁸
8. On 8 December 2014, the Chamber issued its “Order shortening the time limit for observations on ‘Urgent Motion for Provisional Release’”,¹⁹ in which it ordered that any response to the Provisional Release Motion had to be filed by 16.00 on 12 December 2014, while any reply had to be filed by 16.00 on 15 December 2014.²⁰
9. On 12 December 2014, the prosecution filed its “Prosecution’s Response to

¹³ ICC-01/05-01/08-3211, paragraphs 40 to 42.

¹⁴ ICC-01/05-01/08-3211, paragraphs 43 to 45.

¹⁵ ICC-01/05-01/08-3211, paragraphs 46 to 47.

¹⁶ ICC-01/05-01/08-3211, paragraphs 48 to 49.

¹⁷ ICC-01/05-01/08-3211, paragraph 50.

¹⁸ ICC-01/05-01/08-3211, paragraphs 51 to 55.

¹⁹ Order shortening the time limit for observations on “Urgent Motion for Provisional Release”, 8 December 2014, ICC-01/05-01/08-3212.

²⁰ ICC-01/05-01/08-3212, paragraph 5.

the Defence Urgent Motion for Provisional Release”,²¹ in which it submits that the Provisional Release Motion should be rejected in its entirety.²²

10. The prosecution submits that no changed circumstances exist with respect to the factual findings previously considered by the Chamber and upheld by the Appeals Chamber.²³ Moreover, the prosecution argues that the conditions of release proposed by the defence “do not sufficiently mitigate [the accused’s] flight risk”.²⁴
11. Specifically, the prosecution contends: (i) that the trial is still ongoing, contrary to the defence’s submission that the trial process has concluded;²⁵ (ii) that the defence’s estimate that the trial judgment will be delivered in summer 2015 and that this lengthy period justifies provisional release, is unfounded;²⁶ (iii) that the agreement between Belgium and the ICC to facilitate the release of detainees to Belgium has no bearing on the fact that the accused poses a flight risk and should not alter the factors on which the Chamber’s previous decision was based;²⁷ (iv) that rather than warranting provisional release, the delay in resolving the defence’s submissions on alleged abuse of process was in fact caused by the defence’s own breach of Regulation 37 of the Regulations of the Court (“Regulations”), which cannot result in the accused’s provisional release;²⁸ (v) that the argument that the accused “does not pose a danger to victims, witnesses or any other person” does not affect the basis of the Chamber’s previous detention decision that the accused constitutes a flight risk;²⁹ and (vi) that the defence’s submissions based on Mr Bemba having no criminal

²¹ Prosecution’s Response to the Defence Urgent Motion for Provisional Release, 12 December 2014, ICC-01/05-01/08-3215.

²² ICC-01/05-01/08-3215, paragraphs 1 to 4 and 17.

²³ ICC-01/05-01/08-3215, paragraphs 3, 6, and 7.

²⁴ ICC-01/05-01/08-3215, paragraph 3.

²⁵ ICC-01/05-01/08-3215, paragraph 8.

²⁶ ICC-01/05-01/08-3215, paragraph 9.

²⁷ ICC-01/05-01/08-3215, paragraph 10.

²⁸ ICC-01/05-01/08-3215, paragraph 11.

²⁹ ICC-01/05-01/08-3215, paragraph 12.

record, being the head of his family, and being willing to provide guarantees, do not modify the Chamber's previous finding that the accused poses a flight risk.³⁰

12. In addition, the prosecution argues that the confirmation of charges in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13") increases the risk of flight.³¹

13. Lastly, the prosecution submits that nothing put forward by the defence establishes that the Chamber's prior decision not to consider conditional release should change.³²

14. On 12 December 2014, the legal representative of victims, Maître Marie-Edith Douzima-Lawson ("legal representative"), filed her "Réponse de la Représentante légale des victimes à 'Urgent Motion for Provisional Release', ICC-01/05-01/08-3211",³³ in which she requests that the Chamber deny the defence motion in its entirety as no change in circumstances justifying the provisional release of the accused has been identified.³⁴

15. With reference to the defence's argument that the completion of the trial process constitutes a change in circumstances, the legal representative asserts that in view of Articles 75 and 76 of the Rome Statute ("Statute"), which are included in Part 6 of the Statute dealing with the "trial", the trial has not been completed.³⁵ She further submits that the defence's argument that legal consultations between the defence and Mr Bemba can be

³⁰ ICC-01/05-01/08-3215, paragraph 13.

