

UNITED
NATIONS



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-18-116-T

Date: 25 May 2021

Original: English

BEFORE THE SINGLE JUDGE

Before: Judge Vagn Joensen

Registrar: Mr. Abubacarr Tambadou

THE PROSECUTOR

v.

**ANSELME NZABONIMPA
JEAN DE DIEU NDAGIJIMANA
MARIE ROSE FATUMA
DICK PRUDENCE MUNYESHULI
AUGUSTIN NGIRABATWARE**

PUBLIC

**PUBLIC REDACTED VERSION OF MOTION SEEKING EXTENSION OF MR
TURINABO'S PROVISIONAL RELEASE IN RWANDA AND ORDERS ALLOWING HIM
TO ATTEND HIS TRIAL IN PERSON BEFORE THE IRMCT, DATED 16 AUGUST 2020**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid Rashid

Counsel with Residual Standing

Me Stéphane Bourgon *Ad.E.*

Counsel for the Accused:

Mr. Geoff Roberts for
Anselme Nzabonimpa

Me Philippe Larochelle for
Jean de Dieu Ndagijimana

Mr. Gatera Gashabana for
Marie Rose Fatuma

Mr. Kurt Kerns for
Dick Prudence Munyeshuli

Mr. David Hooper QC for
Augustin Ngirabatware

Further to the “Decision on Maximilien Turinabo’s Motion for Provisional Release” (“Provisional Release Order”) issued by the Single Judge on 29 March 2019¹ and the “Single Judge’s Order Concluding Written Exchanges in Lieu of the Status Conference and Order for Submissions” issued on 30 June 2020 (“30 June Order”),² Counsel representing Maximilien Turinabo (“Defence” or “Mr Turinabo”) hereby submits this:

**Public Redacted Version of Motion Seeking Extension of Mr Turinabo’s
Provisional Release in Rwanda and Orders Allowing Him to Attend His Trial in
Person Before the IRMCT, Dated 16 August 2020**

INTRODUCTION AND OVERVIEW

1. The Indictment against Mr Turinabo was confirmed on 24 August 2018.³ On 3 September 2018, Mr Turinabo was arrested and detained in Kigali, Rwanda and subsequently transferred in the custody of the International Residual Mechanism for Criminal Tribunals (“IRMCT”) on 11 September 2018. On 22 August 2019, having served almost twelve months in pre-trial detention at the United Nations Detention Facility (« UNDF ») in Arusha, Mr Turinabo was effectively provisionally released in Rwanda.⁴
2. In the Annex to his 30 June Order, the Single Judge invited any defendant who intends to remain on provisional release during trial proceedings or otherwise litigate issues surrounding the termination of provisional release at the commencement of trial to file the relevant motion.⁵ More recently, the Single Judge, by electronic correspondence, through his Senior Legal Officer, indicated *inter alia*, that “(p)rovisional release at this stage has been granted with respect

¹ *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo’s Motion for Provisional Release, 29 March 2020. All further references are to the *Turinabo et al.* case unless otherwise indicated.

² Single Judge’s Order Concluding Written Exchanges in Lieu of the Status Conference and Order for Submissions, 30 June 2020.

³ Order on Confirmation of Indictment, 24 August 2018.

⁴ Registrar’s Submission in Relation to Provisional release, 23 August 2019, para. 2.

⁵ 30 June Order, Annex, para. 6

to release in Rwanda and not in Tanzania” and that any request “that provisional release be continued in Rwanda notwithstanding the commencement of trial proceedings” would, in effect, “constitute a waiver of the right to be present at trial (...)”.⁶

3. Since being granted provisional release in Rwanda, Mr Turinabo has fully respected all conditions imposed on him in the Provisional Release Order and he has every intention of continuing to do so.
4. Mr Turinabo has the right to be present in person during his trial and insists on doing so. Accordingly, Mr Turinabo respectfully requests the Single Judge to extend his period of provisional release in Rwanda until delivery of the trial judgment and to issue the orders required to allow him to attend his trial before the IRMCT in Arusha, in person, without being detained.
5. No statutory authority precludes Mr Turinabo from attending his trial without being detained. Moreover, the IRMCT Host State Agreement⁷ with Tanzania provides for such a possibility.
6. More importantly, no reason justifies Mr Turinabo’s detention during his trial. In fact, the reasons that justified Mr Turinabo being granted provisional release on 29 March 2019 have not changed and carry even more weight today. Additional factors also militate in favour of Mr Turinabo not being detained during his trial such as the benign nature of the offences Mr Turinabo is charged with in comparison to core crimes under the Statute of the International Residual Mechanism for Criminal Tribunals (“Statute”), the risk of being detained for a period longer than the sentence that could be imposed at the end of the proceedings as well as humanitarian considerations, including the

⁶ Email from the Senior Legal Officer, 22 July 2020 at 08h29 (“22 July Email”).

