

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 16 August 2011

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 Redacted Version of the "Decision on Applications for Provisional
Release" of 27 June 2011**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Competent authorities of
the Kingdom of Belgium,
the Kingdom of the Netherlands and
[REDACTED]

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues this Decision on Applications for Provisional Release, in which it rules upon the following four defence motions: (i) the “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”, filed 3 May 2011;¹ (ii) the “Requête aux fins d’une convocation d’une conférence de mise en état”, filed 3 May 2011;² (iii) the “Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]”, filed 6 June 2011;³ and (iv) the “Demande d’autorisation de sortie sous le bénéfice de l’extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d’accomplir ses devoirs civiques en République Démocratique du Congo”, filed 10 June 2011.⁴

I. Background

1. On 3 July 2008, Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) was surrendered to the seat of the Court. Since then, he has been detained. Mr Bemba’s trial commenced on 22 November 2010.

2. On 17 December 2010, the Chamber issued its “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals

¹ Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo, 3 May 2011, ICC-01/05-01/08-1387-Conf and five confidential annexes and corrigendum, ICC-01/05-01/08-1387-Conf-Corr and confidential annex filed on 4 May. An English translation of the Application was filed on 6 May 2011: Corrigendum to Application for the interim release of Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1387-Conf-Corr-tENG and five confidential annexes.

² Requête aux fins d’une convocation d’une conférence de mise en état, 3 May 2011, ICC-01/05-01/08-1388-Conf. An English translation of the Request was filed on 6 May 2011: Request to convene a status conference, ICC-01/05-01/08-1388-Conf-tENG.

³ Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED], 6 June 2011, ICC-01/05-01/08-1479-Conf and two confidential annexes.

⁴ Demande d’autorisation de sortie sous le bénéfice de l’extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d’accomplir ses devoirs civiques en République Démocratique du Congo, 10 June 2011, ICC-01/05-01/08-1501-Conf and three confidential annexes. An English translation of the Application was filed on 23 June 2011: Extremely urgent application for an exeat from the detention centre to allow Mr Jean-Pierre Bemba Gombo to perform his civic duties in the Democratic Republic of the Congo, ICC-01/05-01/08-1501-Conf-tENG.

Judgment on 19 November 2010" ("December 2010 Decision"),⁵ in which the Chamber ruled that the accused was to remain in detention.⁶

3. On 3 May 2011, the defence filed its "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo" ("First Application"),⁷ requesting interim release of the accused during the Court's summer judicial recess and weekends, subject to a guarantee from a State Party that he will appear at trial.⁸ The First Application asserts that the accused should be transferred to the Kingdom of Belgium ("Belgium") if provisional release is granted.⁹
4. On 3 May 2011, the defence filed its "Requête aux fins d'une convocation d'une conférence de mise en état" ("Status Conference Application"),¹⁰ requesting that the Chamber convene a status conference to allow (i) the defence to elaborate on its arguments in support of the First Application; and (ii) the defence and the Registry to address the Chamber regarding the feasibility of provisionally releasing the accused into the territory of Belgium or any other State.¹¹
5. On 12 May 2011, the Chamber issued its "Decision requesting observations on the 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'",¹² in which the Chamber (i) requested the Office of the Prosecutor ("prosecution"), the legal representatives of victims ("legal

⁵ Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment on 19 November 2010, 17 December 2010, ICC-01/05-01/08-1088. A French translation of the December 2010 Decision was filed on 28 January 2011: *Décision relative au réexamen de la détention de Jean-Pierre Bemba Gombo en exécution de l'arrêt du 19 novembre 2010*, ICC-01/05-01/08-1088-tFRA.

⁶ ICC-01/05-01/08-1088, paragraph 48.

⁷ ICC-01/05-01/08-1387-Conf-Corr-tENG.

⁸ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 33-34.

⁹ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 10-24.

¹⁰ ICC-01/05-01/08-1388-Conf-tENG.

¹¹ ICC-01/05-01/08-1388-Conf-tENG, paragraphs 5-15.

¹² Decision requesting observations on the "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", 12 May 2011, ICC-01/05-01/08-1398-Conf. A French translation of the decision was filed on 13 May 2011: *Décision relative à la présentation d'observations concernant la Requête de mise en liberté provisoire de Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1398-Conf-tFRA.

representatives”) and the Office of the Public Counsel for Victims (“OPCV”) to submit their views on the First Application by 19 May 2011; and (ii) invited the Kingdom of the Netherlands (“Host State”) and Belgium to submit their observations on the First Application by 27 May 2011.¹³

6. The prosecution filed its observations on the First Application on 19 May 2011, arguing that the application should be rejected.¹⁴
7. The OPCV and the legal representatives filed their observations on the First Application on 23 and 24 May 2011,¹⁵ pursuant to an extension of time granted by the Chamber.¹⁶ Both legal representatives and the OPCV submitted that the First Application should be denied.
8. On 27 May 2011, the Registrar filed the observations of the Host State.¹⁷ In its observations, the Host State explained that it would “facilitate the transfer of Mr Bemba to Belgium should he be granted interim release”,

¹³ Belgium later requested a 15 working day extension of time and access to the confidential annexes to the First Application. *See* Report of the Registrar on the execution of decision ICC-01/05-01/08-1398-Conf, 16 May 2011 (notified on 17 May 2011), ICC-01/05-01/08-1411-Conf and three confidential annexes. After providing the defence with an opportunity to comment on the transmission of the annexes, the Chamber granted Belgium access to four out of five annexes and an extension of time until 13 June 2011. *See* Decision on the ‘Report of the Registrar on the execution of decision ICC-01/05-01/08-1398-Conf’, 19 May 2011, ICC-01/05-01/08-1424-Conf.; *see also* E-mail sent by the Chamber to the defence on 17 May 2011 at 13.20.

¹⁴ Prosecution’s observations on the Defence Application for the interim release of Mr Jean-Pierre Bemba Gombo, 19 May 2011, ICC-01/05-01/08-1423-Conf.

¹⁵ Observations des victimes demandereses sur la Requête de Mise en liberté provisoire déposée par la Défense de M. Bemba le 3 mai 2011, 23 May 2011, ICC-01/05-01/08-1433-Conf; Observations de Maître Zarambaud Assingambi, Representant légal des victimes, relatives à la “Requête de mise en liberté provisoire déposée par la défense le 3 mai 2011”, 23 May 2011, ICC-01/05-01/08-1435-Conf; an English translation of Mr Zarambaud’s observations was filed on 27 May 2011: Observations of Mr Zarambaud Assingambi, Legal Representative of Victims, on the “Application for the interim release of Mr Jean-Pierre Bemba Gombo filed by the Defence on 3 May 2011”, ICC-01/05-01/08-1435-Conf-tENG; Observations de Maître Douzima-Lawson à la requête de mise en liberté provisoire de Mr. Jean-Pierre Bemba Gombo, 24 May 2011 (notified on 25 May 2011), ICC-01/05-01/08-1440-Conf; an English translation of Ms Douzima-Lawson’s observations was filed on 30 May 2011: Ms Douzima-Lawson’s observations on the application for the interim release of Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1440-Conf-tENG.

