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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
With two confidential annexes A and B**

**Defence Submissions on the Review of the Detention of Mr Jean-Pierre Bemba
Gombo**

Source: Defence team for Mr Jean-Pierre Bemba Gombo

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

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I. Introduction

1. By a decision of 19 November 2010, the Appeals Chamber of the International Criminal Court, ruling on a Defence appeal,¹ reversed Trial Chamber III's decision of 28 July 2010, which had ordered the continued detention of Mr Jean Pierre Bemba Gombo.²
2. In that same decision, the Appeals Chamber ordered Trial Chamber III to carry out a new review of Mr Jean Pierre Bemba Gombo's detention.
3. It is also worth noting that the 120-day period, which began with the detention order of 28 July 2010, ends on 28 November 2010.

II. The risk of absconding referred to in article 58 of the Statute is not established to the required legal standard and the grounds for the detention order relied on for the review of detention are no longer valid

4. Pre-trial detention can only be maintained if it is the only means to secure Mr Jean-Pierre Bemba's appearance at trial;
5. According to the jurisprudence of the Appeals Chamber, the argument advancing the risk of absconding involves an element of prediction.³
6. In the Defence's view, the Trial Chamber cannot maintain detention on the basis of the risk that the person may abscond without supporting its decision with concrete and relevant information on the true nature of that risk.⁴
7. Indeed, the United Nations Human Rights Committee has held that a legal decision to maintain detention on the basis of the risk that they might abscond cannot be based on mere conjecture.⁵

¹ ICC-01/05-01/08-1019 OA4 *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010*.

² ICC-01/05-01/08-843 *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*.

³ *Prosecutor v. Lubanga, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber*, ICC-01/04-01/06-824, 13 February, para. 137.

⁴ *Iljickov v. Bulgaria*, para. 84.

III. Evidence in support of the release of Mr Jean Pierre Bemba

8. This evidence is useful in reassessing the circumstances and grounds underpinning the last decision depriving Mr Jean Pierre Bemba of his liberty. Even in the absence of new evidence, the arguments supporting the previous detention can still be reviewed in the light of the submissions set out below.
9. Moreover, it will be for the Court to assess these submissions from the point of view of a material change in circumstances.

1) The commencement of the trial on 22 November 2010:

1st limb: the trial commenced after a long 30-month period of detention, which cannot be attributed to the Defence:

10. Since his transfer to The Hague on 3 July 2008, several dates have been set for the commencement of the trial – which has been postponed for various reasons – 27 April 2010, 5 July 2010, and 14 July 2010, from which it was postponed until an unspecified date.⁶
11. The first material change since the last detention order is that the trial commenced after Mr Jean Pierre Bemba had spent more than 30 months in detention, whereas the Defence never requested the slightest
12. Mr Jean Pierre Bemba Gombo has been deprived of his liberty for more than 30 months. This is a particularly long period of time considering that the pre-trial phase itself lasted approximately one full year. Then, after the decision on the confirmation of charges on 15 June 2009, the trial only commenced one and a half years later.
13. According to the jurisprudence of the European Court of Human Rights: "*As regards the risk of the applicant's absconding, the Court observes that the possibility of*

⁵ *Hill and Hill v. Spain* (526/93), para. 12.3.

⁶ ICC-01/05-01/08-811.

a severe sentence is not sufficient after a certain lapse of time to justify maintaining the applicant in detention for this reason".⁷

2nd limb: lack of concrete evidence establishing increased risk of absconding

14. It cannot be considered that Mr Jean Pierre Bemba is likely to abscond simply because his trial has commenced.
15. A potential or hypothetical fear cannot serve as a sound basis for a decision based on the criterion set forth in article 58 (1)(b)(i) of the Rome Statute: the Prosecutor must prove, and the judge issuing the ruling must identify, concrete evidence establishing, in the case in point, a risk that an accused person whose trial has commenced may abscond.
16. To find that there is a real risk of absconding simply because the trial has commenced, without supporting that finding with evidence pertaining specifically to the Accused, so as to allow the latter to challenge such evidence fairly and to assert his subjective right to liberty, would be to rule on the basis of a general provision that no accused person whose trial has just commenced can be released on an interim basis. This would contravene article 6(1) of the European Convention on Human Rights.