³¹ ICC-01/05-01/08-3215, paragraphs 14 and 16.

³² ICC-01/05-01/08-3215, paragraph 15.

³³ Réponse de la Représentante légale des victimes à "Urgent Motion for Provisional Release", ICC-01/05-01/08-3211, 12 December 2014, ICC-01/05-01/08-3214.

³⁴ ICC-01/05-01/08-3214, paragraph 5 and page 11.

³⁵ ICC-01/05-01/08-3214, paragraph 7.

conducted at a distance, is speculative and does not relate to the criteria of Article 58(1)(b).³⁶

16. The legal representative argues that the agreement between the Belgian Government and the ICC on the provisional release of detainees is not a guarantee ensuring the appearance of the accused in Court or preventing him from obstructing the proceedings.³⁷
17. Regarding the defence's argument that the delay in the resolution of Mr Bemba's submissions on alleged abuse of process constitutes a change in circumstances, the legal representative submits that the defence has failed to demonstrate a link between the alleged delay and the basis for provisional release.³⁸ In this regard, the legal representative asserts that it has not been established that a faster resolution of the Provisional Release Motion would have resulted in a decision granting provisional release.³⁹
18. The legal representative contends that in view of the large support and political network available to Mr Bemba, his capacity to give orders to his party despite his detention, the availability of significant financial means, the security concerns expressed by victims, and Mr Bemba's capacity to contact victims and witnesses, provisional release would entail a significant risk for the victims and witnesses in this case.⁴⁰
19. Lastly, concerning the defence's claim that Mr Bemba is not a flight risk, the legal representative asserts that the gravity of the charges, the imminence of the judgment and the substantial sentence he risks in case of

³⁶ ICC-01/05-01/08-3214, paragraph 8.

³⁷ ICC-01/05-01/08-3214, paragraph 9.

³⁸ ICC-01/05-01/08-3214, paragraphs 11 to 13.

³⁹ ICC-01/05-01/08-3214, paragraphs 11 to 13.

⁴⁰ ICC-01/05-01/08-3214, paragraph 16, quoting Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo", 13 July 2012, ICC-02/11-01/11-180-Red-tFRA, paragraph 57.

a conviction may incite Mr Bemba to abscond.⁴¹ She adds that the charges confirmed by Pre-Trial Chamber II in case ICC-01/05-01/13 cannot be considered as a change of circumstances justifying the provisional release of Mr Bemba, but rather entail an increased risk of flight and danger for witnesses.⁴²

20. On 15 December 2014, the defence filed its “Defence Reply to Responses to its Urgent Motion for Provisional Release” (“Defence Reply”),⁴³ in which it requests that the Chamber grant the relief sought in the Provisional Release Motion.⁴⁴

21. First, the defence submits that “the Prosecution and Legal Representative’s assertions that Mr. Bemba would pose a danger and threat to witnesses” are speculative and ungrounded.⁴⁵ Second, the defence argues that the legal representative’s reliance on Mr Bemba’s political support as a reason to continue his detention violates his right to exercise his political rights.⁴⁶ Third, the defence contends that “arguments concerning Mr. Bemba’s alleged risk of flight are based on the presumption that Belgium and Portugal, two States Parties, are incapable of ensuring that this does not occur”; the defence submits that “it should be presumed that Belgium and Portugal have the ability to carry out any obligations to which they agree concerning Mr. Bemba’s release, monitoring, and return to the seat of the Court”.⁴⁷ The defence states that, “in the absence of any indication that the Trial Chamber has solicited the views of either Belgium or Portugal in its determination of the [Provisional Release Motion], the Defence requests that a status conference be called, with representatives from both states

⁴¹ ICC-01/05-01/08-3214, paragraph 21.

⁴² ICC-01/05-01/08-3214, paragraphs 22 to 26.

