ANNEX 1

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **3 October 2011**

THE APPEALS CHAMBER

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

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

Public Redacted version
Urgent
With an annex 1

Document in support of Defence Appeal against the Trial Chamber III's decision of 26 September 2011 entitled:*"Decision on the accused's application for provisionnal release in light of the Appeals Chamber's judgment of 19 August 2011"*

Source: **Defence for Mr Jean-Pierre Bemba Gombo**

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

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Other

I. BACKGROUND

1. On 6 June 2011, the Defence filed an application for Mr. Bemba's provisional release to [REDACTED] during Court recesses and periods when the Chamber does not sit for at least three consecutive days, including long weekends.[1] This was filed in advance of the summer judicial recess.

2. Three weeks later, on 27 June 2011, Trial Chamber III ("the Chamber") denied the Defence request.[2]

3. The Defence appealed the Chamber's decision, and on 19 August 2011, the Appeals Chamber rendered its "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release.[3]

4. On 22 September 2011, the Defence was informed for the first time, by way of an email from a Legal Officer from the Chamber, that the Prosecution had lost contact with at least the two next witnesses.[4] On 23 September 2011, by way of an email from the Prosecution to the Chamber, the Defence received further details of the Prosecution's inability to call witnesses on the list, putting the Defence and the Chamber on notice of likely breaks in the proceedings.[5]
5. On 26 September 2011, Trial Chamber III ("the Chamber") rendered its "Decision on the accused's application for provisional release in light of the Appeals Chamber's Judgement of 19 August 2011" ("the Impugned Decision").[6]
6. On 27 September 2011, the Defence filed its Notice of Appeal against the Impugned Decision, and hereby urgently appeals pursuant to Article 82(1)(b)

[1] ICC-01/05-01/08-1479-Conf
[2] ICC-01/05-01/08-1626-Red.
[3] ICC-01/05-01/08-1626-Conf
[4] [REDACTED]
[5] [REDACTED]
[6] ICC-01/05-01/08-1789-Conf

of the Rome Statute, Rule 154 of the Rules of Procedure and Evidence, and Regulation 64 of the Regulations of the Court.

7. The Defence notes that the next recess in the proceedings is scheduled for 7 – 17 October 2011, and as such asks that this appeal be treated as expedited.

II.ARGUMENTS

Ground 1: The impugned decision is based on a manifest error of law and procedure

First limb: the Chamber has not itself identified the appropriate conditions of release which [REDACTED]should implement in the event of provisional release

Second limb: the Chamber itself limited the observations of [REDACTED] to the conditions referred to in Rule 119 of the Rules of Procedure and Evidence

Third limb: the Chamber did not invite the Republic of [REDACTED] to provide information on its willingness and ability to implement additional conditions outside or beyond those listed in Rule 119 of the Rules of Procedure and Evidence

Fourth Limb: The Trial Chamber did not invite [REDACTED] to provide information on its willingness and capacity to implement additional conditions beyond those proposed by [REDACTED] itself on its own initiative in its various letters, particularly those of [REDACTED] and [REDACTED] (but notified on [REDACTED]).

Fifth Limb : The Chamber committed a manifest error in analyzing the letters from the Republic of [REDACTED] as containing final and definitive details as to all the practical steps that this state is able to take, when the details of security arrangements are not able to be revealed in correspondence which will be notified to all parties and participants.

8. According to the jurisprudence of the Appeals Chamber, the Trial Chamber

holds a discretionary power to analyse, in each case, if the conditions imposed during a period of provisional release will be able to minimize or eliminate the risk of flight of the accused, or the intimidation of witnesses referred to in Article 58(1) of the Statute.

9. Once provisional release has been granted, the Trial Chamber has the procedural obligation to identify the necessary conditions, and to seek from the state in question information as to its willingness and capacity to enforce these conditions on its territory.[7] The Trial Chamber in this case fell into error when it firstly failed to identify the conditions, and then failed to seek from [REDACTED] its willingness and capacity to enforce them. The procedure followed did not allow the Chamber to receive the relevant observations in order to be informed about the conditions that this State Party would have been able to apply on its territory.