3rd limb: implementing a substantial defence against the Prosecutor's accusations

17. Mr Jean Pierre Bemba, who does not benefit from the legal aid system, has, in conjunction with his team, assembled a substantial arsenal of lawyers to provide a meticulous and thorough defence.
18. This defence team, which is the largest in terms of personnel and was assembled for the commencement of the trial, is a concrete sign that the

⁷ See: *Wemhoff v. Germany*, Judgment of 27 June 1968, Series A7, p. 25, para. 14, and *B. v. Austria*, Judgment of 28 March 1990, Series A175, p. 16, para. 44.

Accused believes in the defence's case, and therefore in the prospect of an acquittal as the outcome of the trial.

19. Furthermore, on the very first day of the trial, he pleaded not guilty at the first opportunity, which is another concrete indication that he believes in his innocence.
20. It follows necessarily from the presumption of innocence enshrined in article 66 of the Rome Statute and in article 9 of the Declaration of Human Rights that it cannot be taken for granted that there is a distinct risk that Mr Jean Pierre Bemba could abscond simply because the trial has commenced, given that he has formally pleaded not guilty and has assembled the largest defence team in all of the cases before the International Criminal Court.

2) Family ties

21. The Court considered it necessary to take into account the fact that the Accused has a residence and ties that are likely to deter him from absconding in the country to which he would be released. This applies to Mr Jean-Pierre Bemba Gombo for Belgium, Portugal and the Democratic Republic of the Congo, where he has family ties. These circumstances have not been challenged in any way by the other parties in the case.
22. The Pre-Trial Chamber's decision of 14 August 2009 acknowledged that Mr Jean Pierre Bemba is particularly attached to his family; this led the Registrar to authorise him to communicate with his family outside the normal times.⁸
23. The Accused differs from the other detainees in that his family resides in a Schengen State, very near to the seat of the Court. In addition, the

⁸ ICC-01/05-01/08-475, *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic.*

commencement of the trial on 22 November 2010 is an ordeal for the children, who are distinctive in that they are still minors, and affects their schooling, all the more so as the schedules of the hearings sometimes extend into the evening, preventing normal telephone contact with the Accused and considerably reducing the opportunities for visits to the Detention Centre. In addition, they suffer shame in their immediate surroundings given the proximity of their normal living environment to the seat of the Court. Only the release of the Accused would allow family life to be organised such as to restore the family balance, currently under serious threat in regard to the children, who deserve special protection under the New York convention on the protection of children.

24. It must also be recalled that, on leaving a hearing at the International Criminal Court, Mr Jean Pierre Bemba Gombo's father, having been directly affected by the gravity of the accusations brought against the Accused in the instant case, died from a heart attack. It was in these circumstances that, by decision of 1 July 2009, the Accused was first granted a short-term release to travel to Brussels to attend his father's funeral.
25. His paternal grandmother, whose only child was his late father, now has only the Accused as a child, given that, as is traditional in Africa, he has replaced his father as head of the family. His ties with his grandmother have therefore become all the more important. However, the health of his grandmother, who is over 85 years old, is continually deteriorating: the unexpected death of her son (the father of the Accused) and the arrest of her first-born grandson have had an adverse effect on her health, and her medical diagnoses are a cause for concern. It would be fitting for him to be allowed to live with his grandmother during her last days, both for his family – comprising numerous brothers, sisters and uncles, for whom, as the oldest, he is responsible – and for his

grandmother, but also in light of his right to maintain family relations within the meaning of article 8 of the European Convention on Human Rights.

26. The case law of the ICTY offers a precedent in which the interim release of an accused was ordered for humanitarian reasons, namely the deterioration in the health of immediate family members. For example, in the *Strugar* case, the view of the ICTY Appeals Chamber was as follows:

While there is no need to speculate as to whether the condition of Strugar's sister is fatal, the Medical Report of 8 April 2008 clearly shows that her health is drastically deteriorating. Therefore, the Appeals Chamber accepts that the specific diagnoses and symptoms described in the Medical Report of 8 April 2008, combined with the advanced age of Strugar's sister, qualify as acute justification for the purposes of determining whether the special circumstances envisaged by Rule 65(I)(iii) of the Rules exist. Accordingly, the Appeals Chamber is satisfied that this particular requirement of Rule 65(I) is met.⁹