⁷ Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Residual Mechanism for Criminal Tribunals, 26 November 2013 (“Host State Agreement” or “IRMCT Host State Agreement”), article 38(2).

conditions of detention at the UNDF in light of Mr Turinabo's age, the likelihood of Mr Turinabo being isolated if detained at the UNDF due to restrictions likely to be imposed to cope with the Covid-19 pandemic and Mr Turinabo not being able to effectively participate in trial proceedings in these conditions.

7. Mr Turinabo thus requests the Single Judge to extend his period of provisional release in Rwanda and to issue orders: (i) authorizing him, while on provisional release in Rwanda, to leave the territory of Rwanda for definite periods of time for the specific purpose of attending his trial in Arusha, Tanzania, subject to specific conditions; (ii) to the Government of Rwanda, to allow Mr Turinabo, while on provisional release in Rwanda, to leave the territory of Rwanda for definite periods of time for the specific purpose of attending his trial before the IRMCT; (iii) to the Government of Tanzania, to allow and facilitate Mr Turinabo's re-entry in Tanzania, while on provisional release in Rwanda, and his stay in Arusha for definite periods of time for the specific purpose of attending his trial before the IRMCT; (iv) to the Registry, to enter into consultations with the Government of Rwanda and the Government of Tanzania for the purpose of facilitating Mr Turinabo's: (i) provisional release in Rwanda, (ii) safe travel between Rwanda and Tanzania; and (iii) presence in person during his trial before the IRMCT.
8. In support of the foregoing, Mr Turinabo hereby provides a detailed statement and undertaking to fully respect any conditions imposed by the Single Judge as part of his decision extending his period of provisional release in Rwanda and allowing him to be present in person during his trial, without being detained.

PROCEDURAL BACKGROUND

9. Mr Turinabo was arrested in Rwanda on 3 September 2018 and subsequently transferred to the UNDF in Arusha, Tanzania, on 11 September 2018.

10. On 14 February 2019, Mr Turinabo moved for provisional release pending determination of the charges against him, either in Rwanda or in Tanzania.⁸
11. On 20 February 2019, the Single Judge provided the Government of Rwanda and the Government of Tanzania with an opportunity to be heard in relation to Mr Turinabo's motion for provisional release, in accordance with Rule 68(B).⁹ Neither Rwanda nor Tanzania filed submissions.¹⁰
12. On 29 March 2019, the Single Judge granted provisional release to Mr Turinabo in Rwanda.¹¹
13. On the same date, the Single Judge dismissed Mr Nzabonimpa's request for provisional release in Arusha, Tanzania, stating that "in line with the Host State Agreement, Tanzania's support is required for the provisional release of Nzabonimpa on its territory and that this is a relevant consideration in assessing whether an accused person can be provisionally released onto its territory".¹²
14. On 1 April 2019, the Prosecution appealed the Provisional Release Order¹³ and on 3 April 2019, the Presiding Judge of the Appeals Chambers stayed the Single Judge's Provisional Release Order until the Appeals Chambers renders its decision on the merits of the Prosecution Appeal.¹⁴
15. On 5 August 2019, the Appeals Chambers dismissed the Prosecution Appeal in its entirety.¹⁵

⁸ Motion for provision release, 14 February 2019.

⁹ Order for Submissions, 20 February 2019.

¹⁰ Provisional Release Order, para. 4.

¹¹ Provisional Release Order, p. 7-9.

¹² Decision on Anselme Nzabonimpa's Motion for Provisional Release, 29 March 2019, paras. 15-16.

¹³ Prosecution Appeal of Decision Granting Turinabo Provisional Release, 1 April 2019 ("Prosecution Appeal").

¹⁴ Decision on the Prosecution Requests to Stay Decisions Granting Provisional Release, 3 April 2019.

¹⁵ Decision on Prosecution Appeals Against the Decisions Granting Turinabo and Ndagijimana Provisional Release, 5 August 2019.

16. On 23 August 2019, the Registry informed the parties that Mr Turinabo “ha[s] been delivered to [his] authorized address [in Rwanda] on 22 August 2019”.¹⁶
17. On 31 January 2020, the Single Judge, by electronic correspondence, through his Senior Legal Officer, requested observations from the Parties on a draft Order on the conduct of the proceedings, which provided *inter alia*, that “[g]enerally, provisional release terminates upon the commencement of the trial.”¹⁷
18. On 30 June 2020, the Single Judge invited “[a]ny defendant who intends to remain on provisional release during trial proceedings or otherwise litigate issues surrounding the termination of provisional release at the commencement of trial (...)”¹⁸ to file the relevant motion without delay.
19. On 22 July 2020, the Single Judge, by electronic correspondence, through his Senior Legal Officer, requested submissions from the Parties on any pandemic-related issues and the commencement of trial, stating *inter alia*, that “[p]rovisional release at this stage has been granted with respect to release in Rwanda and not in Tanzania. Bearing in mind prior decisions rejecting provisional release in Tanzania [...], it bears emphasizing that the Host State agreement does not allow for provisional release of Mechanism accused in Tanzania.”¹⁹
20. On 3 August 2020, the Defence submitted its observations, stating *inter alia*, that “Mr Turinabo intends to be present for his trial in Arusha” and that it would be “submitting a request for Mr Turinabo to be granted provisional release during

¹⁶ Registrar’s Submission in Relation to Provisional release, 23 August 2019, para. 2.

