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No.: ICC-01/05-01/08

Date: 15/12/2014

**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 Reply to Responses to its 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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**Defence Support Section****Deputy Registrar****Victims and Witnesses Unit**

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**Detention Section****Victims Participation and Reparations Other  
Section**

## A. BACKGROUND

1. On 5 December 2014, the Defence filed its urgent motion for provisional release (“Defence Request”).<sup>1</sup>

2. The Defence Request detailed the changed circumstances which warrant Mr. Bemba’s release after six and a half years in prison, namely the completion of the trial phase of the proceedings, the agreement between the ICC and Belgium providing for provisional release of accused onto Belgian territory, and the delay in the adjudication of the request for a stay of proceedings for abuse of process. The Request also provided reasons why Mr. Bemba is not a flight risk, nor poses a danger to victims or witnesses.

3. Both the Prosecution<sup>2</sup> and Legal Representative of Victims<sup>3</sup> filed responses on 12 December 2014, submitting that the Defence Request should be rejected in its entirety.

4. By way of its “Order shortening the time limit for observations on “Urgent Motion for Provisional Release”, the Trial Chamber ordered that any reply on the part of the Defence be filed by 16.00 on 15 December 2014.<sup>4</sup> Pursuant to that order, the Defence files the following reply to the Responses filed by the Prosecution and Legal Representative of Victims.

## B. SUBMISSIONS

5. The Prosecution and Legal Representative’s assertions that Mr. Bemba would pose a danger and threat to witnesses, should he be released, amount to nothing

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<sup>1</sup> ICC-01/05-01/08-3211.

<sup>2</sup> ICC-01/05-01/08-3215 (“Prosecution Response”).

<sup>3</sup> ICC-01/05-01/08-3214 (“LRV Response”).

<sup>4</sup> ICC-01/05-01/08-3212.

more than speculation. The Prosecution argues that “victims and witnesses living in the Central African Republic are still exposed and vulnerable [...] some witnesses are living in places other than the CAR and could be even more accessible by the Accused, if released.”<sup>5</sup>

6. The unsupported assertions that witnesses are “exposed” or “could be more accessible” provide no basis upon which to assert that Mr. Bemba will pose a threat or danger to victims or witnesses if released. A grounded suspicion is required, and none exists. There is no evidence that Mr. Bemba has ever sought to pose danger or harm to witnesses, or that he intends to do so now that the evidence has concluded. Mr. Bemba’s communications can be just as easily monitored in Belgium as they can in the detention unit. The witnesses in question are in contact with the Court, either through VWU, Maître Douzima-Lawson or the Prosecution;<sup>6</sup> any “threats or danger” coming from Mr. Bemba would be immediately reported and would warrant Mr. Bemba’s re-arrest and re-incarceration.

7. The attempts of the Legal Representative of Victims to rely on Mr. Bemba’s political support as a means for keeping him imprisoned is similarly flawed. Any political involvement by Mr. Bemba’s makes it objectively much less likely, in fact, that he would abscond from justice. Through these submissions, the Legal Representative is in fact inviting the Trial Chamber to hold Mr. Bemba’s political activity against him in deciding on his release. This approach cannot be reconciled with the European Court of Human Rights’ confirmation that defendants have a right to continue to exercise their political rights,<sup>7</sup> nor with the latitude granted to

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<sup>5</sup> ICC-01/05-01/08-3215, para. 5.

<sup>6</sup> ICC-01/05-01/08-T-360-Conf-ENG-ET, p.11, lines 7-12; p.15, lines 1-9; Email from Mr. Jean-Jacques Badibanga to the Chamber, Defence, Legal Representative of Victims and VWU on Tuesday 14 October 2014 at 12.05.

<sup>7</sup> ECHR Grand Chamber, *Hirst v. The United Kingdom* (No. 2), (Application no. 74025/01), 6 October 2005.

Kenya's President and Vice-President to remain at liberty and be excused from hearings to allow them to continue to exercise the obligations of their political office.<sup>8</sup>

8. In any event, in addition to the undertakings set out in the Defence Request,<sup>9</sup> Mr. Bemba also undertakes not to issue any public statements of any kind, including any which could interfere or could be seen as interfering in political activities in the Democratic Republic of Congo or elsewhere, should provisional release be granted.

9. The arguments concerning Mr. Bemba's alleged risk of flight are based on the presumption that Belgium and Portugal, two States Parties, are incapable of ensuring that this does not occur. The Belgian authorities and police have successfully supervised two previous instances of provisional release.<sup>10</sup> They have successfully carried out arrests of two accused before the ICC.<sup>11</sup> Any suggestion that Mr. Bemba is a flight risk implies that Belgium is incapable of enforcing the terms of its agreement with the ICC, which would in effect render the accord on provisional release a dead letter. The Trial Chamber in Kenyatta has recently held that a presumption of good faith applies to States Parties in their cooperation with the Court.<sup>12</sup> It should be presumed that Belgium and Portugal have the ability to carry out any obligations to which they agree concerning Mr. Bemba's release, monitoring, and return to the seat of the Court.

10. As in the past, the Defence has been informed that Belgium remains willing to accommodate any request from the Court concerning Mr. Bemba's provisional release. In the absence of any indication that the Trial Chamber has solicited the views of either Belgium or Portugal in its determination of the Request, the Defence requests that a status conference be called, with representatives from both states

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<sup>8</sup> ICC-01/09-02/11-830; ICC-01/09-01/11-T-72-ENG ET, p. 67, lines 20-22.

<sup>9</sup> ICC-01/05-01/08-3211, para. 55.

<sup>10</sup> ICC-01/05-01/08-437-Conf and ICC-01/05-01/08-1099-Conf.

<sup>11</sup> ICC-01/05-01/08-424, para. 2; ICC-01/05-01/13-749, para. 3.

<sup>12</sup> ICC-01/09-02/11-982, para. 40

being invited to attend to discuss the implementation of appropriate conditions and logistical arrangements for any eventual period of provisional release.

11. Finally, the attempts to rely on the Article 70 case to justify Mr. Bemba's ongoing detention in the present case are misplaced.<sup>13</sup> Such considerations fall outside the scope of an Article 58 assessment in these proceedings. Moreover, the Single Judge in the Article 70 case, who is now more familiar than the current Trial Chamber with the evidence, released Mr. Bemba's co-suspects on 21 October 2014, relying on the lack of risk of interference that proceedings or investigations might be obstructed or endangered, or the alleged crimes or related offences be committed.<sup>14</sup> Mr. Bemba has also filed for provisional release in the Article 70 case, on the basis that the same factors which warranted release of his four co-suspects also apply equally to him, and that the question of his release should properly be decided by the present Chamber.<sup>15</sup> None of the four co-suspects have "fled", following their release. Nor is there any basis for an assertion that, unlike them, Mr. Bemba intends to abscond.

### **C. RELIEF REQUESTED**

12. 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

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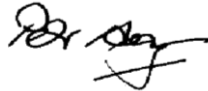
<sup>13</sup> LRV Response, paras. 22-24; Prosecution Response, para. 14.

<sup>14</sup> ICC-01/05-01/13-703, p.4.

<sup>15</sup> ICC-01/05-01/13-782-Red.

**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

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

15 December 2014