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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR *v.* JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO**

URGENT

Public

Decision on Mr Bemba's Application for Release

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

The Office of the Prosecutor

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REGISTRY

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Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 58(1)(b) and 60(2) of the Rome Statute ('Statute') and Rules 118(1) and 119 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Mr Bemba's Application for Release'.

I. Procedural history

1. On 23 November 2013, Mr Bemba was served with an arrest warrant in the present case.¹ He was then detained until 23 January 2015, when he was released for purposes of this case by the Pre-Trial Chamber Single Judge.² This release was reversed and remanded by the Appeals Chamber on 29 May 2015, at which point Mr Bemba was effectively re-detained for this case.³ No remand decision was issued because the defence for Mr Bemba ('Bemba Defence') subsequently withdrew its interim release request.⁴ As of the date of issuance of the present decision, Mr Bemba has been detained for over four years pursuant to his Article 70 arrest warrant.
2. On 8 March 2018, the Appeals Chamber upheld Mr Bemba's convictions in this case for offences against the administration of justice pursuant to Article 70(1)(a) and (c) of the Statute.⁵ As regards his sentence of one year of additional imprisonment plus a 300,000 euro fine, the Appeals Chamber reversed the

¹ Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 20 November 2013, ICC-01/05-01/13-1-Red2-tENG ('Arrest Warrant').

² Decision on "Mr Bemba's Request for provisional release", 23 January 2015, ICC-01/05-01/13-798.

³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'", 29 May 2015, ICC-01/05-01/13-970, OA 10 ('*Bemba et al.* OA 10 Judgment').

⁴ See Decision Regarding Interim Release, 17 August 2015, ICC-01/05-01/13-1151, paras 29-30 ('17 August Interim Release Decision').

⁵ Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, A6-A9 (with annex); Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, A-A5 (with three annexes, one containing the separate opinion of Judge Henderson).

sentence following a successful appeal by the Office of the Prosecutor ('Prosecution'). The Appeals Chamber remanded the matter to this Chamber, and a new sentence will be rendered in due course.

3. On Friday 8 June 2018, the Appeals Chamber in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Main Case') issued a judgment, by majority, ('Main Case AJ') acquitting Mr Bemba with respect to the charges in that case.⁶ The Appeals Chamber indicated that 'while the Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on the basis of the [Main Case], it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted'.⁷
4. Within an hour of notification of the Main Case AJ, the Chamber scheduled a status conference to discuss the matter of Mr Bemba's continued detention.⁸ The status conference itself was held on the morning of 12 June 2018 ('Detention Hearing').⁹
5. At the Detention Hearing, the Bemba Defence requested the immediate release of Mr Bemba pursuant to Article 60(2) of the Statute ('Request'). The Prosecution responded that Mr Bemba's detention must be maintained, arguing that Article 60(2) does not apply at this point in proceedings and that, even if it did, the application of the criteria would lead to Mr Bemba's continued detention.

⁶ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, A.

⁷ Main Case AJ, ICC-01/05-01/08-3636-Red, para. 200.

⁸ Order Convening a Status Conference, 8 June 2018, ICC-01/05-01/13-2288.

⁹ Transcript of hearing, ICC-01/05-01/13-T-58-ENG RT. All citations are to the real time transcript. The pages may not be the same in the edited transcript, which will be published on a later date.

II. Applicable law

A. Legality of Mr Bemba's detention as of this moment

6. As a preliminary point of law, Mr Bemba is lawfully detained in this case as of this moment. The Appeals Chamber's direction quoted above suggests as much – Mr Bemba is not released automatically as a result of the Main Case AJ, but it rather falls to this Chamber to decide on his continued detention. Mr Bemba has been detained for over four years in this case, but less than the possible five year statutory maximum for his convictions under Article 70(1)(a) and (c) of the Statute.¹⁰ The Prosecution asks for this five year maximum sentence in its sentencing submissions on remand.¹¹ The possibility of a sentencing reduction review is not available in Article 70 cases.¹² Therefore, at least as concerns the powers of this Court, Mr Bemba would have to fulfil the full term of whatever imprisonment is given to him.

B. Applicability of interim release framework

7. The Chamber considers that the interim release framework under Article 60(2) of the Statute governs the resolution of this Request. In this regard, the Chamber recalls that it may exercise any functions of the Pre-Trial Chamber, including those related to interim release, pursuant to Articles 61(11) and 64(6)(a) of the Statute.
8. The Prosecution argues that this framework does not apply to the present situation because Mr Bemba has been found guilty and no longer benefits from the presumption of innocence.¹³

¹⁰ Article 70(3) of the Statute.