¹⁷ Email from the Senior Legal Officer, 31 January 2020 at 07h50, Annex: Draft Order on the Procedure for the Conduct of Trial, para. 30 (“31 January Email”).

¹⁸ 30 June Order, Annex, para. 6.

¹⁹ 22 July Email.

the trial, thereby allowing him to attend trial proceedings without being detained".²⁰

21. On 13 August 2020, the Senior Legal Officer, by electronic correspondence, granted the Defence's informal request for an extension of the word limit to a maximum of 6000 words.²¹

APPLICABLE LAW

22. Rule 68(B) of the Rules of procedures and evidence ("Rules") provides for provisional release:

Release may be ordered **at any stage of the trial proceedings prior to the rendering of the final judgement** by the Trial Chamber **only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard** and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness, or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release. [emphasis added]

23. The Host State Agreement between the Government of Tanzania and the IRMCT specifies that its aim is "to facilitate the smooth and efficient functioning of the International Residual Mechanism for Criminal Tribunals in the United Republic of Tanzania."²²

24. With respect to provisional release, the Host State Agreement provides that:

Article 38. Provisional release

1. The host State shall facilitate the transfer of persons granted provisional release into a State other than the host State.

²⁰ Observations on Behalf of Mr Turinabo on the "Registrar's Submission in Response to the 'Order Concluding written Exchanges in lieu of the Status Conference and Order for Submissions' of 30 June 2020", 3 August 2020, para. 12.

²¹ Email sent by the Senior Legal Officer, Re: Request for an extension of the word limit, 13 August 2020 at 13h40.

²² Host State Agreement, preamble.

2. The host State shall facilitate the re-entry into the host State of persons granted provisional release and **their stay in the host State for any purpose related to proceedings before the Mechanism**. [emphasis added]
 3. The Mechanism and the host State **shall make practical arrangements** as to the implementation of this Article [emphasis added].
25. Resolution 1966 (2010) of the Security Council of the United Nations, which provides for the creation of the IRMCT and its Statute, also requires the cooperation of all States with the IRMCT, including Tanzania.²³

THE BEMBA ET AL. CASE

26. There are striking similarities between the *Bemba et al.* case before the International Criminal Court (“ICC”) and the *Turinabo et al.* case, in particular concerning the nature of the charges and the status of the accused, warranting careful consideration of the continued interim release of the four accused in that case, which constitutes a highly relevant precedent.
27. In the *Bemba et al.* case, the accused were charged with various offences of contempt, including *inter alia* corruptly influencing witnesses, in relation to 14 witnesses who testified for the Defence in the *Bemba* main case.²⁴ Four of the accused were granted provisional release, after a period of 11 months of pre-trial detention.²⁵ Each of the four accused was granted provisional release in a

²³ United Nations Security Council Resolution 1966, U.N. Doc. S/Res/1966, 22 December 2010, para. 8 (“Recalls the obligation of States to cooperate with the Tribunals, and in particular to comply without undue delay with requests for assistance in the location, arrest, detention, surrender and transfer of accused persons” and para. 9 “Decides that all States shall cooperate fully with the Mechanism in accordance with the present resolution and the Statute of the Mechanism (...) including the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute”).

²⁴ See *The Prosecutor v. Bemba et al.*, Public redacted version of Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, 20 November 2013, ICC-01/05-01/13-1-Red2-tENG.

²⁵ *The Prosecutor v. Bemba et al.*, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, ICC-01/05-01/13-703.

different State: the United-Kingdom, France, Belgium and the Democratic Republic of the Congo.