¹⁶ *See* e-mail sent by the Chamber to the OPCV on 13 May at 16.21, granting an extension of time due to the late notification of the First Application and its annexes; e-mail sent to the legal representatives’ case manager on 23 May 2011 at 18.27, granting an extension of time because the legal representatives had shown exceptional circumstances outside their control that prevented them from filing their responses on time.

¹⁷ Transmission of the observations of Host State on the request for interim release, 27 May 2011, ICC-01/05-01/08-1463-Conf and two confidential annexes.

while noting that such a “transfer may have a considerable impact on operational resources of the Host State”.¹⁸

9. On 6 June 2011, the defence filed its “Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]” (“Second Application”),¹⁹ requesting, as an alternative to the accused’s release into the territory of Belgium, that he be granted provisional release into the territory of [REDACTED]. Temporally, the Second Application is limited to the Court recess and periods where the Chamber does not sit for at least three consecutive days, including long weekends.²⁰

10. On 8 June 2011, the Chamber issued its “Decision requesting observations on the ‘Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]’”,²¹ in which the Chamber invited the prosecution, the legal representatives, the OPCV and [REDACTED] to submit their observations on the Second Application by 20 June 2011.²²

11. On 10 June 2011, the Registrar filed the “Observations of the Kingdom of Belgium” in relation to the First Application (“Belgium’s Observations”),²³

¹⁸ ICC-01/05-01/08-1463-Conf-Anx2.

¹⁹ Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED], 6 June 2011, ICC-01/05-01/08-1479-Conf and confidential annexes.

²⁰ ICC-01/05-01/08-1479-Conf, paragraphs 1 and 19.

²¹ Decision requesting observations on the ‘Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]’ 8 June 2011, ICC-01/05-01/08-1492-Conf. A French translation of the decision was filed on 10 June 2011: Décision demandant la présentation d’observations relatives à la Requête ampliative de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED], ICC-01/05-01/08-1492-Conf-tFRA.

²² ICC-01/05-01/08-1492-Conf, paragraph 9.

²³ Transmission des observations du Royaume de Belgique relatives à la demande de mise en liberté provisoire, 10 June 2011, ICC-01/05-01/08-1505-Conf and three confidential annexes. An English translation of Annex 2 was filed on 20 June 2011: English translation of Annexe 2: Transmission des observations du Royaume de Belgique relatives à la demande de mise en liberté provisoire, ICC-01/05-01/08-1505-Conf-Anx2-tENG.

in which Belgium "categorically opposes the possible interim release of Mr [Bemba] into its territory".²⁴

12. On 10 June 2011, the defence filed its "Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo", requesting that the accused be permitted to leave detention for approximately 17 hours to travel to the Democratic Republic of the Congo ("DRC") to register for the upcoming elections ("Third Application").²⁵ In the Third Application, the defence asserts that the only way for the accused to complete his electoral registration is to travel to the DRC and to register in person.²⁶

13. To this end, the defence proposes that the accused travel to the DRC by private jet, departing from Rotterdam airport at 06.00 and returning to The Hague at 21.00, with one hour spent on the ground in the DRC.²⁷ The defence states that the accused's "family and friends will defray the costs" of the proposed trip.²⁸ The defence seeks an expedited decision on the Third Application on the basis that electoral registration closes on 30 June 2011 in the Equatorial, Oriental and Nord-Kivu Provinces and on 5 July 2011 in the city of Kinshasa.²⁹

14. On 13 June 2011, the defence submitted its "Demande d'autorisation de répliquer conformément à la norme 24(5) du Règlement de la Cour",

²⁴ ICC-01/05-01/08-1505-Conf-Anx2-tENG, page 17.

²⁵ Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo, 10 June 2011, ICC-01/05-01/08-1501-Conf and three confidential annexes. An English translation of the application was filed on 23 June 2011: Extremely urgent application for an exeat from the detention centre to allow Mr Jean-Pierre Bemba Gombo to perform his civic duties in the Democratic Republic of the Congo, ICC-01/05-01/08-1501-Conf-tENG.

²⁶ ICC-01/05-01/08-1501-Conf-tENG, paragraphs 13-14.

²⁷ ICC-01/05-01/08-1501-Conf-tENG, paragraphs 15-16.

²⁸ ICC-01/05-01/08-1501-Conf-tENG, paragraph 17.

²⁹ ICC-01/05-01/08-1501-Conf-tENG, paragraph 14.

requesting leave to file a reply to Belgium's Observations.³⁰ The Chamber granted the application the next day.³¹

15. On 13 June 2011, the Chamber issued its "Decision requesting observations on the 'Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo'", in which the Chamber requested the prosecution, the legal representatives and the OPCV to submit their views on the Third Application by 17 June 2011.³²

16. On 16 June 2011, the defence filed its "Réplique de la Défense aux observations du Royaume de Belgique du 9 Juin 2011", in which it addresses several factual and legal issues raised in Belgium's Observations.³³ Among other things, the defence asserts that (i) fewer security measures would be required to ensure the accused's safety than on the two previous occasions on which he was permitted to travel to Belgium;³⁴ and (ii) an order for the accused's provisional release under the conditions proposed in the First Application could in fact be reconciled with Belgian law.³⁵

17. The legal representatives and the OPCV filed their observations on the Third Application on 16 and 17 June 2011, all of which opposed granting

³⁰ Demande d'autorisation de répliquer conformément à la norme 24(5) du Règlement de la Cour, 13 June 2011, ICC-01/05-01/08-1506-Conf. While this filing was not initially notified to the OPCV, on 15 June 2011 the Chamber instructed the Registry to notify the OPCV of the filing. See email sent by the Chamber on 15 June 2011 at 13:01.

³¹ Decision on the defence "Demande d'autorisation de répliquer conformément à la norme 24(5) du Règlement de la Cour", 14 June 2011, ICC-01/05-01/08-1513-Conf.

³² Decision requesting observations on the 'Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo', 13 June 2011, ICC-01/05-01/08-1508-Conf, paragraph 5.

³³ Réplique de la Défense aux observations du Royaume de Belgique du 9 Juin 2011, ICC-01/05-01/08-1530-Conf and confidential annex.

³⁴ ICC-01/05-01/08-1530-Conf, paragraphs 13-22.

³⁵ ICC-01/05-01/08-1530-Conf, paragraphs 31-50.

the Third Application.³⁶ The prosecution submitted its views on the Third Application on 17 June 2011, taking the position that “there is neither precedent nor justification for this extraordinary request.”³⁷

18. Mr Zarambaud submitted his views on the Second Application on 17 June 2011,³⁸ and the prosecution,³⁹ Ms Douzima-Lawson,⁴⁰ the OPCV⁴¹ and [REDACTED]⁴² submitted their views on 20 June 2011.