10. The jurisprudence of the Appeals Chamber emphasizes that it is the responsibility of the Chamber, rather than the state into which conditional release is being sought, to set the conditions of release.[8] As a result, the Trial Chamber should have provided a concrete list of conditions to the Republic of [REDACTED], and the comprehensive conditions to have been applied in the case of the provisional release of Mr. Jean-Pierre Bemba, based on the Chamber's analysis of the situation. On the basis of those conditions presented by the Chamber, the State Party concerned would have been able to decide. This approach that would have allowed the Chamber to make an informed decision, guided by the unanimous jurisprudence of the Court which emphasizes that freedom is the rule, and detention the exception.

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[7] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release" ICC-01/05-01/08-1626-Conf du19-08-2011, à la page18, paragraphe 53

[8] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release" ICC-01/05-01/08-1626-Conf du19-08-2011, à la page18, paragraphe 53

11. Indeed, the letters of [REDACTED], such as those of [REDACTED]and [REDACTED] (but reported on [REDACTED]), by no means contain an exhaustive list of all conditions that [REDACTED] is able to implement should Mr. Jean-Pierre Bemba be released onto his territory.

12. [REDACTED] was never asked by the Chamber to provide a complete list of conditions, nor was [REDACTED] asked in abstracto which measures it would be able to provide. It is the responsibility of the Chamber itself to identify the necessary conditions and to then verify the willingness and capacity of the state concerned whether they are able to comply. State Parties are not provided with a complete list of conditions for provisional release, to allow them to exhaustively inform on their willingness and capacity to implement each of these conditions. On this point, the also Defence notes that neither the Statute of the International Criminal Court nor the Rules of Procedure and Evidence provide an exhaustive list of possible conditions to be imposed on provisional release.

13. Moreover, in its list of proposed conditions proposed on 29 July 2011, [REDACTED] committed to take "all measures necessary" to prevent the intimidation of witnesses. [9] It was the Chamber's obligation to seek clarifications from [REDACTED] by inviting further submissions which would have allowed the Judges to have been informed of its position on the measures proposed.

14. In fact, the list of measures set out in [REDACTED]s letter of [REDACTED]is a response to an Order of the Trial Chamber of 8 June 2011[10], who had requested observations of [REDACTED] solely on the conditions set out in Rule 119 of

[9] ICC-01/05-01/08-1621-Conf-Anx1, du 04-08-2011, à la page 3

[10] ICC-01/05-01/08-1492-Conf

the Rules of Procedure and Evidence. The Chamber never asked questions on the willingness or capacity of [REDACTED]to ask other questions outside those which Rule 119 anticipates.

15. The Chamber committed a manifest error of law and procedure in evaluating only those conditions set out in [REDACTED]'s letters, when it should rather have invited [REDACTED] to give information on its willingness and capacity to implement other conditions identified by the Judges themselves on the basis of their discretionary power to determine the most appropriate conditions. The Trial Chamber has committed a clear error of law and procedure by simply evaluating only the conditions set out in the various letters of [REDACTED] when it should invite the [REDACTED] to provide information on its willingness and ability to apply other conditions identified by the Judges themselves based on their discretion to determine the most appropriate conditions.

16. Beyond [REDACTED]s broad statements of principle as to the conditions to be implemented pursuant to Rule 119 of the Rules of Procedure and Evidence, the Chamber cannot reasonably expect [REDACTED] to communicate all details of security measures in the context of correspondence, notably the letter of [REDACTED] which was communicated to all parties and participants, including the Defence. Evidently, this is because these measures are aimed specifically at eliminating the risk of flight of the accused, or the potential interference with witnesses, but also because aspects may relate to the defence of the state, or the exercise of the state's rights within its territory. The details of security measures, although likely to assist the Judges, by their very nature cannot be set out in documents which will be read by all parties. Rather, the Chamber had an obligation to request additional information from [REDACTED] through the appropriate internal communication channels of the Court to which the parties do not have access, or even via an ex parte

status conference with [REDACTED] and the Registry.