28. On appeal by the Prosecution, seven months later, the ICC Appeals Chamber held that the Pre-Trial Chamber erred in its first decision.²⁶ However, since the accused were already on provisional release, the Appeals Chamber maintained their release pending determination of the matter by Trial Chamber VII.
29. A month and a week before commencement of the trial, the Trial Chamber decided to extend the provisional release of the accused in their respective states of residence.²⁷ Notably, the Trial Chamber included the following condition to “[a]bide by all instructions and orders from the Court, including an order from this Chamber for them to be present in The Hague at their trial, scheduled to commence on 29 September 2015.”²⁸
30. On 18 September 2015, the Trial Chamber, adjudicating a request submitted by one of the accused to follow his trial *via* videoconference from the United Kingdom due to immigration concerns, held that “Mr Mangenda is free to travel from and to the UK in order to attend his trial in The Hague. He holds a visa valid until January 2016, with the possibility of renewal. Therefore, there is no impediment for Mr Mangenda to be physically present during his trial.”²⁹ The Trial Chamber further stated, that: “Mr Mangenda’s provisional release was granted under the condition, amongst others, that he be present in The Hague for trial, scheduled to commence on Tuesday, 29 September 2015. [...]

²⁶ *The Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release of Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969, OA 5 OA 6 OA 7 OA 8 OA 9 (“Bemba Interim Release Appeals Judgment”).

²⁷ *The Prosecutor v. Bemba et al.*, Decision Regarding Interim Release, 17 August 2015, ICC-01/05-01/13-1151.

²⁸ *Ibid.*, para. 28(i).

²⁹ *The Prosecutor v. Bemba et al.*, Decision on ‘Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules’, 18 September 2015, ICC-01/05-01/13-1269, para. 22.

Considering Mr Mangenda's expressed preference to be physically present during trial, the Chamber does not find that further steps, at this stage, are warranted to secure his presence at trial."³⁰

31. Significantly, The Netherlands, the ICC Host State did not interfere and trial proceedings started in the presence of the four accused that effectively remained on provisional release in a State other than the Host State.³¹ The four accused remained on provisional release until the conclusion of all appeals proceedings.

ARGUMENT

I. Mr Turinabo's Provisional Release Does Not Have to End with the Commencement of Trial Proceedings

32. On 31 January 2020³² and again on 22 July 2020,³³ the Single Judge indicated that Mr Turinabo's provisional release would likely end with the commencement of trial proceedings. However, no order has been issued to that effect.
33. As envisioned in the Provisional Release Order, ending Mr Turinabo's provisional release requires an order terminating Mr Turinabo's provisional release to be issued by the Single Judge.³⁴
34. Pursuant to Rule 68(B) of the Rules, provisional release can be granted at any time until the final judgment. Accordingly, in the event the Single Judge is inclined to issue an order ending his provisional release, Mr Turinabo respectfully requests, for the reasons set out below, that his period of

³⁰ *Ibid.*, para. 24.

³¹ See *Bemba et al.*, Trial Hearing Transcript, 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG, p. 6, l. 16-17 "Four accused are provisionally released and are active in their private and professional lives".

³² 31 January Email, para. 30.

³³ 22 July Email.

³⁴ Provisional Release Order, para. 18(v)(j) ("Turinabo shall return to the Mechanism at a date to be determined by the Single Judge") and 18(v)(k) ("Turinabo shall strictly comply with any further order of the Single Judge varying the terms of or terminating his provisional release").

provisional release in Rwanda be extended until the delivery of the final judgment.

35. In addition, Mr Turinabo respectfully requests the Single Judge to issue the orders required to allow him, while on provisional release in Rwanda, to attend his trial in person before the Arusha Branch of the IRMCT, without being detained.

II. The IRMCT Legal Framework Provides for Mr Turinabo's Attendance During His Trial, While on Provisional Release

36. The right of Mr Turinabo to be present during his trial is undisputed and provided for in Article 4(d) of the Statute. Mr Turinabo intends and insists on being present in person during his trial.
37. No legal provision precludes the possibility for Mr Turinabo to attend his trial without being detained.
38. The Statute and the Rules do not provide for the end of provisional release at the beginning of trial proceedings. Rather, Rule 68(B) of the Rules provides for the possibility of provision release "at any stage of the trial proceedings prior to the rendering of the final judgment by the Trial Chamber".
39. Mr Turinabo acknowledges the Single Judge's earlier decision denying Mr Nzabonimpa's application for provisional release in Tanzania on the basis of the Host State Agreement³⁵ but nonetheless contends that his situation and this request are different.
40. Indeed, even though the Host State Agreement does not appear to provide for the provisional release of an accused in Tanzania *per se*, it expressly provides

³⁵ Nzabonimpa Provisional Release Decision.

for the stay of Mr Turinabo in Tanzania, while on provisional release in a State other than the Host State, to allow for his presence in person during his trial.