¹¹ Prosecution Sentencing Submissions, 30 April 2018, ICC-01/05-01/13-2279 (with annex), para. 84.

¹² Article 110 of the Statute; Rule 163(3) of the Rules.

¹³ Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, pages 18-20.

9. However, the statutory framework makes it clear that persons can seek release at various points across the proceedings.
10. Article 60(2) of the Statute and Rule 118(1) of the Rules provide that a suspect can request interim release as soon as he/she first appears before the Court.
11. Although Article 60(2) of the Statute refers to applying for interim release ‘pending trial’, Trial Chambers often conduct interim release reviews after trials commence and the Appeals Chamber has reviewed such rulings routinely.¹⁴ One such ruling arose in the Main Case as late as the deliberations phase following the closure of the evidence presentation.¹⁵ As the Appeals Chamber stated in this ruling when interpreting the word ‘trial’ in Article 58(1)(b)(i) of the Statute: ‘[t]he presence of the accused at trial is required not only for the purposes of hearing the evidence against him or her, but also to ensure the accused’s availability for judgment *and sentencing*’.¹⁶
12. Article 81(3)(a) of the Statute provides that a convicted person shall remain in custody pending an appeal, but with the caveat that this is ‘[u]nless the Trial Chamber orders otherwise’.¹⁷ Article 81(3)(b) of the Statute also provides for a person’s release pending appeal when a convicted person’s time in custody exceeds the sentence of imprisonment imposed.

¹⁴ See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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, OA 7; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version - 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, OA 10; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention, 19 July 2017, ICC-02/11-01/15-992-Red, OA 10.

¹⁵ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled “Decision on ‘Defence Urgent Motion for Provisional Release’”, 20 May 2015, ICC-01/05-01/08-3249-Red, OA 11 (‘*Bemba OA 11 Judgment*’).

¹⁶ *Bemba OA 11 Judgment*, ICC-01/05-01/08-3249-Red, para. 38 (emphasis added).

¹⁷ This is in contrast to the analogous power in Rule 65(I) of the ICTY Rules and Rule 68(I) of the MICT Rules, where it is the Appeals Chamber who decides upon the provisional release of convicted persons.

13. The statutory framework creates opportunities for a person to seek and receive release across the proceedings. This is in conformity with human rights law requirements that questions of liberty must be considered at all stages of the proceedings.¹⁸ Given this, the Chamber considers it would be an illogical interpretation of this framework to remove the possibility for a convicted person to seek release while awaiting sentencing with no pending appeal. As the Appeals Chamber indicated, the interim release framework extends to ensuring Mr Bemba's availability for sentencing. As such, the Chamber considers that it may release Mr Bemba under Article 60(2) of the Statute if satisfied that detention no longer appears necessary.

C. Interim release framework

14. The applicable law regarding interim release begins with Article 60(2) of the Statute, but relates back to Article 58(1) of the Statute. Article 58(1) of the Statute sets out the conditions for a warrant of arrest, and requires the ruling chamber to be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court¹⁹ and that 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 (collectively, the 'Article 58(1) Risks').²⁰
15. A person subject to a warrant of arrest may apply for interim release pending trial, pursuant to Article 60(2) of the Statute. If the Chamber is satisfied that the conditions set forth in Article 58(1) of the Statute are met, the person shall

¹⁸ ICCPR Articles 9(3), 14(3); UN Human Rights Committee General Comment No. 35, CCPR/C/GC/35; ECHR Articles 5(3), 6(1); *See also* ECtHR, *Neumeister v Austria*, Judgment, 27 June 1968, app. no. 1936/63, paras 16-21.

¹⁹ Article 58(1)(a) of the Statute.

²⁰ Article 58(1)(b) of the Statute.

continue to be detained.²¹ If the Chamber is not satisfied, it shall release the person, with or without conditions.²² Requests under Article 60(2) must be heard without delay, after seeking the views of the Prosecution.²³

16. A chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecution, in its decision pursuant to Article 60(2) or (3) of the Statute.²⁴ The duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed, in order to determine whether, all factors being considered, the continued detention ‘stops being reasonable’ and the individual accordingly needs to be released. Such a determination requires balancing the Article 58(1) Risks that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.²⁵ The potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable.²⁶ It cannot be a factor assessed in isolation, but would need to be assessed in light of all of the circumstances of the case.²⁷
17. When setting out any conditions of release pursuant to Rule 119 of the Rules, appropriate conditions may be examined with a view to mitigating or negating the Article 58(1) Risks. The Chamber may also, in appropriate circumstances, impose conditions that do not, *per se*, mitigate these risks.²⁸

²¹ Article 60(2) of the Statute.

²² Article 60(2) of the Statute.

²³ Rule 118(1) of the Rules.