27. See also the decision in *Krajisnik*, where the Trial Chamber of the ICTR held that:

The Applicant submits that his wish to visit his elderly and gravely ill mother most probably for the last time constitutes "special circumstances" that warrant release... [T]he Trial Chamber nonetheless is satisfied that the "special circumstances" have been established. The medical condition and age of the Applicant's mother in combination demonstrate a sufficient humane and compassionate basis for granting the Motion¹⁰

28. If he were released, the Accused would not be cowardly and become a fugitive, abandoning his five children, who are still minors, his wife, his paternal grandmother, who is his only remaining direct ascendant, all his extended family comprising his aunts and uncles, as well as his seven sisters and four brothers, for whom he is responsible and held as an example, both as the oldest son and head of the family since the death of his father.

⁹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, *Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds*, 15 April 2008 (Public Redacted Version), para. 11.

¹⁰ *Prosecutor v. Krajisnik*, Case No. IT-00-39-ES, *Decision on Krajisnik's Application for a Custodial Visit*, 17 June 2009, para. 18.

3) The Prosecutor's failure to disclose information which he claims to have regarding the risk that the applicant will abscond

29. The initial arrest warrant against Mr Jean Pierre Bemba was issued on the basis of unilateral proceedings in the absence of the Accused. During these proceedings, the Prosecutor filed an application for a warrant of arrest, citing "information" in his possession which demonstrated that there was a risk that the Accused would abscond.¹¹
30. To date, although the trial has commenced and all the confidential material that is useful for the trial, including material relevant to the assessment of the risk that the Accused might abscond, is supposed to have been filed in the record of proceedings and disclosed to the Defence, the Prosecutor has not produced a single piece of concrete evidence on the alleged risk of absconding.
31. Despite the requests by the Defence, the Prosecutor has, so far, refused to disclose this "information" regarding the risk of absconding, thus preventing the Defence from challenging it legitimately, particularly because these are the only "concrete" documents that the Prosecutor has so far been able to cite to justify his allegations concerning the risk of absconding.
32. Before ruling, it would be appropriate for the Chamber to order the Prosecutor to disclose "this information"; failing that, Mr Jean Pierre Bemba should be released immediately. Otherwise, he would be tried unfairly in violation of article 6 of the European Convention on Human Rights if he were considered as intending to abscond on the basis of evidence to which he has no access. Are we now to take it that there was no evidence for the alleged absconding of Mr Jean Pierre Bemba?

¹¹ ICC-01/05-01/08-3.

33. The Prosecutor's steadfast silence and lack of clarity in response to the Defence's request to access the evidence behind the arrest of the Accused on the basis of the initial arrest warrant of 23 May 2008 prevents the Accused from exercising his defence rights on an issue as important as that of the right to liberty, in violation of his right to a fair trial.

4) A Statesman's word of honour

34. Mr Jean-Pierre Bemba Gombo reiterates his willingness and his solemn undertaking to cooperate with the Court and comply with all the orders and conditions that would be attached to his possible release.

35. He personally undertakes to appear willingly at all the ongoing hearings of the trial if he is released.

36. He could be granted leave to appear as a free man before the Court.

37. He also gives his word of honour, once again, that he will continue to respect the alleged victims and witnesses.

38. International criminal jurisprudence, notably in the *Pasko Ljubicic* case (No. IT-00-41-PT) recognizes that the judge must take into account the willingness expressed by the Accused to comply with all the conditions required for his or her interim 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.¹²

39. Given that Mr Abu Garda's word was taken when he undertook to appear voluntarily with regard to the situation in the Sudan, there is no reason not to

¹² PASKO LJUBICIC, Case No.: IT-00-41-PT.
<http://www.icty.org/x/cases/ljubicic/tord/en/050818.htm>.

believe in the tried and tested word of honour of Senator Jean Pierre Bemba, who affirms that he will appear voluntarily at all Court hearings, without exception, if he is granted interim release. There is no justification for his continued detention beyond the intention to abscond which he has been accused of harbouring without concrete evidence. Mr Jean Pierre Bemba wishes to be put to the test.