41. In particular, Article 38(2) refers explicitly to the fact that the Host State, Tanzania, must facilitate the re-entry and the “stay” on its territory of an accused on provisional release. The Host State Agreement does not refer either to detention or to any requirement to end the provisional release of an accused upon re-entry.
42. This interpretation of the Host State Agreement is in conformity with the interpretation of the Host State Agreement between the Government of the Netherlands and the ICC on the basis of which the four accused in the *Bemba et al.* Case were allowed to attend their trial before the ICC in The Netherlands, while being on provisional release in different State, without being detained.
43. In fact, the ICC Host State Agreement includes an almost identical provision as that found in the IRMCT Host State Agreement regarding the re-entry of persons accused on provisional release, namely: “[t]he host State shall facilitate the re-entry into the host State of persons granted interim release **and their short-stay in the host State for any purpose related to proceedings before the Court**”.³⁶
44. The provisions of both the ICC and the IRMCT Host State Agreements³⁷ expressly provide for the possibility for a person accused on provisional release to “stay” in the Host State for the purpose of the proceedings.

³⁶ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, entry into force on 1 March 2008, art. 47(b) [emphasis added].

³⁷ This is also the case for the agreement with The Netherlands in relation to the IRMCT The Hague Branch. See Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, 23 February 2015, art. 38(2) “The host State shall facilitate the re-entry into the host State of persons granted provisional release, and their short-term stay in the host State, for any purpose related to proceedings before the Mechanism.”

45. These provisions differ from that found in the Host State Agreement between the Netherlands and the ICTY³⁸ as well as in the Host State Agreement between the Government of Tanzania and the ICTR,³⁹ that did not provide for persons accused on provisional release to *stay* on the territory of the Host State.
46. As observed by Judge Orié of the IRMCT Appeals Chambers, it is not surprising that initially, detention was considered an automatism⁴⁰ and thus, nothing was foreseen in the case of provisional release.
47. Consequently, the ICTY and the ICTR had no choice but to order an accused on provisional release in the territory of a State, other than the Host State, to be detained upon re-entry on the territory of the Host State for his trial. In the *Beqaj* contempt case before the ICTY, the Trial Chamber held that “accused before the International Tribunal are not allowed by the Dutch authorities to remain undetained [*sic*] on Dutch territory even in contempt cases”.⁴¹ In another case before the ICTY, the accused had to be in and out of provisional release, as it was required for them to be detained while attending their trial in The Hague.⁴²
48. It follows from this distinction that the IRMCT Host State Agreement, like the ICC Host State Agreement, clearly aimed to depart from the unjust situation

³⁸ Agreement between the United Nations and the Kingdom of the Netherlands concerning the headquarters of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, 27 May 1994.

³⁹ Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda, 31 August 1995.

⁴⁰ See Public Redacted Version of the “Dissenting Opinion of Judge Alphons Orié to the Decision of Prosecution Appeal Against Decision Granting Marie Rose Fatuma Provisional Release” Issued on 16 May 2019, 6 June 2019, para. 5 (“Judge Orié Dissenting Opinion”).

⁴¹ *Prosecutor v. Beqaj*, IT-03-66-R77, Decision on Defence’s Motion to Reconsider the Order Suspending the Provisional Release of the Accused, 25 April 2005, fn. 5.

⁴² *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Order Recalling Astrit Haraqija and Bajrush Morina from Provisional Release, 15 August 2008 (in which provisional release was terminated in relation to the upcoming trial) and *ibid*, Decision on Defence Application for Provisional Release of the Accused Astrit Haraqija, 15 September 2008 and *ibid*, Decision on Defence Application for Provisional Release of the Accused Bajrush Morina, 15 September 2008 (in which provisional release was granted at the end of trial hearings, pending the delivery of the judgement).

prevailing at the time, whereby persons accused on provisional release had to be detained for the duration of the trial proceedings in the territory of the Host State. The Government of the Netherlands' reaction when provided with an opportunity to be heard in relation to the application for provisional release of four accused in the *Bemba et al.* contempt case before the ICC supports this interpretation. The Netherlands stated that they would abide by their obligations and the four accused were able to attend their trial, while on provisional release in States other than the Host State, without being detained.⁴³

49. Lastly, it is significant that neither Rwanda *nor* Tanzania submitted views when given an opportunity to be heard in relation to Mr Turinabo's motion for provisional release. Indeed, Rule 68B requires solely that Rwanda and Tanzania be given an opportunity to be heard. In the absence of submissions by the States concerned, the Single Judge is empowered to issue a decision in conformity with the Host State Agreement.⁴⁴

III. No Reason Justifies Mr Turinabo's Detention During His Trial.

50. Mr. Turinabo evidently fulfills the conditions of Rule 68(B) and no reason justifies his return in detention for the purpose of attending his trial.
51. As stated by the ICC Appeals Chambers in the *Bemba et al.* contempt case, provisional release provisions – such as Rule 68(B) before the IRMCT – ought to be interpreted and applied with the aim of respecting human rights as provisional release is the “proper legal avenue to protect the right to liberty of

⁴³ *The Prosecutor v. Bemba et al.*, Observations from the 5 host States on Interim Release, ICC-01/05-01/13-1088-AnxI-Red, 22 July 2016, p. 3.