17. In its letter of [REDACTED], [REDACTED] stated that it would set up a system to ensure both the safety and ongoing monitoring of Mr. Jean-Pierre Bemba. In the same letter, [REDACTED] added that it guarantees the return of the accused to appear at his trial when required by the Trial Chamber. [11]

18. [REDACTED].[12]

19. The Chamber erred in failing to appreciate the consequences of the agreement in principle from [REDACTED], and its willingness to cooperate with the Court in the specific context of the eventual release of the accused into its territory, and failed to invite that information be provided to the Court in a confidential manner.

20. For example, when the accused was twice released to go to Belgium, the Belgian state met confidentially with the relevant organs of the Registry, as directed by the Trial Chamber, to discuss the details of security measures that Belgium would accept and would have the capacity to implement as a condition of release. These details have never been disclosed to the Defence.

21. Given that [REDACTED] has given its agreement in principle and has expressed both its willingness and ability to cooperate with the court to facilitate the accused's provisional release on its territory, it was for the Chamber to convene an ex parte hearing, if necessary in the absence of the Defence, or to otherwise discuss with the State Party through the internal communication channel of the Registry (to which the parties and participants

[11] ICC-01/05-01/08-1621-Conf-Anx1, 04-08-2011, on the page 4
[12] ICC-01/05-01/08-1621-Conf-Anx1, du 04-08-2011, à la page 2

do not have access, as was the case of the two previous provisional releases of the accused into Belgium) on the measures to be implemented in order to remove the risk of flight, or the possible intimidation of witnesses.

22. Speculating on the willingness or capacity of [REDACTED] to implement additional conditions not specifically listed in its letters, or minimizing the effect [REDACTED]guarantee, or even by refraining to consider the guarantee as a new circumstances, constitutes unequal treatment of State Parties to the Rome Statute, and ultimately would violate Article 21 of that Statute which prohibits all forms of discrimination in the application and interpretation of the relevant legal texts.

Ground II: The Impugned Decision is based on a manifest error of assessment, in that the Trial Chamber considers that the conditions imposed by [REDACTED] **are not sufficient to remove or mitigate the risk of flight under article 58 of the Statute.**

23. The decision on the review of Mr. Bemba's detention of 17 December 2011, which resulted in an ongoing deprivation of Mr. Bemba's liberty, serves as the starting point in the current review of provisional release. Relying on this decision, the Chamber recalled that the accused had motives to flee given the seriousness of the charges against him, and the possibility of being sentenced to a significant sentence. On the other hand, the Chamber also based its decision to continue to incarcerate the accused on the financial resources available to the accused which could allegedly be used to flee.

24. In fact, if in the decision of 17 December 2011 the Chamber found that the accused could activate the means to flee if release, this finding was made in the absence of a State Guarantee. The situation has now dramatically changed, and it cannot reasonably be concluded that [REDACTED], being a large [REDACTED]which enjoys great respect with in the community of

nations, and which was [REDACTED] to ratify the Rome Statute, which proposed to put in place a system to remove the risk of flight, is unable to quash an attempted escape. The financial means of the accused, a private person, cannot outweigh the interest a state like [REDACTED] has in successfully completing an operation it has undertaken to carry out.

25. In its letter of [REDACTED], [REDACTED] stated that at the first indication of an attempted flight, the accused would be arrested, detained, and transferred to The Hague, accompanied by [REDACTED] police officers as far as the airport in The Netherlands. This necessarily implies the use of a monitoring device which will allow Mr. Bemba to be arrested at the first signs of an attempted escape. [REDACTED] itself spoke of guaranteeing that the accused would appear for trial.