II. Submissions

19. The First, Second and Third Applications (together, “Applications for Release”) generated numerous written submissions, many of which advanced variations on the same arguments. For the sake of brevity and in light of the need for an expeditious resolution, the Chamber will not repeat all of the arguments in the filings now before it. Rather, the

³⁶ Observations sur la requête de la Défense du 10 juin 2011 aux fins d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République démocratique du Congo, 16 June 2011, ICC-01/05-01/08-1539-Conf; an English translation of Mr Zarambaud's observations was filed on 23 June 2011: Observations on the Extremely Urgent Defence Application of 10 June 2011 for an exeat from the Detention Centre to allow Mr Jean-Pierre Bemba Gombo to perform his civic duties in the Democratic Republic of the Congo, ICC-01/05-01/08-1539-Conf-tENG; Observations des victimes demandereses sur la Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence déposée par la Défense de M. Bemba le 10 juin 2011, 17 June 2011, ICC-01/05-01/08-1540-Conf; Observations de la Représentante légale de victimes relative à la demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République démocratique du Congo, 17 June 2011, ICC-01/05-01/08-1541-Conf.

³⁷ Prosecution's Response to the Defence 'Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo', 17 June 2010, ICC-01/05-01/08-1542-Conf, paragraph 2. *See also* confidential annex.

³⁸ Observations sur la requête de la Défense du 6 juin 2011 aux fins de mise en liberté provisoire de Mr. Jean-Pierre Bemba Gombo suite à la garantie étatique de [REDACTED], ICC-01/05-01/08-1543-Conf, 17 June 2011.

³⁹ Prosecution's Response to Defence “Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]”, ICC-01/05-01/08-1555-Conf, 20 June 2011.

⁴⁰ Observations de la Représentante légale des victimes relatives à requête ampliative de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED], 20 June 2011, ICC-01/05-01/08-1553-Conf.

⁴¹ Observations des victims demandereses sur la Requête ampliative de mise en liberté sur le territoire de [REDACTED] déposée par la Défense de M. Bemba le 6 juin 2011, ICC-01/05-01/08-1552-Conf, 20 June 2011.

⁴² Report of the Registry on the Implementation of Decision, ICC-01/05-01/08-1492-Conf, ICC-01/05-01/08-1556-Conf, 21 June 2011, and two confidential annexes. While the Registry's Report explains that [REDACTED]'s observations were received approximately one and a half hours after the 16.00 filing deadline on 20 June 2011, the Chamber will consider [REDACTED]'s untimely filing because (i) the late filing was due in part to “technical problems at the Registry's end”; (ii) [REDACTED]'s ambassador called the Registry to advise that [REDACTED]'s filing would be late and to request a brief extension; and (iii) [REDACTED]'s views are highly relevant to the Second Application. *See* ICC-01/05-01/08-1556-Conf, paragraphs 2-3.

principal arguments advanced by the parties, the participants and the States concerned are summarised below.

Defence submissions in relation to the First and Second Applications

20. In relation to the First and Second Applications, the defence proceeds under Article 60(3) of the Rome Statute (“Statute”), arguing that the Chamber should depart from its December 2010 Decision because “changed circumstances so require”.⁴³ Framing the Chamber’s December 2010 Decision as being premised on a single concern – ensuring the accused’s appearance at trial – the defence argues that the following constitute “material change[s] in the circumstances” that negate that concern and justify a grant of provisional release into the territory of either Belgium or [REDACTED]:⁴⁴

- a. The prosecution has already called almost all of its vulnerable witnesses and there has been no suggestion to date that vulnerable witnesses have been intimidated by the defence or any person associated therewith;⁴⁵
- b. Belgium has indicated, by way of a 25 October 2010 letter (notified to the defence in March 2011), that it would be willing to respond to an inquiry of the Chamber regarding the possibility of the accused being granted provisional release in Belgium;⁴⁶
- c. The Mayor of the Waterloo District in Belgium sent the defence a letter dated 8 April 2011, which, according to the defence, demonstrates that Waterloo District “could set up a monitoring and protection system if [it] was assigned additional manpower from the federal police force and the State Security Service”;⁴⁷

⁴³ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 2; ICC-01/05-01/08-1479-Conf, paragraph 4.

⁴⁴ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 5 and 7; ICC-01/05-01/08-1479-Conf, paragraphs 5-7.

⁴⁵ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 6-9.

⁴⁶ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 10-15.

⁴⁷ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 16.

- d. The accused is willing to have the costs of protection and monitoring services in Belgium “covered by his family members”;⁴⁸
- e. The Registry has taken the position that “should a decision to release be rendered prior to the signing of [an interim release agreement with States Parties], an *ad hoc* request for cooperation could be made to those States which may receive the released person”;⁴⁹
- f. The Host State has taken the position, in a 28 October 2010 letter (notified to the defence in March 2011), that it is prepared to transfer the accused to Belgium or any other State to which he is provisionally released;⁵⁰ and
- g. [REDACTED] has agreed, in a 26 May 2011 letter, to accept the accused into its territory if the Court grants him provisional release.⁵¹

21. In addition, the defence advances several legal arguments in support of the First and Second Applications. *First*, the defence contends that a refusal to grant the accused provisional release cannot be reconciled with his right to a fair trial under Article 67 of the Statute or Article 6 of the European Convention on Human Rights (“ECHR”) because, in the defence’s submission, “a fair trial must include a realistic possibility of release”.⁵² *Second*, the defence argues that “detaining the accused infinitely throughout trial” and “maintain[ing] him in a situation where he has no real prospect of release” is inconsistent with the prohibition against inhuman or degrading treatment under Article 3 of the ECHR and violates the accused’s rights to liberty and security of person under Article 5 of the

⁴⁸ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 17-18.

⁴⁹ ICC-01/05-01/08-1387-Conf-Corr-tENG-Anx-4; *see also* ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 21-22.

⁵⁰ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 24; *see also* Anx 3; *see also* ICC-01/05-01/08-1479-Conf, paragraph 18.

⁵¹ ICC-01/05-01/08-1479-Conf, Anx A; *see also* ICC-01/05-01/08-1479-Conf, paragraphs 8-13.

⁵² ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 27.

ECHR.⁵³ *Third*, the defence submits that a refusal to grant the accused provisional release would be “difficult to reconcile” with the presumption of innocence enshrined in Article 66(1) of the Statute.⁵⁴

22. Finally, the defence submits that the summer recess is an appropriate time to grant provisional release because the adjournment means that the accused’s absence from the seat of the Court will not disrupt the trial.⁵⁵

Defence submissions in relation to the Third Application

23. In contrast to the First and Second Applications, the Third Application is not premised on Article 60(3) of the Statute. Indeed, the defence cites no provisions of the Statute, Rules or Regulations, nor any ICC precedent, in support of the relief sought.

24. Rather, the Third Application appears to be premised on the argument that the release sought is justified by “humanitarian concerns”.⁵⁶ To this end, the defence asks the Chamber to balance the prospect of releasing the accused “for a matter of hours” against the “serious personal and political repercussions” if release is not granted — namely, the accused’s “exclusion from the next elections in the Democratic Republic of Congo if he were to be acquitted”.⁵⁷

25. In support, the defence invokes Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”) and its prohibition against “unreasonable restrictions” on an individual’s ability to participate in the

⁵³ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 28-31. The defence also posits that Article 8 of the ECHR gives the accused the “right to enter any European territory in which his wife resides”, although the defence stops short of arguing that such a right entitles him to provisional release. *See* ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 26.

⁵⁴ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 31.

⁵⁵ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 32-33.

⁵⁶ ICC-01/05-01/08-1501-Conf-tENG, paragraph 34.

