

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 4 November 2008

PRE-TRIAL CHAMBER III

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Mauro Politi

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre BEMBA GOMBO***

Confidential

Defence Objections and Observations to 24 Applications to Participate in Pre-Trial Proceedings as Victims

Source: Defence Team of Mr Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Petra Kneuer

Counsel for the Defence

Nkwebe Liriss

Tjarda E. Van Der Spoel

Aimé Kilolo Musamba

Legal Representatives of Victims

[

Legal Representatives of Applicants

Douzima Lawson

Goun Gaye Quanfiyo

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Sivana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 23 October 2008, Pre-Trial Chamber III issued its “Second Decision on the question of victims' participation requesting observations from the parties”¹, ordering that 24 applications to participate be provided to the Prosecution and the Defence in the present case and granting leave for observations to be filed no later than 4 November 2008.
2. On 24 October 2008, the Victims Participation and Reparations section of the Registry filed the 24 redacted applications to participate in the present proceedings.²
3. The Bemba Defence hereby responds to the applications set out in Annexes 1 to 24 by:
 - a. Objecting to all the applications, all of which have been so redacted as to make it impossible to determine whether or not the applicants should have standing to participate in these proceedings; and
 - b. Objecting to specific applications which do not relate to events falling within the time period covered by the Charges in this case.

APPLICABLE LAW

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

...

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

...

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence

admissible under this Statute;

...

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

Article 68

¹ ICC-01/05-01/08-184.

² ICC-01/05-01/08-140-Conf-Exp + Anxs1-24 (redacted version).

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. ...

...

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

...

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 81**Restrictions on disclosure**

...

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to

protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

Rule 85

Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; ...

Rule 87

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

- (a) Such a motion or request shall not be submitted *ex parte*;
- (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
- (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
- (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and
- (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
- (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
- (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
- (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
- (e) That a Chamber conduct part of its proceedings in camera.

LEGAL ARGUMENTS

- 4. Article 68(1) obliges the Court to take “appropriate measures” to protect victims and witnesses. This provision is expressly subject to the caveat that measures authorised under article 68(1) “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” (emphasis added).
- 5. The only statutory provision which permits the non-disclosure of information to the defence (as opposed to the public), is article 68(5), which does not apply to the present circumstances.
- 6. In terms of the Rules, Rule 81(4) does not provide a general basis for the redaction of the identity of applicants; it is subject to the requirements of necessity and proportionality,³ and the overall limitations of article 68, noted above.
- 7. The *travaux préparatoires* reveal that participating victims were not intended to be anonymous: “[t]he design of the ICC Statute is intended to prevent the Court from adopting the approach of the ICTY majority in *Tadic*. The drafter’s aim was to endorse the approach taken in *Blaskic* of permitting the court ‘to withhold certain identifying information about witnesses prior to trial, but not after the trial commenced [...]. As one

³ In the present circumstances, the OPCD submits that withholding the identities of the alleged victims from the OPCD or the ad hoc counsel is neither necessary nor proportionate. There is no legitimate basis for deeming either the OPCD or the ad hoc counsel for the defence to constitute a security risk: OPCD/ad hoc counsel do not communicate with any accused persons or potential witness concerning the contents of the applications, nor do they conduct investigative inquiries in the field in relation to the applications. There is also no basis for discriminating between the professional ethical responsibilities of the defence, as compared to the Prosecution.

participant at the Treaty Conference stated: ‘Delegations agreed that in certain cases it would be appropriate for the Prosecutor to withhold evidence until the commencement of the trial on the grounds that disclosure could lead to grave endangerment to a witness. However upon the commencement of the trial it would not be appropriate ... In other words the Article does not permit the use of ‘anonymous witnesses’. The accused must be in a position to know his accusers.’”⁴

8. “The commission did not adopt a proposal by Italy, supported by three other states, to permit the court in certain cases to conceal the identity of witnesses from the accused by appointing a “guardian” to investigate the reliability of the victim or witness. Australia, supported by a large number of states, opposed any rule authorizing the use of anonymous witnesses at trial. It reminded delegates that the understanding of the drafters of Article 68(5) at the Diplomatic Conference was that it permitted the court to withhold certain identifying information about witnesses prior to trial, but not after the trial commenced. It also stated that concealing the identity of prosecution witnesses from the accused would violate human rights and that, under the principle of equality of arms, such anonymity would require the court to permit the accused to conceal the identity of defense witnesses from the prosecution.”⁵ Because the Statute was finalised in 1998, the participants in this process would have been aware of the fact that the participation of anonymous witnesses at the ICTY had been problematic, and indeed, that the veil of anonymity had been used to hide the manufacturing of false evidence.
9. In this regard, the ICTY proceedings relating to witness L (Dragan Opacic), demonstrate that the fact that the Chamber has been apprised of the identity of the applicant/victim will not in itself ameliorate the prejudice to the defence and the integrity of the proceedings which could result if the assertions of the applicants are false. In this case, upon application of the Prosecution, the Chamber granted full anonymity to witness L – who alleged that both his father and brother had been killed. It was subsequently discovered by chance that these persons were in fact alive, and Witness L conceded that he had fabricated his testimony, and that he had been coached to do so by videos shown to him

