Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/08**
Date: **1 July 2011**

THE APPEALS CHAMBER

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO

Public redacted version
Urgent

Document in support of Defence Appeal against Trial Chamber III's decision on Applications for Provisional Release, dated 27 June 2011

Source: **Defence 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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A. INTRODUCTION

1. Pursuant to Article 82(1)(b) of the Rome Statute, Rule 154 of the Rules of Procedure and Evidence, and Regulation 64 of the Regulations of the Court, the Defence hereby appeals from Trial Chamber III's ("the Chamber") *Decision on Applications for Provisional Release* of 27 June 2011.[1] In particular, the Defence appeals the Trial Chamber's denial of provisional release into [REDACTED]for the period of the upcoming judicial recess,[2] and provisional release into the Democratic Republic of Congo ("DRC") for a period of approximately 17 hours in order to participate in the democratic processes in his country ("the Impugned Decision"). The Defence does not appeal those aspects of the decision which relate solely to the Chamber's findings as regards provisional release into the Kingdom of Belgium.

B. SUBMISSIONS

Ground 1: The Trial Chamber erroneously evaluated the guarantees provided [REDACTED] **and as such erred in concluding that the accused remains a flight risk**

2. The Chamber based its conclusion that the accused remains a flight risk on (a) a previous findings by the Appeals Chamber that the gravity of the charges against the accused, the confirmation of these charges, and potential for a substantial sentence in case of conviction constitute powerful incentives to abscond, particularly now that a significant proportion of the Prosecution evidence has been heard;[3] and (b) Mr. Bemba's "network of international contacts, his past and present political position and the financial resources apparently at his disposal provide him with the means to abscond if he so desires**.**"[4]

3. Turning to the first of the Chamber's considerations, the Defence submits that the Chamber erred in failing to attribute appropriate weight to [REDACTED]Guarantees[5] as a means of mitigating the previous concerns. In all three decisions cited by the Chamber, not one of the accused in question had produced a state guarantee in support of his request for

[1] ICC-01/05-01/08-1565-Conf
[2] The judicial recess is scheduled between 16 July 2011 until 7 August 2011, according to the ICC calendar available at at: http://www.icc-cpi.int/NR/rdonlyres/4C6DB572-93EA-4849-8725-192F2977946F/0/2011calendarbilingual.pdf
[3] Impugned Decision, para. 55.
[4] Impugned Decision, para. 56 (emphasis added).
[5] Letter from the Ministry of Foreign Affairs of [REDACTED]to Maitre Aime Kilolo Musamba, 26 May 2011, ICC-01/05-01/08-1479-Conf-AnxA; Letter from the Ministry of Foreign Affairs [REDACTED]dated 20 June 2011, ICC-01/05-01/08-1556-Conf-Anx2 ('[REDACTED]Guarantees').

provisional release.[6] A state guarantee is recognised as a factor which mitigates the risk of flight of an accused.[7] Significantly, the Appeals Chamber has held that a state guarantee is a pre-requisite for provisional release, holding that "a State willing and able to accept the person concerned ought to be identified prior to a decision on provisional release."[8]

4. The Chamber concluded that [REDACTED] "do little to allay the Chamber's concerns regarding the possibility of the accused absconding"[9] and "convey little more than a general willingness to accept the accused into [REDACTED]territory, and do not specify which of Rule 119(1)'s conditions [REDACTED] would be able to implement"[10] The Defence submits that the Chamber's assessment is based on a misapprehension of the extent of the guarantees provided. A proper assessment of the relevant correspondence demonstrates that this is not the case that they "convey little more than a general willingness", and that the Chamber has erred in drawing this conclusion.

5. On 20 September 2010, Counsel for Mr. Bemba wrote to [REDACTED], setting out in detail the Defence request for release of Mr. Bemba into [REDACTED].[11] Notably, this letter requested:

> "[v]otre accord en principe d'accueillir sur votre territoire pour une période strictement limitée au temps de sa mise en liberté provisoire"; et "d'offrir un régime de garantie de comparaître, notamment au travers d'un système de surveillance quelconque, dans l'hypothèse où il serait libéré provisoirement ou à tout le moins bénéficierait d'une autorisation de sortie les week-ends sur votre territoire national ou sur un territoire national tiers relevant d'un tout autre Etat d'accueil."

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[6] ICC-01/05-01/08-631 0A2, paragraph 70; Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", ICC-01/05-01/08-323 PT OA, 16 December 2008, paragraph 55; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de ThomasLubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, paragraph 136.

