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Date: **2 July 2009**

**PRE-TRIAL CHAMBER III**

**Before: Judge Ekaterina Trendafilova, Single Judge**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF**

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

**Public Document**

**Written Submissions Supplementing the Oral Submissions Made by the Defence  
at the Hearing of 29 June 2009**

**Source: Mr Jean-Pierre Bemba Gombo's Defence Team**

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

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## **BACKGROUND TO THE DETENTION PROCEDURE**

1. On 9 May 2008, the Prosecutor applied to Pre-Trial Chamber III, now II, for the issuance of a provisional warrant of arrest for Mr Jean-Pierre Bemba Gombo.
2. In response to this application, the Pre-Trial Chamber, in its decision of 21 May 2008, requested the Prosecutor to provide additional information to substantiate his submissions.
3. In order to circumvent this requirement which it was unable to meet, on 23 May 2008, the Prosecution filed an application under article 92 of the Statute arguing that, based on information available to it, Mr Jean-Pierre Bemba Gombo was allegedly preparing to flee to the DR Congo.
4. Neither the nature nor the source of this information have been revealed to the Defence.
5. On 23 May 2008, the Chamber issued a provisional warrant of arrest on the basis of these claims and, on 10 June 2008, issued a further warrant replacing the first one.<sup>1</sup>
6. After his initial appearance, Mr Bemba filed three applications for interim release which were denied.
7. These decisions denying interim release all relied on the findings of the warrant of arrest of 10 June 2008 which Mr Jean-Pierre Bemba's Defence had purportedly not succeeded in shaking.<sup>2</sup>

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

<sup>2</sup> ICC-01/05-01/08-15-tENG.

8. On 15 June 2009, the Chamber issued a decision confirming the charges on the basis of responsibility as military commander (article 28(a)) in connection with just five counts.

9. The Chamber thus rejected all of its findings initially made in the decision of 10 June 2008 pertaining to the provisional warrant of arrest.

10. The Chamber convened a hearing for 29 June 2009 to review the detention in accordance with article 60(3).

11. Considering the Parties' submissions at this hearing, the Defence submits that Mr Jean-Pierre Bemba must be granted interim release on the following grounds:

#### **SUBMISSIONS**

12. Article 60(3) of the Statute states that the Pre-Trial Chamber may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

13. "Changed circumstances" therefore constitute the key criterion for making a ruling as to the possible release of a suspect.

14. The Single Judge concurred with this in her decision of 14 April 2009 in which she stated that:

15. "The Single Judge stresses that the revision of a decision on release or detention of a person depends on the criterion "changed circumstances" as set out in article 60(3) of the Statute..." (4)

16. In this regard, the question that the Single Judge must ask herself is whether the Pre-Trial Chamber would have rendered the same decision to issue a warrant of

arrest had the Chamber been placed in the same factual and legal circumstances as those contained in the decision on the confirmation of charges.

17. In this regard, the Defence submits, contrary to the Prosecutor's allegations, that there has been a marked change in circumstances with respect to:

18. The gravity of the crimes and severity of the punishment incurred;

19. Mr Jean-Pierre Bemba's individual responsibility;

20. The guarantee that he will appear at trial.

### **GRAVITY OF THE CRIMES**

21. The Single Judge based her decision of 14 April 2009 denying the application for interim release on the fact that "[t]he charges that Mr Jean-Pierre Bemba is facing are various and of such gravity that they might result in multiple convictions leading to an overall lengthy sentence and that the gravity of these crimes and charges, are those contained in the two previous decisions issuing the provisional warrant of arrest.

22. However, as aforesaid, this decision was set aside by the new decision on the confirmation of charges, which only charges Mr Bemba with unintentional omission in relation to 2 murders, 5 or 6 rapes, and theft committed by MLC soldiers.

23. Accordingly, the charges brought against Mr Bemba are now no longer of the same gravity or scope.

24. According to O. Triffterer, command responsibility is not included in the crimes enumerated in article 5 and detailed in articles 6 to 8 of the Statute; it cannot be considered a crime *per se*.<sup>3</sup>

25. Such responsibility is not of a serious nature by virtue of the fact that it only constitutes an accessory to the commission of another crime and cannot be charged more severely than the perpetrator. Command responsibility does not make the commander a co-perpetrator of the crimes committed.<sup>4</sup>

26. Moreover, in its decision on the confirmation of charges, the Chamber implicitly recognized the lesser gravity of charges of command responsibility compared to charges of responsibility as a co-perpetrator with which Mr Jean-Pierre Bemba was initially charged.

