

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 23 July 2008

PRE-TRIAL CHAMBER III

Before: Judge Fatoumata Dembele Diarra, Presiding Judge
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre Bemba Gombo***

**Public Document
Application for interim release**

Source: Defence

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

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Other

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I. Summary application

1. The Defence submits that in principle the arrest warrants mentioned in the procedural background are null and void and that in the alternative Mr Jean-Pierre Bemba should be granted interim release.

II. Procedural background

2. On the application for warrant of arrest submitted by the Prosecutor on the 9th of May 2008¹ Pre-Trial Chamber III issued a Warrant of Arrest on the 23rd of May 2008.²

After the assurance of a Warrant of Arrest on 23 May 2008³, and the provisional arrest of Mr Jean-Pierre Bemba pursuant to article 92 of the Statute, the Prosecutor submitted further information and materials on 27 May 2008⁴. Based on the entirety of information received, the Pre-Trial Chamber III issued a new Warrant of Arrest under article 58 of the Statute on 10 June 2008 which replaced the Warrant of Arrest dated 23 May 2008.⁵

3. Mr Jean-Pierre Bemba was arrested by the Belgium authorities on the 24th of May 2008 and he was transferred and surrendered to the ICC detention center in The Hague on the 3rd of July 2008.

¹ ICC-01/05-13-US-Exp

² ICC-01-05-01-08-1

³ ICC-01/05-01/08-1

⁴ ICC-01/05-16-US-Exp

⁵ ICC-01/05-01/08-15

4. The initial appearance before Pre-Trial Chamber III took place on the 4th of July 2008 after which the Defence filed a motion to unseal certain documents and decisions on the 14th of July 2008. The decision on this motion took place on the 22nd of July 2008 in which the motion was rejected⁶.

As a result the Defence is still ignorant of the material that justifies the warrant of arrest of the 10th of June 2008 ⁷

III. Factual background

5. According to the warrant of arrest of the 23rd of June 2008 Mr Jean-Pierre Bemba is allegedly criminally responsible, jointly with another person or through other persons, within the meaning of article 25 (3) (a) of the Rome Statute, of:

- three counts of crimes against humanity: rape (article 7 (1) (g)), torture (article 7 (1) (f)), and murder (article 7 (1) (a));
- five counts of war crimes: rape (article 8 (2) (e) (VI)), torture (article 8 (2) (c) (I)), committing outrageous upon personnel dignity, in particular humiliating and degrading treatment (article 8 (2) (c) (II)), pillaging a town or place (article 8 (2) (e) (V)), and murder (article 8 (2) (c) (I)).

⁶ Decision on the “motion to unseal certain documents and decisions” of 14 July 2008, no.. IC-01-05-01-08

⁷ Decison on the Prosecutor’s Application for a Warrant of Arrest against Mr Jean-Pierre Bemba Gombo ICC-01/05-01/08-14 t ENG.

6. This is not the time to put up a full defence however it should be noted that Mr Jean-Pierre Bemba denies being responsible for the possible criminal offences that have been committed by MIC combatants in the CAR as the Prosecutor alleges.

When Mr Jean-Pierre Bemba became aware of irregularities in the CAR he took all possible measures within his authority and asked the UN to investigate the situation.
(**annexes 1 + 2**)

7. Mr Jean-Pierre Bemba escaped the DRC after a murder attempt and found 24 hours protection guaranteed by the authorities in Portugal. Since one and a half years Mr Jean-Pierre Bemba has been in Schengen territory and has regularly stayed with his wife and children in Belgium.

Mr Jean-Pierre Bemba is still senator in the DRC (**annex 3**) and leader of a very important democratic opposition. In these capacities Mr Jean-Pierre Bemba is in dialogue with many European authorities and both his places of residence were well-known to these authorities.

IV. Arrest proceedings in Belgium (the custodial State)

8. The prosecutor requested the arrest and surrender of Mr Jean-Pierre Bemba to Belgium on the basis of the arrest warrant of the 23rd of May 2008 and on the 25th of May 2008 investigating judge Maitre Hervé Louveaux issued the arrest of Mr Jean-Pierre Bemba (**annex 4**).

On the basis of this arrest warrant Mr Jean-Pierre Bemba appeared before the Brussels (Chambre du conseil) on the 28th of May 2008 pursuant to article 14 of the Belgium law of 29 March 2004 regarding the corporation with the International Criminal Court.