[7] It has been held at the ICTY that State Guarantees should be given "considerable weight": *Prosecutor v. Vidoje Blagojevic* et al., Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002, page 2; See also ICC-01/05-01/08-631-Conf 02-12-2009 32/33 IO T OA2, paragraphs 105: [...] If, however, the release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber may, pursuant to rule 119 of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk. As the list of conditions in rule 119 (1) of the Rules of Procedure and Evidence indicates, the Chamber may also, in appropriate circumstances, impose conditions that do not, per se, mitigate the risks described in article 58 (1) (b) of the Statute. The result of this two-tiered examination is a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions. Put differently, in such circumstances, release is only possible if specific conditions are imposed.

[8] ICC-01/05-01/85-631-Conf, para. 106.

[9] Impugned Decision, para. 59.

[10] Impugned Decision, para. 59.

[11] Letter, Maitre Aime Kilolo Musamba to Chef de l'Etat [REDACTED], 20 September 2010, ICC-01/05-01/08-1479-Conf-AnxB

6. The letter then set out four conditions which [REDACTED] was asked to accept, namely:

> 1. Veiller dans toute la mesure du possible à la sécurité et la surveillance permanente de Monsieur Jean-Pierre Bemba Bemba Gombo durant la présence de celui-ci sur votre territoire dans le cadre de sa mise en liberté provisoire, en veillant à ce qu'il soustraie pas à l'action de la justice ,
> 2. Faire savoir à la Cour Pénale Internationale, par la voie autorisée, si Mr Bemba s'est conformé à l'obligation qui pourrait lui être imposée de se présenter en personne auprès de l'Autorité compétente selon le calendrier qui lui sera imposé,
> 3. Signaler immédiatement à la Cour toute violation ou tentative de violation des conditions auxquelles pourrait être assorties sa mise en liberté en vertu de la Règle 119 du règlement de Procédure et de Preuve, et de prendre les dispositions nécessaires en vue de son retour au Quartier pénitentiaire des Nations Unies à La Haye
> 4. Veiller à ce que l'Accusé regagne les Pays-Bas pour comparaître dès que la Cour Pénale Internationale l'aura ordonné et remettre l'Accusé à la garde des autorités néerlandaises avec son passeport et autres documents de voyage

7. The letter, which had been transmitted by the Defence to the Registry on 24 September 2010 for transmission to [REDACTED], was not received until over 6 months later on 19 April 2011. The Ministry of Foreign Affairs of [REDACTED] responded noting that: [12]

> "les Autorites [REDACTED] competentes **marquent leur accord a cette requete**. La CPI a egalement ete inforrnee de ce qui precede. Par ailleurs, les modalites pratiques d'accueil de Monsieur BEMBA au [REDACTED] s'il venait a beneficier de la liberte provisoire, seront portees a votre connaissance et a celIe de la Cour, dans les meilleurs delais possibles."

8. As such, the [REDACTED]authorities officially noted their acceptance of the Defence's detailed request. This exchange of letters was filed with the Chamber on 6 June 2011,[13] and as such the Chamber's conclusion that the [REDACTED] Guarantees "convey little more than a general willingness to accept the accused into [REDACTED] territory, and do not specify which of Rule 119(1)'s conditions [REDACTED]would be able to implement"[14] is in error. By contrast, in its letter of 26 May 2011, the [REDACTED]authorities expressly agreed to the Defence detailed request which raised particular conditions. The Chamber also held that "[c]ritically, [REDACTED] does not guarantee to ensure the accused's return to the seat of the Court if he is released into [REDACTED]s territory."[15] A proper reading of this correspondence reveals that in fact

[12] Letter, Minister of Foreign Affairs of [REDACTED] to Maitre Aime Kilolo Musamba, dated 26 Mai 2011, ICC-01/05-01/08-1479-Conf-AnxA . (emphasis added)
[13] ICC-01/05-01/08-1479-Conf.
[14] Impugned Decision, para. 59.
[15] Impugned Decision, para. 29.

[REDACTED]has agreed to the conditions imposed, including the return of the accused to The Hague upon a request from the Court, or upon any violation of the terms of the conditions of release.

9. Following the Defence request on 6 June 2011, the Chamber requested the observations of [REDACTED] pursuant to Rule 119.[16] The Chamber requested that the [REDACTED]provide its views, and in particular raised two specific questions:

> (i) whether there would be any legal impediment for Mr Bemba to enter and leave the territory of [REDACTED], should he be conditionally released by the Chamber during the duration of the Court's judicial recesses and/or periods where the Chamber does not sit for at least three consecutive days, including long weekends; and
> (ii) whether the [REDACTED]would be in a position to impose one or more of the conditions listed in Rule 119 of the Rules, should the Chamber order the interim release of Mr Bemba on the territory of [REDACTED].