26. Moreover, since obtaining the detention of 17 December 2010, the defense actually offered financial support for expenses related to travel and security of Jean Pierre Bemba in the event of release. However, it is not reasonable, without advancing any evidence in this regard, concluding that the creditors of the accused who are willing to give him help or lend him money through legitimate and legal a release decided by the Court would agree to do so in an illegal leak of a total illegality. Such a conclusion is that the trial of intent is based on a manifest error of assessment. In any event, even if such means were used, quod non in this case, it does not stand up to the funding of a State failing to prove the contrary.

27. [REDACTED]

Ground III:The contested decision is based on a manifest error of assessment in that the Trial Chamber considers that the conditions

proposed by the State of [REDACTED] are not sufficient to destroy or minimize the risk of intimidation of witnesses referred to Article 58 of the Statute

28. The approach of the Chamber in the Impugned Decision cannot be reconciled with jurisprudence from the international tribunals on the same issues. At the ICTY, for example, the Appeals Chamber held that:

> *"The Appeals Chamber notes also that despite the Prosecution's protestations, before it submitted the Rule 115 Motion, which is inadmissible in any event, it had not given a single concrete example of witness intimidation in this case. Even the example adduced with the Rule 115 motion, while they do discuss intimidation of witnesses in this case, show only a tenuous link to the accused...* ***A showing that a witness in a case has been intimidated does not equate to a showing that the Accused in this case did the intimidating."***[13]

29. The Chamber has heard from 29 witnesses in the present case. In the Impugned Decision, the Chamber relies on allegations that two of these witnesses - Witness 0173 and Witness 0179 - have experienced threats as a result of their testimony.

30. There is absolutely no information that these threats have in any way originated from the Defence. Both of these witnesses reside outside of the Democratic Republic of Congo, the country in which the Chamber alleges the accused continues to enjoy influence.

31. The Chamber itself notes that it is not in a position at this stage to reach conclusions as to "who is responsible for the alleged incidents of witness interference", but then leaps to the conclusion that "it is a reasonable

[13] *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84-AR65.1, Decision on Ramush Haradinaj's modified Provisional Release, 10 March 2006, footnote 101.

inference, however, that some may have originated from individuals who support the accused."[14] No basis is given for this "reasonable inference".

32. The Defence is aware that Article 58(1)(b)(ii) of the Statute may be satisfied if there is a "possibility" of witness interference. However, the Defence submits that this "possibility" cannot be pure speculation, but rather must have some basis or some kind of grounding. The Appeals Chamber has previously found that a Chamber is not obliged to take into consideration hypothetical arguments which are not supported by concrete evidence.[15] The Chamber cannot apply a more lenient standard to factors which militate against provisional release than it applies to factors which militate in favour of it.

33. The Chamber failed to refer to any basis for its conclusion that it was the accused, or supporters of the accused who were responsible for the alleged interference. There is no evidence before the Chamber that Mr. Bemba has sought, either through himself, or through others, to seek to intimidate witnesses. There is no evidence before the Chamber that associates of Mr. Bemba have ever sought to do this on their own behalf. There is no evidence before the Chamber from the United Nations Detention Unit that Mr. Bemba has used the telephone available to him to intimidate or direct others to intimidate witnesses. The Chamber's leap to blame and accuse Mr. Bemba and his unnamed associates has absolutely no basis. As such, the Defence submits that there is insufficient grounding for the Chamber's inference, which should rightly be quashed.

34. On this point, the Chamber did not consider that: (a) the threats could come from the person whom the Chamber has previously been informed has

[14] Impugned Decision, para. 31.
[15] ICC-01/05-01/08-323,para. 55.

threatened Prosecution witnesses in the present case;[16] (b) the interference stems from the witnesses themselves having compromised their protection by revealing to friends, or neighbours in their small communities that they were testifying against Mr. Bemba in The Hague; (c) the threats could have been fabricated by Witness 0173 and Witness 0179 in order to support claims for compensation; (d) the threats could have been fabricated by the witnesses in furtherance of the underlying bias against Mr. Bemba demonstrated during their testimony; or (e) the threats could have been made by the political opponents of Mr. Bemba who have a direct and significant interest in his provisional release being denied.