⁴³ Defence Reply to Responses to its Urgent Motion for Provisional Release, 15 December 2014, ICC-01/05-01/08-3216.

⁴⁴ ICC-01/05-01/08-3216, paragraph 12.

⁴⁵ ICC-01/05-01/08-3216, paragraphs 5 and 6.

⁴⁶ ICC-01/05-01/08-3216, paragraphs 7 and 8.

⁴⁷ ICC-01/05-01/08-3216, paragraph 9.

being invited to attend to discuss the implementation of appropriate conditions and logistical arrangements for any eventual period of provisional release”.⁴⁸

22. Lastly, the defence submits that nothing relating to case ICC-01/05-01/13 bears relevance to the Chamber’s assessment under Article 58.⁴⁹

II. Analysis

23. In accordance with Article 21(1) of the Statute, the Chamber has considered Articles 58(1), 60(3) and 64 of the Statute and Rules 118 and 119 of the Rules of Procedure and Evidence (“Rules”).

24. A Chamber may modify an earlier order relating to a person’s detention under Article 60(3) of the Statute only “if it is satisfied that changed circumstances so require”.⁵⁰ As the Appeals Chamber has held, “the ‘requirement of changed circumstances [in Article 60(3) of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary’”.⁵¹ In undertaking its inquiry, “the Chamber must revert to the [previous] ruling[(s)] on detention to determine whether there has been a change in ... circumstances that ha[s] a bearing on the conditions under article 58(1) of the Statute”.⁵² In addition, the Appeals Chamber has held that “the Chamber should not restrict itself to only considering the arguments raised by the detained

⁴⁸ ICC-01/05-01/08-3216, paragraph 10.

⁴⁹ ICC-01/05-01/08-3216, paragraph 11.

⁵⁰ Article 60(3) of the Statute.

⁵¹ Judgment 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, paragraph 51 (quoting 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, 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 60).

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

person” when undertaking a review under Article 60(3) of the Statute.⁵³

25. The Chamber’s most recent ruling on the detention of the accused is its “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’” (“January 2012 Decision”).⁵⁴ The Chamber found that there were no “changed circumstances” warranting modification of its previous finding that the accused constituted a flight risk, which was based on the following four factors: (i) the final dismissal of the defence’s challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits.⁵⁵ On this basis the Chamber found that “the accused’s detention continues to be necessary to ensure his presence at trial and is therefore warranted under Article 58 (1)(b)(i) of the Statute”.⁵⁶ The January 2012 Decision was upheld on appeal.⁵⁷
26. The question before the Chamber is whether the alleged changes in circumstances raised in the Provisional Release Motion, or any other changes in circumstances, alter the above factual findings such that modification of the January 2012 Decision is warranted.

⁵³ ICC-01/05-01/08-1019, paragraph 52.

⁵⁴ Decision on the defence’s 28 December 2011 “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”, 6 January 2012, ICC-01/05-01/08-2034-Conf. A public redacted version of this decision was filed on 19 January 2012; ICC-01/05-01/08-2034-Red.

⁵⁵ ICC-01/05-01/08-2034-Red, paragraphs 8 to 9. *See also* Decision on the “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”, 19 December 2011, ICC-01/05-01/08-2022-Conf, paragraphs 11 to 13. A public redacted version was filed on 3 January 2012; ICC-01/05-01/08-2022-Red.

⁵⁶ ICC-01/05-01/08-2034-Red, paragraph 10.

⁵⁷ ICC-01/05-01/08-2151-Red.

Submissions as to changed circumstances relevant to Article 58(1)(b)(i)