10. In response to this specific request, the [REDACTED]authorities responded in the following terms to the discrete questions which had been asked of them by the Chamber:[17]

> Le gouvernement de [REDACTED]atteste que:
> - Il n'existe aucun obstacle légal à ce que Monsieur BEMBA entre en territoire [REDACTED] ou en sorte, en case de mise en liberté provisoire, durant les vacances et des périodes d'au mois trois (3) jours consécutifs pendant lesquels la Cour ne siégerait pas, y compris des long week-end;
> - Il est en mesure de mettre en ouvre une or plusieurs des conditions visées à l'article 110 du Règlement, au cas ou la Cour déciderait d'ordonner la mise en liberté provisoire de Monsieur BEMBA sur le territoire [REDACTED].
> - En conséquence, il ne s'oppose pas à la mise en liberté de Monsieur Jean Pierre BEMBA GOMBO

11. The Chamber characterised this letter as doing little to allay its concerns, given that it only stated that it was "able to put in place on or several of the conditions referred to in article 119 [sic] of the Rules."[18] By contrast, the [REDACTED] authorities responded in open, exhaustive and unmitigated terms to the specific questions posed by the Chamber. As such, any criticisms of the "brevity" or "general" nature of the correspondence are without merit.

12. The Defence respectfully submits that the [REDACTED]Guarantees are sufficient to demonstrate that state's willingness to comply with any request from the Court as to conditions to be applied to Mr. Bemba's provisional release. Moreover, the Defence submits

[16] ICC-01/05-01/08-1492-Conf, para. 9.
[17] ICC-01/05-01/08-1556-Conf-Anx2.
[18] Impugned Decision, para. 59.

that had the Chamber required further details (which the Defence submits were not necessary), the Chamber erred by (a) failing to wait for the communication of "les modalities pratiques" which [REDACTED] stated would be "portees a votre connaissance et a celIe de la Cour, dans les meilleurs delais possibles";[19] (b) failing to ask the authorities of [REDACTED] for further details in order to satisfy itself of any outstanding question; and (c) failing to convene the Status Conference which the Defence had requested to discuss the feasibility of provisionally releasing the accused into the territory of a third state.[20]

13. The Defence submits that had the Chamber given appropriate weight to the [REDACTED] Guarantees, it would not have concluded that the accused remains a flight risk, particularly in light of the other considerations set out in paragraph 61 of the Impugned Decision. As such, the Chamber's finding on this should be reversed.

14. As to the credibility of [REDACTED]Guarantees, the Defence notes the recent public address by the Prosecutor in [REDACTED], recognising [REDACTED] as [REDACTED]signatory of the Rome Statute, and stating that "[REDACTED]democracy and its democratic changeovers demonstrate that the rule of law promotes development and security" and that "[t]he Court needs [REDACTED]; as a legal expert, a professor and a statesman, he enjoys unrivalled respect in [REDACTED]and the world."[21] As such, given [REDACTED] recognised commitment to the ICC, its guarantees are credible, a factor which the Chamber failed to either discuss or give any weight.

15. In addition to the above arguments, the Defence submits that the factors cited by the Appeals Chamber do not in themselves support the conclusion that the accused is a risk of flight, particularly when weighed properly against the other factors listed in paragraph 61 and the consistent conduct of Mr. Bemba which demonstrates a lack of desire to abscond. As a starting point, the Defence notes that the Appeals Chamber has held that any assessment as to whether the person will abscond will necessarily involve an element of prediction.[22] The Defence nonetheless submits that the Chamber's predictive assessment should be founded on

[19] Letter, Minister of Foreign Affairs of [REDACTED] to Maitre Aime Kilolo Musamba, dated 26 May 2011, ICC-01/05-01/08-1479-Conf-AnxA.
[20] Impugned Decision, para. 73.
[21] Available at: http://www.icc-cpi.int/NR/rdonlyres/DB2A5875-2BFB-46F9-8E88-532D9EF95392/277811/ICCOTP20080813PR345ENG2.pdf
[22] ICC-01/04-01/06-824, 13 February 2007 at para 137

relevant and specific information;[23] the Human Rights Committee has held in this regard that in assessing the likelihood that a detainee might abscond, the Court's decision cannot be based on mere conjectures.[24]

16. Accordingly, a determination that Mr. Bemba is able to flee by virtue of his international contacts, would necessarily require a consideration of the identity of these contacts, and the manner in which their relationship to Mr. Bemba would render it more likely that he would abscond if released. In the present case, the Chamber has simply referred in the abstract to an unnamed "network of international contacts" without further specification as to their identity, or why their relationship to the accused would transform him from someone who has twice willingly returned to the seat of the court, into someone who absconds from justice. The mere fact that the Appeals Chamber has held that the existence of international contacts is a relevant factor does not remove the requirement of sufficient information to establish that the existence of such contacts and financial means renders it "more likely"[25] (not just theoretically possible) that the defendant would abscond.