⁵⁷ ICC-01/05-01/08-1501-Conf-tENG, paragraphs 21-24.

democratic process, as well as jurisprudence from the ECHR and the International Criminal Tribunal for the former Yugoslavia.⁵⁸ Finally, the defence argues that (i) the limited period of time envisaged on Congolese territory negates any concern about witness interference; and (ii) any flight risk is minimised because the DRC has a history of cooperation with the ICC and legislation requiring the same.⁵⁹

Prosecution's observations on the First and Second Applications

26. Noting that the Chamber's December 2010 Decision focused on the risk of the accused absconding, the prosecution argues that the accused is more of a flight risk than ever. In the prosecution's view, this is because the evidence so far presented against the accused at trial gives him a strong incentive to flee.⁶⁰ The prosecution asserts that the flight risk is further heightened by the accused's access to significant financial means, a fact confirmed, in the prosecution's view, by the representation in the First Application that the accused's "family and friends" would cover any protection and monitoring costs associated with his release.⁶¹

27. The prosecution assails the "new circumstances" relied upon by the defence in the First and Second Applications, arguing that none of them negate the concern regarding the accused's flight.⁶² *First*, the prosecution dismisses the letters from the Belgian and Dutch authorities as irrelevant because they do not contain any commitment or indication of the States' positions, let alone any guarantees regarding the accused's appearance at trial.⁶³ *Second*, the prosecution argues that the letter laying out the Registry's position does not constitute a relevant new circumstance

⁵⁸ ICC-01/05-01/08-1501-Conf-tENG, paragraphs 18, 19 and 33.

⁵⁹ ICC-01/05-01/08-1501-Conf-tENG, paragraphs 35 and 36.

⁶⁰ ICC-01/05-01/08-1423-Conf, paragraph 11; ICC-01/05-01/08-1555-Conf, paragraph 7.

⁶¹ ICC-01/05-01/08-1423-Conf, paragraph 12.

⁶² ICC-01/05-01/08-1423-Conf, paragraphs 13 and 15-23; ICC-01/05-01/08-1555-Conf, paragraphs 6-7.

⁶³ ICC-01/05-01/08-1423-Conf, paragraphs 16-20.

because it does not provide any guarantee of the accused's appearance at trial and cannot be interpreted as having an impact on a State's willingness to provide such guarantees.⁶⁴ *Third*, the prosecution attacks the defence's attempts to draw support from the fact that most vulnerable witnesses have already been called, noting that this relates to Article 58(1)(b)(ii) concerns (obstruction or endangering the court proceedings), while the December 2010 Decision was based on Article 58(1)(b)(i) of the Statute (risk of flight).⁶⁵ *Fourth*, the prosecution submits that [REDACTED]'s letter "is irrelevant" because it merely expresses a "general willingness to accept the Accused on [[REDACTED]'s] territory" and "fails to provide sufficient guarantees or properly address how it would ensure the Accused's appearance at trial."⁶⁶

28. Turning to the alleged violation of the ECHR, the prosecution submits that this legal argument does not constitute a change in the circumstances underpinning the December 2010 Decision or a new circumstance that could have a bearing on the considerations enumerated in Article 58(1) of the Statute. In any event, says the prosecution, the defence argument is not legally sound, because the Appeals Chamber has held that a person is entitled to provisional release only if sufficient protective conditions can be imposed and enforced.⁶⁷

29. Finally, the prosecution submits that (i) there has not been any inexcusable delay by the prosecution given the significant progress it has made in the

⁶⁴ ICC-01/05-01/08-1423-Conf, paragraphs 21-22.

⁶⁵ ICC-01/05-01/08-1423-Conf, paragraph 13.

⁶⁶ ICC-01/05-01/08-1555-Conf, paragraphs 6-7.

⁶⁷ ICC-01/05-01/08-1423-Conf, paragraph 23 (referring to Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's decision '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 of South Africa', 2 December 2009, ICC-01/05-01/08-631-Conf OA2, paragraphs 104 and 106).

presentation of its case since the commencement of the trial; and (ii) the length of the accused's detention has not been unreasonable.⁶⁸

Prosecution's observations on the Third Application

30. The prosecution submits that permitting the accused to travel to the DRC would be "incompatible with th[e] findings" of the "Pre-Trial, Trial and Appeals Chambers (...) that the Accused presents a flight risk".⁶⁹ The prosecution distinguishes the Third Application from the two occasions in which the Pre-Trial Chamber and the Trial Chamber permitted the accused to travel to Belgium to attend relatives' memorial services, arguing that those decisions were premised on "humanitarian grounds", whereas the Third Application asks for permission to take "a trip solely to exercise political activities in the DRC."⁷⁰

31. To underline the distinction, the prosecution cites this Chamber's refusal, in the December 2010 Decision, to grant the accused provisional release to visit his ailing grandmother in the DRC.⁷¹ Invoking the Chamber's reasoning that the Court could not ensure the accused's presence at trial if he were released into the territory of the DRC, the prosecution argues that the same is true in relation to the Third Application: "Neither the DRC Government nor the United Nations Organization Stabilization Mission in the DRC (MONUSCO) has undertaken to secure his custody and return for trial."⁷² In essence, says the prosecution, the accused remains a flight risk and there "has been no material change in the circumstances underpinning the Chamber's [December 2010 Decision] to warrant the Accused's present requested interim release to the DRC."⁷³

⁶⁸ ICC-01/05-01/08-1423-Conf, paragraph 24.

⁶⁹ ICC-01/05-01/08-1542-Conf, paragraph 2.

⁷⁰ ICC-01/05-01/08-1542-Conf, paragraphs 2, 5 and 6.

⁷¹ ICC-01/05-01/08-1542-Conf, paragraph 8.

⁷² ICC-01/05-01/08-1542-Conf, paragraphs 6 and 8.

⁷³ ICC-01/05-01/08-1542-Conf, paragraph 8.

Observations of the legal representatives and the OPCV on the First and Second Applications

32. Mr Zarambaud submits that the provisional release sought in the First and Second Applications would compromise the accused's appearance at trial and "put the lives of the witnesses and victims at serious risk, even those who are not vulnerable".⁷⁴ Specifically, Mr Zarambaud argues that the accused's continued detention is warranted because at least one vulnerable dual status witness has not yet testified and because Witness [REDACTED], as well as some [REDACTED] witnesses [REDACTED], have expressed a fear of relation by the accused.⁷⁵ Moreover, Mr Zarambaud reminds the Chamber that the legal representatives may be permitted to call witnesses after the close of the prosecution case, some of whom may be vulnerable.⁷⁶ With regard to [REDACTED]'s letter, Mr Zarambaud argues that it does not constitute a "material new circumstance" because the letter responds to a request of the defence, not the Chamber, and because it does not satisfy all of the conditions laid out in Rule 119(1) of the Rules.⁷⁷

33. Ms Douzima-Lawson joins with Mr Zarambaud in expressing concerns about victim safety, arguing that there is a heightened risk for witnesses and victims at this stage of proceedings because "the Accused and his supporters are now apprised [...] of the identity of all the witnesses [and] also of the content of their written and oral evidence".⁷⁸ Ms Douzima-Lawson also submits that [REDACTED]'s letter forms an insufficient basis for granting the accused provisional release because [REDACTED] neither

⁷⁴ ICC-01/05-01/08-1435-Conf-tENG, page 8.