27. The defence argues that since “the trial process has now concluded”, the condition of Article 58(1) – “[t]he arrest of the person appears necessary ... [t]o ensure the person’s appearance at trial” – is no longer met.⁵⁸ The defence argues that since the trial has now moved into the deliberations stage, the accused’s presence in The Hague is no longer required.⁵⁹
28. The defence argument is premised on the assertion that the “trial process has now concluded”. This assertion is based on the statement of the Presiding Judge that “in accordance with Rule 142(1) of the Rules of Procedure and Evidence, the Chamber shall now retire in order to start deliberations”.⁶⁰ However, nothing in this statement necessarily implies that the *trial* has concluded.
29. The Chamber notes that the Appeals Chamber has held that, in the context of Regulation 55 of the Regulations, the deliberations stage forms a part of the trial.⁶¹ The Chamber also notes that Trial Chamber V(A) has indicated that the trial includes the delivery of the judgement and, if applicable, the sentencing hearing, sentencing itself, victim impact hearings, and reparation hearings.⁶²
30. Taking the above into account, and noting that Article 74 – dealing with the requirements of the Chamber’s judgment, Article 75 – dealing with reparations, and Article 76 – dealing with sentencing, are all included in Part 6 of the Statute entitled “The Trial”, the Chamber considers it clear that the commencement of deliberations does not mean that the *trial* has

⁵⁸ ICC-01/05-01/08-3211, paragraph 35.

⁵⁹ ICC-01/05-01/08-3211, paragraphs 6 and 35.

⁶⁰ ICC-01/05-01/08-3211, paragraph 6. *See* T-365-Red-ENG ET, page 67, line 25 to page 68, line 2.

⁶¹ Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363, paragraphs 17 and 20.

⁶² Trial Chamber V(A), Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014, ICC-01/09-01/11-1186, paragraph 79.

concluded. As such, neither the closure of evidence nor the start of deliberations mean, *per se*, that the condition of Article 58(b)(i) is no longer met.

31. In addition to the above, the commencement of deliberations does not alter the four factors relied upon by the Chamber in its previous decision that the accused poses a flight risk.⁶³
32. Having carefully considered the above, the Chamber concludes that the commencement of deliberations is not a changed circumstance requiring modification of its prior finding that the accused's continued detention is necessary to ensure his appearance at trial and, therefore, warranted under Article 58(b)(i) of the Statute.
33. In addition to making submissions based on the commencement of deliberations, the defence also sets out a number of reasons why the accused is not a flight risk.⁶⁴
34. Firstly, the defence refers to the accused's lack of criminal record, his familial responsibilities, and his political career.⁶⁵ Contrary to the requirement of Article 60(3) of the Statute, the information the defence provides does not contain any new facts or changed circumstances which could warrant modification of the Chamber's ruling on detention; rather, the defence appears to seek reconsideration of the Chamber's prior determination that the accused poses a flight risk. In this respect, the Appeals Chamber has stated that "[i]f ... the ... Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention".⁶⁶

⁶³ See paragraph 25 above.

⁶⁴ ICC-01/05-01/08-3211, paragraphs 53 to 55.

⁶⁵ ICC-01/05-01/08-3211, paragraphs 53 to 54.

⁶⁶ ICC-01/05-01/08-2151-Red, paragraphs 31 and 32.

35. Secondly, the defence submits that the accused is willing to provide a number of “personal guarantees” to reassure the Court that no risk of flight exists.⁶⁷ While the bulk of these relate to proposed conditions of release, the Chamber notes that the defence states that the accused is willing to provide a “personal guarantee” to ensure “strict compliance with any order of the Trial Chamber varying the terms of or terminating his provisional release”.⁶⁸ The Chamber understands this to be a guarantee as to the accused’s willingness to, *inter alia*, return to complete his trial should the Chamber so order.

36. The Chamber has twice previously addressed undertakings on the part of the accused which the Chamber found “speak... to the accused’s willingness to return to complete his trial if granted provisional release”.⁶⁹ The Chamber found that such undertakings constituted a changed circumstance which “bears on the issue of the accused’s risk of flight”.⁷⁰ However, on both occasions the Chamber, noting that the undertakings did not alter the facts underpinning its earlier finding that the accused poses a flight risk, found that the accused’s personal undertakings were insufficient to warrant modification of its prior rulings on detention.⁷¹ The Chamber sees nothing in the present circumstances warranting a different conclusion.

37. In light of the above, the Chamber finds that the accused’s detention is still necessary to ensure his appearance at trial and therefore warranted under Article 58(1)(b)(i) of the Statute.

⁶⁷ ICC-01/05-01/08-3211, paragraph 55.

⁶⁸ ICC-01/05-01/08-3211, paragraph 55.

