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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***

**Defence Urgent Motion for Provisional Release**

**Source:** Defence for Mr. Jean-Pierre Bemba Gombo

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

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## A. INTRODUCTION

1. Mr. Jean-Pierre Bemba was arrested on 24 May 2008. He is presumed innocent.

2. At the time of the present filing, he has been incarcerated for a period of over six and a half years. Separated from his wife, extended family and community, his children are now grown and he has been deprived of being a part of the seminal years of their childhood.

3. The deprivation of liberty has been recognised by the International Criminal Court, and by established human rights covenants, as the exception rather than the rule.<sup>1</sup> In reality however, provisional release is simply missing from the Court's practice.

4. The International Criminal Tribunal for the Former Yugoslavia, by contrast, has developed a consistent practice of ensuring that those accused before the Tribunal are not detained for unreasonable periods, with provisional release being ordered on a regular basis, allowing defendants to spend significant periods with their families during the trial process. This is despite the fact that victim and witness protection are paramount priorities at the ICTY, the defendants are accused of crimes of the utmost gravity, and often continue to enjoy substantial influence in their respective countries. Despite this, provisional release during periods of judicial recess, or while waiting for a Judgement to be delivered, is an accepted practice at the ICTY,<sup>2</sup> and viewed as not creating additional risks, but constituting a positive measure on the part of Chambers to ensure that defendants are not detained for an unreasonable length of time during the proceedings, and compliance with international human rights standards concerning detention.

5. Consistent with this practice, and with the international human rights norms governing detention and the presumption of innocence, Mr. Bemba comes again before the Trial Chamber, after a period of six and a half years in prison, seeking provisional release. A change in circumstances exists in relation to all aspects of the previous decision on Mr.

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<sup>1</sup> ICC-01/05-01/08-475, 14 August 2009, para. 77; ICC-01/04-01/10-163, 19 May 2011, para. 33; Article 5(1) European Convention on Human Rights.

<sup>2</sup> *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 8 December 2010, paras. 25-26; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, Case No. IT-08-91-T, Decision Granting Mico Stanisic's Request for Provisional Release, 6 June 2012, para. 26; *The Prosecutor v. Jadranko Prlic et al.*, Case No. IT-04-74-T, Decision on Motion for Provisional Release of the Accused Milivoj Petkovic, 30 November 2011, paras. 37-38;

Bemba's detention, and each change in circumstances undermines the bases relied upon to justify Mr. Bemba's ongoing detention.

6. In particular, the Defence refers to three significant developments. The first, is the completion of the proceedings in the present case, with the Chamber having now publicly declared that the trial has moved into the period of deliberations in accordance with Rule 142(1) of the Rules of Procedure and Evidence.<sup>3</sup> Mr. Bemba's presence is no longer required for the purpose of a trial has itself, finished. One of the key motivations for compelling his present before the Court has thus expired.

7. The second is the signing and entry into force in April 2014 of the agreement between the Government of Belgium and the ICC on the interim release of detainees into Belgian territory, through which Belgium agreed to accept provisionally released detainees of the Court.<sup>4</sup> This agreement is of particular relevance given that Belgium is the state of residence of Mr. Bemba's family. The existence of an agreement with a State where Mr. Bemba has such strong familial links undermines the risk of flight.

8. The third, is the decision of the Trial Chamber on 26 November 2014, rejecting a Defence filing for stay of proceedings for abuse of process ("the Decision").<sup>5</sup> The Defence motion for stay for abuse of process ("Motion for Stay"<sup>6</sup> and subsequent "Addendum"<sup>7</sup>) had been filed on 11 November 2014, in advance of the Closing Arguments.<sup>8</sup> Its length was apparent to both the Prosecution and the Chamber from the moment of its filing. The Prosecution waited two weeks into its three week response period before first alerting the Trial Chamber to its apparent objection to its length.<sup>9</sup> As such, the Trial Chamber's Decision rejecting the Motion for Stay was rendered over two weeks after its filing.

9. Having rejected the Motion for Stay, the Decision goes on to order the Defence to compress several years of practice demonstrating abuse of process and all accompanying legal and factual submissions into 40 pages. In practical terms, this means the re-starting of the abuse of process litigation from scratch, forcing the Defence back to the drawing board to prepare a new reduced filing within which the relevant procedural background, submissions,

<sup>3</sup> T-365-Red-ENG ET, p.68, lines 1-2.

<sup>4</sup> ICC-CPI-20140410-PR993.

<sup>5</sup> ICC-01/05-01/08-3210, para. 12.

<sup>6</sup> ICC-01/05-01/08-3203-Red2.