²⁴ *Bemba et al.* OA 10 Judgment, ICC-01/05-01/13-970, para. 23; Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969, OA 5-OA 9, para. 43 (*Bemba et al.* OA 5-9 Judgment’).

²⁵ *Bemba et al.* OA 10 Judgment, ICC-01/05-01/13-970, para. 23; *Bemba et al.* OA 5-9 Judgment, ICC-01/05-01/13-969, para. 45.

²⁶ *Bemba et al.* OA 5-9 Judgment, ICC-01/05-01/13-969, para. 45.

²⁷ *Bemba et al.* OA 5-9 Judgment, ICC-01/05-01/13-969, para. 45.

²⁸ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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

III. Release of Mr Bemba

18. Mr Bemba is currently detained on the basis of all three Article 58(1) Risks.²⁹ The Chamber is not satisfied that any of the Article 58(1) Risks justifies Mr Bemba's further detention. This conclusion is reached primarily on the basis of three developments: (i) Mr Bemba's acquittal in the Main Case, which the Chamber still considers of significance despite the independence of this case from the Main Case;³⁰ (ii) his Article 70(1)(a) and (c) convictions being upheld on appeal and (iii) the percentage of the possible maximum sentence Mr Bemba has already served in detention.
19. As regards Mr Bemba's arrest appearing necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings,³¹ the Chamber does not consider that any such risk remains in this case. Mr Bemba's convictions under Article 70(1)(a) and (c) in this case are final after being confirmed on appeal. All that remains is to re-determine Mr Bemba's sentence on remand. There is no longer any meaningful incentive to obstruct or endanger investigations or court proceedings which are all but concluded at this point.
20. As regards Mr Bemba's arrest appearing necessary to prevent him from continuing to commit offences,³² the Chamber recalls that Mr Bemba was convicted for offences against the administration of justice committed in the course of the Main Case. Any incentive for Mr Bemba to solicit the false testimony or otherwise corruptly influence witnesses vanished with the irrevocable termination of the Main Case. At this point, there is no risk of Mr Bemba continuing with the commission of any offences falling under Article 58(1)(b)(iii) of the Statute.

Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red, OA 2, ICC-01/05-01/08-631-Red, para. 105.

²⁹ Arrest Warrant, ICC-01/05-01/13-1-Red2-tENG, paras 21-23.

³⁰ Contrary to the Prosecution's submissions in Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, pages 17-18.

³¹ Article 58(1)(b)(ii) of the Statute.

³² Article 58(1)(b)(iii) of the Statute.

21. As regards Mr Bemba's arrest appearing necessary to ensure his presence at sentencing,³³ the Chamber notes that certain factors may militate in favour of keeping Mr Bemba detained as a flight risk.³⁴ Mr Bemba knows he is now a convicted person in this case with his convictions confirmed on appeal. He is also aware that his sentence is on remand following a successful Prosecution appeal, and that the Prosecution seeks to keep him in detention up to the five-year maximum term for his offences. Mr Bemba still remains able to mobilise substantial means and resources to abscond in response to any order compelling his further imprisonment.
22. However, countervailing considerations strongly suggest that further detention for this reason is unjustified. As held by regional human rights bodies, the danger of flight diminishes as the detention continues because the balance of the sentence that the person may expect to have to serve is reduced.³⁵ The Chamber emphasises and places substantial weight on the fact that Mr Bemba has already been detained for over 80% of the 5 year maximum term.³⁶ Mr Bemba's total potential imprisonment across his cases dramatically decreased by virtue of his Main Case acquittal, further mitigating any risk of him absconding from the Court. The Chamber also notes that no delays in these proceedings can be attributed to Mr Bemba and that conditions of release can be imposed to further reduce any flight risk.³⁷
23. Taking into account all relevant factors and the circumstances of the case as a whole, the Chamber considers it disproportionate to further detain Mr Bemba

³³ Article 58(1)(b)(i) of the Statute.

³⁴ As raised by the Prosecution in Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, pages 21-23.

³⁵ ECtHR, *Neumeister v Austria*, Judgment, 27 June 1968, app. no. 1936/63, para. 10; ECtHR, *Maznetter v Austria*, Judgment, 10 November 1969, app. no. 2178/64, para. 11; ECtHR, *Wemhoff v Germany*, Judgment, 27 June 1968, app. no. 2122/64, para. 14; IACHR, *Bronstein et al v Argentina*, Merits, 11 March 1997, Case No 11.205 and others, para. 28.

³⁶ This is in contrast to the situation in *Muvunyi*, where an ICTR Trial Chamber maintained the accused's detention for a re-trial when he had served eight years in detention out of a possible 25 year sentence (i.e., only 32% of the maximum). ICTR, Trial Chamber, *The Prosecutor v. Tharcisse Muvunyi*, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, 3 April 2009, ICTR-00-55A-R65, para. 15.