⁶⁹ Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo”, 2 September 2011, ICC-01/05-01/08-1691, paragraphs 18 to 23; and Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011, 26 September 2011, ICC-01/05-01/08-1789-Conf, paragraphs 25 to 26. A public redacted version of this decision was filed on 27 September 2011: ICC-01/05-01/08-1789-Red. ICC-01/05-01/08-1789-Red.

⁷⁰ ICC-01/05-01/08-1691, paragraphs 18 to 23; and ICC-01/05-01/08-1789-Red, paragraphs 25 to 26.

⁷¹ ICC-01/05-01/08-1691, paragraphs 18 to 23; and ICC-01/05-01/08-1789-Red, paragraphs 25 to 26.

Submissions relevant to Article 58(1)(b)(ii)

38. Turning to the defence's argument that the accused does not pose a danger to victims, witnesses or any other person, the Chamber firstly notes that the accused is not currently detained on this ground.⁷²
39. In its "Decision on the accused's application for provisional release in light of the Appeal's Chamber's judgement of 19 August 2011" ("September 2011 Decision"), the Chamber found that Article 58(b)(1)(ii) constituted an additional ground for the accused's detention.⁷³ However, the Appeals Chamber subsequently found that, pursuant to Rule 118(3), the Chamber made a procedural error in relying on a ground of detention where the accused "could not possibly have addressed [this ground] in his Application ... and could not have foreseen at that time that this would be a reason for denying his application".⁷⁴ The Appeals Chamber stated that in such circumstances, the accused could not "be faulted for failing to address these issues" and that "the Trial Chamber therefore should have sought submissions from Mr Bemba concerning witness intimidation before deciding on this issue as an additional ground of detention under Article 58 (1) (b) (ii) of the Statute".⁷⁵ In subsequent decisions the Chamber did not consider whether the accused's detention may be warranted under Article 58(1)(b)(ii).⁷⁶
40. Having considered the above, the Chamber notes that the present circumstances differ greatly from those that prevailed at the time the September 2011 Decision was taken.

⁷² See paragraph 25 above. See also ICC-01/05-01/08-1937-Red2, paragraphs 64 to 67; and ICC-01/05-01/08-2022-Red, paragraphs 10 and 14.

⁷³ ICC-01/05-01/08-1789-Red, paragraphs 27 to 33.

⁷⁴ ICC-01/05-01/08-1937-Red2, paragraph 66.

⁷⁵ ICC-01/05-01/08-1937-Red2, paragraph 66.

⁷⁶ See paragraph 25 above. See also ICC-01/05-01/08-2022-Red, paragraphs 10 and 14.

41. First, the Chamber notes that the defence itself made submissions on this ground of detention in its Provisional Release Motion,⁷⁷ to which the prosecution and legal representative responded.⁷⁸
42. Second, since the September 2011 Decision, Pre-Trial Chamber II, in its public “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute” in case ICC-01/05-01/13, has found that there exist “substantial grounds to believe” that the accused (i) committed or solicited the offences of corruptly influencing witnesses and presenting false evidence; and (ii) solicited the commission of the offence of giving false testimony.⁷⁹ Both the prosecution and the legal representative address issues related to case ICC-01/05-01/13 in their submissions,⁸⁰ and the defence advances submissions on this matter in its Defence Reply.⁸¹
43. Therefore, the Chamber considers that it has received observations on the conditions of Article 58(1)(b)(ii), including specifically relating to case ICC-01/05-01/13, from the prosecution, the legal representative, and the defence. Consequently, no argument can be made that the defence “could not have foreseen at that time that this would be a reason for denying” its Provisional Release Motion.
44. In light of the above, the Chamber will consider whether the accused’s detention is also necessary to “ensure that the [accused] does not obstruct or endanger the ... court proceedings” pursuant to Article 58(1)(b)(ii). In this regard, the Appeals Chamber has held that Article 58(1)(b)(ii) may be relied upon as a ground for detention where there is a “possibility” that the arrest of the person appears necessary to ensure that the person does

⁷⁷ ICC-01/05-01/08-3211, paragraphs 51 to 52.

⁷⁸ ICC-01/05-01/08-3214, paragraphs 14 to 20 and ICC-01/05-01/08-3215, paragraphs 12 and 14.