<sup>7</sup> ICC-01/05-01/08-3207-Red.

<sup>8</sup> 4, ICC-01/05-01/08-3203-Red2.

<sup>9</sup> ICC-01/05-01/08-3209-Conf.

and applicable law cannot possibly be described. The prejudice caused by the Chamber's Decision will be raised in forthcoming filings. Of significance to the present request, however, is that the relief requested in the Motion for Stay was the release of Mr. Bemba into either the Portuguese Republic ("Portugal") or the Kingdom of Belgium ("Belgium").<sup>10</sup> As such, the Chamber's delayed Decision has had the additional consequence of delaying the resolution of this question.

10. Also relevant to the present application is the withdrawal by P-169 of his allegations that he was threatened as a result of his testimony,<sup>11</sup> further undermining any suggestion that Mr. Bemba's provisional release would pose a danger to victims, witnesses or any other person. In light of the evidential close of the cases, there is also no objective incentive to interfere with witnesses or evidence.

11. Accordingly, pursuant to Article 60(3) of the Rome Statute and Rule 118(2) of the Rules of Procedure and Evidence, the Defence hereby seeks the provisional release of Mr. Jean-Pierre Bemba into either Portugal or Belgium for the period of deliberations pending the issuance of a Judgement under Article 74 of the Statute or, in the alternative, for the period of the upcoming winter judicial recess and during the weekends for the duration of the deliberations period.<sup>12</sup>

## **B. BACKGROUND**

12. On 23 May 2008, Mr. Jean Pierre Bemba was arrested by the Belgian authorities on the basis of a Warrant of Arrest issued by the Pre-Trial Chamber III.<sup>13</sup> On 20 August, 16 December 2008 and 14 April 2009, the Single Judge Ekaterina Trendafilova issued three decisions concerning Mr. Bemba's provisional release, deciding that his detention would be continued.<sup>14</sup> A decision granting provisional release on 14 August 2009<sup>15</sup> was subsequently

<sup>10</sup> ICC-01/05-01/08-3203-Conf-Red, para. 327.

<sup>11</sup> ICC-01/05-01-08-T-361-Conf-ENG-ET, p.11, lines 12-13, p.12, lines 16-23; ICC-01/05-01-08-T-363-Conf-ENG-ET, p.26, lines 22-23.

<sup>12</sup> The 2014-2015 winter judicial recess is scheduled between Friday 12 December 2014 until Monday 5 January 2015.

<sup>13</sup> ICC-01-05/01-08-1.

<sup>14</sup> ICC-01/05-01/08-73-Conf; ICC-01/05-01/08-321 ICC-01/05-01/08-403.

<sup>15</sup> ICC-01/05-01/08-475.

overturned.<sup>16</sup> Subsequent decisions of the Trial Chamber and Appeals Chamber have refused to allow his release from the Detention Unit for any notable period.<sup>17</sup>

13. The trial of Mr. Jean-Pierre Bemba opened on 22 November 2010.<sup>18</sup> The presentation of Prosecution's evidence began on 23 November 2010 with Witness P-38.<sup>19</sup> The Defence started its case on 14 August 2012 with the testimony of Witness D-53.<sup>20</sup> On 18 November 2013, the Chamber called Witness CHM-01 to give evidence, who completed his testimony on 22 November 2013.<sup>21</sup> Between 22 and 24 October 2014, the trial was re-opened to hear the evidence of Prosecution Witness P-169, who was recalled by the Trial Chamber after indicating that he wished to review his testimony.<sup>22</sup> Closing Arguments were heard on 12 and 13 November 2014.<sup>23</sup>

14. None of the delays experienced during the trial process are attributable to the Accused. The most significant delays are attributable to insistence of certain Prosecution witnesses that they testify at their own convenience,<sup>24</sup> and failures by the Democratic Republic of Congo to authorise the appearance of Defence witnesses in a reasonable period.<sup>25</sup> When two members of his Defence team were arrested, the Defence team was reconstituted within a matter of weeks, and no requests for delays were made.

15. Mr. Bemba has been deprived from his liberty during the entirety of this process.

16. Running in the background of these proceedings, and unknown at the time to the Defence, was a parallel Article 70 investigation into former members of Mr. Bemba's Defence team and his Defence witnesses. Of utmost alarm, is the fact that the Prosecution impermissibly and erroneously seized the Trial Chamber hearing the present case with its requests for assistance with this investigation.<sup>26</sup> As such Trial Chamber III, the very triers of fact who are required to assess the credibility of the Defence witnesses, were being informed about unsubstantiated and unproven allegations about these witnesses, in *ex parte*

<sup>16</sup> ICC-01/05-01/08-631.