17. The Chamber also considered Mr. Bemba's representation that his family and friends would cover the costs of security and monitoring. The Chamber held that "if the accused can summon sufficient funds for those purposes, it is a proper inference that he can also muster the funds he would need to abscond."[26] The Defence submits that this is an unreasonable inference. As noted above, the Chamber had no evidence before it that Mr. Bemba's family and friends are likely to assist in the criminal activity of assisting the accused evade justice. In fact, any suggestion is undermined by his contact with family members during his two periods of provisional release in Belgium[27] and his recognised compliance with all conditions imposed including his willing return to the prison facilities of the ICC. In addition, the Chamber's inference is further undermined by the fact that for the two previously-authorised releases of Mr. Bemba into Belgium, his family and friends in fact covered the cost of this release.[28] As such, their willingness to again cover this cost cannot be considered as a factor which mitigates against his release.

18. The Chamber also relies upon Mr. Bemba's "past and present position" as providing

[23] Iljikov v. Bulgaria, para 84.
[24] Hill and Hill v. Spain (526/93) at para 12.3
[25] ICC-01/04-01/06-824, para 136.
[26] Impugned Decision, para. 56.
[27] ICC-01/05-01/08-437; ICC-01/05-01/08-1099.
[28] ICC-01/05-01/08-437-Conf, page 6, para. (vii); ICC-01/05-01/08-1099-Conf, para. 17 (iii).

him with the means to abscond if he so desires.[29] This consideration is undermined by the fact that, as recognised by the Chamber, the accused holds "an apparent desire to live as a public figure rather than as a fugitive."[30]

19. As such, the Defence respectfully submits that the Trial Chamber erred in placing undue weight on the considerations of the accused's unnamed "international contacts", his ability to "muster resources" and his "past and present position" when balanced against the other factors negating his risk of flight. The Defence submits that this error warrants reversal of the Chamber's finding that Mr. Bemba's continued detention is necessary pursuant to Article 58(1)(b)(i) of the Statute.

Ground 2: The Trial Chamber erred in finding a possibility that, if released, the accused may interfere with witnesses

20. The Chamber found that there was a possibility that if released, the accused may endanger the Court's proceedings by interfering with witnesses, which justified his ongoing detention pursuant to Article 58(1)(b)(ii).[31] In coming to this conclusion, the Chamber relied upon the fact that (a) the accused had been informed of the identities of all Prosecution witnesses; (b) the accused has the means available to him to interfere with witnesses by means of his position of influence, network of supporters and apparently ability to muster financial resources; and (c) some vulnerable witnesses may still be called, some testifying witnesses have expressed concerns as to safety, and two witnesses have been placed in the ICC Protection Program as a result of a threat assessment carried out by the Court.[32]

21. The Impugned Decision represents the first finding that there is a risk that Mr. Bemba will interfere with witnesses. Each of the three grounds relied upon by the Chamber in the Impugned Decision existed at the time that numerous previous provisional release decisions which had considered this same question. Addressing each of the Chamber's grounds in turn: (a) the accused has been in possession all particulars of Prosecution witnesses since 6 November 2009;[33] (b) the apparent means available to the accused, position of influence and network of supporters available to the accused has been recognised in numerous previous

[29] Impugned Decision, para. 56.
[30] Impugned Decision, para. 61.
[31] Impugned Decision, para. 65.
[32] Impugned Decision, paras. 62 – 64.
[33] ICC-01/05-01/08-599-Conf-Exp-AnxA.

decisions;[34] (c) at the time of these previous decisions **none** of the Prosecution's vulnerable witnesses had testified as the proceedings had not yet commenced. The Chamber has identified no new circumstances, new facts, or new actions on the part of the accused which justify a departure from previous findings on this question. As such, the Defence submits that the Chamber erred in its misapprehension of and application of the facts and failed to provide sufficient reasoning justifying departure from previous findings, warranting a reversal of the finding that there is a risk that the accused will interfere with witnesses.

22. The Defence also notes that the Appeals Chamber has previously held that Article 58(1)(b) of the Statute requires that continued detention "appears to be necessary" for one of the reasons given in the provision, and does not require the inevitability of that future occurrence.[35] However, the Defence respectfully submits that the Chamber erred by making its assessment *in abstracto* with no identification of any factual basis, identifiable threat or propensity of the accused to intimidate witnesses, and with no reasons being given to discount the demonstrated history of non-interference on behalf of the accused in the intervening three years and one month since his arrest on 24 May 2008.

23. The Defence notes the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia ("ICTY") is consistent in holding that in determining requests for provisional release that "an assessment of danger posed to victims, witnesses or others **cannot be made in the abstract"** and that there must be "a substantial indication from the Prosecution that [the Convicted person] will seek to intimidate witnesses."[36] In another decision, the Trial Chamber recongised the general problem of witness intimidation in Kosovo, and yet held:[37]

> In its submissions to the Trial Chamber, **the Prosecution has not identified or alleged that the Accused can be linked to any of the incidents of witness interference that were mentioned**. … **The Trial Chamber notes that in this case, there is nothing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice.** The Accused has also given an undertaking that he will not have any contact or interfere, directly or indirectly, with any potential witness.