9. The Brussels “Chambre du conseil” confirmed the arrest warrant and an appeal was lodged against this decision.

On the 6th of June 2008 the Appeals Court (“Chambre de Mises en Accusation”) confirmed the Judgement of the “Chambre du conseil”.

This arrest of the 6th of June 2008 was brought to Mr Jean-Pierre Memba’s notice on the 18th of June 2008 and his defence team lodged an appeal against this decision to the “Cour de Cassation”

However the “Cour de Cassation” never went into the merit of the case considering that the appeal had become pointless because the warrant of arrest of the 23rd of May 2008 had in the mean time been replaced by the warrant of arrest of the 10th of June 2008.

10. Regarding the arrest warrant of the 10th of June 2008 the request for the arrest and surrender of Mr Jean-Pierre Bemba was executed in Belgium, following an enforcement procedure in which Mr Jean-Pierre Bemba was neither interviewed nor summoned or represented.

In appeal the “Chambre des Mises en Accusation” confirmed that decision and the “Court de Cassation” considered at the end of the day that de Belgium law foresees in an unilateral procedure.

V. The Applicable law concerning arrest and surrender

11. Article 59.1 of the Rome Statute stipulates the following: “a State Party which has received the request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with it’s laws and the provisions of Part 9”.

Article 59.2 of the Rome Statute says the following:

“A person arrested shall be brought promptly before the component judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with a proper process; and
- (c) The person’s rights have been respected.

12. Regarding the requirement that the person’s rights have been respected article 55.2 under (d) of the Rome Statute is applicable:

“Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights on which he or she shall be informed prior to being questioned :

- (a)
- (b)
- (c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

13. It is submitted, that the above mentioned rights have been violated in the arrest proceedings in Belgium.

During Mr Jean-Pierre Bemba's questioning at the investigating judges in regard to the arrest warrant of the 23rd of May 2008 Mr Jean-Pierre Bemba asked to be represented by his lawyer Maitre Pierre Legros of the Bar of Brussels (**annex 5**)

Neither the investigating judge nor the registrar respected Mr Jean-Pierre Bemba's wish to be represented by Maitre Legros. Therefore Mr Mr Jean-Pierre Bemba was deprived of his fundamental right to be assisted by a counsel of his own choice.

14. In regard to the execution of the arrest warrant of the 10th of June 2008 it is submitted, that this was not fulfilled in a lawful way because Mr Jean-Pierre Bemba was neither heard nor represented in these proceedings.

15. **Principally** it is submitted, that the arrest warrants of the 23rd of May 2008 and the 10th of June 2008 are null and void and that Mr Jean-Pierre Bemba therefore should be put into liberty.

IV The applicable law concerning interim release

16. Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined.

The provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with "internationally recognized human rights". This is underlined in *prosecutor v. Mister Thomas Lubanga Dyilo*.⁸

"Human rights underpin the Statute, every aspect of it, including the exercise of the jurisdiction of the Court".

⁸ *Prosecutor v Lubanga Dyilo* " Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" 14 December 2006 (ICC-01-04-01-06-722), para. 36 and 37.

17. Article 9 (3) of the ICCPR emphasizes *inter alia* that: “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial”.

Article 5 (3) of the ECHR provides *inter alia* that: “everyone arrested or detained shall be entitled trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”.

18. In the *Smirnova versus Russia* Judgment the European Court of Human Right stipulated quite clearly: “a person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify the continued detention. The Convention case-law has developed four basis acceptable reasons for refusing bail: the risk that the accused will fail to appear for trial; the risk that the accused, if released, would take action to prejudice the administration of justice or commit further offences cause public disorder. The danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention. In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts.⁹

19. According to ICC case law in evaluating the justification for the continued detention of the arrestee, the first element to which regard must be had is the crimes attributed to him. A pre-requisite for the issuance of a warrant of arrest is that the Chamber must be satisfied that there are reasonable grounds to believe that the person committed the crimes in question.

⁹ *Case of Sminova versus Russia, European Court of Human Rights* (§ 58-§ 60)-, (applications numbers 46133-99 and 48183-99), final judgement 24 October 2003.

The same applies in proceedings for interim release under article 60 (2) of the Statute. The belief must be founded upon grounds such as to warrant its reasonableness. Suspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact. The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes.¹⁰

20. According to the ordinary meaning of article 60 (2) of the Statute, the burden of proof in relation to the continuing existence of the conditions mentioned in article 58 (1), of the Statute during the time a person is under pre-trial detention lies with the prosecution.¹¹

21. As debated in the motion to unseal certain documents and decisions filed on the 14th of July 2008 the Defence is ignorant of the fact that there are reasonable grounds to believe that Mr Jean-Pierre Bemba committed the offences as stipulated in the arrest warrant.