<sup>17</sup> ICC-01/05-01/08-631-Red; ICC-01/05-01/08-743; ICC-01/05-01/08-1565-Red; ICC-01/05-01/08-1751; ICC-01/05-01/08-1789-Red; ICC-01/05-01/08-2022-Red; ICC-01/05-01/08-2034-Red.

<sup>18</sup> ICC-01/05-01/08-T-32.

<sup>19</sup> ICC-01/05-01/08-T-33.

<sup>20</sup> ICC-01/05-01/08-T-229.

<sup>21</sup> ICC-01/05-01/08-T-353 and ICC-01/05-01/08-T-357.

<sup>22</sup> ICC-01/05-01/08-T-361-Conf-ENG to ICC-01/05-01/08-T-363-Conf-ENG.

<sup>23</sup> ICC-01/05-01/08-T-364-Conf-ENG; ICC-01/05-01/08-T-365-Conf-ENG.

<sup>24</sup> ICC-01/05-01/08-2068-Red; ICC-01/05-01/08-2076-Red; ICC-01/05-01/08-2081.

<sup>25</sup> ICC-01/05-01/08-2891-Red.

<sup>26</sup> ICC-01/05-01/08-2412, para. 1.

proceedings, and in the absence of any safeguards to protect the rights of the Accused.<sup>27</sup> It took the Trial Chamber five months to eventually find that it had no competence to deal with the Prosecution's requests,<sup>28</sup> a decision which should rightly have been made in the first instant of its being seized.

17. During these five months, the Chamber had not only been tainted by written filings,<sup>29</sup> but had convened a Status Conference during which the details of the Prosecution's Article 70 investigation were discussed.<sup>30</sup> During the course of this status conference, the same Prosecution team conducting the main case made extensive pleadings about its unproven suspicions and allegations against Defence witnesses and the credibility of the Defence case. Perhaps, however, of greatest concern were suggestions from the Presiding Judge as to steps the Prosecution could take to further its investigations into the Defence and the Accused.<sup>31</sup>

18. As a result of the cumulative effect of these, and other, procedural irregularities, the Defence filed a Motion for Stay on 11 November 2014.<sup>32</sup> The filing set out the actions of the Trial Chamber and the Prosecution over the course of the last three years, which rendered the present proceedings incapable of being characterised as fair. Notably, the Motion for Stay set out prejudice caused by the Trial Chamber's manifest error in entertaining the Prosecution's request for judicial assistance with which it should never have been seized.<sup>33</sup> The Motion for Stay included a reasoned request for an extension of the page limit pursuant to Regulation 37(2).<sup>34</sup>

19. The Prosecution waited two weeks into its three week response period before first alerting the Trial Chamber to its apparent objection to the Defence request for an extension of the page limit.<sup>35</sup> On 26 November 2014, the Motion for Stay and its Addendum were rejected on the basis that the Motion exceeded the page limit, and the request for an extension of pages was made within the filing itself.<sup>36</sup>

<sup>27</sup> ICC-01/05-01/08-T-303-Conf-Red-ENG, p.10.

<sup>28</sup> ICC-01/05-01/08-2606-Red.

<sup>29</sup> ICC-01/05-01/08-2412; ICC-01/05-01/08-2548.

<sup>30</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET.

<sup>31</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.23, lines 17-22, p.24, lines 8-10.

<sup>32</sup> ICC-01/05-01/08-3203-Red2.

<sup>33</sup> ICC-01/05-01/08-2606-Red, para. 21

<sup>34</sup> ICC-01/05-01/08-3203-Red2, paras. 13-15.

<sup>35</sup> ICC-01/05-01/08-3209.

<sup>36</sup> ICC-01/05-01/08-3210.

20. The Chamber accepted the Prosecution argument that “the Regulations ‘do not provide for a retroactive extension of page limits’”.<sup>37</sup> The ICC Prosecution itself has made such requests.<sup>38</sup> Rather than striking out the Prosecution filings, the Court has authorised these extensions, despite having been sought “retroactively”.<sup>39</sup> The Trial Chamber makes no reference to this practice in finding the Motion for Stay and Addendum to be “non-compliant” with the Regulations of the Court.

21. The significance of this failure is heightened by the Trial Chamber having issued the Decision, despite having been notified of the Defence’s intention to exercise Mr. Bemba’s right to seek leave to reply to the Prosecution Response.<sup>40</sup> In an email sent to the Chamber on 25 November 2014, the day after the Prosecution filed its response, the Defence informed the Chamber, the Prosecution, and the Legal Representative of Victims as follows:

We are writing to you in relation to the Prosecution's Response to the Defence Request for an Extension of the Page limit... the Defence respectfully informs you that it intends to file a request for leave to reply in the next couple of days.