⁷⁵ ICC-01/05-01/08-1435-Conf-tENG, pages 5-6.

⁷⁶ ICC-01/05-01/08-1435-Conf-tENG, page 6.

⁷⁷ ICC-01/05-01/08-1543-Conf, paragraph 12.

⁷⁸ ICC-01/05-01/08-1440-Conf-tENG, page 5; ICC-01/05-01/08-1553-Conf, paragraph 21.

“agrees to the conditions proposed by the defence” nor “guarantees to ensure the protection of victims and witnesses or that of the accused”.⁷⁹

34. The OPCV asserts that the First and Second Applications should be denied and detention maintained because (i) the progress of the trial and the evidence presented against the accused make him more of a flight risk than ever;⁸⁰ (ii) “the preeminent position of the accused in the community supporting him as well as the financial means at his disposal” could render the accused a risk to “victims and witnesses, independent of the location to which he is temporarily released”;⁸¹ and (iii) a decision releasing the accused “would be extremely difficult for victims to understand” and would have “an impact on victims’ confidence in the Court’s processes”.⁸² Further, the OPCV urges the Chamber to discount [REDACTED]’s “very brief” letter, arguing that the information contained therein “is insufficient to guarantee that an effective monitoring system could be put in place” in [REDACTED].⁸³

Observations of the legal representatives and the OPCV on the Third Application

35. Mr Zarambaud submits that the Third Application should be denied because “only the conditions provided in Article 58 regarding detention are to be taken into account, and those conditions have not changed” since the December 2010 Decision.⁸⁴ Mr Zarambaud also asserts that “Mr Jean-Pierre Bemba’s presence in Congo, at a moment when the enrolment process seems to be proceeding trouble-free [...] would risk causing serious public order problems”.⁸⁵ Moreover, Mr Zarambaud asserts that denying the Third Application would not forever prevent the accused

⁷⁹ ICC-01/05-01/08-1553-Conf, paragraphs 11-12.

⁸⁰ ICC-01/05-01/08-1433-Conf, paragraph 8; ICC-01/05-01/08-1552-Conf, paragraph 7.

⁸¹ ICC-01/05-01/08-1433-Conf, paragraph 8; ICC-01/05-01/08-1552-Conf, paragraph 13.

⁸² ICC-01/05-01/08-1552-Conf, paragraph 18.

⁸³ ICC-01/05-01/08-1552-Conf, paragraph 8.

⁸⁴ ICC-01/05-01/08-1539-Conf-tENG, paragraph 26.

⁸⁵ ICC-01/05-01/08-1539-Conf-tENG, paragraph 28.

from enrolling in DRC elections, citing (i) the failure of defence to provide the Chamber with the legislation that allegedly imposes this limitation; and (ii) the statement from Congo's National Independent Electoral Commission that in addition to enrolling during the registration period, "it is also possible to acquire voter status for the purposes of identification and registration if a person registers as a candidate".⁸⁶

36. Ms Douzima-Lawson also argues that the Third Application should be rejected because, in her submission, the accused's presence in the DRC for political purposes would be hard to keep secret and "could lead to public order difficulties".⁸⁷

37. The OPCV, for its part, asserts that the Third Application "finds no legal basis in the Court's legal framework" and argues that "the election process in the DRC does not appear, in and of itself, to constitute an exceptional circumstance warranting the Chamber's use of its powers for *humanitarian reasons*" (emphasis in original).⁸⁸ Noting that the defence has not provided any State guarantees that the accused will return for trial if the Third Application is granted,⁸⁹ the OPCV also argues that granting the accused even a brief release into the territory of the Congo would harm the psychological well-being of victims and undermine their confidence in the Court's processes.⁹⁰ Finally, the OPCV asserts that travelling to the DRC is not the only way for the accused to complete his electoral registration, and that denying the Third Application would therefore not necessarily prevent the accused from participating in the next elections.⁹¹

⁸⁶ ICC-01/05-01/08-1539-Conf-tENG, paragraph 20 (quoting ICC-01/05-01/08-1501-Conf-AnxA, page 3).

⁸⁷ ICC-01/05-01/08-1541-Conf, paragraphs 12 and 15-19.

⁸⁸ ICC-01/05-01/08-1540-Conf, paragraphs 9 and 13.

⁸⁹ ICC-01/05-01/08-1540-Conf, paragraphs 14 and 15.

⁹⁰ ICC-01/05-01/08-1540-Conf, paragraphs 24-27.

⁹¹ ICC-01/05-01/08-1540-Conf, paragraphs 28-31.

Observations of Belgium and [REDACTED]

38. Belgium's Observations, which are limited to the First Application, make clear that Belgium opposes any transfer of the accused into its territory, stating that the Government "*categorically opposes* the possible interim release of Mr [Bemba] into its territory" (emphasis in original).⁹²
39. Belgium's Observations identify a number of practical and legal obstacles to releasing the accused into Belgian territory under the conditions proposed in the First Application. These obstacles relate to (i) the inability to guarantee the accused's security while in Belgium;⁹³ (ii) the inability to provide a rapid response were the accused to violate the conditions of his release;⁹⁴ and (iii) the negative impact that the accused's release into Belgium may have on its relations with States in the Great Lakes Region.⁹⁵ In addition, Belgium identifies a "major legal problem" with the proposed release – namely, that the conditions proposed in the First Application would be akin to a "conditional detention" under Belgian law, and that there is no legal basis under Belgian law for this Court to order conditional detention on Belgian territory.⁹⁶
40. In addition, Belgium's Observations challenge a number of factual assertions in the First Application. Of particular importance, Belgium submits that (i) Belgium's 25 October 2010 letter to the Registry took no position on the possibility of the accused's release into Belgium, and therefore cannot be cast as a "new circumstance" justifying the accused's release, as argued by the defence;⁹⁷ and (ii) the Mayor of Waterloo's

⁹² ICC-01/05-01/08-1505-Conf-Anx2-tENG, page 17.

⁹³ ICC-01/05-01/08-1505-Conf-Anx2-tENG, pages 6-9.

⁹⁴ ICC-01/05-01/08-1505-Conf-Anx2-tENG, pages 9-10.

⁹⁵ ICC-01/05-01/08-1505-Conf-Anx2-tENG, page 9.

⁹⁶ ICC-01/05-01/08-1505-Conf-Anx2-tENG, pages 10 and 14-17. Belgium does leave open the possibility that this problem could be solved through a formal agreement between Belgium and the Court regarding provisional release.

⁹⁷ ICC-01/05-01/08-1505-Conf-Anx2-tENG, page 10.

8 April 2011 letter states that he is not empowered to make decisions regarding the accused's possible release into Belgium and that in any event, the Waterloo District lacks the ability to monitor and protect the accused with the resources at its disposal.⁹⁸

41. [REDACTED], in its brief observations, takes the position that "[REDACTED]" and informs the Chamber that "[REDACTED]".⁹⁹ Further, [REDACTED] states that "[REDACTED]" if the Chamber grants the accused provisional release into the territory of [REDACTED].¹⁰⁰

III. Relevant provisions

42. In accordance with Article 21(1) of the Statute, the Chamber has, in ruling on the Applications for Release, considered Articles 58, 60, 61 and 64 of the Statute and Rule 118 of the Rules of Procedure and Evidence ("Rules").