27. Indeed, in the decision on the confirmation of charges, the Pre-Trial Chamber stated twice that it would only examine Mr Bemba's responsibility under article 28 of the Statute if it determined that there was insufficient evidence to establish substantial grounds to believe that the suspect was responsible as a co-perpetrator within the meaning of article 25(3)(a) of the Statute.<sup>5</sup>

28. Accordingly, had it found that there was sufficient evidence to confirm the charges under article 25(3)(a), the Pre-Trial Chamber would not have examined the evidence tendered to establish reasonable grounds to believe that the charges under article 28 could be confirmed. By making this examination contingent on the absence of a determination of co-perpetration, the Chamber implicitly acknowledged that

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<sup>3</sup> [...] Mere failure to control the subordinates does not per se bring into play this charge. The conclusion, therefore, should be that the commander will not be liable in this case, since command responsibility is not a crime per se, but a mere form or participation into another crime. Participation is always to be considered accessory to the primary conduct, so that a participant cannot be charged more severely than the primary perpetrator. [...]"

<sup>4</sup> *Idem*.

<sup>5</sup> Paragraphs 342 and 402 of the decision on the confirmation of charges of 15 June 2009.

superior responsibility is a form of subsidiary responsibility and is, by virtue of that, of less gravity than co-perpetration.

29. Accordingly, it may be concluded that the rejection of the co-perpetration charges and the confirmation of the superior responsibility charges – charges which themselves were expressly requested by the Pre-Trial Chamber – constitute a substantial change in the circumstances of the case. Article 60(3) of the Statute should be applied, since changed circumstances justify the modification of the Pre-Trial Chamber's previous rulings as to detention.

30. In her decision of 14 April 2009, the Single Judge also acknowledged, in more explicit terms, that the determination of Mr Jean-Pierre Bemba's responsibility under article 28(a) of the Statute would give the Chamber cause to reconsider the need for detention: "[TRANSLATION][t]he Single Judge recalls the "Chamber's recent decision adjourning the hearing, in which it requested the Prosecutor "to consider submitting to the Chamber [...] an amended document containing the charges "addressing article 28 of the Statute as possible mode of criminal liability [...] The Single Judge underlines that this "was without any predetermination on the possible application of the form of participation invoked "by the Prosecutor in the amended document containing the charges (article 25(3)(a) "of the Statute). Accordingly, the Chamber's earlier findings in "the 10 June 2008 Decision with respect to the applicant's responsibility under "article 25(3)(a) of the Statute still stand, until the Chamber has made its "final determination on whether to confirm the charges against him in its upcoming decision."

31. By specifying that, insofar as these decisions were based on the Decision of 10 June 2008 pertaining to Mr Jean-Pierre Bemba's responsibility under article 25(3)(a), the decisions to reject the various applications for release still stood until the Chamber ruled on the confirmation of these charges and, by deciding that these

decisions were henceforth based on responsibility under article 28(a) of the Statute, the Single Judge thereby explicitly recognized the need to modify her decisions as to Mr Jean-Pierre Bemba's detention.

32. The jurisprudence of the ICTY also expressly acknowledges the lesser gravity of charges involving command responsibility compared to those involving co-perpetrator responsibility.

33. In *Hadžihasanović*, the Trial Chamber considered that the sentencing scale applicable to those accused convicted on the basis of article 7(1), namely as perpetrators, co-perpetrators or accomplices, could not be applied to those accused who are convicted as superiors (on the basis of article 7(3)).<sup>6</sup> The Chamber suggests that superior responsibility entails a shorter sentence because it is possible to find the superior guilty in the absence of the *actus reus* and the *mens rea* of the crime.

34. Thus, on several occasions, commanders who incurred responsibility on this basis were granted interim release [provisional release under the ICTY Statute] even in the most serious cases.