³⁷ Section IV below.

merely to ensure his appearance for sentencing. The Prosecution argues that, instead of rendering a ruling on Mr Bemba's continued detention, the Chamber could instead simply expedite its ruling on sentencing. The Chamber rejects this alternative, both because it considers that the Bemba Defence should be afforded an opportunity to make new sentencing submissions following the Main Case AJ³⁸ and, noting Mr Bemba's fundamental right to liberty, any judicial consideration beyond release would unduly prolong his detention.

24. For these reasons, the Chamber concludes that: (i) for Article 58(1)(b)(i) of the Statute, the remaining risk of Mr Bemba not appearing for his sentencing on remand is outweighed by countervailing considerations to a point that his detention has become disproportionate and (ii) Mr Bemba's arrest does not appear necessary under either Article 58(1)(b)(ii) or (iii) of the Statute. As the Chamber is unsatisfied as to the sufficient presence of any of the Article 58(1) Risks, Mr Bemba must be released.

IV. Conditions of Mr Bemba's release

25. The Chamber notes that Mr Bemba has requested release to the Kingdom of Belgium ('Belgium') and that the Prosecution indicates that Belgium's views be sought prior to any release.³⁹ The Chamber notes that Belgium (an ICC State Party where Mr Bemba has substantial family ties), had, in the earlier stages of this case, already provided submissions indicating that an agreement exists between the Court and Belgium for receipt of persons on provisional release.⁴⁰ Although this past submission primarily concerned Mr Kilolo, the Chamber notes also the Bemba Defence's submission (not substantially disputed by the Prosecution) that Belgium has previously demonstrated its willingness and capacity to supervise

³⁸ See Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, pages 6, 25.

³⁹ Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, pages 7, 10, 19, 25. See also Regulation 51 of the Regulations of the Court.

⁴⁰ Annex IV to Observations from the 5 host States on Interim Release, 15 July 2015, ICC-01/05-01/13-1088-Conf-AnxIV, page 12.

Mr Bemba if released.⁴¹ Under the circumstances, the Chamber is satisfied that no further submissions on this point are currently necessary.⁴²

26. The Chamber notes the conditions of release required of Mr Kilolo and Mr Mangenda.⁴³ In a signed filing, and with slight modifications to reflect the current stage of proceedings, Mr Bemba took it upon himself to abide by these conditions should he be released.⁴⁴ The Chamber considers the conditions proposed by Mr Bemba further mitigate the outstanding Article 58(1) Risks and are otherwise appropriate because they essentially put him in the same position as the other released persons in this case. Accordingly, Mr Bemba must:

- (i) Comply fully with all orders issued in this case, and to surrender himself immediately to the relevant authorities if required by the Chamber;
- (ii) Ensure that: (a) his most recent addresses and contact information are provided to the Court and the state authorities where he is released and (b) he does not change his address without prior notice to the Court, considering that a change in address may amount to a material change in circumstances of continuing interim release;
- (iii) Provide advance notice to the Court of any overnight travel from the locations where he will reside, including the destination, contact information, and duration of such travel;

⁴¹ Detention Hearing, ICC-01/05-01/13-T-58-ENG RT, page 10, *referencing* Registry, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of the “Report of the Registrar providing feedback on the implementation of the ‘Decision on the Defence’s Urgent Request concerning Mr Jean-Pierre Bemba’s Attendance of his Father’s Funeral’”, 10 July 2009, ICC-01/05-01/08-445-Red.

⁴² It falls to the Registry to make all necessary arrangements and consultations following release. *See* Rule 185 of the Rules.

⁴³ 17 August Interim Release Decision, ICC-01/05-01/13-1151, para. 28(i)-(v).

⁴⁴ Mr Jean-Pierre Bemba’s Signed Undertaking, 12 June 2018, ICC-01/05-01/13-2290 (with annex). Mr Bemba does not explicitly agree to conditions (ii) and (iii) in paragraph 28 of the 17 August Interim Release Decision, but he does agree to ‘comply fully with any other conditions that might be imposed by the Trial Chamber’. Accordingly, these conditions from the 17 August Interim Release Decision have been incorporated.

- (iv) Not contact any witnesses in this case, and not discuss the evidence in this case with any person other than his defence team; and
- (v) Refrain from making any public statements, directly or indirectly, about the case.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the release of Mr Bemba in this case; and

ORDERS that Mr Bemba abide by the conditions of his release set out at paragraph 26 above.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 12 June 2018

At The Hague, The Netherlands