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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

Defence Submission on the Review of Mr Jean-Pierre Bemba Gombo's Detention

Source: Mr Jean-Pierre Bemba Gombo's Defence Team

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. By order of 7 July 2010,⁽¹⁾ the Trial Chamber invited the parties to submit their observations on the review of Mr Jean-Pierre Bemba Gombo's detention.
2. Rule 118(2) of the Rules of Procedure and Evidence provides that the Chamber shall review its ruling on detention every 120 days.

II. Points of contention affecting the current order for detention

3. Article 58(1)(a) and (b) of the Rome Statute lay down the conditions which need to be met for the Chamber to issue or maintain a warrant of arrest: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary to ensure the person's appearance at trial and to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or, 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.
4. Mr Jean Pierre Bemba Gombo is currently held under the decision of 1 April 2010, which constitutes the basis for detention pending the release sought by the Defence.
5. In the decision of 1 April 2010, the Trial Chamber held that the Defence had in fact presented two factors which might constitute a change in circumstances, but that as of 1 April they had not yet reached the necessary threshold to justify reconsideration of Mr Bemba Gombo's detention; the factors in question were his diminished political status and changes to his financial circumstances.⁽²⁾
6. The Trial Chamber acknowledged that such changes might also reflect the inevitable consequences of the passage of time.
7. In the same decision, the Chamber noted that the two aforementioned factors were relevant, and had been recognised as such in various prior decisions on the review of Mr Jean-Pierre Bemba Gombo's detention.
8. In its decision of 1 April 2010, the Trial Chamber also mentioned the fact that the adjournment of the trial date from 27 April 2010 to 5 July 2010 was potentially a change of circumstances meeting the requisite threshold to merit release. However, it considered that this fact alone was not sufficient, since the sole reason for the adjournment was to enable the parties and participants to respond to the Defence

⁽¹⁾ ICC-01/05-01/08-811, para. 7.

⁽²⁾ ICC-01/05-01/08-743, para. 29.

admissibility challenge made on 25 February 2010 after the original trial date had been set.⁽³⁾

9. In its order, the Trial Chamber confined the ground for Mr Jean-Pierre Bemba Gombo's detention under the order of 1 April to the criterion laid down in article 58(1)(b)(i) of the Rome Statute, namely the risk of flight.⁽⁴⁾

III. Fresh information in support of the release of Mr Jean-Pierre Bemba Gombo

10. Under article 61(11) of the Rome Statute, the Trial Chamber may exercise the prerogatives generally accorded to the Pre-Trial Chamber and, if appropriate, terminate an accused person's detention or implement a more lenient detention regime.
11. The case law of the Appeals Chamber of the ICC holds that it is for the Chamber seized of the issue of the applicant's release to conduct a fresh review of the last order for detention and to ascertain whether or not the conditions stipulated in article 58(1) continue to be met in light of the grounds set out in that previous decision to keep him in custody.⁽⁵⁾
12. It is clear from the case law of the Trial Chamber, and specifically its Decisions of 8 December 2009⁽⁶⁾ and 1 April 2010⁽⁷⁾ that, I quote:
- “to order the release of the accused at this stage the Chamber would need to identify either a change in some or all of the facts underlying the previous decision on detention or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber's last decision ordering the detention of the accused is necessary.”
13. Pre-trial detention may only be continued if this is the only way of ensuring Mr Jean-Pierre Bemba's appearance at trial.
14. In any case, it should be noted that, since the last order for detention, there has been a substantial change in the conditions stipulated in article 58(1)(b)(i) of the Rome Statute which justified his detention; at the very least, relevant factors have intervened which require that detention should be terminated, or in any event that the current detention regime should be modified.

⁽³⁾ICC-01/05-01/08-743, para. 31.

⁽⁴⁾ICC-01/05-01/08-743, para. 34.

⁽⁵⁾ICC-01/05-01/08-631-Conf, paras. 58 to 59.

⁽⁶⁾ICC-01/05-01/08-T-18-ENG-ET, page 25, lines 13-17.

⁽⁷⁾ICC-01/05-01/08-743, para. 26.

1) Adjournment of the trial to an unspecified date:

15. Since his transfer to The Hague on 3 July 2008, several dates for the commencement of the trial have been set and all have been postponed for various reasons: 27 April 2010, 5 July 2010, 14 July 2010, adjournment to an unspecified date.
16. The first material change since the last detention order of 1 April 2010 is without doubt the trial date, which has now been adjourned to an unspecified date by order of the Chamber dated 7 July 2010.⁽⁸⁾
17. In view of the case law established in the last decision on the review of detention dated 1 April 2010, that adjournment of the commencement of the trial in itself constitutes a significant material change.⁽⁹⁾
18. Furthermore, the presumption of innocence enshrined in article 66 of the Rome Statute as well as in Article 9 of the Declaration of Human Rights necessarily implies that at the end of each 120-day period there is a presumption that there has been a material change in circumstances, which it is for the Prosecutor to rebut if he can, which is not the case here. This approach is in line with the guiding principle of the presumption of innocence, which is to avoid pre-trial punishment.
19. In his submissions of 15 July 2010, the Prosecutor is unable to demonstrate that the only way to ensure Mr Jean-Pierre Bemba Gombo's appearance at trial is to deprive him of his liberty, even though there is the option of releasing him, in view of the fresh information which has come to light since 1 April 2010.