IV. Analysis

Threshold Question: Availability of Preliminary Release at the Trial Stage

43. No other accused before the Court has applied for provisional release after the commencement of trial or for interim release during the Court's recess. As such, the Chamber considers it necessary to address as a threshold matter the question of whether there is a proper legal basis for the accused to seek provisional release at the trial stage of proceedings.

44. The First and Second Applications are made under Article 60(3) of the

⁹⁸ ICC-01/05-01/08-1505-Conf-Anx2-tENG, page 11.

⁹⁹ ICC-01/05-01/08-1556-Conf-Anx2.

¹⁰⁰ ICC-01/05-01/08-1556-Conf-Anx2.

Statute, which states, in relevant part, that the Pre-Trial Chamber “may review [its ruling on the release or detention of the person] at any time on the request of the Prosecutor or the person.”¹⁰¹ The Chamber notes that Article 60 of the Statute, by its terms, concerns only the period prior to the commencement of trial. There is therefore a plausible argument that Article 60 does not provide a proper legal basis for an accused to seek provisional release after his trial begins.

45. In the Chamber’s view, however, a close reading of Articles 60(3) and 61(11) of the Statute and Rule 118(2) of the Rules compels the opposite conclusion. Both Article 60(3) and Rule 118(2) provide that the Pre-Trial Chamber may review its ruling on the release or detention of the person “*at any time* on the request of the Prosecutor or the person” (emphasis added). Article 61(11) of the Statute provides that the Trial Chamber “may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in th[e trial] proceedings”.

46. Because Article 60(3) and Rule 118(2) employ the words “at any time” and because Article 61(11)’s grant of authority to the Trial Chamber does not specifically exclude the review of previous detention rulings, it follows that Article 60(3) of the Statute permits (i) the accused to apply for provisional release during trial; and (ii) the Trial Chamber to consider such an application when made. Put differently, the commencement of trial does not extinguish the accused’s right to request that the Chamber review its previous ruling(s) on detention. It merely extinguishes the automatic review that is required at least every 120 days at the Pre-Trial stage under Rule 118(2) of the Rules.¹⁰²

¹⁰¹ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 2.

¹⁰² See also ICC-01/05-01/08-1088, paragraph 26.

47. For this reason, the Trial Chamber concludes that it may properly consider the Applications for Release, notwithstanding the fact that the accused's trial is underway. With this threshold question resolved, the Chamber now turns to the applicable standard of review.

Applicable Legal Standard

48. The arrest and detention of an accused are governed by Articles 58(1) and 60(2) of the Statute. Detention may be justified to ensure the individual's appearance at trial, to ensure that he or she does not obstruct or endanger the investigation or the court proceedings, or to prevent him or her from committing crimes within the jurisdiction of the Court arising out of the same circumstances as the case that the Chamber is considering.¹⁰³

49. Where, as here, the accused is detained pursuant to an earlier order of the Court, the Chamber will modify its earlier order only "if it is satisfied that changed circumstances so require".¹⁰⁴ As the Appeals Chamber has held, "the 'requirement of changed circumstances [in Article 60(3) of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.'"¹⁰⁵ In undertaking its inquiry, "the Chamber must revert to the [earlier] ruling on detention to determine whether there has been a change in circumstances that have a bearing on

¹⁰³ Article 58(1)(b) of the Statute.

¹⁰⁴ Article 60(3) of the Statute.

¹⁰⁵ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "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", 19 November 2010, ICC-01/05-01/08-1019 OA4, paragraph 51 (quoting Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "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 of South Africa", 2 December 2009, ICC-01/05-01/08-631-RED OA2, paragraph 60).

the conditions under article 58(1) of the Statute.”¹⁰⁶

50. Thus, the starting point for the Chamber’s review is the December 2010 Decision, in which the Chamber ruled that the accused was to remain in custody.¹⁰⁷ If the Chamber concludes that the facts underlying the December 2010 Decision remain unchanged and that there are no new circumstances bearing on the conditions under Article 58(1) of the Statute, the Chamber’s analysis ends there and the accused remains in custody.¹⁰⁸ If the Chamber concludes that the facts underlying the December 2010 Decision have changed or that there are new circumstances, the Chamber must then consider whether the conditions of Article 58(1) of the Statute are still satisfied in light of the changes. If the Article 58(1) conditions are satisfied despite the changed circumstances, then the accused *must* remain in custody. If the Article 58(1) conditions are no longer satisfied, then the accused *must* be released. In this respect, the decision on detention or release “is not of a discretionary nature”.¹⁰⁹

51. In addition to the above analysis, the Chamber may also invoke its inherent powers under Article 64(6)(f) of the Statute to grant an accused provisional or temporary release in “exceptional humanitarian circumstances”.¹¹⁰ Both this Chamber and the Pre-Trial Chamber have previously invoked this power to permit the accused to leave detention for brief periods to attend memorial services for deceased relatives.¹¹¹

¹⁰⁶ ICC-01/05-01/08-1019 OA4, paragraph 52.

¹⁰⁷ ICC-01/05-01/08-1088, paragraph 48.

¹⁰⁸ ICC-01/05-01/08-1019 OA4, paragraph 52.

¹⁰⁹ ICC-01/05-01/08-631-RED OA2, 2 December 2009, paragraph 59.

¹¹⁰ Public Redacted Version of ICC-01/05-01/08-437-RED: Decision on the Defences Urgent Request concerning Mr Jean-Pierre Bemba's Attendance of his Father's Funeral, ICC-01/05-01/08-437-RED, 3 July 2009, paragraph 9; Public Redacted Version of ICC-01/05-01/08-1099-RED: Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, ICC-01/05-01/08-1099-RED, 7 January 2011, paragraph 13.

¹¹¹ ICC-01/05-01/08-437-RED, pages 5-6; ICC-01/05-01/08-1099-RED, 7 January 2011, paragraph 16.

52. It is within this legal framework that the Chamber now turns to the substance of the Applications for Release.

Article 58(1)(a) of the Statute

53. The first pre-requisite for detention is the requirement, under Article 58(1)(a) of the Statute, that “there are reasonable grounds to believe that the accused has committed crimes within the jurisdiction of the Court”. This requirement is plainly satisfied here and the defence does not argue otherwise. Charges have been confirmed against Mr Bemba, which necessitated a finding by the Pre-Trial Chamber that there were “substantial grounds to believe” that Mr Bemba committed the crimes charged – an even higher evidentiary threshold than that required under Article 58(1)(a) of the Statute.¹¹² Article 58(1)(a)’s “reasonable grounds” requirement is therefore satisfied at this stage.

Article 58(1)(b) of the Statute

54. The second pre-requisite for detention is a finding that the accused’s detention is necessary due to one of the considerations enumerated in Article 58(1)(b) of the Statute. On this point, the Chamber is satisfied that the accused’s continued detention is required to “ensure [his] presence at trial” (Article 58(1)(b)(i)) and to ensure that he does not “obstruct or endanger” the Court’s proceedings (Article 58(1)(b)(ii)).