⁴⁴ Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, p. 4; *see also* Decision on Anselme's Nzabonimpa's Motion for Provisional Release, 29 March 2020, p. 3.

a person, as well as the right to be tried within a reasonable period of time or to release pending trial".⁴⁵

52. Additional criteria in determining whether an accused should be detained or granted provisional release during trial – which are relevant to Mr Turinabo’s application – include: the nature of the charges brought against the accused, the potential penalty for the offence charged, the time already spent in custody by the accused and the conduct of the accused since the beginning of the proceedings. Humanitarian considerations are also important, including the conditions of detention, as is the impact of being detained on the ability of the accused to participate in the trial proceedings.
53. As held by the ICC Appeals Chambers in the *Bemba et al.* contempt case:

[I]n light of the recognized human rights principles mentioned above, **the duration of time in detention pending trial is a factor that needs to be considered** along with the risks [of provisional release] in order to determine whether, all factors being considered, **the continued detention “stop being reasonable”** and the individual needs to be released. In the context of the legal framework of the Court, such a determination requires balancing the risks [...] that were found to still exist against the duration of detention taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole. **The potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable.** Nevertheless, this factor cannot be assessed in isolation, but would need to be considered in light of all of the circumstances of the case.⁴⁶

A. The conditions of Rule 68(B) are fulfilled

54. Since being granted provisional release on 29 March 2019 and having returned to live with his family in Rwanda on 23 August 2019, Mr Turinabo has respected all conditions imposed on him in the Provisional Release Order and his conduct

⁴⁵ Bemba Interim Release Appeals Judgment, para. 43.

⁴⁶ Bemba Interim Release Appeals Judgment, para. 45 [emphasis added].

has been impeccable. The undertaking attached to this motion demonstrates that Mr Turinabo has every intention to continue respecting all conditions imposed on him. This motion also dispels any doubt that Mr Turinabo will not abscond; he wants to be present during his trial.

B. The nature of the charges and the potential penalty

55. The nature of the offences Mr Turinabo is charged with – *i.e.* contempt, a non-violent offence – is serious but cannot be compared to the gravity of core crimes under the IRMCT Statute, which carry a significantly higher penalty. This is not a genocide case. Moreover, detention of Mr Turinabo is not necessary to ensure the fulfilment of the Rule 68(B) conditions. There is also no overriding public interest in keeping Mr Turinabo detained during his trial.
56. When granting Mr Turinabo provisional release, the Single Judge considered that “a conviction [on charges of contempt] carries the prospect of a much more limited term of imprisonment, if any”⁴⁷ and that “there is a possibility that a conviction results in limited or no jail time and [as] Turinabo has already spent more than six months in detention, there is a risk that continued pre-trial detention could exceed his eventual sentence, if he were found guilty”.⁴⁸
57. Mr Turinabo has now spent more than eleven months in pre-trial detention, which significantly increases the risk that the time spent in detention could exceed his eventual sentence, if found guilty.
58. What is more, keeping Mr Turinabo detained during trial proceedings could very well increase time spent on detention by six months, if not more, for a total of some 18 months.

⁴⁷ Provisional Release Order, para. 10.

⁴⁸ Provisional Release Order, para. 17.

59. There is no precedent of such a high sentence imposed on anyone convicted of offence(s) similar to those Mr Turinabo is charged with⁴⁹ and the Prosecution's intention to request a sentence that would constitute a marked departure from relevant precedents is certainly not a valid consideration at this stage.⁵⁰

C. Humanitarian considerations militate in favor of Mr Turinabo NOT being detained during trial proceedings

60. Mr Turinabo is 68 years old. Although he is generally and relatively in good health, even the best of detention conditions are likely to have negative consequences on a man of this age. During the period he was detained at the UNDF, Mr Turinabo required [REDACTED] and the almost twelve months he was there did take a toll on him.

61. The current situation in Tanzania, in which the Government does not release data on COVID-19 cases or deaths since April, is preoccupying and may lead to possible overwhelming of hospitals.⁵¹ Although these concerns remain whether Mr Turinabo is detained or not, it is recognized that detainees are more susceptible to being infected by COVID-19, due to the difficulty of respecting physical distancing and the sharing of facilities. The increased risk to Mr Turinabo's health is not justified by the circumstances of this case.

62. Furthermore, as indicated by the Registrar in his submissions,⁵² it is likely with a view to minimizing the increased risk to Mr Turinabo's health, that in the event he is detained at the UNDF during his trial, he will be held in a separate

⁴⁹ See Judge Orié Dissenting Opinion, para. 9.

⁵⁰ See Email from the Prosecutor, Re: Re: Turinabo et al.: Informal Consultation on Guidelines on the Procedure for the Conduct of Trial, 21 February 2020 at 09h31, para. 1(c).

