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Date: **22 July 2009**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public Document

Response of the Legal Representatives of Victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 and a/0467/08 to the Additional Observations of the Office of the Prosecutor and the Defence on the Interim Release of Jean-Pierre Bemba

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 12 December 2008, Applicants a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 and a/0467/08 were granted the status of victims authorised to participate in the proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.¹

2. On 15 June 2009, Pre-Trial Chamber II issued the *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (the “Decision on the Confirmation of Charges”),² confirming five of the eight charges brought against Mr Jean-Pierre Bemba Gombo and committing him for trial.

3. On 17 June 2009, the Single Judge of Pre-Trial Chamber I issued her *Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence*, by which she decided to hold a public hearing on 29 June 2009 on the accused’s interim release in accordance with rule 118(3) of the *Rules of Procedure and Evidence*.³ On 29 June 2009, the Chamber held that hearing in the presence of the Prosecutor, the Defence and the Registry.

4. On 2 July 2009, the Office of the Prosecutor filed its “Prosecution’s Additional Observations on Interim Release pursuant to Rule 118(3) of the Rules of Procedure and Evidence”,⁴ supplementing the oral observations made by it at the hearing of 29 June 2009.

¹ See *Fourth Decision on Victims’ Participation* (Pre-Trial Chamber III, Single Judge), ICC-01/05-01/08-320, 12 December 2008.

² See *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (Pre-Trial Chamber I), ICC-01/05-01/08-424, 15 June 2009 (the “Decision on the Confirmation of Charges”).

³ See *Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence* (Pre-Trial Chamber I), ICC-01/05-01/08-425, 17 June 2009.

⁴ See “Prosecution’s Additional Observations on Interim Release pursuant to Rule 118(3) of the Rules of Procedure and Evidence”, ICC-01/05-01/08-431, 2 July 2009.

5. That same day, the Defence for Jean-Pierre Bemba submitted “Written Submissions Supplementing the Oral Submissions Made by the Defence at the Hearing of 29 June 2009”.⁵

6. Under regulation 24(2) of the *Regulations of the Court*, “[v]ictims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1”.

7. Accordingly, Principal Counsel of the Office of Public Counsel for Victims (“the Office” or “the OPCV”), acting in her capacity as Legal Representative of Victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 and a/0467/08, respectfully submits the following observations to the Chamber.

II. Response to the additional observations of the Prosecutor and the Defence on the interim release of the accused

8. Principal Counsel notes that, in its additional observations, the Office of the Prosecutor addressed the new issues raised by the Defence at the hearing of 29 June 2009, and hereby wishes to confirm her support for all of the Prosecutor’s arguments. In particular, Principal Counsel of the Office notes and reiterates the points made by the Office of the Prosecutor regarding the lack of change in the circumstances and conditions set forth in articles 58(1)(a) and (b) and 60(2) and (3) of the *Rome Statute* concerning the restrictions placed on the liberty of the accused and the need to keep him in detention. However, if a change of circumstances were to be pleaded, Principal Counsel notes that this could only be done to the detriment of the accused, since the only change which has arisen since the last decision on his continued detention is the decision confirming the charges against him and committing him for

⁵ See “Written Submissions Supplementing the Oral Submissions Made by the Defence at the Hearing of 29 June 2009”, ICC-01/05-01/08-432-tENG, 2 July 2009.

trial. Hence, Principal Counsel of the Office fully concurs with the arguments set forth by the Office of the Prosecutor in respect of rule 119 of the *Rules of Procedure and Evidence* and agrees that the 20 guarantees submitted by the Defence in support of its application are premature and inappropriate.

9. Principal Counsel would also state her support for the Office of the Prosecutor's arguments concerning the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, on which the Defence relies heavily, and recalls the relevant case law of the Court relating to decisions on continuing an accused's detention, as well as on the risks faced by victims and witnesses. In this respect, Principal Counsel notes that the accused's pre-eminent position in the community supporting him and the means which remain available to him are factors which the Single Judge should take into consideration in order to assess the specific risk which Mr Bemba's release might pose for the victims and witnesses, regardless of the place to which he is provisionally released.

10. Furthermore, Principal Counsel would like to revisit certain arguments set out by the Defence in its additional submissions. First, with regard to its denial of the gravity of the mode of responsibility upheld by the Chamber in respect of the accused, Principal Counsel would state the following: the contention that command responsibility is accessory to the commission of a crime⁶ is not merely shocking but also legally incorrect. In this respect, Principal Counsel would also cite the reasoning by Pre-Trial Chamber II in the Decision on the Confirmation of Charges: *"The Chamber notes that article 28 of the Statute reflects a different form of criminal responsibility than that found under article 25(3) (a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. This sort of responsibility can be better understood 'when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to*

⁶ Idem., paras. 24-25 [emphasis added].

act'".⁷ Furthermore, the fact that the Chamber confirmed five charges against the accused under that mode of responsibility and drew the obvious conclusion that the accused must be committed to a trial chamber contradicts the Defence's claim that "[...] *in its decision on the confirmation of charges, the Chamber implicitly recognized the lesser gravity of charges of command responsibility*".⁸

11. Moreover, Principal Counsel recalls the wording of article 61(7)(a) of the *Rome Statute*, under which: "[t]he Pre-Trial Chamber shall [...] *determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: [c]onfirm those charges in relation to which it has determined that there is sufficient evidence [...]. [emphasis added]*" Although the concept of gravity is not used in the Court texts in this context, Principal Counsel would point out that, on the one hand, there is no hierarchy between the different modes of responsibility established by the *Rome Statute* and, on the other, that the jurisdiction of the International Criminal Court is exercised for the most *serious* crimes of concern to the international community as a whole.

12. Furthermore, the fact that the Chamber indicated that the decisions denying the various applications for release remained valid until it had ruled on the confirmation of charges means, at the very most, that the Chamber recognised the need to *review* the conditions linked to the accused's continued detention throughout the proceedings, in order to guarantee respect for the rights of the Defence, but can in no way signify, as the Defence maintains, an explicit recognition of "the need to *modify* [its] decisions".⁹

13. Lastly, Principal Counsel would draw the Chamber's attention to the generally accepted legal principle of international law that "the burden of proof is on

⁷ See Decision on the Confirmation of Charges, *supra*, footnote 2, para. 405.

⁸ See Defence's written submissions, *supra*, footnote 5, para. 26.

⁹ See Defence's written submissions, *supra*, footnote 5, para. 31.

the applicant". In this regard, Principal Counsel draws the Chamber's attention to the Defence's contention that it is for the Office of the Prosecutor to prove that a defendant would abscond once released. Since the application for interim release was filed by the Defence, Principal Counsel submits that responsibility for showing that the accused will not abscond rests with the Defence. The same applies in regard to proof of the other criteria required for a ruling on the Defence's application.

14. Lastly, Principal Counsel, while sensitive to the Defence's arguments as to the state of health of the accused's family, and of his wife in particular, would also remind the Chamber of the state of health of certain victims of the crimes with which the accused now stands charged.

FOR THE REASONS SET OUT ABOVE, Principal Counsel of the Office, acting in her capacity as Legal Representative, respectfully requests the Single Judge to take account of her observations and to deny the application for interim release submitted by Mr Bemba's Defence. Should the Chamber consider amending the conditions restricting the accused's liberty, Principal Counsel would also respectfully request leave to make submissions on that issue pursuant to rule 119(3) of the *Rules of Procedure and Evidence* in order to present the observations of the victims whom she represents.

[signed]
Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 22 July 2009

At The Hague, The Netherlands