22. This email mirrored previous practice of the Defence in promptly alerting the Chamber in situations where a reply would, in the view of the Defence, assist the Chamber in its deliberations by bringing additional and relevant information to its attention.<sup>41</sup> In every other instance, the Chamber then properly waited for the Defence to file a request for leave to reply. In situations of urgency where the litigation in question had the potential to stymie the progress of the trial, the Defence was ordered to file a reply within limited periods, sometimes of only 48 hours.<sup>42</sup>

23. The Chamber’s Legal Officer has since confirmed that the Defence’s email was brought to the attention of the Chamber.<sup>43</sup> Regardless, the Decision was issued immediately, and without waiting for the Defence filing. No indication was given to the Defence that the Chamber did not intend to wait for the Defence to exercise Mr. Bemba’s right to seek leave

<sup>37</sup> ICC-01/05-01/08-3209, para. 4.

<sup>38</sup> See, for example, ICC-01/04-141, para. 6; ICC-01/09-02/11-T-18-ENG CT WT, page 37, lines 11-14; ICC-01/04-01/06-1545-Conf-Exp, para. 7.

<sup>39</sup> ICC-01/04-168 OA3, para. 4.

<sup>40</sup> Email to Ms Saabel on 25 November 2014 at 15.29; email from Ms Saabel on 27 November 2014 at 12.33 and ICC-01/05-01/05-3210, fn. 11.

<sup>41</sup> See for example email to Ms Saabel 24 February 2014 at 09.58 for leave to reply to filings ICC-01/05-01/08-2990 and ICC-01/05-01/08-2984.

<sup>42</sup> See, for example, ICC-01/05-01/08-3165-Conf.

<sup>43</sup> Email to the Defence on 27 November 2014, at 12:33.



to reply. No reasoning was provided in the decision as to why a reply was not deemed necessary. The Chamber's established practice was abandoned.

24. As a result, Mr. Bemba was deprived of the opportunity to respond to the Prosecution's arguments; arguments which could not have been anticipated at the time the Defence filed its Motion for Stay. In particular, the Defence was unable to respond to the unsubstantiated allegations of repetition,<sup>44</sup> or provide submissions on the fact that the Motion for Stay necessarily brought together numerous issues not to re-litigate them, but in order to demonstrate that the adverse decisions of the Trial Chamber, when considered cumulatively, had rendered the proceedings unfair.<sup>45</sup>

25. The Defence was also deprived of the opportunity to make submissions as to the scope of *ex parte* and other filings and status conferences the Motion for Stay was required to address. Over the course of the last two years, the Prosecution and Chamber have generated over 480 pages of transcripts, filings and decisions concerning the Article 70 investigation and subsequent litigation, much of it *ex parte*, and much concerning issues which were erroneously and improperly before the Chamber.<sup>46</sup> A Defence reply would have permitted Mr. Bemba an opportunity to make submissions on the utter reasonableness of addressing the multitude of novel issues - many unique not only to international criminal law, but to criminal litigation generally – in under 100 pages.

26. The Defence would also have been in a position to address the practice in international criminal law concerning the length of applications and motions for abuse of process.<sup>47</sup> Submissions could have been made on the exigencies of the particular

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<sup>44</sup> ICC-01/05-01/08-3209, para. 5.

<sup>45</sup> ICC-01/05-01/08-3209, para. 5.

<sup>46</sup> See, for example: ICC-01/05-01/08-2412; ICC-01/05-01/08-2421; ICC-01/05-01/08-2461; ICC-01/05-01/08-2548-Conf-Red; ICC-01/05-01/08-T-303-Conf-Red-ENG; ICC-01/05-01/08-2606-Conf; ICC-01/05-01/08-2910; ICC-01/05-01/08-2920; ICC-01/05-01/08-2943; ICC-01/05-01/08-2948-Conf; ICC-01/05-01/08-2951; ICC-01/05-01/08-2954-Conf; ICC-01/05-01/08-2965-Conf; ICC-01/05-01/08-2966-Conf; ICC-01/05-01/08-2969; ICC-01/05-01/08-2970-Conf; ICC-01/05-01/08-2979; ICC-01/05-01/08-2984; ICC-01/05-01/08-2985; ICC-01/05-01/08-2986-Conf; ICC-01/05-01/08-2990-Conf; ICC-01/05-01/08-2995; ICC-01/05-01/08-3006; ICC-01/05-01/08-3014; ICC-01/05-01/08-3021-Conf; ICC-01/05-01/08-3022; ICC-01/05-01/08-3024; ICC-01/05-01/08-3029; ICC-01/05-01/08-3039; ICC-01/05-01/08-3049; ICC-01/05-01/08-3052-Conf; ICC-01/05-01/08-3057; ICC-01/05-01/08-3058; ICC-01/05-01/08-3059; ICC-01/05-01/08-3067; ICC-01/05-01/08-3070-Conf; ICC-01/05-01/08-3080; ICC-01/05-01/08-3086-Conf; ICC-01/05-01/08-3098-Conf; ICC-01/05-01/08-3074-Conf; ICC-01/05-01/08-3100; ICC-01/05-01/08-3101; ICC-01/05-01/08-3108; ICC-01/05-01/08-3108-Conf-AnxA; ICC-01/05-01/08-3110-Conf; ICC-01/05-01/08-3113; ICC-01/05-01/08-3120-Conf; ICC-01/05-01/08-3122-Conf; ICC-01/05-01/08-3149.