2) Absence of a valid indictment

20. The *Decision on the confirmation of charges* was adopted on 15 June 2009, over a year ago. To date, no indictment has been disclosed. More than two years since his transfer to The Hague, Mr Jean-Pierre Bemba Gombo has still not seen the indictment on which the Prosecutor intends to found his case if it goes to trial.
21. Under the oral order rendered by the Trial Chamber on 7 October 2009,⁽¹⁰⁾ the Prosecutor was required to produce an amended indictment in line with the *Decision on the confirmation of charges*, so as to enable the Defence to submit its grounds of defence on a fully informed basis, in accordance with Article 6 of the European Convention on Human Rights, which enshrines the principle of the right to a fair trial.

⁽⁸⁾ ICC-01/05-01/08-811.

⁽⁹⁾ ICC-01/05-01/08-743, para. 31.

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

22. On 12 February 2010, the Defence filed a motion before the Trial Chamber challenging additions to the indictment, such that it did not reflect the *Decision on the confirmation of charges*, but went beyond it.⁽¹¹⁾
23. Since the last order for detention, the Trial Chamber has, on 21 July 2010, rendered the decision entitled: *Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges*,⁽¹²⁾ ordering the Prosecutor to produce a fresh indictment complying with the instructions in the Chamber's order of 7 October 2009.
24. That decision of Trial Chamber III noted that in several respects the impugned indictment was not in line with either the *Decision on the confirmation of charges* or the instructions in the Chamber's Order of 7 October 2009, and ordered the Office of the Prosecutor to make a number of amendments and corrections.⁽¹³⁾ This is a new fact which constitutes a material change justifying the interim release of Mr Jean-Pierre Bemba Gombo.
25. It is thus clear that, to date and up to the day, prior to 1 August 2010, when the decision on the review of the decision is rendered, there will be no indictment. In light of this latest development, there is uncertainty as to the date for the commencement of the trial, all the more so in view of the fact that the Prosecutor might decide to lodge an appeal, or indeed might fail to meet the deadline of 18 August 2010 that he has been given for submission of the new amended indictment.

3) The inexcusable delay attributable to the Prosecutor has resulted in undue delay

26. It is appropriate to recall the case law of the Appeals Chamber of the International Criminal Court, which rendered an authoritative judgment on release in the following terms: "Article 60(2) and article 60(4) constitute separate grounds for release. Thus [a]rticle 60(4) of the Statute is independent of article 60(2) in the sense that even if a detainee is appropriately detained pursuant to article 60(2), the Pre-Trial Chamber

⁽¹¹⁾ ICC-01/05-01/08-694, paragraph 135.

⁽¹²⁾ ICC-01/05-01/08-836.

⁽¹³⁾ Trial Chamber III Decision of 20 July 2010, ICC-01/05-01/08-836 in the following paragraphs: 49,53,73,75,80,82,89,94,98,112,114,117,118,119,121,123,130,132,134,140,155,158,163,166,168,169,172,177,184,187,196,198,200,204,206,207,211,215,216,223,228,234,235,241,243,245,247,270 and 275.

- shall consider releasing the detainee under article 60(4) if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”.⁽¹⁴⁾
27. While it is established in the jurisprudence that the Chamber can only grant release if there is a material change or if fresh facts emerge indicating that the conditions of article 58 of the Statute are no longer met, that is not the case where the application of article 60(4) of the Statute is concerned. In the latter case, the court must examine the entire proceedings from the time when the person was first deprived of liberty until the date of its ruling, in order to determine whether there has been undue and inexcusable delay attributable to the Prosecutor.
28. The Defence’s position is based on the fact that Mr Jean-Pierre Bemba Gombo has suffered an extension of his period of pre-trial detention as a result of undue and inexcusable delay in the proceedings attributable to the Prosecutor, resulting in the start of the trial being adjourned to an as yet unspecified date.
29. International criminal jurisprudence holds that detention for more than two years, as in the case of Mr Jean Pierre Bemba Gombo, without the trial having started, coupled with the fact that other procedural acts might reasonably delay the start of the trial by several months (the Prosecutor has to redraft the indictment, the Appeals Chamber must decide on the admissibility challenge), is sufficient to justify release. The Trial Chamber of the ICTY held in a decision of 14 April 2005 in the *Milutinovic* case, and I quote:
- “That period of three years in pre-trial detention, coupled with the real possibility that an application for joinder might further delay the start of the trial for several months, is a factor to be weighed in favour of the Accused”.⁽¹⁵⁾
- a) The undue delay:**
30. Mr Jean-Pierre Bemba Gombo was deprived of his liberty on 24 May 2008, under a warrant of arrest issued by the ICC.
31. After his arrest, the hearing dates were repeatedly postponed until the confirmation hearing was finally held, and the *Decision on the confirmation of charges* was rendered the following year on 15 June 2009.⁽¹⁶⁾
32. In September 2009, the Defence wrote directly to the Pre-Trial Chamber to say that it did not accept the *Decision on the confirmation of charges*, but that, in order to