5) Financial means and network of contacts

40. It should be recalled that Trial Chamber III recently issued a decision on the funding of the Accused's defence team, precisely because he does not have the financial means to meet the expenses and fees of the team.¹³

41. By the same token, he does not have the financial means to abscond. Furthermore, neither the Registry nor the Prosecutor has adduced evidence to the contrary beyond mere allegations which, even at such an advanced stage in proceedings, are not supported by concrete evidence.

6) The countries to which the Accused is seeking release

42. In its decision of 2 December 2009, the Appeals Chamber considers that, for conditional release to be granted, it is necessary to identify the State which agrees to receive the person concerned and to apply the related conditions. Rule 119 of the Rules of Procedure and Evidence requires the Court to seek, *inter alia*, the view of any relevant State before imposing or amending any conditions restricting liberty. It follows that a State which is prepared to accept the person concerned should be identified before a decision is made regarding conditional release.

43. The applicant's first choice of receiving state would be **the Democratic Republic of the Congo**. The Congo is obliged to receive him as a Congolese national and Senator in office, and thus is obliged to ensure his safety, as for any Congolese citizen. Furthermore, he would benefit from increased

¹³ ICC-01/05-01/08-1007-Conf.

protection as a former Vice-President of the Republic. The Congo has demonstrated its capacity to cooperate by sending three detainees to the ICC and has shown its faith in this institution by referring situations to the ICC. It would be worthwhile to read Article 30 of the Constitution and the decree on the security of former vice-presidents. Moreover, President Kabila would not allow his political opponent to escape legal proceedings. Particular emphasis is placed on Mr Jean Pierre Bemba's need to complete his mourning by paying his respects at the cemetery where his father is buried in the town of Gemena in the Democratic Republic of the Congo, and by placing a gravestone there as the eldest son, as is customary in Africa.

44. Alternatively, the applicant suggests **Belgium and Portugal**, where he has family and personal assets.

45. It should be noted that in Belgium, the public Federal Department of Justice generally uses the method of electronic tagging to guarantee that accused persons will appear at court, where the sole ground for remanding an accused person in custody is the risk of absconding. This same system could be used within the framework of the cooperation that Belgium is statutorily bound to provide to the ICC. In this respect, it should be recalled that all of Mr Jean Pierre Bemba's children are living in Belgium and attend school there.

46. In respect of Portugal, it should be recalled that, prior to his arrest by the Court, Mr Jean Pierre Bemba already had protection and round-the-clock police surveillance during the time he spent there in 2007 and 2008. This round-the-clock surveillance, which was set up with the full cooperation of the local police force in Faro, could be replicated in the event of Mr Bemba's release.

47. Mr Bemba also proposes **South Africa and Senegal**. These African States provide sound guarantees under their judicial systems for receiving accused persons and are able to ensure that the conditions ordered by the Court are

applied. The Court could ask these States to confirm their willingness to receive the Accused and to cooperate with the Court in the event of his release to their territories.

48. The Defence has already initiated contact with the authorities of South Africa at the highest level. A sizeable delegation of the country's most distinguished personalities recently visited the Accused at the Detention Centre to discuss the possibility of offering a guarantee that he will appear at trial. At South Africa's suggestion, the Defence requested a meeting between the Defence team, the Ambassador of South Africa to the Netherlands, and the Office of the Prosecutor to consider the most stringent conditions which would reassure the Prosecutor, with a view to finalising the guarantee of Mr Bemba's appearance at trial which South Africa was preparing to offer.¹⁴ The Defence subsequently received a message from the Office of Prosecutor, which decided to meet with the Ambassador separately prior to responding to the Defence's request. To date, the Defence has received no response to this amicable proposal, which it intended to implement jointly with South Africa, one of the States Parties which cooperates closely with the Office of the Prosecutor and supports the work of the Court.

49. Furthermore, the Defence is in constant contact with the Minister of Foreign Affairs of Senegal, who informally confirmed to the Defence his country's readiness to receive Mr Jean Pierre Bemba and, in this connection, to offer the Court a guarantee that the Accused will appear at trial. Confirmation of this position may be sought from Senegal.

50. Mr Jean Pierre Bemba also proposes **Holland**, where he could stay in an apartment in The Hague, in the immediate vicinity of the Court and the Detention Centre in Scheveningen. The electronic tagging system is also used

¹⁴ Confidential Annexes A and B.

in the Netherlands to neutralise the risk of absconding; it can also be set up for the Accused in the area surrounding the International Criminal Court.