⁵¹ See: U.S. Embassy in Tanzania, *Health Alert: U.S. Embassy Dar es Salaam*, <https://tz.usembassy.gov/health-alert-u-s-embassy-dar-es-salaam-july-16-2020>, 16 July 2020 ("The Tanzanian government has not released aggregate numbers on COVID-19 cases or deaths since April; U.S. Embassy in Tanzania, *Health Alert: U.S. Embassy Dar es Salaam*, <https://tz.usembassy.gov/health-alert-u-s-embassy-dar-es-salaam-may-13-2020>, 13 May 2020.

⁵² Registrar's Submission in Response to the "Order Concluding Written Exchanges in lieu of the Status Conference and Order for Submissions" of 30 June 2020, 17 July 2020 ("Registrar's Submission").

block, isolated from others. While the Registrar's intentions in taking such measures are commendable *per se*, they fail to take into consideration that detention in isolation from other detainees, in whole or in part, is much harder on detainees, in particular older detainees.

63. This is where the principle of proportionality takes all of its importance. Indeed, if alternate and less stringent measures are available and can be taken to ensure that Mr Turinabo meets the requirements of Rule 68(B) without the aggravation and higher risks to his health associated with detention at the UNDF, the principle of proportionality demands that they be implemented.

D. Detention of Mr Turinabo in these conditions would impede his ability to effectively participate in his trial

64. The normal conditions of detention at the UNDF are such that the ability of Mr Turinabo to confer with Counsel during trial proceedings is severely impeded, in particular in the evenings and even more so during weekends.
65. Considering the additional measures likely to be put in place at the UNDF to cope with the risks associated with the Covid-19 pandemic, it would be even more difficult for Counsel to meet with Mr Turinabo, thereby impeding his right to an effective defence.
66. The conditions of Rule 68(B) being fulfilled, Mr Turinabo should not be placed in a position of having to choose between two unacceptable propositions, *i.e.* (i) not being present in person for his trial but remaining on provisional release in Rwanda; and (ii) being present for his trial but being detained in harsh conditions impeding his ability to participate effectively in the presentation of his own defence.

IV. Mr Turinabo Undertakes to Respect All Conditions Imposed on Him

67. In support of his Motion respectfully requesting the Single Judge to extend his provisional release in Rwanda and to issue the orders necessary allowing him to attend his trial without being detained, Mr Turinabo hereby provides a detailed statement and undertaking to abide by and fully respect any conditions imposed on him by the Single Judge as part of his decision and/or any related orders.
68. In addition, pursuant to his statement in annex A to this motion, Mr Turinabo undertakes to: (i) upon being informed as to when trial proceedings will resume before the IRMCT in Arusha, informing the Government of Rwanda of the dates he will be absent from Rwanda to attend his trial; (ii) liaising with the IRMCT Registry to organize and ensure his safe travel from Rwanda to Arusha, and back whenever necessary; (iii) upon entering in Tanzania, surrendering his passport either to the Government of Tanzania or to the Registry as the case may be; (iv) fully respecting the laws of the land, including any laws or regulations in force in Tanzania regarding the Covid-19 pandemic; (v) living and staying with his Counsel, at the same address for the duration of his stay in Tanzania; (vi) attending his trial and refraining from any act or conduct likely to disrupt the proceedings; and (vii) returning to Rwanda as soon as possible whenever proceedings are adjourned for any significant period of time during which his presence is not required.

CONCLUSION

69. In light of the foregoing, taking into consideration the fulfillment of the Rule 68(B) requirements, Mr Turinabo's intention to be present in person during his trial, the Host State Agreement between the IRMCT and the Government of Tanzania and absence of legal impediment precluding Mr Turinabo from attending his trial without being detained, the nature of the charges and the

time already spent by Mr Turinabo in pre-trial detention, humanitarian considerations including the present Covid-19 pandemic, related to detention at the UNDF, Mr Turinabo's conduct and statement/undertaking in Annex A and the principle of proportionality, the Defence submits that all conditions are met to allow the Single Judge to grant the relief sought.

70. The presence of the accused Dick Munyeshuli on the territory of Tanzania since 2 October 2019 without creating difficulties either for the IRMCT or the Government of Tanzania – even though his legal status is different – also militates strongly in favor of granting Mr Turinabo's motion.