⁽¹⁴⁾ *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”, ICC-01/04-01/06-824, paragraph 4.*

⁽¹⁵⁾ *Decision on General Ojdanic’s Fourth Application for Provisional Release, 14 April 2005, Prosecutor v. Milutinovic et al., Case No. IT-99-37-PT, para. 34.*

⁽¹⁶⁾ ICC-01/05-01/08-424.

- expedite proceedings it would not lodge an appeal, while reserving the right to present the defence case directly before the Trial Chamber.⁽¹⁷⁾
33. Furthermore, on 22 July 2009 the Defence asked the Prosecutor to comply with his obligations and disclose all the evidence in the criminal case file, in particular all items that would enable the Defence to raise the admissibility challenge.⁽¹⁸⁾
34. After a delay of more than six months, the Prosecutor has persisted with a culpable inertia, in defiance of all the transparency obligations incumbent upon him; it was only following a binding decision rendered by Trial Chamber III on 14 December 2009,⁽¹⁹⁾ which the Defence appealed, that the Prosecutor began sparingly to disclose certain items.
35. Moreover, several dates for the commencement of the trial were set and then adjourned in turn: first 27 April 2010, then 5 July 2010, then 14 July 2010 and now an adjournment to an unspecified date.
36. As things stand today, although Mr Jean-Pierre Bemba appeared before the International Criminal Court for the first time on 4 July 2008, more than two years later, the commencement of the trial has been adjourned *sine die* and the date of the trial is not yet known.
37. The total of more than two years of deprivation of liberty further highlights the excessive delay: it was not until 30 November 2009, in other words five months after the accused was transferred to The Hague, that the Prosecutor disclosed his main evidence. But in reality disclosures have continued since the last detention order, and the most recent dates from 20 July 2010,⁽²⁰⁾ that is, one year since the transfer of the accused. Furthermore, since his transfer, the only important procedural act throughout the proceedings against the accused has been the *Decision on the confirmation of charges*. This decision itself dates from 15 June 2009 and, for more than a year, weeks and months have gone by without there being any real progress in the proceedings.
38. In determining whether the delay has been excessive, it is appropriate to bear in mind three main factors: the length of detention, the facts and circumstances of the case and also the stage of the proceedings.

⁽¹⁷⁾ ICC-01/05-01/08-506.

⁽¹⁸⁾ ICC-01/05-01/08-458.

⁽¹⁹⁾ ICC-01/05-01/08-655.

⁽²⁰⁾ ICC-01/05-01/08-838+Conf-Exp-Anxs – “Prosecution’s Communication of Incriminatory, Potentially Exculpatory and Rule 77 Evidence Disclosed to the Defence on 20 July 2010”.

*The length of detention:

39. There is no doubt that Mr Jean- Pierre Bemba Gombo has been deprived of his liberty for more than two years already; in fact for some 26 months. This is a particularly long time, given that the pre-trial stage itself took around one full year. Since then, following the *Decision on the confirmation of charges* on 15 June 2009, the trial has been unable to commence.
40. The case law of the European Court of Human Rights holds, I quote: “As regards the danger of the applicant's absconding, the Court observes that the possibility of a severe sentence alone is not sufficient after a certain lapse of time to justify continued detention based on the danger of flight”.⁽²¹⁾
41. In that case, the Court held that it was necessary to take into account the fact that the accused had a home and social ties liable to prevent him from absconding in the country of release, which is the case of Mr Jean-Pierre Bemba Gombo in Belgium, in Portugal or in the Democratic Republic of the Congo, where he has family ties. Moreover, this state of affairs has not been challenged by the other participants in the case.⁽²²⁾

*The facts and circumstances of the case:

42. Furthermore, the length of the proceedings is due neither to the complexity of the case nor to the number of persons involved. Mr Jean-Pierre Bemba Gombo is the sole accused in the case, whilst the alleged victims are all represented by a small team of two lawyers, who often file joint submissions, which means that it is only the lack of diligence on the part of the Prosecutor in disclosing evidence which can have caused all the delay.
43. The International Criminal Court itself had reasonably considered that a timescale of four months was sufficient to cover the entire pre-trial phase, from the initial court appearance on 4 July 2008 until 4 November 2008, which was the date initially scheduled for the confirmation hearing. Why, in the end, was three times the normal period required—namely 12 months—in order for the *Decision on the confirmation of charges* to be rendered, if not because of procrastination on the part of the Prosecutor?
44. During this phase, Mr Jean-Pierre Bemba Gombo waited some four months, from 4 July 2008, for the initial disclosure of evidence from the Prosecutor to begin, which was not until October, less than 30 days before the date for the confirmation hearing

⁽²¹⁾ See *Wemhoff v. Germany*, Judgment of 27 June 1968, Series A No. 7, p. 25, para. 14, and *B. v. Austria*, Judgment of 28 March 1990, Series A No. 175, p. 16, para. 44.

⁽²²⁾ See also *Chraidi v. Germany* (Application No. 65655/01), Strasbourg, 26 October 2006).

set, on a reasonable basis, by the International Criminal Court itself.

45. As a result, in its decision of 15 September 2008, Pre-Trial Chamber III, noting the procrastination on the part of the Prosecutor, made the following statement:
- “The Single Judge would take this opportunity to recall that any inexcusable delay which can be ascribed to the Prosecutor might have consequences in respect of the Chamber’s examination of any request for interim release by Mr Jean-Pierre Bemba pursuant to article 60(4) of the Statute”.⁽²³⁾
46. The procedural history shows even more clearly the failings of the Prosecutor, who in reality began to gather evidence in Bangui and in Kinshasa after the accused was taken into custody, which resulted in an unacceptable delay in the proceedings.
47. The silence and opacity into which the Prosecutor retreated when the Defence sought access to the evidence underlying the arrest of the accused on the basis of the initial warrant of arrest of 23 May 2008 shows a clear lack of diligence.
48. On 31 July 2008, Pre-Trial Chamber III rendered the *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, so as to enable the confirmation hearing to be held on 4 November 2008.⁽²⁴⁾
49. That decision emphasised two fundamental legal principles, namely the right to a fair trial and the principle of expeditious proceedings, so that, from the date of the initial appearance hearing on 4 July 2008 until the conclusion of the procedure (said confirmation hearing having been initially scheduled for 4 November 2008), the length of time spent by the applicant in pre-trial detention would not exceed four months (but ultimately it took more than a year).
50. Because of the Office of the Prosecutor’s failure to respect the schedule, in violation of the decision of 31 July 2008, on 17 October 2008 the Pre-Trial Chamber was impelled to adopt the *Decision on the Postponement of the Confirmation Hearing*.⁽²⁵⁾
51. In its decision of 17 October, the Court states that: “the Prosecutor is required to disclose information concerning prosecution witnesses to the Defence sufficiently in advance to enable the adequate preparation of the defence.”⁽²⁶⁾
52. In that same decision of 17 October 2008, Pre-Trial Chamber III noted that the Office of the Prosecutor’s “Second Request was filed on 30 September 2008, that is long after 3 September 2008, the deadline set by the Chamber in its Decision of 31 July 2008 for the filing of any request for redactions”.⁽²⁷⁾

⁽²³⁾ ICC-01/05-01/08-102-Corr.

⁽²⁴⁾ ICC-01/05-01/08-55.

⁽²⁵⁾ ICC-01/05-01/08-170.

⁽²⁶⁾ ICC-01/05-01/08-170, para. 18.

⁽²⁷⁾ ICC-01/05-01/08-170, para. 19.

53. In the same decision, the Chamber noted that the Prosecutor's Third Request was again filed just three days before 20 October 2008, the fifteen-day deadline prior to the date of the confirmation hearing.⁽²⁸⁾
54. On 31 October 2008, Pre-Trial Chamber III rendered a further decision "setting the date for the confirmation hearing" for 8 December 2008, the result being that the length of pre-trial detention was extended far beyond the period of time initially stipulated by the Court itself.
55. The initial confirmation hearings would finally be held from 12 to 15 January 2009, as a result of the Prosecutor's failure to comply with his obligations.