⁷⁹ Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014. ICC-01/05-01/13-749, paragraph 25 and pages 47 and 48.

⁸⁰ ICC-01/05-01/08-3214, paragraphs 21 to 26 and ICC-01/05-01/08-3215, paragraph 14.

⁸¹ ICC-01/05-01/08-3216, paragraph 11.

not obstruct or endanger the court proceedings.⁸² The Appeals Chamber has also held that factors relevant to determining whether an accused has the incentive and means to abscond (Article 58(1)(b)(i)), are also relevant to determining whether he or she has the incentive and means to obstruct the proceedings (Article 58(1)(b)(ii)).⁸³

45. Turning first to the defence's submissions, the Chamber notes that the defence argues that considerations related to case ICC-01/05-01/13 "fall outside the scope of an Article 58 assessment in [the *Bemba* case]".⁸⁴ The Chamber finds this argument without merit. Insofar as information has a factual bearing on the question of whether there exists a risk that the accused may "obstruct or endanger the ... court proceedings", it falls squarely within the scope of the Chamber's assessment pursuant to Article 58(1)(b)(ii).

46. The defence also states that the Single Judge in case ICC-01/05-01/13 "released Mr. Bemba's co-suspects on 21 October 2014, relying on the lack of risk of interference that proceedings or investigations might be obstructed or endangered..."⁸⁵

47. In this regard, the Chamber notes, firstly, that the Single Judge of Pre-Trial Chamber II, in his "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido",⁸⁶ did not find that a "lack of risk of interference" alone justified provisional release, but also considered, "*more specifically*, that the reasonableness of the duration of the detention has to be balanced *inter alia*

⁸² 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", 16 December 2008, ICC-01/05-01/08-323, paragraph 67.

⁸³ Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red, paragraphs 63 and 64.

⁸⁴ ICC-01/05-01/08-3216, paragraph 11.

⁸⁵ ICC-01/05-01/08-3216, paragraph 11.

⁸⁶ Pre-Trial Chamber II, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, ICC-01/05-01/13-703.

against the statutory penalties applicable to the offences at stake ... and that, accordingly, the *further extension of the period of the pre-trial detention would result in making its duration disproportionate*".⁸⁷

48. Secondly, the Chamber notes that after noting the specific nature of the evidence in case ICC-01/05-01/13, the Single Judge considered that the "risks that *these* proceedings or the investigations might be obstructed or endangered" was reduced.⁸⁸ This finding has no bearing on this Chamber's assessment of whether there exists a risk that the accused may "obstruct or endanger the ... court proceedings" in the *Bemba* case.

49. Turning to the condition of Article 58(1)(b)(ii), while noting its decision not to authorise submission of evidence collected in investigations related to case ICC-01/05-01/13,⁸⁹ the Chamber considers that the existence of a finding by Pre-Trial Chamber II that there are "substantial grounds to believe" that the accused committed or solicited offences against the administration of justice related to the *Bemba* case,⁹⁰ as a matter of fact and strictly for the purposes of its assessment under Article 58(1)(b)(ii), clearly satisfies the standard set by the Appeals Chamber that there must be a "possibility" that the arrest of the person appears necessary to ensure that the person does not obstruct or endanger the court proceedings.⁹¹ In this regard, the Chamber is also mindful of the three factors relating to the accused's incentive to abscond,⁹² and its finding as to "the financial and material support from which the accused benefits",⁹³ which underlay its finding that the accused poses a flight risk. The Chamber finds these

⁸⁷ ICC-01/05-01/13-703, page 4 (emphasis added).

⁸⁸ ICC-01/05-01/13-703, page 4 (emphasis added).

⁸⁹ See Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029.

⁹⁰ ICC-01/05-01/13-749, paragraph 25 and pages 47 and 48.

⁹¹ 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", 16 December 2008, ICC-01/05-01/08-323, paragraph 67.

⁹² See paragraph 25 above. The relevant three factors are: (i) the final dismissal of the defence's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; and (iii) the potential substantial sentence in case of conviction.

⁹³ See paragraph 25 above.

factors equally relevant in assessing whether the accused has the incentive and means to obstruct or endanger the proceedings.