35. The following are such cases:

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<sup>6</sup> ICTY, Trial Chamber, *Prosecutor v. Enver Hadžihasanović, Amir Kubura*, Judgement, 15 March 2006, para. 2076: "When a person is found responsible solely on the basis of Article 7(1) of the Statute, or cumulatively in conjunction with Article 7(3), the gravity of the offence is evaluated in view of two elements: the inherent gravity of the acts committed and the form and degree of the Accused's participation in the crimes in question. <sup>4879</sup> The concept of command responsibility in this regard is exceptional in law in that it allows for a superior to be found guilty of a crime even if he had no part whatsoever in its commission (absence of an *actus reus*), and even if he never intended to commit the crime (absence of *mens rea*). Accordingly, the Chamber finds that the *sui generis* nature of command responsibility under Article 7(3) of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article 7(1) of the Statute, or cumulatively under Articles 7(1) and 7(3), is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article 7(1)."



**Halilović** (Decision IT-01-48-PT of 13 December 2001), charged with command responsibility for 62 murders committed in Gbadolite and Uzdol. The Prosecution concurred with the provisional release.<sup>7</sup>

**Perišić (Decision of 9 June 2005 No. IT-04-81-PT)**

Charged with the same responsibility for crimes of pillaging, planning and execution of members, inhumane acts, persecution of civilians on the basis of race and religion, extermination and attack on civilians in Sarajevo and massacres of about one hundred Muslims in Srebrenica.<sup>8</sup>

**Haradinaj (Decision IT-04-84-PT)<sup>9</sup>**

Charged with responsibility on the basis of direct perpetration of 17 counts of crimes against humanity and 20 counts of war crimes.

**Simatović (Decision IT-03-69-PT)<sup>10</sup>**

Charged with direct responsibility in the perpetration or commission of murders against Muslim youths.

**Pavković (Decision IT-05-87-PT)<sup>11</sup>**

Charged on the basis of participation in a criminal enterprise for deporting and murdering Albanians.

Provisional release was upheld in spite of the Prosecutor's appeal.

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<sup>7</sup> <http://www.icty.org/x/cases/halilovic/ind/en/hal-ii010912e.pdf>

<sup>8</sup> <http://www.icty.org/x/cases/perisic/ind/en/per-ii050222e.htm>

<sup>9</sup> <http://www.icty.org/x/cases/haradinaj/ind/en/har-ii050224e.pdf>

<sup>10</sup> [http://www.icty.org/x/cases/stanisic\\_simatovic/ind/en/sta-ai031209e.pdf](http://www.icty.org/x/cases/stanisic_simatovic/ind/en/sta-ai031209e.pdf)

<sup>11</sup> <http://www.icty.org/x/cases/milutinovic/tdec/en/050930.htm>

**Sreten Lukić (Decision, IT-05-87-PT)<sup>12</sup>**

Charged with criminal participation in the deportation and murder of Kosovo Albanians. He was provisionally released despite having appeared before the Tribunal on the basis of a warrant of arrest.

**RISK OF ABSCONDING**

36. The Appeals Chamber of the Court and this Chamber have, on a number of occasions, established a proportionate link between the gravity of the charges brought against a person and the risk that he or she might abscond.

37. In *Lubanga*, the Appeals Chamber held:

38. “If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond.”<sup>13</sup>

39. At this stage, it appears necessary not to adopt the Prosecution’s view that the burden lies with a person applying for interim release to prove that he or she will not abscond.

40. Rather, the burden lies with the Prosecution and the Chamber to prove why Mr Bemba should be considered a flight risk.

41. In its judgment of 13 February 2007, the Appeals Chamber considered that the Pre-Trial Chamber in *Lubanga* failed to adequately “explain in more detail why it reached its conclusion that the Appellant may abscond.”<sup>14</sup> Indeed, in its decision

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<sup>12</sup> <http://www.icty.org/x/cases/milutinovic/tdec/en/051003.htm>

<sup>13</sup> Appeals Chamber, *Prosecutor v. T. Lubanga Dyilo*, 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 OA7, 13 February 2007, para. 136.