*The stage of the proceedings:

56. Since the *Decision on the confirmation of charges*, rendered on 15 June 2009, over a year ago, there has been no significant progress in the proceedings. After the last detention order, not only was the trial postponed *sine die*, but there is still no indictment. Following the decision by Trial Chamber III of 21 July 2010, the Prosecutor has to prepare a fresh indictment.⁽²⁹⁾

b) The delay is attributable to the Office of the Prosecutor:

57. It is on the Prosecutor that the burden of proof lies, and hence the obligation of timely disclosure of both incriminatory and exculpatory evidence, so as to allow the Defence to prepare under conditions which comply with the requirements of the right to a fair and expeditious trial, as provided, inter alia, in Article 6 of the European Convention on Human Rights.
58. The postponement of the trial *sine die* is wholly attributable to the Prosecutor, as a result of his failure to disclose the evidence at his disposal in a timely fashion, so as to allow the Defence to initiate the admissibility challenge several months earlier.
59. Following the Prosecutor's refusal, the Defence showed diligence in filing an application before the Pre-Trial Chamber on 22 July 2009,⁽³⁰⁾ requesting it to order the Office of the Prosecutor to disclose evidence relating to admissibility.
60. On 13 August 2009, the Prosecutor lodged an objection to this application, claiming erroneously that he had checked all the documents in his possession or control, including both those from the Central African Republic and those from the Democratic Republic of the Congo, and that he had already fully discharged all his obligations regarding disclosure of evidence between November 2008 and December

⁽²⁸⁾ ICC-01/05-01/08-170, para. 2.

⁽²⁹⁾ ICC-01/05-01/08-836, para. 280.

⁽³⁰⁾ ICC-01/05-01/08-458.

2008.⁽³¹⁾

61. Faced with the Prosecutor's refusal to disclose the evidence requested by it, on 5 October 2009 the Defence repeated its request to Trial Chamber III for disclosure of the evidence relating to admissibility.⁽³²⁾
62. And strangely, a week after this application was filed, the Prosecutor performed a complete U-turn on 12 October 2009 and, without waiting for the decision of Trial Chamber III, he partially disclosed the evidence in his possession relevant to admissibility.⁽³³⁾ This shows that the delay incurred is not only attributable to the Prosecutor, but is also inexcusable.
63. On 2 December, Trial Chamber III informed the parties that it would hold an *ex parte* hearing with the Office of the Prosecutor to establish the status of disclosures requested by the Defence.⁽³⁴⁾
64. And indeed, following the *ex parte* status conference with the Office of the Prosecutor, Trial Chamber III realised that the Prosecutor, contrary to his claims, had not made full disclosure of the evidence relevant to admissibility, as the Defence had already been asking him to do for several months.
65. As a result, on 14 December 2009 Trial Chamber III ordered the Office of the Prosecutor to make further disclosures relevant to admissibility no later than 18 December 2009.⁽³⁵⁾ It was this order which finally forced the Prosecutor to make a full disclosure of all the evidence relevant to admissibility, whereas he had previously claimed to have already made full disclosure.
66. As a result of all this procrastination on the part of the Office of the Prosecutor, the Defence was forced to wait until December – a six-month delay in other words – before beginning work on the admissibility challenge.
67. The result is an extension in the length of Mr Jean-Pierre Bemba Gombo's detention, including beyond 1 April 2010, the date of the last order for detention, because the Defence was only able to raise the admissibility challenge belatedly due to the delay imposed upon it as a result of the attitude of the Prosecutor.
68. It should be recalled that, at the status conference of 8 March 2010, the honourable Presiding Judge of Trial Chamber III had already directed the Office of the Prosecutor as follows:

⁽³¹⁾ ICC-01/05-01/08-474, para. 9.

⁽³²⁾ ICC-01/05-01/08-542.

⁽³³⁾ ICC-01/05-01/08-556.

⁽³⁴⁾ ICC-01/05-01/08-632, para. 31.

⁽³⁵⁾ ICC-01/05-01/08-655.

“2 PRESIDING JUDGE FULFORD: I think you must be a little careful
3 with that, because in order to mount an appropriate admissibility
4 challenge, you may have to have received appropriate disclosure from
5 the Prosecution in advance. So I don’t think, Ms Kneuer, you can
6 completely separate disclosure from admissibility. There may be a
7 relationship between the two. Indeed, you may wish to address that
8 point in your written submissions in due course. Right. But you can
9 respond then to that later”.⁽³⁶⁾

69. In light of the foregoing, the Defence leaves it to Trial Chamber III to determine whether there has been any abuse of process on the part of the Prosecutor which has forced the Defence to wait several months before raising its admissibility challenge, even though it had requested the evidence during the pre-trial stage.

70. Generally, the delay in the proceedings as a result of the lack of diligence in disclosing evidence remains attributable to the Prosecutor from the pre-trial stage up to the present time, as is demonstrated by the entire procedural history.

71. In fact, at the initial appearance before Pre-Trial Chamber III on 4 July 2008, all the participants were informed of the date of the confirmation hearing, including the Prosecutor.