⁴ David Lusty, ‘Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials’ 24 *Sydney L. Rev.* (2002) 361, at 421-3 (citing Helen Brady, ‘Trials and Appeals before the International Criminal Court’: www.redcross.org.au).

⁵ “Christopher Keith Hall, ‘The First Five Sessions of the Un Preparatory Commission for the International Criminal Court’, 94 *Am. J. Int’l L.* 773 at 784.

by the Bosnian Government.⁶ This historical precedent amply demonstrates that the fact that the Chamber has access to the identities of the applicants does not in itself act as a safeguard for the fairness of the proceedings, since the Chamber is not in a position to investigate the background of the applicants. The Defence refers in this connection to recent reports concerning the submission of fraudulent victim applications,⁷ which underscores the need to adopt a vigorous approach to the review of these applications.

10. The Defence therefore submits that in the same manner, the participation of anonymous applicants could prejudice the integrity of these important appellate proceedings; as such, their participation would be inappropriate.
11. In terms of the applicability of other sources of law under article 21 of the Statute, the current practice of the Extraordinary Chambers for the Courts in Cambodia is to disclose fully unredacted versions of victim applications to the defence, notwithstanding the proximity of the defendants to the residence of the victims. In addition, domestic practice does not consistently⁸ support the use of anonymous victims and witnesses.⁹

⁶ Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996, <http://www.un.org/icty/tadic/trialc2/decision-e/61205pm2.htm>. See Transcript of 26 November 1996, www.un.org/icty/transe1/961126ED.htm at page 8584. "Witness L's false testimony was deliberately fabricated by the Bosnian authorities with no other objective than to secure the conviction of the Serb Dusko Tadic. When witness L finally confessed that he had lied, it became clear that information and video material exists which enables a non-witness to testify as though he had been there. His initial evidence was convincing to the extent that the Prosecution believed it without query. Witness L confessed that he had been set up by the Bosnian authorities after he was captured as a member of the Bosnian Serb Army. After being interviewed by the military and police officers about his own behaviour, he was transferred to (redacted). There at a security centre (that, as we now know turned out to be the building of the secret service of the Bosnian government) he was compelled to co-operate with the Bosnian authorities in testifying against Dusko Tadic. Witness L said that he was trained for a substantial length of time. They showed him all kinds of documents and maps, instructed him on the basis of the statements of others and showed him video tapes of Trnopolje camp and about Dusko Tadic. They instructed him to give statements while he was watching the video tapes. At the conclusion of the training, they gave him three prepared statements to sign. These statements were handed over to the Prosecution of the Tribunal. On the basis of this material, witness L gave evidence in Court, in closed session, as the anonymous Witness L. Further, it has become clear that the Prosecution did not in any way check whether witness L's statements were correct. This is in spite of the fact that for more than a year the man was at the Prosecution's disposal in the UN detention unit here in The Hague. It was not until we discovered, by coincidence, during our investigation on location information which indicated that witness L was not telling the truth, that the Prosecution reluctantly started to verify his statements. However, the Prosecution continued to the end to deny the results of the defence's investigation and to obstruct the Defence's attempts to expose witness L as a liar."

⁷ Human Rights Watch Report, 'Court History: the Landmark International Court's First Years', 11 July 2008, Section VII(2) of the Report

⁸ As set out at Appeals Chamber's Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, dated 13 July 2006, ICC-01/04-168, in order to constitute a general principle of law, it is necessary to ascertain that the principle in question is "universally adopted" (see para. 32). See also the ICTY Furundzija Trial Judgement of 10 December 1998, at para 178: "reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world". Trial Judgement of 10 December 1998, at para 178: <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>

12. The Defence further submits that the provisions of article 68(3) must be construed in a manner which is consistent with internationally recognised human rights norms. In this connection, the Defence refers to the prohibition under human rights law of anonymous accusers,¹⁰ and anonymous complainants.¹¹