22. The existence of reasonable grounds to believe that the person did commit the offences lays the ground for inquiring into the need for his or her detention. The arrest of a person, in accordance with article 58 (1) (b) of the Statute, may be ordered if it appears that it is necessary for any one or more of the three grounds specified there under: (i)

¹⁰ *Case of Sminova versus Russia, European Court of Human Rights (§ 58-§ 60)-*, (applications numbers 46133-99 and 48183-99), final judgement 24 October 2003.

¹¹ *Prosecutor v Germain Katanga*, "Decision on the powers of the Pre-Trial Chamber to review proprio motu the Pre-Trial Detention of Germain Katanga, 18 March 2008, (ICC-01/04-01/07-330, p. 6

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. " ¹²

As stated by the Appeals Chamber in the Lubanga case. The reasons for detention pursuant to article 58 (1) (b) (i) to (iii) of the Statute are in the alternative...." ¹³

23. What may justify arrest under article 58 (1) (b) of the Statute that it must "appear to be necessary to insure the person's appearance at trial".

In the above mentioned Appeal Chamber Judgment *Prosecutor v. Mathieu Ngudjolo Chui* the Appeal Chamber explains what is meant by "appear": "the question revolves around the possibility, not the inevitability, of a future or occurrence. In this case, the single judge held, in the first place, that the crimes attributed to the appellant are serious, a factor importing it itself the possibility of a long prison sentence. Evading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportions to the consequences that conviction may entail". ¹⁴

¹² Article 58 (1) (b) of the Statute

¹³ *Prosecutor v. Lubanga Dyilo* "Judgement on the appeal of Mister Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" 13 February 2007 (ICC-01/-4—1/06-824, para. 139

¹⁴ *Prosecutor v. Mathieu Ngudjolo Chui* "Judgment in the appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the decision of Pre-Trial Chamber I on the application of the appellant for interim release" 9 June 2008 (ICC-01/04-01/07-572, para. 21)

24. However in the above mentioned decision of the Appeal Chamber in the Lubanga case other circumstances are mentioned that could substantiate that there is an justification to keep the accused detained.

It is the Defence's submission that only the graveness of the crime and the fact the the accused might face a lengthy prison is insufficient to meet the test that it appears necessary to insure the person's appearance at trial.

The Defence also refers to European law as mentioned in the Smirnova arrest ¹⁵ and to the case law of the ad hoc tribunals. ¹⁶

25. Mr Jean-Pierre Bemba's personal circumstances and the following arguments show that the conditions of article 58 paragraph 1 of the Rome Statute have not been met.

26. It should be noted that the investigations in the CAR situation and Mr Jean-Pierre Bemba's alleged conduct in that situation has been initiated over a year ago and therefore the hypothetical risk of flight existed long before his arrest in Belgium. Mr Jean-Pierre Bemba therefore had all his time to flee but as we know never made use of this possibility.

¹⁵ See *Case of Sminova versus Russia, European Court of Human Rights (§ 58-§ 60)-*, (applications numbers 46133-99 and 48183-99), final Judgment 24 October 2003.

¹⁶ See for example: *Prosecutor v Nico Stanisic*, Decision on prosecution's interlocutory appeal of Nico Stanisic provisional release 17 october 2005, Case No. IT-04-79-AR 65.1, par. 8

27. After leaving the DRC Mr Jean-Pierre Bemba stayed in the Schengen territory and all his movements have been well known during that year.

Mr Jean-Pierre Bemba is an important politician man who often travels within Europe to maintain his contacts.

However he never hides his intents and his travel movements are very transparent as his agenda shows (**annex 6**).