72. At the hearing of 4 July 2008, the Prosecutor – who was questioned in this regard by the Presiding Judge of the Chamber – did not deem it necessary to express any reservations whatsoever concerning the date of 4 November 2008 announced by the Court.⁽³⁷⁾

73. On 9 September 2008, the Defence submitted its observations on the Prosecutor’s request to convene a status conference and stated the following in particular:

“[TRANSLATION]14. ... the Office of the Prosecutor has been seized of a complaint by the Court of Cassation of the Central African Republic since 13 April 2006, and the Prosecutor officially announced the opening of an enquiry into the situation in the Central African Republic on 22 May 2007. It might be thought that, over two years later, he has already assembled a full body of evidence for disclosure to the Defence, and that his case is thus ready for presentation.

15. That the Defence deplores the fact that today, with less than one month to go until 4 October 2008, not a single piece of evidence against Mr Jean Pierre Bemba Gombo has been disclosed to him.

16. That the Defence will not tolerate any delaying tactic designed to delay the confirmation hearing or the trial”.⁽³⁸⁾

74. On 15 September 2008, the Pre-Trial Chamber rendered a decision on the Prosecutor’s

⁽³⁶⁾ ICC-01/05-01/08-T-20-CONF-ENG CT2 08-03-2010 20/29 EA T, lines 2 to 9.

⁽³⁷⁾ ICC-01/05-01/08-T-3-FRA ET WT 04-07-2008 1-11 NB PT.

⁽³⁸⁾ ICC-01/05-01/08-96.

request to convene a status conference, finding inter alia that it was: “particularly disturbing that the Prosecutor has yet to begin disclosing his evidence, whether incriminatory or exculpatory”.⁽³⁹⁾

75. In its decision of 17 October 2008, “[i]n light of the foregoing, the Chamber notes the existence of significant problems that have emerged so far in the evidence disclosure system especially regarding the Prosecutor’s obligation to disclose this material to the Defence correctly, fully and diligently in accordance with the timetable set in the Decision of 31 July 2008.”

76. Furthermore, at the hearing of 7 October 2009 before the Trial Chamber, the Prosecutor declared that he would be able to fulfil all his obligations involving the disclosure of evidence to the Defence by 30 November 2009;⁽⁴⁰⁾ this deadline was never complied with.

77. It is the procedural failings on the part of the Prosecutor which led to the confirmation hearing being postponed repeatedly and then, after 1 April 2010, to delays in the commencement of the trial and, as a result, to the extension of Mr Jean-Pierre Bemba Gombo’s detention.

c) The delay is inexcusable:

78. That the delay is inexcusable is evidenced by the fact that it stems from repeated failures on the part of the Prosecutor to comply with his obligations from the pre-trial stage until the present time, resulting in the postponement of the commencement of the trial *sine die*.

79. The Prosecutor cannot escape his failure by claiming that the postponement of the commencement of the trial *sine die* is due to the appeal lodged by the Defence against the decision by the Trial Chamber dismissing the admissibility challenge.

80. At the status conference of 27 April 2010, the Chamber made it quite clear that Mr Jean-Pierre Bemba Gombo was entitled to exercise the rights of appeal provided to him by law.⁽⁴¹⁾

81. The admissibility challenge could have been settled six months earlier if the Prosecutor had not failed to meet his obligations.

82. The entire procedural history clearly demonstrates the various failures by the Prosecutor, which have resulted in an inexcusable delay.

83. The first failure is the non-compliance with the Pre-Trial Chamber’s decision of 31 July 2008 setting a timetable and deadlines for the disclosure of evidence.

⁽³⁹⁾ ICC-01/05-01/08-102-Corr.

⁽⁴⁰⁾ ICC-01/05-01/08-T-14-ENG ET WT 07-10-2009 18/42.

⁽⁴¹⁾ ICC-01/05-01/08-T-22-ENG CT WT 27-04-2010.

84. Notwithstanding the decision of 31 July 2008, the Prosecutor continued, well after 3 October 2008, to disclose evidence to the Defence which he intended to use at the confirmation hearing on 4 November 2008; the Prosecutor also submitted a request for redactions well after the deadline of 3 September 2008, thus showing scant regard for the Chamber's decision.
85. On 17 October 2008, the Defence was informed of a fresh indictment emanating from the Office of the Prosecutor, purportedly on the basis of rule 121 of the Rules of Procedure and Evidence.
86. A close examination of this new indictment showed that it contained virtually no substantial change as compared with the previous one, which begs the question whether it really was a fresh indictment in the sense of rule 121 as aforesaid; it seems rather that the Prosecutor was vainly seeking, by means of this new, unwarranted indictment, to justify his wrongful disclosures out of time.
87. The only change was to add a new paragraph 50, in which it is claimed that robbery, rape, pillaging and murder occurred in the town of Boy-Rabe, Bangui, on 30 October 2002. Rabe Boy is a district of Bangui already mentioned in the first indictment.
88. Pre-Trial Chamber III felt impelled to note in particular that:

“[t]he Prosecutor's Second Request was filed just three days before 3 October 2008, the thirty-day deadline prior to the date of the confirmation hearing. Accordingly, the Prosecutor put himself in a position where it was materially impossible for him to disclose the redacted versions of the statements of nine of the additional witnesses to the Defence by 3 October 2008, since requests for redactions must be granted or denied by the Chamber prior to any disclosure to the Defence”.⁽⁴²⁾

89. The attitude of the Office of the Prosecutor has continued to be unreasonable and has constantly run roughshod over the principle of a fair trial, which lies at the heart of a sound justice system, in particular in filing the request for redactions on the last day of the deadline set by the Chamber, knowing full well that it would not be in a position to rule thereon that same day, thus making it impossible for the timetable set by the Chamber on 30 July 2008 to be complied with.
90. That in its decision of 17 October 2008, the Pre-Trial Chamber stated, I quote: “In fact the Chamber notes with concern that part of the evidence on which the Prosecutor intends to rely at the confirmation hearing is not yet accessible to the Defence.”

Conclusions

91. Mr Jean Pierre Bemba Gombo reiterates his willingness and solemn undertaking to

⁽⁴²⁾ICC-01/05-01/08-170, para. 20.

cooperate with the Court, and to comply with all orders and conditions attached to any decision to release him, including his voluntary appearance at all status conferences or trial hearings as required.

92. International criminal jurisprudence, specifically in the case of *PASKO LJUBICIC*, Case No. IT-00-41-PT, holds that the court must take into account the willingness demonstrated by the accused to comply with all the necessary conditions for his provisional release:

“The Applicant wishes to demonstrate his unconditional determination to appear before the Court by willing to, should the Trial Chamber decide so, remain under house arrest until the beginning of trial. The Applicant’s determination to consent “to the imposition of any condition necessary to his provisional release”, even then when those conditions is very rigorous, is an important fact that the Trial Chamber cannot neglect”⁴³.

93. It would in any event be possible to attach conditions to the release, for a strictly limited period, until a decision by the Appeals Chamber on admissibility or the date of commencement of the trial, as appropriate.

94. At the very least, a more lenient detention regime might be considered, which would involve release every weekend from Friday morning until Sunday night, subject to conditions and restricted to the territory of the Netherlands. In this regard the Registry confirmed to the Defence, in an e-mail dated 21 July 2010, that the Dutch authorities had indeed received full reimbursement of the costs incurred by them in transferring Mr Jean Pierre Bemba Gombo to Belgium.⁴⁴ The International Criminal Tribunal for the former Yugoslavia has already had occasion in a number of cases to order a modification in detention conditions, and specifically in the *Blaskic* case. General Blaskic was permitted to spend one night a month with his wife and children and to meet them freely outside of the detention centre, at his own expense.⁽⁴⁵⁾

95. Furthermore, the Defence is of the view that, if the International Criminal Court decides to release Mr Jean-Pierre Bemba Gombo, he must be released to a State Party to the Rome Treaty. And if no country accepts, the Court would be bound to find that it is unable to guarantee a fair trial for the accused and to release him. Otherwise only persons with close links with the government of their country of origin or of a State Party to the Rome Treaty would be able to benefit from interim release, which is contrary to the principle of liberty.

⁽⁴³⁾ *PASKO LJUBICIC*, Case No.: IT-00-41-PT (<http://www.icty.org/x/cases/ljubicic/tord/en/050818.htm>).

⁽⁴⁴⁾ E-mail from the Registry to Mr Kilolo dated 21 July 2010.

⁽⁴⁵⁾ <http://www.icty.org/x/cases/blaskic/press/en/PR063e%20Blaskic%20case%20update%202%20defendant%20detention%20conditions%20further%20modified..pdf>.

96. The accused enjoys a presumption of innocence pursuant to article 66 of the Rome Statute, and pursuant to article 55(1) of the Statute he shall not be subjected to any form of coercion, duress or any other form of punishment. It is only under exceptional conditions that a person may be deprived of liberty under article 58 of the Statute. If these conditions are no longer met, the court has a duty to release the accused. And if it proves impossible to implement a decision for release if States Parties refuse to receive Mr Jean Pierre Bemba Gombo on their territory, this is a violation of his right to a fair trial, contrary to Article 14 of the International Covenant on Civil and Political Rights, which includes the right to enforcement of a judgment rendered in his favour. In accordance with the decision in the *Lubanga* case (ICC-01/04-01/06-2517-Red 08-07-2010 1/24 CB T), the Court must stay the proceedings if it is unable to guarantee the accused a fair trial.
97. The Defence wholly supports Amnesty International's official position published on 14 August 2009 in the present case:
98. "Jean-Pierre Bemba has the right to be presumed innocent until a decision is made by the ICC on his case. The ICC has conducted a thorough evaluation and determined that he should be provisionally released, subject to conditions. Given this ruling, to keep in detention indefinitely would violate Jean-Pierre Bemba's rights to a fair trial.
99. Once the Pre-Trial Chamber determines which is the preferred receiving country to accept Jean-Pierre Bemba on interim release, that state has an unconditional obligation under article 86 of the Rome Statute of the International Criminal Court to comply with the ICC's request to accept him".⁽⁴⁶⁾
100. Mr Jean Pierre Bemba Gombo's conditions of detention can be modified by the Chamber, in view of the fact that he is not being held on the basis of the risk that he might obstruct the investigation or proceedings, but solely on the basis of the risk that he may abscond. From this point of view, the Chamber must take into account his right to be treated humanely in accordance with the fundamental principles of respect for his dignity and the presumption of innocence, and on the other hand security requirements. This might justify his being placed under house arrest on the territory of the Host State, the Netherlands, or at the very least being permitted to spend the weekends there, in full contact with his close family, whilst remaining under surveillance to avoid the risk that he might flee.