Article 58(1)(b)(i) of the Statute

55. In relation to Article 58(1)(b)(i), the Chamber concludes that the accused remains a flight risk. In the Chamber’s view, and as the Appeals Chamber

¹¹² Article 61(7) of the Statute.

has confirmed, the gravity of the charges against the accused, the fact that those charges have been confirmed, and the potential for a substantial sentence in case of conviction constitute powerful incentives to abscond.¹¹³ This incentive is further increased because at this stage of the trial, a significant portion of the prosecution's incriminatory evidence has been presented against the accused.

56. What is more, the accused'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.¹¹⁴ In this regard, the Chamber notes the accused's representation that his "family and friends" would cover the costs of his security and monitoring in Belgium and his transport by private jet to the DRC.¹¹⁵ 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.

57. The Chamber is not persuaded by the defence's attempts to demonstrate "changed circumstances" that negate the risk of flight. The letters from the Belgian authorities that underpin the First Application cannot be considered "changed circumstances" by any measure.¹¹⁶ Besides the fact that neither letter so much as hints that Belgium would be willing to guarantee the accused's appearance at trial, Belgium's Observations demonstrate that it has neither the desire nor the means to guarantee the accused's security on its territory or his eventual return to the seat of the

¹¹³ ICC-01/05-01/08-631 OA2, 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 Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, paragraph 136.

¹¹⁴ ICC-01/05-01/08-631-RED OA2, paragraph 74; ICC-01/05-01/08-323 PT OA, paragraph 53; ICC-01/04-01/06-824, paragraph 137.

¹¹⁵ ICC-01/05-01/08-1387-Conf-Corr, paragraph 17; ICC-01/05-01/08-1501-Conf-tENG, paragraph 17.

¹¹⁶ ICC-01/05-01/08-1387-Conf-Corr, Anxs 1 and 2.

Court.¹¹⁷

58. The letter from the Host State is similarly unavailing.¹¹⁸ [REDACTED].¹¹⁹

Likewise, the Registry's letter merely addresses the possibility that it *might* be able to negotiate an *ad hoc* agreement with a State into whose territory the accused could hypothetically be released.¹²⁰ Hypotheticals and conditionals do not constitute "changed circumstances" for the purposes of Article 60(3) of the Statute.¹²¹

59. In contrast, [REDACTED]'s position does constitute a new circumstance bearing on the likelihood of the accused returning to trial, were he to be granted provisional release. [REDACTED] has agreed to accept the accused into its territory and has stated that it will be "[REDACTED]" if provisional release is granted.¹²² However, [REDACTED]'s brief letter and its equally succinct submission to this Chamber convey little more than a general willingness to accept the accused into [REDACTED]'s territory and do not specify which of Rule 119(1)'s conditions [REDACTED] would be able to implement. Critically, [REDACTED] does not guarantee to ensure the accused's return to the seat of the Court if he is released into [REDACTED]'s territory. In this regard, [REDACTED]'s letters do little to allay the Chamber's concerns regarding the possibility of the accused absconding. This is particularly true given that the accused appears to have no personal or family connections to [REDACTED].

60. In assessing the impact of the position taken by [REDACTED], the

¹¹⁷ ICC-01/05-01/08-1505-Conf-Anx2-tENG, pages 5-9 and 16.

¹¹⁸ ICC-01/05-01/08-1387-Conf-Anx3.

¹¹⁹ ICC-01/05-01/08-1387-Conf-Anx3.

¹²⁰ ICC-01/05-01/08-1387-Conf-Anx-4.

¹²¹ ICC-01/05-01/08-323 PT OA, paragraph 55.

¹²² ICC-01/05-01/08-1556-Conf-Anx2.

Chamber considers this new circumstance not in isolation but rather in the context of the other factors bearing on the accused's detention.¹²³ In other words, the Chamber's decision is not based on [REDACTED]'s position alone but on various factors assessed collectively.¹²⁴

61. Specifically, the Chamber has weighed the concerns outlined above in paragraphs 55, 56 and 59 against (i) [REDACTED]'s willingness to accept the accused into its territory; (ii) the compliant behaviour of the accused during his travel to Belgium in July 2009 and January 2010; (iii) the accused's apparent desire to live as a public figure rather than as a fugitive; and (iv) the fact that the accused is seeking provisional release for relatively short, discrete periods as opposed to release for an undetermined time. Balancing these considerations, the Chamber concludes that there is a meaningful risk that if provisionally released into the territory of [REDACTED], the accused would not return to complete his trial. On this basis, the Chamber concludes that the requirement of Article 58(1)(b)(i) of the Statute is met and that the accused's continued detention remains necessary to ensure his appearance at trial.¹²⁵

¹²³ ICC-01/05-01/08-323, paragraph 55; ICC-01/05-01/08-403, Decision on Application for Interim Release, 14 April 2009, paragraph 46; 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 of South Africa, 14 August 2009, paragraph 57.

¹²⁴ Thus, even if [REDACTED] were to guarantee that it would ensure that the accused returned to complete his trial and to implement each of Rule 119(1)'s conditions, this would not be dispositive. The Chamber would simply consider such assurances as part of the total mix of factors bearing on the question of the accused's detention.

¹²⁵ The Chamber is unconvinced by the defence's attempts to argue that denying the accused provisional release is inconsistent with the right to a fair trial under Article 67 of the Statute and Article 6 of the ECHR, the right to liberty of person under Article 5 of the ECHR, the prohibition against inhuman or degrading treatment under Article 3 of the ECHR and the presumption of innocence enshrined in Article 66(1) of the Statute. *See* ICC-01/05-01/08-1387-Conf-Corr, paragraphs 27-31. *First*, there is no inconsistency between the accused's right to a fair trial and the presumption of innocence on the one hand and a judicial process in which the accused is detained to ensure his appearance at trial and to prevent his interference with the Court's processes on the other. This is evidenced by the fact that the Statute contains provisions that cement an accused's right to a fair trial and his entitlement to the presumption of innocence *as well as* provisions that provide for the accused's detention throughout the judicial process. *Second*, Article 5 of the ECHR is inapposite because it expressly provides that an individual may be deprived of his liberty "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." *Third*, detaining the accused for a

Article 58(1)(b)(ii) of the Statute

62. Turning to Article 58(1)(b)(ii) of the Statute, the Chamber finds that there is a risk that if released, the accused may endanger the Court's proceedings by interfering with witnesses. While this factor was not referred to in the December 2010 Decision, the Chamber believes that it may consider alternative bases for the accused's detention, particularly in light of the Appeals Chamber's ruling regarding the broad inquiry that the Chamber is required to undertake in the context of detention decisions.¹²⁶

63. The Chamber recalls that the accused has been informed of the identities of all prosecution witnesses, a fact that increases the scope for witness interference. Moreover, the accused has the means available to him to interfere with witnesses by virtue of his position of influence in the region where many witnesses reside, his network of supporters and his apparent ability to muster substantial financial resources. The Chamber's concerns about witness intimidation are allayed to some degree by the fact that the accused is seeking provisional release for relatively short periods rather than for an undetermined period of time. It is self-evident, however, that releasing the accused for any meaningful period would increase his ability to interfere with witnesses. On this basis, the Chamber is not convinced that the period of release sought reduces the risk of witness interference by a significant degree.