⁹ In the United States of America, plaintiffs filing a claim under the Alien Torts Act can request that their identity and documentation be withheld from the public (John Doe procedure). Nonetheless, if the defendant chooses to contest the claim, the “the defendant’s lawyers would still have the right to ask [...] questions (in a proceeding known as a “deposition”) and to ask [the plaintiff] to provide documents in [the plaintiff’s] possession that relate to the case.” This includes the right to request the plaintiff to disclose their identity. If the plaintiff does not wish to do so due to security risks, he or she has the option to withdraw the complaint. Becoming a Plaintiff Without Revealing Your Identity’, prepared by the Center for Justice and Accountability, <http://www.cja.org/cases/BeingADoe.pdf>. The OPCD further notes that the identities of witnesses may not be kept from the Defence in Cyprus, Finland, Italy, Luxembourg, Malta, and Sweden: The Law Society of England and Wales, ‘Study of the laws of evidence in criminal proceedings throughout the European Union’, Summary Report October 2004, pp43-45. Available at: <http://www.sq3.it/enlsc/docs/materials/LawEvidenceEU.pdf>

¹⁰ See for example, Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 59 rev. (2000). (Chapter II) <http://www1.umn.edu/humanrts/iachr/country-reports/peru2000-chap2.html#66#66>; Odolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha and Carlos Florentino Molero Coca v. Peru, Case 11.182, Report N ° 49/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 1126 (1999); Human Rights Committee’s Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76, 1 April 1997, paras. 21, 40.

¹¹ The regimes for individual applications to both regional and UN human rights bodies do not allow for the identity of the applicant to be withheld from the respondent State; the Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> provides, at Article 35(2)(a), that “The Court shall not deal with any [individual] application that is anonymous”; the Rules of Court of the European Court of Human Rights only permit anonymity vis-à-vis the public, in exceptional cases - Rule 47(3), <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>. The Inter-American Court of Human Rights similarly does not allow for such a measure; Article 26 of the Rules of Procedure and Evidence provides that “the following information shall be provided to the Court by the Commission: (a) the parties to the case”, whilst Article 28 provides that “[o]n receipt of the application, the Secretary shall give notice thereof and transmit copies to ... the respondent State” <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm>. Article 56 of the African Charter on Human and Peoples’ Rights provides that the name of the victim must be provided, whilst Article 57 provides that “prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned.” <http://www1.umn.edu/humanrts/instr/z1afchar.htm>.

Similarly, the United Nations Treaty Bodies do not permit consideration of anonymous complaints: “[i]t is not possible to submit a complaint anonymously. The relevant Committee however will normally agree, if requested, to suppress the name of the alleged victim in published documents. It is not possible however to keep the name of the alleged victim from the relevant State, as the State cannot investigate the allegations if it does not know who that person is.” S. Joseph, K. Mitchell, L. Gyorki, C. Benninger-Budel, *A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* Part II, Procedures of the Human Rights Committee, at p.55, http://www.omct.org/pdf/UNTB/2006/handbook_series/vol4/eng/handbook4_full_eng.pdf

See First Optional Protocol to the International Convention on Civil and Political Rights, Article 3: “The Committee shall consider inadmissible any communication under the present Protocol which is anonymous...” (http://www.unhchr.ch/html/menu3/b/a_opt.htm) and Rules 90-91 of the Human Rights Committee, which provide for the rejection of anonymous applications on consideration of admissibility, whilst requiring that the respondent State be contacted and “shall [be] request[ed] ... to submit a written reply to the communication”. Identical provisions can be found in the Rules of Procedure and Evidence of the Committee on Elimination of Racial Discrimination (91-92) and the Committee Against Torture (107-108) (all Rules of Procedure and Evidence of Treaty Bodies available at <http://www1.umn.edu/humanrts/TreatyBodyRulesOfProcedure.pdf>).

See also ‘[23 FAQ about Treaty Body complaints procedures](#)’, which distinguishes between the ability of a complaint to request identifying information be suppressed from the final public decision, and their obligation to provide their identity, which is then transmitted to the State to respond:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm> In terms of the United Nations Human Rights complaint mechanisms, under the revised 1503 complaint mechanism “Manifestly ill-founded and anonymous communications are screened out by the Chairperson of the Working Group on Communications, together with

13. The fact that the OTP has also not been disclosed the unredacted versions does not compensate the defence because unlike the defence, the OTP are not the subject of the victim's accusations and therefore do not have the same right to confront their accusers. In this connection, whilst equality of arms is an element of the fairness of the proceedings, equality does not arise from treating parties in an unlike position in a like manner.¹²
14. In any case, the defence respectfully submits that failing to disclose unredacted versions to the Prosecution can also ultimately be prejudicial to the defence. In accordance with the recent practice of the ICC, victim may also testify as witnesses. The Prosecution would therefore need to have access to the unredacted applications in order to fulfil the Prosecutor's disclosure obligations to the defence under article 67(2) of the Statute, in the event that the applications contained information which was potentially exculpatory, or which contradicted the victim's witness statement. This is especially true where, as in this case, even the dates of events have been redacted.