50. Finally, the Chamber notes that the defence submits that the accused is willing to give a “personal guarantee” not to discuss his case with anyone other than his counsel.⁹⁴ While noting that this undertaking may bear on its assessment pursuant to Article 58(1)(b)(ii), the Chamber finds that this undertaking is insufficient to mitigate the risks outlined above.

51. In light of the above, the Chamber finds that the accused’s detention is warranted under Article 58(1)(b)(ii) of the Statute.

Conditional release pursuant to Rule 119 of the Rules

52. The defence argues that “the existence of an agreement between the ICC and Belgium with the sole purpose of facilitating release of detainees into Belgian territory is a significant measure, and constitutes a change in circumstances warranting the reconsideration of Mr. Bemba’s detention”.⁹⁵

53. While the defence does not expressly refer to conditional release pursuant to Rule 119 of the Rules in its Provisional Release Motion, its submissions clearly envision the application of this rule.⁹⁶ Indeed, the defence submits that the accused is “willing to provide personal guarantees as necessary to reassure the Court that no risk of flight exists” including: to remain in a residence designated by the court; to be subject to the extradition laws of either Belgium or Portugal; to be subject to an order to remain in the country; to surrender his passport to the court; to be subject to 24-hour electronic surveillance; to report to local police or authorities on a daily basis; to receive unannounced visits by the police or local authorities; not

⁹⁴ ICC-01/05-01/08-3211, paragraph 55.

⁹⁵ ICC-01/05-01/08-3211, paragraphs 47.

⁹⁶ See ICC-01/05-01/08-3211, paragraph 55 and ICC-01/05-01/08-3216, paragraphs 9 and 10.

to discuss his case with anyone other than his counsel; to assume all responsibility for travel costs; and to ensure strict compliance with any order of the Chamber varying or terminating his provisional release.⁹⁷ The Chamber will therefore also address the applicability of Rule 119 of the Rules in the present context.

54. The Chamber has previously found, after considering the jurisprudence of the Appeals Chamber,⁹⁸ that “Trial Chambers have the discretion under Rule 119 of the Rules to consider the possibility of conditional release or to decline to consider such a possibility”.⁹⁹ As to the limits of this discretion, the Appeals Chamber has held that:¹⁰⁰

[I]n circumstances where a State has *offered to accept a detained person and to enforce conditions*, it is incumbent upon the ... Chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident the Pre-Trial Chamber's discretion to consider conditional release is unfettered.

55. The Appeals Chamber has further clarified, stating that where “[n]o State ha[s] expressly offered to accept [the accused] and to enforce conditions”, Chambers are “not duty-bound to consider conditional release. Rather, it [i]s within [their] discretion not to consider conditional release.”¹⁰¹

56. In the present circumstances, it is not clear that Belgium has “offered to

⁹⁷ ICC-01/05-01/08-3211, paragraph 55.

⁹⁸ See ICC-01/05-01/08-631-Red, paragraph 105; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, 19 August 2011, ICC-01/05-01/08-1626-Red, paragraphs 55, 82, and 85; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled “Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo’”, 9 September 2011, ICC-01/05-01/08-1722, paragraphs 38 and 39; and Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”, 23 November 2011, ICC-01/05-01/08-1937-Red2, paragraph 35.

⁹⁹ ICC-01/05-01/08-2022-Red, paragraph 20.

¹⁰⁰ ICC-02/11-01/11-278-Red, paragraph 79 (emphasis added).

¹⁰¹ Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”, 11 July 2014, ICC-01/05-01/13-559, paragraph 117; and Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled “Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda”, 11 July 2014, ICC-01/05-01/13-560, paragraph 129.

accept [the accused] and to enforce conditions". In the Provisional Release Motion, the defence makes reference to the existence of an agreement between Belgium and the ICC relating to interim release.¹⁰² However, it is far from clear that such an agreement constitutes an "offer to accept" the accused onto its territory or to enforce conditions, nor is such an offer self-evident.