It is also well-known that Mr Jean-Pierre Bemba resides in Portugal and Belgium so it is no big issue that he travels from Portugal to Belgium as the Prosecutor mentions in the Application for Request for Provisional Arrest ¹⁷

Even after his arrest Mr Jean-Pierre Bemba is still a trusted person according to Louis Michel 'Membre de la Commission Europeenne' who also confirms that Mr Jean-Pierre Bemba asked for investigations in the situation of the CAR in 2003 (**annex 7**)

¹⁷. Prosecutor's Application for Request for Provisional Release under article 92, ICC-01-05-23, May 2008, par.4

28. The Defence contests the information given by the Prosecutor that Mr Jean-Pierre Bemba had the intention to leave Belgium on 25 May 2008 and that he would be returning to the DRC.¹⁷

This information is in contradiction in the light of the facts that Mr Jean-Pierre Bemba had a breakfast meeting in Brussels with the Minister of Cooperation Charles Michel on the 26th of May 2008 and was invited to attend the “13^e Rencontre Internationale de Berlin” on the 29th and 30th of May which invitation he accepted (**annex 8**)

The Prosecutor’s assumption that Mr Jean-Pierre Bemba would return to the DRC is incorrect and implausible. For safety reasons Mr Jean-Pierre Bemba left the DRC and stayed in exile in Portugal and Belgium. Even if he would return to the DRC, that wouldn’t be a safe haven from the ICC. The DRC is a State Party and the present administration would be only too happy to comply in the arrest and surrender proceedings of the chief opposition leader.

29. Mr Jean-Pierre Bemba had no plans whatsoever to leave Schengen territory except for a planned holiday to the United States of America with his wife and children. (**annex 9**)

30. When Mr Jean-Pierre Bemba was arrested in Belgium material was seized from which appears that he was willing to present himself to the ICC. This defence preparation is incompatible with the attitude of a person who seeks to flee and avoid appearing at trial. Mr Jean-Pierre Bemba has more to lose by fleeing than by standing trial. Not only does Mr Jean-Pierre Bemba want to defend himself but his main aim in life is to win the elections in the DRC in 2011.

¹⁷ Prosecutor’s Application for Request for Provisional Arrest under article 92, ICC-01-05, 23 May 2008, par.5

After 10 year of being in the opposition it must be noted, that Mr Jean-Pierre Bemba obtained 42% of the votes in the elections of October 2006.

31. There is no indication whatsoever of any attempt on Mr Jean-Pierre Bemba's behalf to obstruct Justice or any investigations. Mr Jean-Pierre Bemba is still willing to collaborate with the ICC to make the truth come to light.

VII. Conditional release

32. Mr Jean-Pierre Bemba is willing to comply with any conditions that maybe imposed by the Pre-Trial Chamber in regard to his interim release as meant in Rule 119 of the Rules of Procedure and Evidence.

33. Mr Jean-Pierre Bemba would, if he were to be put on interim release, wish to reside in principle in Belgium with his family (**annex 10**), in the alternative under protection of the Portuguese authorities in his residence in Portugal and as a second alternative Switzerland.

34. Mr Jean-Pierre Bemba will cooperate in providing the Pre-Trial Chamber with any travel document in his possession and would also not object to the imposition of a fixed residential address and to comply with any order asking him to report to the national authorities of the place of residence.

35. Mr Jean-Pierre Bemba will respond when summoned by an authority or a qualified person designated by the Pre-Trial Chamber.

36. Mr Jean-Pierre Bemba will also comply with the condition that he will not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber.

36. Mr Jean-Pierre Bemba is also prepared to deposit a bail under the condition that his assets will be freed in order to pay that bail.

For these reasons the Defence respectfully requests Pre-Trial Chamber III:

In principal:

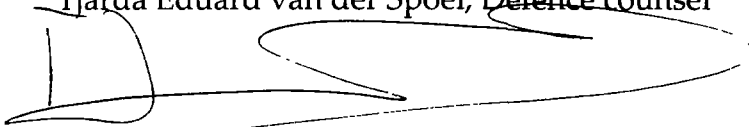
- to declare the arrest warrants of the 23rd May 2008 and the 10th of June 2008 null and void and to release Mr Jean-Pierre Bemba immediately;

In the alternative:

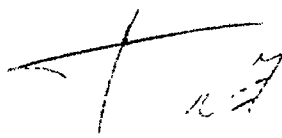
- to grant interim release to Mr Jean-Pierre Bemba and to designate a host country for him, in principle Belgium, in the alternative Portugal and as a second alternative Switzerland and if the Pre-Trial Chamber deems appropriate to impose on Mr Jean-Pierre Bemba any other conditions.

Respectfully submitted on 23rd July 2008 at Rotterdam, The Netherlands

Tjarda Eduard van der Spoel, Defence counsel



Aime Kilolo Musamba, Defence counsel



[
on behalf of
Mr Jean--Pierre Bemba

Dated this 23rd July 2008

At Rotterdam, the Netherlands

At [place, country]