24. The Defence submits that this unequivocal ICTY jurisprudence requiring a foundation or basis for an allegation that an accused would interfere with witnesses is in line with that of

[34] See, for example, ICC-01/05-01/08-475, paras 58 and 62; ICC-01/05-01/08-403, para. 50.
[35] ICC-01/04-01/07-572, para. 21.
[36] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-08-A, Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009, para. 14 (emphasis added).
[37] Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, paras 46 – 48 (emphasis added, internal footnotes omitted).

the ICC. In a recent decision denying provisional release in the *Mbarushimana* case, the Trial Chamber also found a risk that the accused would interfere with witnesses. In contrast with the Impugned Decision, however, the Trial Chamber based its decision on tangible evidence, over and above the existence of an abstract and unfounded risk. The Chamber found that a notebook containing notes apparently made by Mr. Mbarushimana in relation to proceedings in Germany were "indicative of the intention to publish on the internet names of witnesses testifying in the German proceedings", and that "the purpose of publication of witness' names would very likely be the intimidation of those witnesses."[38] The Chamber thus concluded that this document indicated that "Mr. Mbarushimana is predisposed to witness intimidation", and that "the evidence provided to the Chamber shows the 'concrete possibility' of such obstruction."[39] As such, the approach taken by the *Mbarushimana* Chamber supports the position that accusations of witness intimidation must be substantiated.

25. The Impugned Decision, by contrast, failed to identify any basis for its conclusion. Moreover, the Defence notes the report of the Registry dated 27 October 2008, in which the Registry concluded that "the Registrar has not identified direct threats to victims and witnesses. There is no clear information indicating that the disclosure of the witness' identities to the Defence (1 October 2008) has triggered any reactions that could indicate the will to intimidate or harm witnesses. In particular, there is no information at this period of time that Mr. Bemba has disclosed the names of witnesses to a third party."[40]

26. The Defence notes that both the Legal Representatives of Victims expressed concerns as to witness safety,[41] and OPCV opined in the abstract that Mr. Bemba's position and the means at his disposal could render him a risk to witnesses should he be released.[42] However, in none of the multiple filings of the parties and participants was any concrete example or substantiated allegation provided to suggest that Mr. Bemba has interfered or would indeed interfere with witnesses. As such, the Trial Chamber fell into error warranting a reversal of this finding.

27. In addition, the Defence also submits that the Trial Chamber erred in finding that three grounds advanced in the Impugned Decision supported its conclusion that there was a risk that the accused would interfere with witnesses. The Chamber first asserted that the accused

[38] ICC-01/04-01/10-16, para. 64.
[39] ICC-01/04-01/10-16, para. 65.
[40] ICC-01/05-01/08-215-Conf, para. 20.
[41] ICC-01/05-01/08-1435-Conf-tENG, page 8; ICC-01/05/01/08-1440-Conf-tENG, page 5
[42] ICC01/05-01/08-1433-Conf, para 8; ICC-01/05-01/08-1522-COnf, para. 13

had been provided with the particulars of witnesses and as such this "increased the scope" for witness interference.[43] This conclusion is undermined in full by the fact that the accused has been in possession all particulars of Prosecution witnesses since 6 November 2009,[44] and since this date both the Trial and Appeals Chambers have rendered decisions on his requests for provisional release, none of which have found a risk that the accused will interfere with witnesses.[45] The Chamber's conclusion that the provision of witnesses particulars has "increased the scope" for witness interference is without merit, and cannot be reconciled with the numerous decisions on provisional release rendered after 6 November 2009 in which no such "increased scope" has been found. As such, the Chamber's conclusion has no basis, demonstrating the Chamber's error in drawing this conclusion.

28. The Chamber then considered that "the accused has the means available to him to interfere with witnesses by virtue of his position of influence in the region and his apparent ability to muster substantial resources."[46] As an initial point, the Defence is unclear as to the "region" in which the accused is alleged to enjoy a position of influence, but notes the uncontested finding in an earlier decision on provisional release as to the stability of the Central African Republic.[47] The Defence next submits that even if these statements would be accepted as factually correct, which the Defence does not concede, an alleged ability to intimidate witnesses cannot be equated with a risk that an accused will do so, particularly in the absence of any past propensity. On this point, the Defence recalls the consistent jurisprudence of the ICTY that "even if the Accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully."[48] The ICTY has held that even if an accused has contacts who could facilitate the intimidation of witnesses, such as "considerable influence with law enforcement and intelligence agencies in the areas where the crimes are alleged to have occurred",[49] this in itself would be insufficient to deny provisional release in circumstances "where each of the accused was for a period of time aware of investigations against him, [and] there was no evidence that any one of the accused had undertaken any