⁽⁴⁶⁾ <http://www.amnesty.org/fr/for-media/press-releases/amnesty-international-calls-dutch-government-receive-jean-pierre-bemba-2>.

101. The case law of the European Court of Human Rights holds that when the only grounds for detaining an accused is the risk that he or she might abscond, the accused must be released if he or she can provide guarantees that he or she will appear before the Court. In this regard, the Trial Chamber should order the Registry to provide assistance to the Defence to secure the guarantee that the accused will appear and begin negotiations with States Parties with a view to seeking such guarantee.⁽⁴⁷⁾
102. The jurisprudence of the Appeals Chamber considers that the argument involving the risk that a suspect might abscond involves an element of prediction. (*Prosecutor v. Lubanga, Judgment of the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber*).⁽⁴⁸⁾
103. The Defence is of the view that the Trial Chamber cannot keep an accused person in custody solely on the basis of the risk that he or she may abscond, without basing its decision on concrete and relevant information on the true nature of the risk. (*Ilijkov v. Bulgaria*, para. 84).
104. The Human Rights Committee of the United Nations Commission has held that a legal decision to remand an accused person in custody on the basis of the risk that they might abscond cannot be based on mere conjecture (*Hill and Hill v. Spain (526/93)*, para. 12.3).
105. In fact, in his observations of 5 July 2010 the Prosecutor did not produce any concrete information regarding the risk of flight, and does not explain why detention is the sole measure possible to ensure the accused's appearance at trial.

FOR THESE REASONS:

106. The Defence respectfully calls upon the Presiding Judge and Judges of the Trial Chamber of the International Criminal Court to accept these observations and to declare them to be admissible and well-founded for the purposes of:

As principal request

107. Ordering the immediate and unconditional release of Mr Jean-Pierre Bemba Gombo;
- In the alternative
108. Ordering the immediate release of Mr Jean Pierre Bemba Gombo, under such conditions as the Chamber sees fit to impose pursuant to rule 119 of the Rules of Procedure and Evidence;

⁽⁴⁷⁾ (*Wemhoff v. Germany*, judgment of 27 June 1996, Series A, No. 7, para. 15; *Letellier v. France*, judgment of 26 June 1991, Series A No. 207, p.19, para .46).

⁽⁴⁸⁾ ICC-01/04-01/06-824, 13 February 2007, para. 137.

109. If appropriate, ordering his release for a limited period, until such time as the Appeals Chamber shall have rendered its decision on the admissibility challenge and the trial shall have commenced;

110. Issuing, insofar as the Chamber shall deem necessary, a warrant of arrest to guarantee his appearance at trial pursuant to article 60(5) of the Rome Statute;

In the further alternative

111. Ordering a more lenient detention regime for Mr Jean-Pierre Bemba Gombo, to consist of periods of short-term release every weekend, from Friday morning to Sunday night, restricted to the territory of the Host State, the Netherlands, and permitting him to spend his nights there with his wife and children, all costs in that connection to be borne entirely by the accused himself;

112. If appropriate, ordering this modification in the conditions of detention for a limited period, until such time as the Appeals Chamber shall have rendered its decision on the admissibility challenge and the trial shall have commenced;

And in any event

113. Ordering the Registry to assist Mr Jean-Pierre Bemba Gombo's Defence Team in securing a guarantee that the accused will appear at trial, and in initiating negotiations with States Parties with a view to seeking such guarantee; and

114. Ordering a stay of proceedings if it proves materially impossible for the International Criminal Court to secure the release of Mr Jean Pierre Bemba Gombo to the territory of Belgium, the Netherlands, the Democratic Republic of the Congo or any other State Party to the Rome Treaty, and until such time as the Court is in a position to guarantee to the accused that the proceedings will continue under conditions whereby his fundamental rights are respected, and in particular the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights.

[signed]

Aimé Kilolo Musamba

Associate Counsel

Dated this 22 July 2010

At The Hague, The Netherlands