64. The Chamber is unpersuaded by the defence's attempts to downplay the risk of witness interference on the basis that "the Prosecutor has already

reasonable period for the purpose of ensuring his appearance at trial is a far cry from the "inhuman or degrading treatment" proscribed by Article 3 of the ECHR.

¹²⁶ ICC-01/05-01/08-1019 OA4, paragraph 52. While the Appeals Chamber's 19 November 2010 Judgment concerned the Chamber's periodic review of detention at the pre-trial stage under Rule 118(2) of the Rules, the Chamber proceeds on the basis that the Appeals Chamber's ruling applies *mutatis mutandis* at the trial stage.

called almost all of his vulnerable witnesses".¹²⁷ One 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.¹²⁸ Moreover, some testifying witnesses have expressed concerns to the Chamber about their safety and that of their families, often because the area in which they live makes them vulnerable to retaliation. Against this backdrop, two witnesses who have not yet testified have been placed in the ICC Protection Program as the result of a threat assessment conducted by the Court.

65. While the Chamber recognises that the risk of witness interference involves an element of prediction, the Appeals Chamber has held that Article 58(1)(b)(ii) of the Statute may be satisfied if there is a "possibility" of witness interference.¹²⁹ The Chamber finds that at this stage of the proceedings, such a possibility exists and that this constitutes an independent ground for the accused's continued detention under Article 58(1)(b)(ii).¹³⁰

Article 60(4) of the Statute

66. While the defence does not base its Applications for Release on an "inexcusable delay by the Prosecutor" under Article 60(4) of the Statute, the Chamber will briefly consider this provision for the sake of completeness.

¹²⁷ ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraphs 6-9.

¹²⁸ Article 68(3) of the Statute; Rule 89(1) of the Rules.

¹²⁹ ICC-01/05-01/08-323 PT OA, paragraph 67.

¹³⁰ In its observations, the prosecution requests "an opportunity to renew its arguments with respect to Article 58(1)(b)(ii) of the Statute" if the Chamber decides to consider that provision. See ICC-01/05-01/08-1423-Conf, paragraph 14. In light of the extensive briefing from all parties and participants, the need for a timely decision and the fact that the prosecution could have advanced its Article 58(1)(b)(ii) arguments in its initial submissions, the Chamber decided not to give the prosecution an additional opportunity to brief its Article 58(1)(b)(ii) arguments. This cannot have prejudiced the prosecution in any way because the Chamber has ruled that detention is warranted under Article 58(1)(b)(ii).

67. Assuming, without deciding, that Article 60(4) is applicable at the trial stage, the Chamber finds that the accused has not been detained for an unreasonable period due to an inexcusable delay by the prosecution. Since the start of trial, the prosecution has made steady progress in the presentation of its case, has called over half of its witnesses and has not sought any significant adjournments. Article 60(4) is inapplicable in these circumstances.

The Third Application

68. The Third Application is to be summarily denied. The defence cites no provision of the Court's Statute, Rules or Regulations in support of the Application, and as far as the Court is aware, nothing in the Court's constitutional documents supports a grant of release for the purposes sought.

69. As evidenced by the Chamber's decisions of 3 July 2009 and 7 January 2011, the Chamber is open to permitting the accused to leave detention for humanitarian reasons in "exceptional circumstances".¹³¹ But travelling to the DRC to complete one's electoral registration is not the type of circumstance that warrants such extraordinary relief.

70. The Chamber is mindful that participation in the democratic process through voting in elections or running for public office is a fundamental right, enshrined in key human rights instruments such as the ICCPR and the ECHR.¹³² But these instruments, and case law decided pursuant to them, make clear that the right to participation in the democratic process is

¹³¹ ICC-01/05-01/08-437-RED, paragraph 9; ICC-01/05-01/08-1099-RED, paragraph 13.

¹³² ICCPR, Article 25; ECHR, Protocol I, Article 3.

not absolute and is subject to reasonable restrictions.¹³³

71. 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*. Because the Third Application is being denied on this basis, it was not necessary for the Chamber to seek the views of the DRC before issuing this Decision, as is usually the case under Rule 119(3) of the Rules.

72. To the extent that this decision results in the accused being unable to register for the upcoming elections,¹³⁴ the Chamber considers that to be an unavoidable consequence of his status as an individual against whom serious charges have been confirmed. In the Chamber's view, such a decision – which stands in contrast to a decision specifically enjoining a person from voting in elections or standing for public office – cannot be considered an unreasonable restriction on one's right to participate in the democratic process.

¹³³ See, e.g., ICCPR, Article 25 (“Every citizen shall have the right and the opportunity [to vote and be elected], without any of the distinctions mentioned in article 2 and without *unreasonable* restrictions”) (emphasis added); European Court of Human Rights, *Hirst v. The United Kingdom (No. 2)*, no. 74025/01 [2005] ECHR 681 (6 October 2005), paragraph 60 (“the [voting] rights bestowed by Article 3 of Protocol No. 1 are not absolute”); European Court of Human Rights, *Matthews v. United Kingdom*, no. 24833/94, ECHR 1999-I, paragraph 63 (“the [voting] rights set out in Article 3 of Protocol No. 1 are not absolute, but may be subject to limitations”).

¹³⁴ It is unclear to the Chamber whether travel to the DRC is the only way for the accused to register for the upcoming elections. As the submissions of Mr Zarambaud and the OPCV point out, alternative avenues may exist for the accused to complete his registration short of travelling to the DRC before the 5 July 2011 deadline. See ICC-01/05-01/08-1539-Conf-tENG, paragraph 20; ICC-01/05-01/08-1540-Conf, paragraphs 28-31. In any event, the Chamber need not resolve this question because its denial of the Third Application is based upon the Application's lack of a legal basis, as well as the Chamber's conclusions regarding the flight risk that the accused presents.

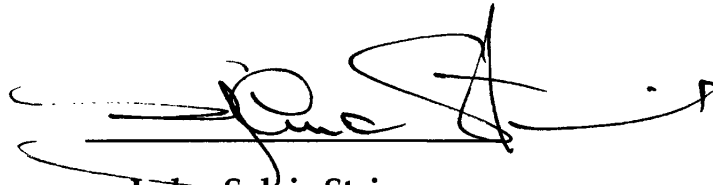
V. Conclusion

73. Having considered the submissions of the parties, the participants and the relevant States Parties, and after considering whether there exists any additional information that bears on the subject, the Chamber concludes that the conditions for the accused's detention under Article 58(1)(b) of the Statute continue to be met and that there has not been an inexcusable delay by the prosecution resulting in the accused being detained for an unreasonable period. In light of these findings, and because the parties and participants have been afforded ample opportunity to express their views by way of written submissions, the Chamber concludes that it is unnecessary to convene a status conference as requested in the Status Conference Application. Finally, the Chamber concludes that no legal or factual basis justifies granting the accused provisional release to travel to the DRC for the purposes of electoral registration.

74. The Chamber therefore:

- (a) DENIES the Applications for Release pursuant to Article 60(3) of the Statute;
- (b) DENIES the Status Conference Application as moot; and
- (c) ORDERS that the accused shall remain in detention.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 16 August 2011

At The Hague, The Netherlands