[43] Impugned Decision, para. 63.
[44] ICC-01/05-01/08-599-Conf-Exp-AnxA.
[45] ICC-01/05-01/08-631-Red 02-12-2009; ICC-01/05-01/08-743 01-04-2010; ICC-01/05-01/08-857 18-08-2010; ICC-01/05-01/08-843 28-07-2010.
[46] Impugned Decision, para. 62.
[47] ICC-01/05-01/08-475, para. 78.
[48] *Prosecutor v. Ramush Haradinaj et al*., Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, paras 46 – 48, citing to *Prosecutor v. Prlic et al*., Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic, 30 July 2004, para. 28.
[49] *Prosecutor v. Prlic et al*., Case No. IT-04-74-PT, Decision on Motions for Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, at para. 28.

activity to interfere with the administration of justice."[50]

29. The Chamber finally took into consideration the fact that one vulnerable dual status witness is still to be called; the Chamber may decide to call more; and testifying witnesses have expressed concerns to the Chamber about their safety and that of their families.[51] No citation was given in support of the latter. The Chamber also stated that two Prosecution witnesses have been placed in the ICC protection program, with no further details given.[52] However, no link was made between the fears of witnesses and any threat, pressure or actions of any kind on the part of the accused. The Defence notes that it is regularly the case that witnesses express concerns about their safety, demonstrated by the vast majority of both Prosecution and Defence witnesses in the ICC and the International Tribunals who testify with the benefit of protective measures. The Defence submits that this fact, in the absence of any link between these fears and any real or threatened actions of the accused, does not support a finding of a risk that the accused will interfere with witnesses. As to the witnesses who have been placed in an ICC Protection Program, the Defence notes that Mr. Bemba can have no knowledge of their location and as such his release can in no way create a particular risk to them. Moreover, the Defence notes that even before the testimony of any of the vulnerable[53] Prosecution witnesses, no finding had been made of a risk that the accused would intimidate witnesses, and as such the Chamber's consideration that "[o]ne vulnerable dual status witness remains to be called, and it is possible that the chamber will elect to call additional witnesses at a later stage" does not support its conclusion.

30. Moreover, the Defence notes that the [REDACTED] Guarantees negate the risk that the accused will interfere with witnesses. In its letter of 20 September 2010, the Defence specifically referred to "un systeme de surveillance", and also clarified that the accused accepted any additional conditions which would be imposed pursuant to Rule 119.[54] This would necessarily include conditions able to remove the risk of witness intimidation, in particular the monitoring of telephone calls, and the restriction of people with whom the accused is permitted to have direct contact. As noted above, the conditions in the Defence

[50] *Ibid*.
[51] Impugned Decision, para. 64.
[52] Impugned Decision, para. 64.
[53] On this point, see: ICC-01/05-01/08-974-Anx2 25-10-2010, paras. 5 and 6 for a definition of vulnerable witnesses.
[54] Letter, Maitre Aime Kilolo Musamba to Chef de l'Etat [REDACTED], 20 September 2010, ICC-01/05-01/08-1479-Conf-AnxB.

letter were accepted by [REDACTED] in its response of 26 May 2010.[55] This acceptance finds further support in [REDACTED] correspondence to the Chamber of 20 June 2011, in which [REDACTED] noted that "Il est en mesure de mettre en ouvre une or plusieurs des conditions visées à l'article 119 du Règlement, au cas ou la Cour déciderait d'ordonner la mise en liberté provisoire de Monsieur BEMBA sur le territoire [REDACTED]." [56] Rule 119 of the Rules specifically provides in relevant part for the imposition of conditions which mitigate the risk of interference with witnesses, such as "(b) The person must not go to certain places or associate with certain persons… and (c) The person must not contact directly or indirectly victims or witnesses". As such, the Defence submits that the Chamber erred in failing to consider the [REDACTED] Guarantees in its consideration of whether there is a risk that the accused may interfere with witnesses in relation to provisional release into [REDACTED]. The Defence further submits that had the Chamber considered the [REDACTED]Guarantees in its consideration of this question, it would not have concluded that such a risk exists.

31. The Defence therefore respectfully submits that the Trial Chamber erred in failing to provide sufficient grounds for its finding of the existence of a risk that should the accused be released, he may endanger the Court's proceedings by interfering with witnesses.[57]

Ground 3: The Chamber erred in summarily denying the application for travel to the DRC

32. On 10 June 2011, the Defence requested that Mr. Bemba be authorized to leave the United Nations Detention Unit ("UNDU") for approximately 17 hours to travel to the DRC and to spend one hour in Congolese territory to complete his voter registration and obtain his carte d'électeur, which would facilitate his candidature in future elections in the DRC in the event of an acquittal.[58] This request was founded on (a) the necessity of completing electoral registration in the territory of the DRC;[59] (b) international covenants and jurisprudence which recognized the right to vote or to participate in democratic processes as being internationally recognized,[60] coupled with the presumption of innocence afforded to the accused as