<sup>47</sup> See, for example, *Prosecutor v. Augustin Ngirabaware*, ICTR-99-54-T, Defence Motion for a Stay of Proceedings based on the Cumulative Effect of Numerous Defects in the Indictment that led to an Unfair Trial, No. **ICC-01/05-01/08**

circumstances of the Defence filing; namely the ongoing litigation and pending decisions concerning Witnesses P-169 and P-178 which were directly relevant to the Motion for Stay, the necessity of filing the motion prior to Closing Arguments, and general considerations of expeditiousness of the proceedings. The Defence was barred from raising any of these issues in response to the Prosecution's submissions that this critical filing should be rejected.

27. As such, the Chamber issued the Decision in the absence of submissions on key Prosecution allegations, and without considering relevant practice and jurisprudence which undermine the Prosecution arguments. In doing so, it deprived Mr. Bemba of his right to be heard, rendered a decision which was erroneous in law and patently unfair.

28. Most significantly for the present request, the Decision has delayed the resolution of the issue, which is of particular relevance given that the relief requested as a result of the abuse of process was the immediate release of Mr. Bemba into either Belgium,<sup>48</sup> or Portugal.<sup>49</sup>

### C. APPLICABLE LAW

29. Article 66 of the Rome Statute enshrines the presumption of innocence to be enjoyed by accused appearing before the ICC.

30. The provisions of the Rome Statute relevant to detention, like every other provision, must be interpreted and applied in accordance with "internationally recognized human rights".<sup>50</sup>

31. Article 58(1)(a) and (b) of the Rome Statute lay down the conditions which need to be met in order 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

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22 February 2012, running to 82 pages. See also *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5, Motion for Reconsideration, 14 January 2009, running to 89 pages (including annexes).

<sup>48</sup> ICC-01/05-01/08-3203-Red2, para. 327.

<sup>49</sup> ICC-01/05-01/08-3207-Red, para. 25.

<sup>50</sup> ICC-01-04-01-06-722, paras. 36 and 37.

commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

32. Article 60(3) of the Rome Statute allows a Chamber to modify an earlier order relating to a person's detention if changed circumstances so require. The “notion of ‘changed circumstances’ are “either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying the Chamber that a modification of its prior ruling is necessary.”<sup>51</sup>

33. The burden remains with the Prosecution to satisfy the Trial Chamber that the conditions for detention continue to be met, notwithstanding this charge in circumstances.<sup>52</sup>

#### **D. SUBMISSIONS**

34. Mr. Jean Pierre Bemba is currently held under the Appeal Chamber’s decision of 5 March 2012,<sup>53</sup> rendered nearly two years ago. Since this decision, there has been a substantial change in the conditions stipulated in Article 58(1)(b)(i) of the Rome Statute which warrant the granting of provisional release.

##### **(a) Changed circumstances exist which warrant Mr. Bemba’s provisional release**

###### **(i) The completion of the trial process**

35. Mr. Bemba’s detention is no longer warranted to ensure his appearance at trial, given that the trial process has now concluded. The condition of Article 58(1) that detention is necessary to ensure his presence at trial is accordingly no longer met. Having attended the trial and participated in the process in full, Mr. Bemba’s presence in The Hague is simply no longer required. Any consultation with his legal team on issues arising during the deliberations period can be conducted at a distance without any detriment to his legal representation.

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<sup>51</sup> ICC-01/05-01/08-631-Red, para.47.

<sup>52</sup> ICC-01/05-01/08-1019, at para. 51.

<sup>53</sup> ICC-01/05-01/08-2151-Red.