<sup>14</sup> Appeals Chamber, *Prosecutor v. T. Lubanga Dyilo*, 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 OA7, 13 February 2007, para. 136.

denying interim release, the Pre-Trial Chamber must fully explain why it considers that a flight risk exists.<sup>15</sup>

42. In view of the 20 guarantees provided by Mr Bemba that he will appear before the Court, the burden lies with the Prosecutor to show why they are inadequate and to suggest further guarantees if necessary.

**Arrest on the basis of a secret warrant of arrest**

43. As a result of the Prosecutor's false allegations about the risk of absconding, Mr Bemba was arrested on the basis of a secret warrant of arrest. Mr Bemba was thus denied the opportunity of appearing voluntarily before the Court. At the ICTY, "voluntary surrender" is considered one of the factors in favour of interim release being granted. Furthermore at the ICTY, in cases of arrests on sealed indictments, failure to voluntarily surrender can no longer be viewed unfavourably:

44. *"Where an indicted person is "arrested on a sealed indictment", and where "[t]here is no suggestion that he knew of its existence", so that he had "no opportunity to surrender voluntarily", he is "denied the benefit which such a surrender would have provided to him in relation to this issue. [...] In such a case - absent specific evidence directed to that issue - the*

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<sup>15</sup> *Idem*, para. 17: "Furthermore, the Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the international contacts of the Appellant because there had been no evidence before that Chamber that the Appellant actually would make use of these contacts to abscond. The Appeals Chamber notes that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction. The Appeals Chamber notes furthermore that in paragraph 100 of the Decision on the Warrant of Arrest the Pre-Trial Chamber had noted publicly voiced concerns of the Appellant about the prospect of being prosecuted before the Court. In the second paragraph of page 2 of the Impugned Decision the Pre-Trial Chamber had made reference to the Decision on the Warrant of Arrest. Although it would have been preferable for the Pre-Trial Chamber to explain in more detail in the Impugned Decision itself why it came to the conclusion that the Appellant might abscond, it is clear that there was sufficient information before the Pre-Trial Chamber that enabled the Pre-Trial Chamber to make an assessment that such a risk indeed existed."

*Trial Chamber cannot take the fact that the applicant did not voluntarily surrender into account.”<sup>16</sup>*

45. Thus, the Prosecutor has no evidence to counter Mr Bemba’s contention that, if he were to be granted interim release, he would appear at trial.

46. Witness intimidation

47. The Prosecutor has the obligation to identify concrete threats to witnesses; a generalised fear or concerns about potential witnesses or victims in the event of release being granted cannot be considered valid reasons for continued detention:

48. *“...it would be manifestly unfair to such an applicant to keep him in detention because of a possible reaction by the prosecution’s witnesses to the mere fact that he has been granted provisional release.”<sup>17</sup>*

49. At the ICTY, for interim release not to be granted, the existence of danger beyond the mere likelihood of threats to witnesses has to be proven. There must be proof of previous intimidation or specific reasons to believe that the accused person will intimidate witnesses in the future:

50. Provisional release cannot be granted unless the Trial Chamber is satisfied that an accused, if released, would not pose a danger to victims, witnesses or other persons. This assessment cannot be made in the abstract – a concrete danger needs to be identified. (33)”<sup>18</sup>

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<sup>16</sup> *Prosecutor v. Brđanin*, Decision on Motion by Radoslav Brđanin for Provisional Release, 18 September 2000, IT-99-36-PT.

<sup>17</sup> *Prosecutor v. Brđanin*, Decision on Motion by Radoslav Brđanin for Provisional Release, 18 September 2000, IT-99-36-PT.

<sup>18</sup> *Prosecutor v. Brahimaj*, Decision on Motion of Lahi Brahimaj on Provisional Release, 14 December 2007, IT-04-84-T.

51. See also: "The assessment whether the accused would pose a danger cannot be made only *in abstracto*; a concrete danger has to be identified."<sup>19</sup>

52. Lastly, the Prosecutor cannot object to release on the ground that the names of witnesses were disclosed to the accused. The Court rejected that by stating that it is not an argument in favour of continued detention because of a potential danger. As stated above, a concrete evidence-based threat must exist.<sup>20</sup>

### **Cooperation**

53. Mr Bemba has offered to cooperate with the Prosecutor, but the Prosecutor turned down Mr Bemba's offer. Refusal to cooperate will not be held against the accused. An offer of cooperation must be considered in the accused's favour when he applies for interim release.