51. The Appeals Chamber notes that the International Criminal Court exercises its functions and powers on the territory of States Parties and, as such, is dependent on a State's cooperation in the event that it receives a person granted interim release and undertakes to ensure the application of the conditions ordered by the Court. Without such cooperation, any decision of the Court granting conditional release would be ineffective.
52. The Defence recalls that, pursuant to article 86 of the Statute, States Parties are under an obligation to cooperate with the Court. Accordingly, under international law, States cannot rely on barriers in their own domestic legislation in order to circumvent their international obligations.

7) Request for a modification of the detention regime:

53. In the alternative, the Accused seeks a more lenient detention regime, consisting of his being placed in a safe house on the territory of the Netherlands. He would thus be subject to the same measures as those applied by the International Criminal Court in the situation in Sudan, in the *Abu Garda* case. If the previous decisions of the Court in *Abu Garda* are not applied to Mr Jean-Pierre Bemba's case, he will have been subject to unfair discrimination, whereas the Court cannot have double standards.
54. All related expenses incurred will be paid from the private means of the Accused's friends and family members.
55. The International Criminal Tribunal for the former Yugoslavia has had previous occasion to order a modification of the conditions of detention in several cases, including *Blaskic*, where the accused was authorised to spend

the night with his wife and children once a month and to meet with them freely outside the detention centre at his own expense.¹⁵

56. The Defence's alternative request for a modification of the detention regime does not equate to a lifting of the warrant of arrest. In this case, the detention order remains in force, only the detention regime is modified.

57. The request for a modification of the prison regime is not governed at all by articles 58 and 60 of the Rome Statute, as the Prosecutor acknowledged in his observations when the Defence sought authorisation for Mr Jean Pierre Bemba Gombo to leave the Detention Centre for the funeral of his late father, who passed away in Brussels in **July** 2009.¹⁶

58. The Defence clearly states that this is an alternative request in the specific event that the Trial Chamber should decide to maintain the warrant of arrest pursuant to articles 60(3) and 58 of the Statute.

59. Mr Jean Pierre Bemba seeks leave to stay in a safe house with his wife, five children¹⁷ and paternal grandmother, who is weakened in her old age.

FOR THESE REASONS:

60. The Defence respectfully requests that Your Honours, the Judges of the Trial Chamber of the International Criminal Court, entertain these submissions and declare them to be admissible and well-founded for the purposes of:

Firstly:

¹⁵ *Blaskic* case.

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

¹⁶ ICC-01/05-01/08-437-Conf.

¹⁷ ICC-01/05-01/08-484-Conf-AnxG.

61. Ordering initially that the Prosecutor disclose to the Defence, within 24 hours, the specific evidence in his possession indicating the risk that the Accused may abscond, as alleged by his Office;
62. Obtaining the views of the States to whose territory Mr Jean Pierre Bemba is requesting to be released and from whom he is seeking a guarantee that he will appear at trial, namely Belgium, Portugal, the Netherlands, Senegal and South Africa;

As principal request

63. Ordering the immediate release of Mr Jean-Pierre Bemba Gombo.

In the alternative

64. Ordering Mr Jean Pierre Bemba Gombo's release, subject to the conditions Your Honours deem fit pursuant to rule 119 of the Rules of Procedure and Evidence, by restricting such release to all periods of judicial recess at the Court, bearing in mind that, in discussions with the Defence, the State of Senegal in particular has informally indicated its readiness to receive the Accused on its territory during recess periods and to secure his appearance at trial, and that South Africa, too, has shown great interest in receiving the Accused and securing his appearance at trial in the event of his release.

65. Issuing a warrant of arrest to secure his appearance at trial pursuant to article 60(5) of the Rome Statute, should Your Honours deem it necessary.

In the further alternative

66. Ordering a more lenient detention regime for Mr Jean-Pierre Bemba Gombo, placing him in a safe house (under a detention regime) on the territory of the Host State, the Netherlands, and permitting him to spend his nights there with

his wife, children and maternal grandmother, all exclusively at his own expense.

[signed]

[signed]

Aimé Kilolo Musamba

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Dated this 30 November 2010

At The Hague, The Netherlands