36. Of relevance is the significant body of caselaw from the ICTY where accused have been released during the deliberations period, and pending Judgement. In the *Prlić* case, for example, the Trial Chamber held in granting provisional release to Petković.<sup>54</sup>

...as the hearings have ended, the presence of the Accused Petković is no longer required in court. Furthermore, the Accused Petković is no longer required to assist his counsel, whose presence is no longer required in The Hague, in the preparation of his defence as the latter, like the other defence cases, has now ended...The complexity and the scope of the case may also result in a lengthy period of deliberation prior to the delivery of the judgement..

37. Most recently, in November 2014, the ICTY issued the provisional release of Vojislav Šešelj, on the basis that, *inter alia*, “the Chamber is the guarantor of the respect of the rights of Vojislav Šešelj, that it is particularly concerned by the situation of the Accused while awaiting the Judgement”.<sup>55</sup>

38. The lack of a precise date for Judgement delivery is no bar to provisional release being ordered. In *Stanisić and Župljanin*, for example, the Trial Chamber noted that the date of Judgement delivery had not yet been set, and decided that “the period of provisional release shall be set at three months. This period may be extended for additional periods of time upon further application by the Accused, until the Judgement is rendered.”<sup>56</sup>

39. In the present case, the trial proceedings spanned four years. It is reasonable to assume that the complexity and scope of the case will necessarily result in a relatively lengthy period for deliberations. Realistic estimates seem to place delivery in the summer of 2015.

40. By this stage, Mr. Bemba will have been in prison for more than seven years, without provisional release. Detention of this length, prior to Judgement, without release, is problematic not only from a humanitarian perspective, but is also extremely problematic

<sup>54</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Motion for Provisional Release of the Accused Milivoj Petković, 30 November 2011, paras. 37-38.

<sup>55</sup> *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Order of the Provisional Release of the Accused Proprio Motu, 6 November 2014.

<sup>56</sup> *Prosecutor v. Mico Stanisić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Granting Mico Stanisić's Request for Provisional Release, 6 June 2012, para. 26.

given its practical effect as a predetermination of sentence. The United Nations Human Rights Committee has found that:<sup>57</sup>

The holding in detention of accused persons pending trial for a maximum duration **of a third of the possible sentence facing them**, irrespective of the risk that they may fail to appear for trial is incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail.

41. The ICTY is particularly mindful of avoiding any pre-determination of sentence, with Trial Chambers having been explicit that provisional detention meets “cannot in any way be envisaged as an early enforcement of a possible sentence”.<sup>58</sup> In November 2014, in ordering the provisional release of Šešelj, Trial Chamber III of the ICTY confirmed that “that the length of provisional detention of an accused is a factor to be taken into account when considering provisional release.”<sup>59</sup>

42. By any score, seven years is an inordinately long time for an accused, who enjoys the presumption of innocence, to be imprisoned and prevented from involvement in family life. Provisional release in the period pending Judgement will go some way to avoid both the impression and reality of a predetermination of sentence.

43. Should the Trial Chamber decline to order release for the full period of Judgement drafting, the Defence makes an alternate request for release during the period of the winter judicial recess and during the weekends for the duration of the deliberations period.<sup>60</sup>

44. The winter judicial recess encompasses Christmas; a holiday of religious and familial significance. Mr. Bemba’s presence at home with his family would be of undeniable assistance and comfort to his wife and children who have been without their father for six and a half years, and would contribute to their wellbeing. It is worth recalling that the ICTY

<sup>57</sup> Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286.

<sup>58</sup> *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Redacted and Public Version of Order on Jadranko Prlić’s Motion to Extend His Provisional Release, 1 March 2012, p.5.

<sup>59</sup> *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Order of the Provisional Release of the Accused Proprio Motu, 6 November 2014, p.3.

<sup>60</sup> The 2014-2015 winter judicial recess is scheduled between Friday 12 December 2014 until Monday 5 January 2015, according to the ICC calendar available at: [http://icc-cpi.int/en\\_menus/icc/situations%20and%20cases/hearing%20schedule/Documents/2014calendarbilingual.pdf](http://icc-cpi.int/en_menus/icc/situations%20and%20cases/hearing%20schedule/Documents/2014calendarbilingual.pdf).

properly takes such factors into account, with Judges before that Tribunal holding as follows:<sup>61</sup>

Mr Čermak, who is 58 years old, has a wife and an eleven-year-old son to whom he is very close... a relevant factor for provisional release is the restoration, however temporary, of the relationship between a father and his young son... the general benefits of provisional release and gives due weight to the fact that a period of release will tend to boost an accused person's morale and physical and mental health.