57. Accordingly, the Chamber considers that, on the information before it, no State has "offered to accept [the accused] and to enforce conditions" nor is such an offer self-evident. As a consequence, and in application of the Appeals Chamber's jurisprudence outlined above, the Chamber is not required to consider conditional release, and has discretion in this regard. This notwithstanding, the Chamber will consider whether conditional release might be appropriate in the present circumstances. The Chamber will also address whether it is necessary to seek further information from Belgium or Portugal relating to any potential period of conditional release.

58. In line with its previous findings that the accused constitutes a flight risk and that it is "appropriate at this stage for the accused to remain within a detention regime overseen by the Court",¹⁰³ the Chamber concludes that there is no condition short of detention at the seat of the Court that would be sufficient to mitigate the accused's flight risk. In exercising its discretion in this regard, the Chamber has paid particular attention to the factual circumstances on which it based its finding that the accused poses a flight risk, namely: (i) that the trial is ongoing; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits.¹⁰⁴ In reaching its conclusion, the Chamber draws a

¹⁰² ICC-01/05-01/08-3211, paragraphs 46 and 47.

¹⁰³ ICC-01/05-01/08-2022-Red, paragraph 21 and ICC-01/05-01/08-1789-Red, paragraph 37.

¹⁰⁴ Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, 17 December 2010, ICC-01/05-01/08-1088, paragraphs 32 to 41; Decision on Applications

clear distinction between the two occasions on which Mr Bemba was granted provisional release for very limited periods, under strict conditions, and on the basis of exceptional humanitarian reasons,¹⁰⁵ and a general request for provisional release either for an extended period or on a regular and frequent basis.

59. The Chamber also recalls its finding that the accused's detention is necessary pursuant to Article 58(1)(b)(ii) in paragraphs 38 to 51 above. In light of Pre-Trial Chamber II's findings, the Chamber is of the view that no condition short of maintaining the accused's detention would be sufficient to mitigate the risk that the accused might obstruct or endanger the court proceedings.

60. In conclusion, the Chamber does not consider that conditional release would be appropriate in the present circumstances.

61. In light of the above conclusions, the Chamber does not consider it necessary "that a status conference be called, with representatives from [Belgium and Portugal] to discuss the implementation of appropriate conditions and logistical arrangements for any eventual period of provisional release".¹⁰⁶

for Provisional Release, 27 June 2011, ICC-01/05-01/08-1565-Conf, paragraphs 55 to 56. A public redacted version was filed on 16 August 2011: ICC-01/05-01/08-1565-Red; ICC-01/05-01/08-1789-Red, paragraphs 22 to 23; ICC-01/05-01/08-2022-Red, paragraph 11; and ICC-01/05-01/08-2034-Red, paragraph 8.

¹⁰⁵ Decision on the Defence's Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, 3 July 2009, ICC-01/05-01/08-437-Conf. A public redacted version was filed on the same day: ICC-01/05-01/08-437-Red; and Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, 7 January 2011, ICC-01/05-01/08-1099-Conf. A public redacted version was filed on 12 January 2011: ICC-01/05-01/08-1099-Red.

¹⁰⁶ ICC-01/05-01/08-3216, paragraph 10.

“The delay in the resolution of Mr. Bemba’s submissions on abuse of process”

62. The defence argues that the Chamber’s “Decision on defence request for an extension of the page limit” has delayed “resolution of the many questions which have arisen from ... abuse of process” and that this has given rise to changed circumstances warranting the granting of provisional release.¹⁰⁷ However, the defence does not explain how the Chamber’s decision and the alleged delay bear factually on the Chamber’s determination that the accused’s detention continues to be necessary to ensure his appearance at trial. Indeed, the Chamber sees no link between this argument and the basis of the accused’s detention.

63. As such, the Chamber finds that the alleged “delay in the resolution of Mr. Bemba’s submissions on abuse of process” gives rise to no changed circumstances warranting modification of its prior rulings on the detention of the accused.

III. Conclusion

64. For the foregoing reasons, the Chamber DENIES the Provisional Release Motion in its entirety.

¹⁰⁷ ICC-01/05-01/08-3211, paragraphs 48 to 50.

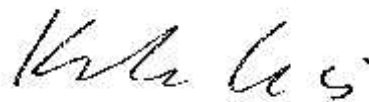
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 23 December 2014

At The Hague, the Netherlands