54. "An accused may not "be penalized because he declines to cooperate with the Prosecution," cooperation "may weigh in [the accused's] favour when he seeks to be provisionally released."<sup>41</sup><sup>21</sup>

### **Government guarantees**

55. The value of government guarantees must be proportionate to the following: 1) the extent to which the Government has cooperated with the Court and 2) the extent to which the Government will be willing to arrest the accused for any breach of the conditions of his interim release.

56. The ICTY took this factor into consideration in its *Decision on Momčilo Perišić's Motion for Provisional Release of 9 June 2005* in which it accepted that the Government

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<sup>19</sup> *Prosecutor v. Haradinaj, Decision on Ramush Haradinaj's Motion for Provisional Release*, 6 June 2005, IT-04-84-PT.

<sup>20</sup> *Prosecutor v. Simatović, Decision on Provisional Release*, 26 May 2008, IT-03-69-PT, paragraph 54. - [http://www.icty.org/x/cases/stanisic\\_simatovic/tdec/en/080526\\_1.pdf](http://www.icty.org/x/cases/stanisic_simatovic/tdec/en/080526_1.pdf).

<sup>21</sup> *Prosecutor v. Pandurević, Decision on Interlocutory Appeal from Trial Chamber's Decision Denying Vito Pandurević's Application for Provisional Release*, 3 October 2005, IT-05-86-AR65.1.

of Serbia and Montenegro, which was severely criticised, had made reforms and was cooperating with the Tribunal.

57. In this respect, it should be noted that Mr Jean Pierre Bemba continues to plead not guilty and is presumed innocent.

58. Mr Jean Pierre Bemba has chosen the following States to host him during his interim release: **Belgium, Portugal, France, Germany, Italy and South Africa.**

59. The reasons for these choices are as follows:

60. The focus of his interests – his family members, wife, children who are in education, his real estate and bank accounts – lies in the first three States. Article 18 of the European convention on human rights, which protects private and family life, must be taken into account: his wife risks losing an eye as a result of stress related to her husband's detention and the children have missed a school year for the same reason.

61. These countries have a law pertaining to cooperation with the International Criminal Court since they are signatories to the Treaty of Rome. They have the obligation to facilitate investigations and prosecutions before the Court pursuant to article 93 of the Rome Statute.

62. These countries' proximity to The Netherlands where the Court is located or, alternatively, their material capacity to ensure the appearance of Mr JP Bemba.

63. Some of these States have already proven that, in practical terms, they were capable of arresting Mr Jean Pierre Bemba Gombo on their soil and surrendering him to the Court and even of seizing his assets.

64. The distance between these receiving States and the countries in which the witnesses and victims are purportedly located is an important factor.

65. It should be noted that the European Commissioner Louis Michel<sup>22</sup> – who has a thorough knowledge of Africa, and particularly of the Congo, and who also knows Jean Pierre Bemba Gombo personally – and *Bourgmestre* and former Belgian Minister, Serge Kubla,<sup>23</sup> have written letters testifying in his favour. They confirm that Mr Bemba will meet his responsibilities and will not flee. He will, however return before the International Criminal Court in the event of interim release.

66. Furthermore, and to ensure his appearance, the Chamber has the discretion, under article 60(5) of the Statute, to issue a warrant for his arrest notwithstanding interim release.

#### FOR THESE REASONS

67. The Defence urges Pre-Trial Chamber II to take into consideration these written submissions and the oral submissions it made at the hearing of 29 June 2009, which are considered to be reproduced in their entirety here.

[signed]

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Nkwebe Liriss  
Co-Lead Counsel

[signed]

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Karim A.A. Khan  
Co-Lead Counsel

[signed]

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Aime Kilolo Musamba  
Associate Counsel

Dated this 2 July 2009

At The Hague, The Netherlands

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<sup>22</sup> ICC-01/05-01/08-200-Anx3 1/2.

<sup>23</sup> ICC-01/05-01/08-200-Anx3 2/2.