RELIEF SOUGHT

71. In light of the foregoing, the Defence respectfully requests the Single Judge to:

GRANT the Defence Motion;

PROVIDE the Government of Rwanda with an opportunity to be heard pursuant to Rule 68(B);

PROVIDE the Government of Tanzania with an opportunity to be heard pursuant to Rule 68(B);

EXTEND Mr Turinabo's provisional release in Rwanda until delivery of the trial judgment;

ORDER AND AUTHORIZE Mr Turinabo, as part of his conditions of provisional release in Rwanda, to leave the territory of Rwanda for definite periods of time for the specific purpose of attending his trial in Arusha, Tanzania, subject to specific conditions;

ORDER the Government of Rwanda to allow Mr Turinabo to leave the territory of Rwanda for definite periods of time, during his provisional release, for the specific purpose of attending his trial before the IRMCT;

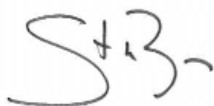
ORDER the Government of Tanzania to facilitate Mr Turinabo's re-entry in Tanzania and his stay in Arusha for definite periods of time for the specific purpose of attending his trial before the IRMCT, as provided for in the Host State Agreement;

ORDER the Registry to enter into consultations with the Government of Rwanda and the Government of Tanzania for the purpose of facilitating Mr Turinabo's provisional release in Rwanda, travel between Rwanda and Tanzania and participation in his trial before the IRMCT; and

ORDER any other measures to implement Mr Turinabo's provisional release.

RESPECTFULLY SUBMITTED ON THIS 25TH DAY OF MAY 2021

Word Count: 5969 words.

A handwritten signature in black ink, appearing to read 'S+B' with a flourish at the end.

Me Stéphane Bourgon *Ad.E.*
Counsel representing Maximilien Turinabo



TRANSMISSION SHEET FOR FILING OF DOCUMENTS / FICHE DE TRANSMISSION POUR LE DEPOT DE DOCUMENTS

I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

To/ À :	IRMCT Registry/ <i>Greffe du MIFRTP</i>	<input checked="" type="checkbox"/> Arusha/ <i>Arusha</i>	<input type="checkbox"/> The Hague/ <i>La Haye</i>
From/ De :	<input type="checkbox"/> President / <i>Président</i>	<input type="checkbox"/> Chambers / <i>Chambre</i>	<input type="checkbox"/> Prosecution/ <i>Bureau du Procureur</i>
	<input type="checkbox"/> Registrar / <i>Greffier</i>	<input checked="" type="checkbox"/> Other/ <i>Autre</i> Counsel with Residual Standing	<input type="checkbox"/> Defence / <i>Défense</i>
Case Name/ Affaire :	Prosecutor v. Nzabonimpa et al.		Case Number/ Affaire n° : MICT-18-116-T
Date Created/ Daté du :	25 May 2021	Date transmitted/ Transmis le :	25 May 2021
			No. of Pages/ Nombre de pages : 21
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Kinyarwanda / <i>B/C/S</i>
			<input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
Title of Document/ Titre du document :	Public Redacted Version of Motion Seeking Extension of Mr Turinabo's Provisional Release in Rwanda and Orders Allowing Him to Attend His Trial in Person Before the IRMCT, Dated 16 August 2020		
Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclue</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
	<input type="checkbox"/> Confidential/ <i>Confidentiel</i>	<input type="checkbox"/> Ex Parte R86(H) applicant excluded/ <i>Art. 86 H) requérant exclu</i>	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ <i>Amicus curiae exclu</i>
	<input type="checkbox"/> Strictly Confidential/ <i>Strictement confidentiel</i>	<input type="checkbox"/> Ex Parte other exclusion/ <i>autre(s) partie(s) exclue(s)</i> (specify/préciser) :	
Document type/ Type de document :	<input checked="" type="checkbox"/> Motion/ <i>Requête</i>	<input type="checkbox"/> Judgement/ <i>Jugement/Arrêt</i>	<input type="checkbox"/> Book of Authorities/ <i>Recueil de sources</i>
	<input type="checkbox"/> Decision/ <i>Décision</i>	<input type="checkbox"/> Submission from parties/ <i>Écritures déposées par des parties</i>	<input type="checkbox"/> Affidavit/ <i>Déclaration sous serment</i>
	<input type="checkbox"/> Order/ <i>Ordonnance</i>	<input type="checkbox"/> Submission from non-parties/ <i>Écritures déposées par des tiers</i>	<input type="checkbox"/> Indictment/ <i>Acte d'accusation</i>
		<input type="checkbox"/> Warrant/ <i>Mandat</i>	<input type="checkbox"/> Notice of Appeal/ <i>Acte d'appel</i>

II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT

<input type="checkbox"/> Translation not required/ <i>La traduction n'est pas requise</i>
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ <i>La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :</i> (Word version of the document is attached/ <i>La version Word est jointe</i>)
<input type="checkbox"/> English/ <i>Anglais</i> <input checked="" type="checkbox"/> French/ <i>Français</i> <input checked="" type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
<input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/ <i>La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :</i>
Original/ Original en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
Translation/ Traduction en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/ <i>La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :</i>
<input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*

JudicialFilingsArusha@un.org OR/ *OU* JudicialFilingsHague@un.org

Rev: August 2019/ *Rév. : Août 2019*