45. This practice of according weight to the benefits of provisional release on a human level has developed despite the fact that the legal regime at the ICTY for provisional release is less favourable to the accused. At the ICTY the burden for requesting provisional release falls on the accused, whereas at the ICC, detention should be the exception, and release, the rule. However, notwithstanding this disparity, the ICTY Appeals Chamber has recognised that whilst there is no right to provisional release during the judicial recess, judicial recess may be an opportune time to grant provisional release due to the absence of judicial activity,<sup>62</sup> and the ability of the defendant to be with his family during important holidays can constitute humanitarian grounds weighing in favour of provisional release.<sup>63</sup>

**(ii) The existence of an agreement between Belgium and the ICC to accept provisionally released detainees.**

46. Mr. Bemba has established ties with Belgium; most significantly being the country of residence of his wife and children. He has spent many years of his life studying, working and living in Brussels, and has been provisionally released onto Belgium territory for two limited periods to attend family funerals.<sup>64</sup> He has a house into which he can be provisionally released, at no cost to either the Belgian state or the ICC.

<sup>61</sup> *Prosecutor v. Ante Gotovina*, Case No. IT-06-90-T, Decision on Ivan Čermak's Motion for Provisional Release, 2 December 2008, para. 14.

<sup>62</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision On Prosecution's Appeal Against The Trial Chamber's Decision On Slobodan Praljak's Motion For Provisional Release 26 May 2008, at para. 10.

<sup>63</sup> See, for example, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 14 December 2007, at para. 22: "The Trial Chamber is mindful of the personal situation of Mr. Haradinaj, who would like to visit his wife and children aged 1 and 3 years over the holiday period. These humanitarian considerations weigh in favour of granting the requested provisional release". *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion for Provisional Release from 21 July 2007 until the Resumption of Trial, 13 July 2007, p.2.

<sup>64</sup> ICC-01/05-01/08-437-Red; ICC-01/05-01/08-99-Red.

47. In such circumstances, the existence of an agreement between the ICC and Belgium with the sole purpose of facilitating release of detainees into Belgian territory is a significant measure, and constitutes a change in circumstances warranting the reconsideration of Mr. Bemba's detention.

**(iii) The delay in the resolution of Mr. Bemba's submissions on abuse of process**

48. As set out above, the Trial Chamber's Decision of 26 November 2014 rejecting the Defence Motion for Stay has had the undeniable effect of delaying the resolution of the many questions which have arisen from the abuse of process which has plagued these proceedings, particularly over the course of the last two years.

49. The Chamber's Decision to reject the filing, particularly having failed to afford Mr. Bemba a right to seek leave to reply, and without consideration to relevant practice and jurisprudence was erroneous. Failing to do so within a reasonable period, compounded this unfairness. Had the Trial Chamber viewed the Motion for Stay as non-compliant, it could have informed the Defence of such on 12 November 2014, rather than on 26 November, thereby avoiding this period of additional delay in determining the issues raised. The Decision to order the Defence to re-file 96 pages of arguments within 40 will lead to additional delay.

50. For these reasons, changed circumstances exist which warrant the granting of provisional release to Mr. Bemba for the period of deliberations, or in the alternative, for the period of the upcoming winter judicial recess and during the weekends for the duration of the deliberations period.

**(b) Mr. Bemba does not pose a danger to victims, witnesses or any other person**

51. No sensible suggestion can be made that Mr. Bemba's provisional release would pose a danger to any victim, witness or any other person. There is simply no basis for any such submission, or any grounds for the Prosecution to allege or the Chamber to accept that this is any such possibility.

52. Regardless, the Defence notes that the trial has now finished, the presentation of evidence has now concluded, and there can be no material benefit to the Accused in even

contacting victims or witnesses, let alone posing a danger to them. Prosecution witnesses live in inaccessible locations. If granted provisional release, Mr. Bemba would remain in the territory of Belgium or Portugal, putting all victims or witnesses hundreds of thousand kilometres out of reach. In such circumstances, it is worth recalling that the only suggestion of “threats” against Prosecution witnesses came from witnesses P-169 and P-178. These allegations were withdrawn during P-169’s testimony.<sup>65</sup> A specific request by the Defence to recall to explore whether P-178’s “allegations” were similarly untrue<sup>66</sup> was rejected by the Chamber.<sup>67</sup>

**(c) Mr. Bemba is not a flight risk**

53. Mr. Bemba has no criminal record and therefore cannot be considered as a criminal seeking to abscond from justice. Having fully participated in the trial process up until this point, his priority remains the establishment of the truth of responsibility for the events that unfolded in the Central African Republic between October 2002 and March 2003.

