

Provisional Release

Lorraine Smith

International Bar Association ICC
Monitoring and Outreach Programme

Right to interim release

- The right of an accused person to provisional release pending trial is a corollary of the presumption of innocence, and is widely recognised in international human rights instruments.
- Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. *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, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
- The Human Rights Committee has stated that '[p]re-trial detention should be an exception and as short as possible'. As such, it must be limited to essential reasons, such as danger of absconding from the jurisdiction, suppression of evidence, interference with witnesses, or repetition of the offence.

ICTY Experience

- No specific provision regarding provisional release contained in the ICTY Statute. The regime for release for accused before, during, or after trial, is set out in Rule 65 of the Rules of Procedure and Evidence (RPE) .

Pre 1999

- Until 1999, rule 65(B) provided that:
 - 'Release may be ordered by a Trial Chamber *only in exceptional circumstances*, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness, or other person.'
- These requirements were held to be conjunctive, and the burden of proof lay on the defence. The requirement of "exceptional circumstances" established a presumption of pre-trial detention. This rule represented a significant departure from the international norm.
- Apart from short term releases to attend funerals, the existence of 'exceptional circumstances' was found only in two instances – both involving the physical health of the defendant.

ICTY Experience

- The presumption against provisional release has been justified on a number of grounds, including:
 - grave nature of the charges;
 - danger to UN and national peacekeeping forces to apprehend the accused ;
 - problem of determining which country would host the detainees; and
 - no effective mechanism for ensuring compliance by the accused with the terms of their release.

ICTY Experience

Post-1999

- In November 1999, rule 65(B) was amended to remove the requirement that release may be granted only in 'exceptional circumstances'.
- Rule 65(B) currently provides:
 - 'Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.'

ICTY Experience - Issues

Onus and burden of proof

- The onus of proof still rests with the defendant, and the burden is a 'substantial one' (i.e. the defendant must demonstrate that it is more likely than not, that he will appear for trial and not pose a danger to others)

ICTY Experience - Issues

(1) Appearance of the accused

- The Trial Chambers will assess a range of factors, including:
 - Voluntary surrender;
 - Seriousness of charge and potential sentence;
 - Guarantees;
 - History of escape and prior public statements;
 - Cooperation with the Prosecution.

ICTY Experience - Issues

(2) Non-interference with victims, witnesses, or other persons

- Difficult for accused to prove that a future event will no occur.
- The Trial Chambers will assess a range of factors, including:
 - knowledge of the identities of prosecution witnesses;
 - possibility of safeguards for witnesses;
 - former profession and network of the accused and
 - links of the accused to the prospective released area ;

ICTY Experience - Issues

(3) Discretionary Power

- Even if the expressed requirements of Rule 65 (B) are met, the Trial Chamber retains its discretion not to grant provisional release.
 - In general, the personal interests of the applicant can be outweighed by the “interest of justice”, including the integrity of the proceedings.
- Trial delay - the right to trial within a reasonable time or to be released is enshrined in Article 9 (3) of the ICCPR and Article 5 (3) of the ECHR.
 - In accordance with ECtHR practice the evaluation of whether a time of pre-trial detention is reasonable has to be made “in the light of all the circumstances of a given case, such as the complexity of the case, speed of handling, conduct of the accused, conduct of the authorities, no unjustified inertia and no lack of adequate budgetary appropriations for the administration of criminal justice.”
 - None of the provisional releases granted in the past were based purely on the reason of duration of the pre-trial detention.

ICTR Experience

- The 'exceptional circumstances' requirement was retained until May 2003 despite changes at ICTY in 1999. Consequently, the ICTR jurisprudence on provisional release has remained largely underdeveloped compared to the ICTY.
- Trials at the ICTR have been particularly plagued by delays, with some detainees spending over a decade in pre-trial detention awaiting a verdict at first instance.
- ICTR differs from ICTY in terms of the willingness of States to receive acquitted persons or accused on provisional release.

SCSL Experience

- RPE at ICTR generally apply at SCSL, including rule 65 in relation to provisional release.
- The government of Sierra Leone has consistently argued that it is unable to guarantee to the Court that accused persons granted bail will not move outside of the jurisdiction.
- Judges of the SCSL have also weighed the potential impact of release of the accused on the public.
- To date no application for provisional release has been successful before the Court.

ICC – Interim release

- Unlike ICTY/R, the Rome Statute includes a number of substantive defence protections, including interim release pending trial.
- Article 60 provides two bases for release:
 - If any of the requisite conditions set out in article 58(1) for the issuance of an arrest warrant are not met.
 - reasonable grounds to believe that the accused has committed crimes within the jurisdiction of the Court
 - necessary to ensure his appearance at trial
 - necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings
 - necessary to prevent the continuing commission of a the crime.
 - If the accused has been detained for an unreasonable period of time prior to the trial due to 'inexcusable delay' of the Prosecutor.
- Article 60(3) (further elaborated in rule 118(2)) imposes a mandatory duty on the PTC to periodically review its ruling on release or detention every 120 days.