35. Regarding the allegations that pressure has been exerted on witnesses, the Defence notes that it was never invited at any time to respond or to make submissions on this point. As such, it would be contrary to the accused's fair trial rights to hold him in detention on facts upon which the Defence has never be given the opportunity to respond, in breach of Article 67 of the Statute.

36. There is a wealth of jurisprudence both at the ICC and internationally which requires that parties should be given the opportunity to make submissions prior to the Chamber making an adverse finding against them.At the ICC, this was most recently enumerated by the Presiding Judge Steiner, when she stated that: [17]

> If there is anything that implicates directly or indirectly the Defence in such report, of course the Defence will be communicated [sic] and will be given the opportunity to give its reasons or make its observations and

[16] ICC-01/05-01/08-1002-Conf-Red 24-01-2011
[17] Transcript, 29 August 2011, page 47, lines 2 – 5.

even if need be the witness can be called again to clarify in case any point has been not clarified yet.

37. In failing to give the Defence an opportunity to comment on these allegations, despite a direct undertaking from the bench on this point, the Chamber was in error, warranting the intervention of the Appeals Chamber.

38. The Defence was made aware during the testimony of Witness 0173, that there were concerns as to interference with this witness. The Defence raised the issue with the bench, asking whether it could be furnished with any relevant reports of VWU on this subject.[18] In responding, the Chamber was clear that there was no implication that the Defence was in any way involved. The Presiding Judge stated:[19]

> *"What I can ensure in advance to the Defence is that apparently the issue has been clarified, but without consulting VWU I cannot share with the Defence right now the conversations held between VWU and the Defence in that respect, but I can assure to the Defence that the Chamber sees no reason at all until now to infer any interference of the Defence with the witness. "*

39. This assertion from the Presiding Judge cannot be reconciled with the subsequent arbitrary finding that "it is a reasonable inference, however, that some may have originated from individuals who support the accused."[20] The Defence submits that such disparate rulings from the same bench undermine the principle of judicial finality, and warrant the intervention of the Appeals Chamber.

[18] Transcript, 29 August 2011, page 45, lines 17 – 21.
[19] Transcript, 29 August 2011, page 47.
[20] Impugned Decision, para. 31.

40. The Trial Chamber acknowledges that it does not know who is responsible for this intimidation. It is manifestly unreasonable to continue to detain the accused based on alleged intimidation by unknown actors.

41. As regards the regime of monitoring the accused's telephone calls, the Trial Chamber had the ability to order that the Registrar receive daily transcripts of the accused's telephone conversations, which would have allowed the Registrar to be aware of any confidential information concerning vulnerable witnesses. In this respect, the Defence notes that [REDACTED] has indicated its willingness to cooperate fully with the Court to ensure the proper conduct of its proceedings.

42. It is clear that the Chamber committed a manifest error of assessment in the evaluation of the extent of [REDACTED]s commitment to cooperate fully with the Court, which would extend to possibility of the providing to the Registrar on a daily basis the transcripts of the private communications of the accused.

43. The Defence attached to the present document the English version of its submission. [21]

RELIEF REQUESTED

44. In light of the flaws in the Impugned Decision outlined above, and in light of the urgency of the situation in light of the upcoming breaks in the trial schedule (none of which can be imputed to the Defence), the Defence respectfully requests that the Appeals Chamber;

   a. Reduce to a minimum the time within which the other parties and participants may submit their observations

[21] Confidential Annex 1

b. **QUASH** the Impugned Decision;

c. **ORDER** that the accused be provisionally released into the Republic of [REDACTED] for breaks in the proceedings longer than 3 days in length;

d. **ORDER** the immediate scheduling of a status conference and the attendance of the relevant parties, including representatives from the Registry of the Court, in order to put in place the logistics for the accused's provisional release.

Aimé Kilolo Musamba
Associate Counsel

Dated this Monday, 3rd of October 2011
At The Hague, The Netherlands