[55] Letter, Minister of Foreign Affairs of [REDACTED]to Maitre Aime Kilolo Musamba, dated 26 Mai 2011, ICC-01/05-01/08-1479-Conf-AnxA.
[56] ICC-01/05-01/08-1556-Conf-Anx2.
[57] Impugned Decision, para. 62.
[58] ICC-01/05-01/08-1501-Conf, para. 39.
[59] ICC-01/05-01/08-1501-Conf, paras 1 – 13.
[60] ICC-01/05-01/08-1501-Conf, paras 18 – 20.

recognized by Article 66 of the Rome Statute;[61] and (c) the inherent Chamber's inherent authority to transfer accused from the Court's detention centre to a third state as previously recognized in this case and cited by the Defence.[62]

33. The Chamber denied the Defence request *in limine* on the following basis: [63]

> "Here, the Chamber's decision not to permit the accused to travel to the DRC is in part a necessary consequence of its finding that he constitutes a flight risk. It is difficult to imagine a scenario that presents a greater opportunity to abscond than permitting the accused to board a private jet, ostensibly to travel to a State in which he enjoys considerable power and influence. In these circumstances, the Chamber considers that the Third Application must be denied *in limine*."

34. By summarily denying the Defence request, the Chamber committed an error of law warranting the reversal of its decision on this point. The Chamber itself has recognised that "[p]ursuant to Rule 119 of the Rules, **before deciding upon a request for interim release**, the Chamber shall seek the views of (i) the prosecution, (ii) the victims that have communicated with the Court in the case and whom the Chamber considers could be at risk as a result of the release or conditions imposed, and (iii) **the State to which the person seeks to be released**.[64] The Defence submits that the use of the word "shall" (rather than "may") which is used by the Chamber itself demonstrates a recognition that the process of consultation is a mandatory pre-requisite to a decision on provisional release. This is also the case at the ICTY, with the Appeals Chamber having held that "the Impugned Decision does not indicate whether the Trial Chamber gave The Netherlands the opportunity to be heard, as Rule 65(B) requires, before the Trial Chamber grants provisional release. This failure constitutes an error of law."[65]

35. The Chamber found that its decision to summarily dismiss the Defence request allowed it to circumvent the requirement that it seek the views of the DRC. The Defence submits that in doing so, the Chamber committed an error of law, warranting reversal. The Chamber's summary dismissal was based on what it considered to be a clear opportunity permitting an accused to abscond. On this point, the Defence again repeats and relies on its arguments set out above as to the errors of the Chamber in determining that the accused remained a flight risk. However, had the Chamber complied with the requirements of Rule 119 and sought the views of the DRC prior to rendering its decision, sufficient conditions could have been agreed in order to have mitigated or even negated this risk of flight. For

[61] ICC-01/05-01/08-1501-Conf, para. 26.
[62] ICC-01/05-01/08-1501-Conf, para. 34.
[63] Impugned Decision, para. 71.
[64] ICC-01/05-01/08-1492-Conf, para. 7 (emphasis added).
[65] *Prosecutor v. Milan Milutinovic et* al., Case No.: IT-05-87-AR65.1, Decision on Interlocutor Appeal from Trial Chamber Decision granting Nebojsa Pavkovic's Provisional Release, 1 November 2005, para. 12.

example, arrangements could have been agreed which would have had the travel and subsequent movement of the accused supervised by the Congolese authorities in the same manner as a detained witness, which would have completely mitigated the risk of flight. The Defence notes that in the *Haradinaj* case, for example the former Prime Minister of Kosovo was provisionally released into Kosovar territory on the basis that the United Nations Mission in Kosovo ("UNMIK") "shall ensure compliance with [the] conditions."[66] Similar undertakings could potentially have been negotiated with the United Nations Stabilisation Mission in the Democratic Republic of Congo ("MONUSCO"). None of these options were discussed, as the Chamber failed to seek the views of the DRC or MONUSCO and so remained unaware of potential ways of mitigating the alleged risk of flight.

36. The Defence submits that the Chamber also erred in concluding that "[t]he Defence cites no provision of the Court's Statute, Rules or Regulations in support of the Application, and as far as the Court [sic] is aware, there is nothing in the Court's constitutional documents supports a grant of release for the purposes sought."[67] In paragraph 34 of its request, the Defence noted that the Trial Chamber had already taken a decision on temporary release on the basis of the "inherent powers" of the Chamber to "authorise transfer of the accused from the Court's detention centre to the Kingdom of Belgium", independently from the criteria set out in Article 58 of the Statute.[68] Moreover, when authorised for release previously under the Chamber's "inherent powers", the Defence had relied upon Article 8 of the European Convention on Human Rights ("ECHR") which safeguards the right to respect for "family life".[69] In a similar manner, in its current request, the Defence relies on Article 25 of the *Pacte international relative aux droits civile et politique*, which protects the right to vote and be elected. Neither of these rights exists as absolute norms in international law, with derogation being possible if absolutely necessary. However, they both exist on the same level as "internationally recognised human rights".[70] On this point, the Defence recalls that in a previous decision on provisional release of the accused, the Appeals Chamber held that: "article 21(3) of the Statute stipulates that the Statute must be interpreted and applied consistently with internationally recognised human rights."[71] As such, to the extent that the Chamber's dismissal is based on the lack of a legal basis for the Defence request, it is in error.