54. Any suggestion that he would seek to abscond fails to take into account his significant responsibilities as the head of his immediate family, and ensuring the welfare and continued support of his wife and children. Since the death of his father in 2009, Mr. Bemba has also taken on the role as head of his extended family. Absconding from justice, would not only be a near-impossible proposition from a practical perspective, particularly given the freezing of his assets by the Court,<sup>68</sup> but would entail his abandoning his responsibilities to his extended family and community both in Belgium and the Democratic Republic of Congo. To that end, the Defence recalls the statement of Her Honour Judge Trendafilova, who considered “Mr Jean-Pierre Bemba's statement at the Hearing of 29 June 2009 regarding his political career plans and his averment that he would not set aside those past "years of sacrifice" and be a fugitive” when considering whether Mr. Bemba had a motive to abscond.<sup>69</sup> There is no basis upon which a Chamber could find that he would be willing or intends to do so.

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<sup>65</sup> ICC-01/05-01-08-T-361-Conf-ENG-ET, p.11, lines 12-13, p.12, lines 16-23; ICC-01/05-01-08-T-363-Conf-ENG-ET, p.26, lines 22-23.

<sup>66</sup> ICC-01/05-01-08-3177-Red2.

<sup>67</sup> ICC-01/05-01-08-3186-Conf.

<sup>68</sup> ICC-01/05-01-08-567-Red; ICC-01/05-01-08-596-Red.

<sup>69</sup> ICC-01/05-01/08-475, para. 67.



55. Moreover, Mr. Bemba remains willing to provide personal guarantees as necessary in order to reassure the Court that no risk of flight exists,<sup>70</sup> including but not limited to: remaining in a residence of the Court's designation; being subject to either Belgium or Portugal's extradition laws; being subject to an order to remain in the country; surrendering his passport to the Court; being subject to 24-hour electronic surveillance by the authorities of the host State; reporting to local police or authorities on a daily basis; receiving unannounced visits by the police or local authorities; not to discuss his case with anyone other than his assigned counsel; assuming responsibility for all expenses concerning transport from Schiphol airport to host state and back; and ensuring strict compliance with any order of the Trial Chamber varying the terms of or terminating his provisional release.

#### **E. REQUEST FOR ABRIDGED PERIOD FOR A RESPONSES AND DECISION**

56. Following the Trial Chamber's Decision on 26 November 2014, the Defence has acted with due diligence in bringing the present request before the Chamber. Regardless, the period of the winter recess is fast approaching, necessitating an abridgement of the time within which the Prosecution and Legal Representatives of Victims may file any response. Both the Prosecution and the LRVs have been in possession of the Defence's arguments on abuse of process for 34 days, and as such no prejudice arises from an abridgement of the time period for responses.

#### **F. CONCLUSION**

57. Incarceration must be viewed as a measure of an exceptional nature.<sup>71</sup> It should be applied only when all other options are judged to be insufficient. Six and a half years of detention prior to a judgement can only reasonably be viewed as excessive. Excessively long periods of detention are detrimental to the individual, with serious consequences to a person's mental and physical health,<sup>72</sup> and a concurrent detrimental effect on the family of the

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<sup>70</sup> International criminal jurisprudence has ruled that Tribunals have to consider the willingness demonstrated by the accused to comply with all the necessary conditions for his provisional release. See *Prosecutor v. Pasko Ljubičić*, Case No. IT-00-41-PT, 23 January 2003.

<sup>71</sup> Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR).

Accused. After a certain period of time, it is no longer sufficient to base a decision on deprivation of liberty of an accused upon the fact that he may have committed crimes.<sup>73</sup> The Chamber must determine whether in the particular circumstances of the case, imprisonment remains necessary given the confines of the statutory regime of the Court. Provisional release of Mr. Bemba is not only warranted, but a necessary component of the fairness of the proceedings.

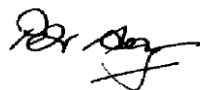
#### **D. RELIEF REQUESTED**

31. Based on the above submissions, the Defence accordingly requests that the Chamber:

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

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

The whole respectfully submitted



Peter Haynes, QC

Lead Counsel for Mr. Jean-Pierre Bemba

The Hague, the Netherlands

5 December 2014

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<sup>72</sup> "Mental health and prisons", report from the World Health Organization headquarters and the International Committee of the Red Cross, 2005 See also report from UN Office on drugs and crime: <http://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html>

<sup>73</sup> See *Wemhoff v. Germany*, Judgement of 27 June 1968, Series A No. 7, p. 25, para. 14, and *B. v. Austria*, Judgement of 28 March 1990, Series A No. 175, p. 16, para. 44.