ICC – Interim release

Article 60(2) – grounds for detention

- The conditions set forth in article 58(1)(b) of the Statute are in the alternative.
- Decisions on detention or release pursuant to article 60(2) are not discretionary. Thus if the Chamber finds that the condition for which an arrest warrant was issued no longer exists, the person shall be released (with or without conditions).
- Prosecution must satisfy the PTC that it has 'reasonable grounds to believe' that the relevant person committed a crime within jurisdiction of court. If this is established, they must proceed to consider whether detention "appears necessary". This later 'question revolves around the possibility, not the inevitability, of a future occurrence.'

The *Bemba* case

- On 14 August 2009, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre Trial Chamber II, issued a decision granting the conditional release of Jean-Pierre Bemba Gombo pending trial.
- Mr Bemba had been denied interim release on three prior occasions since his surrender to the Court in July 2008.
- Article 60(3) provides that the PTC may modify it's ruling if it is satisfied that changed circumstances so require.

The *Bemba* case

Appearance at trial - article 58(1)(b)(i)

- Single Judge took into account a range of factors:
 - pending charges may result in conviction with an overall lengthy sentence;
 - Accused's political and professional position and international contacts;
 - Accused's financial situation and resources;
 - Accused's purported offer to surrender at some time prior to his arrest;
 - Accused's professed willingness to cooperate and appear voluntarily;
 - Accused's future political aspirations;
 - Accused's strong family ties;
 - Accused's good behavior in custody;
 - Accused's conduct during his 24 hour release.

The *Bemba* case

Obstruct or endanger proceedings - article 58(1)(b)(ii)

- General allegations of the Prosecutor and OPCV with no concrete evidence.
- No evidence of seeking to threaten witnesses, victims, or the proceedings during year in detention.

Continuing commission of crimes - article 58(1)(b)(iii)

- Stable situation in CAR, and no evidence to suggest accused would interfere.

The *Bemba* Case

- The Single Judge held:

77. In conclusion, the Single Judge holds that the continued detention of Mr Jean-Pierre Bemba does not appear necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute. The Single Judge also concludes that the continued detention is not necessitated by the other two alternatives encapsulated in article 58(1)(b)(ii) [obstructing or endangering proceedings] and (iii) [continuing commission of crimes] of the Statute. Recalling that the decision on continued detention or release is not of a discretionary nature, and mindful of the underlying principle that deprivation of liberty is the exception and not the rule, the Single Judge decides that Mr Jean-Pierre Bemba shall therefore be released, albeit under conditions.

78. The Single Judge, however, determines that the implementation of this decision is deferred pending a decision by the Chamber on the set of conditions to be imposed on Mr Jean-Pierre Bemba, the State to which he is to be released and all necessary arrangements have been put in place.

The *Bemba* case

- Rule 119(1) of the RPE provide that the PTC may set one or more conditions restricting liberty.
- At the hearings of 29 June 2009, Mr Bemba offered twenty "personal guarantees".
- The Single Judge will seek the view of the Prosecutor, Mr Bemba, the relevant States and victims in accordance with rule 119(3) of the RPE.
- The Prosecutor has appealed the decision, and filed its document in support of the appeal on 24 August 2009. At this time, there is no Defence response available.

The *Bemba* case- Prosecution Appeal

- The Prosecution submits that the Single Judge made two errors in the Appealed Decision:
 - (1) The Single Judge erred by finding “a substantial change of the circumstances since the issuance of the 14 April 2009 Decision” sufficient to justify the Accused’s conditional release.
 - At least seven of the nine factors she considered are not changed circumstances.
 - Single Judge erroneously discounted a number of factors.
 - Changed circumstances regarding accused’s good behavior and previous 24 hour release do not justify release.
 - Single Judge wrongly appraised the Prosecutor’s previous allegations Defence of interference with witnesses.

The *Bemba* case- Prosecution Appeal

(2) The Single Judge erred in ordering conditional release without considering the conditions and specifying a State willing and able to enforce them.

The Court first must determine if the person's release poses a risk; and if it does, it then must consider whether and which conditions can be fashioned and enforced to effectively mitigate the risk. The decision must be a single one that can only be entered once all the prerequisites are satisfied.

The determination of enforceability requires, first and foremost, that the Judge determines a responsible national authority willing to accept the accused.

Interim release and State Cooperation

- Defence has requested that Mr Bemba be released to Belgium, France, Germany, Italy, Portugal or South Africa.
- Court invited observations of the States - all expressed 'objections or concerns to host Mr Bemba on their territory.'
- Article 86 of the Rome Statute provides for the general obligation of States Parties to cooperate with the Court:
 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'
- Court may make a finding of non-cooperation under article 87(7) of the Rome Statute and refer the matter to the Assembly of States Parties.