SPECIFIC OBJECTIONS AND OBSERVATIONS:

A. The redaction of all dates except for the year in which the events described in the applications occurred denies the Defence the information required to determine whether or not the applicants should have standing to participate in these proceedings.

15. In addition to the names and addresses of the applicants being redacted, all 24 of the applications to participate have also been redacted so that it is impossible to be able to tell whether or not the events alleged in the applications occurred within the time period in which the Charges in this case are alleged to occurred. Without this information, it is impossible to assess whether "the personal interests" of the applicants have been affected in this case. On that basis, the Defence objects to each and every application.
16. In addition, given the redaction of dates, there are serious questions as to whether those who committed the crimes alleged in certain of the annexes have any connection

the Secretariat, based on the admissibility criteria. Communications not rejected in the initial screening are transmitted to the State concerned to obtain its views on the allegations of violations.": 'Human Rights Council Complaint Mechanism': <http://www2.ohchr.org/english/bodies/chr/complaints.htm>

¹² See, e.g., *Kokkinakis v. Greece* (1994) 17 ECHR; see also para. 8 of the Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) < <http://www1.umn.edu/humanrts/gencomm/hrcom18.htm> >

whatsoever to Mr. Bemba. These annexes fail to provide any meaningful description of the assailants, and without more, standing should be denied. This objection is raised in relation to Annexes 1, 2, 4, 5, 7 to 9, 11 to 15, and 18 to 24.

17. To the extent applicants to participate in the role of victim are not personally affected by the crimes alleged in the Charges in this case, it is deeply unfair in the circumstances of this case and this accused person. Mr. Bemba has been denied all legal assistance and must bear the costs of defending himself. Participants who are only tangentially involved in the events underlying the charges, and who will focus on matters which are not relevant to these proceedings should not be recognised as participants. Mr. Bemba should be allowed to focus his resources in defending against the Charges and not against those who were not affected by any of the events alleged in the Charges.
18. Where confidentiality has not been requested, it should not be imposed. This includes Annexes 1, 5, 9 and 12. Because these applications either do not request confidentiality at all or do not object to the public being informed, redaction is not necessary.
19. In addition, Mr. Bemba objects to standing being granted to the following applicants because the allegations contained in the applications do not relate to any of the Charges against Mr. Bemba:
 - a. Annex 3 - allegations relate to a time after the time period covered by the Charges
 - b. Annex 8 – allegations relate to crimes committed by Tchadians
 - c. Annex 17 – allegations relate to crimes committed by the forces of Bozize
 - d. Annex 21 – there is no evidence as to who committed the crime alleged.
20. In addition, some of the applications contain inconsistent information or are so unclear that no meaningful response can be made:
 - a. Annex 1 – the age of the applicant is not consistent within the application;
 - b. Annex 3 – the age and sex of the applicant is not consistent within the application;
 - c. Annex 14 – the application is too difficult to understand;
 - d. Annex 19 – the facts alleged in the application are unclear and insufficient.
21. The Defence asks that it be provided evidence which is referred to in the following annexes:

- a. Annex 2 – prior statements of the applicant made in relation to the events alleged in the application.
- b. Annex 7 - a photograph of the men who seized the applicant's car.

CONCLUSION

22. Based upon the above arguments, it is important to remember that the confirmation of charging hearing is based upon penal actions which are led by the Prosecutor. He has the duty to represent the interests of society, which takes into account the interests of victims.

23. Thus, all the questions concerning prejudice and the causal link between the prejudice and the crime will essentially be debated according to whether the charges are to be confirmed, which is not the case in the present stage of the proceedings. Following that, it is essential that the applications of the victims be dismissed or at least that their participation is limited in consideration of the presumption of innocence and the right to a fair trial.

24. For the foregoing reasons, the Bemba Defence respectfully requests the following:

- A. That the applications to participate be denied because they are not well-founded;
- B. In the alternative, that the applications be provided to the Defence, at a minimum, without dates redacted, so that a meaningful opportunity to respond to the applications is made possible, prior to a ruling on participation being entered; and
- C. In the event that standing is granted, that the modalities of participation be limited to written submissions.

Respectfully submitted,



Aimé Kilolo Musamba
Associate Counsel

Dated this 4 November 2008

At The Hague, The Netherlands