[66] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005.
[67] Impugned Decision, para. 68.
[68] ICC-01/05-01/08-1501-Conf, para 34, citing to ICC-01/05-01/08-437-Conf.
[69] Article 8 of the ECHR provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence."
[70] See Article 21(3) of the Statute
[71] ICC-01/05-01/08-323, para. 28.

37. The Chamber considered it "difficult to imagine a scenario that presents a greater opportunity to abscond that permitting the accused to board a private jet…"[72] On this point, the Defence notes that while the Defence proposed travel by means of a privately-owned plane, this is not a plane owned by the accused or any of his associates. Defence enquiries have been made with a company legally established for many years in the territory of the Host State, in order to ensure the feasibility of a one day round trip between the Host State and the DRC, it being understood that the costs will be borne by the same family or friends of the accused who bore the costs associated with his release into Belgium. Nothing precluded or precludes the Chamber from seeking cooperation from the United Nations or another international organisation for the provision of an aircraft, whose costs will also be borne by the accused's family and friends. The sole reason for the Defence proposal of a private flight was for considerations of presumed confidentiality of the provisional release.

38. The Defence therefore requests that the Appeals Chamber reverse the finding of the Trial Chamber in summarily dismissing the Defence request for authorisation to travel to the DRC in order to enrol to vote.

39. As a final point, the Defences notes that its original request had asked for authorisation for Mr. Bemba to travel to the DRC in order to enrol to vote before 5 July 2011, being the last day on which such enrolment could take place in Kinshasa.[73] The Defence has since been informed that the period of enrolment has in fact been extended by 14 days, allowing voters to enrol until 10 July 2010.[74] Moreover, the Defence appended to its request a letter from the *Commission Electorale Nationale Independante* ("CENI") which provided notice of an exception in the following terms:[75]

> Toutefois, il est possible d'acquérir la qualité d'électeur pour se faire identifier et enrôler lors du dépôt de sa candidature (Art. 9 point 5 de la Loi No. 06/0006 du 9 Mars 2006 pourtant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales). A toutes fins utiles, nous joignons a la présente le calendrier électoral publié par notre institution le 30 avril 2011.

40. These different options are reflected in the relief requested below.

C. RELIEF SOUGHT

[72] Impugned Decision, para. 33.
[73] ICC-01/05-01/08-1501-Conf-tENG, para. 11.
[74] Africa News : « PROCESSUS ELECTORAL : La révision du fichier électoral prolongée dans six provinces » http://www.7sur7.cd/index.php?option=com_content&view=article&id=21987%3A-processus-electoral--la-revision-du-fichier-electoral-prolongee-dans-six-provinces&catid=3%3Aafricanews&lang=fr
[75] ICC-01/05-01/08-1501-Conf. *See also* Impugned Decision, para 72, footnote 134.

41. In light of all of the aforementioned, the Defence requests that the Appeals Chamber overturn the Impugned Decision and put in place an expedited schedule for the filing of written observations by the parties or, in the alternative, schedule a status conference in order for the parties to make oral submissions to facilitate the following:

(1) **Republic** [REDACTED]

(a) Render a decision as regards provisional release to [REDACTED]for the duration of the judicial recess before the commencement of the recess on 15 July 2011; and

(b) Authorise the provisional release of Mr. Bemba into [REDACTED]for the periods of judicial recess and for those periods of time in which the Chamber will not sit during the period of three (3) consecutive days including long weekends; and

(2) **Democratic Republic of Congo**

(a) Render a decision regarding the accused's travel to the DRC within a timeframe which would allow him to enrol to vote before 5 July 2011; or in the alternative

(b) Render a decision regarding the accused's travel to the DRC within a timeframe which would allow him to enrol to vote before 21 July 2011; or in the alternative

(c) Render a decision regarding the accused's travel to the DRC within a timeframe which would allow him to enrol to vote by virtue of the exception identified by CENI in paragraph 39 above; and

Authorise the accused to leave the United Nations Detention Facility in The Hague for the period of approximately 17 hours to visit the Democratic Republic of Congo to enrol to vote and receive his carte "d'électeur."

Aimé Kilolo Musamba
Associate Counsel

Nkwebe Liriss
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Dated this Friday, 1st of July 2011

At The Hague, The Netherlands