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No.: **ICC-01/05-01/08**
Date: **7 September 2009**

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
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 Document

Annex

**Submissions of the Legal Representatives of the Victims concerning the Appeal
lodged by the Office of the Prosecutor regarding the Decision on the Interim
Release of Jean-Pierre Bemba Gombo**

Source: The Legal Representatives of the Victims

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

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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

The Kingdom of Belgium
The French Republic
The Federal Republic of Germany
The Italian Republic
The Kingdom of the Netherlands
The Portuguese Republic
The Republic of South Africa

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, the Single Judge of Pre-Trial Chamber III issued the *Fourth Decision on Victims' Participation*, inter alia granting applicants a/0271/08, a/0272/08, a/0273/08, a/0275/08, a/0277/08, a/0278/08, a/0279/08, a/0283/08, a/0284/08, a/0285/08, a/0286/08, a/0287/08, a/0288/08, a/0289/08, a/0290/08, a/0291/08, a/0292/08, a/0293/08, a/0294/08, a/0296/08, a/0297/08, a/0298/08, a/0390/08, a/0391/08, a/0393/08, a/0394/08, a/0395/08, a/0396/08, 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, a/0467/08, a/0468/08, a/0469/08, a/0470/08, a/0471/08, a/0472/08, a/0473/08, a/0474/08, a/0475/08, a/0476/08, a/0477/08, a/0478/08, a/0479/08, a/0480/08 and a/0481/08 the status of victims authorised to participate in the proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.¹

2. On 14 August 2009, the Single Judge of Pre-Trial Chamber II issued the *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa* ("the Decision on Interim Release"),² granting conditional interim release to Mr Jean-Pierre Bemba Gombo, deferring implementation of the said Decision until a State agreed to accept him onto its territory and inviting the aforementioned States to submit detailed observations on the issues relating to Jean-Pierre Bemba Gombo's interim release onto their territory at hearings scheduled to be held from 7 to 14 September 2009.

3. That same day, the Office of the Prosecutor filed the "Prosecution's Appeal against 'the Decision on the Interim Release of Jean-Pierre Bemba Gombo and

¹ See the *Fourth Decision on Victims' Participation* (Single Judge, Pre-Trial Chamber III), No. ICC-01/05-01/08-320, 12 December 2008.

² See the *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa* pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Single Judge, Pre-Trial Chamber II), No. ICC-01/04-01/08-475, 14 August 2009.

Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa”³ pursuant to article 82(1)(b) of the *Rome Statute* and regulation 64(1) of the *Regulations of the Court*.

4. On 18 August 2009, the Legal Representatives of the Victims submitted their “Observations [...] on the Participation of the Victims in the Interlocutory Appeal filed by the Office of the Prosecutor under Article 82(1)(b) of the Rome Statute”.⁴

5. On 25 August 2009, the Office of the Prosecutor filed the public redacted version of its “Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo” (“the Document in Support of the Appeal”).⁵

6. On 26 August 2009, the Appeals Chamber issued an *Order on the filing of responses to the ‘Observations of the Legal Representatives of the Victims on the Participation of the Victims in the Interlocutory Appeal filed by the Office of the Prosecutor under Article 81(2)(b) of the Rome Statute’ and the Prosecutor’s Request for Suspensive Effect*.⁶

7. On 31 August 2009, in the absence of a decision from the Appeals Chamber on the arguments submitted by the Legal Representatives in their observations of 18 August 2009, and given that that day marked the expiry of the five-day time-limit under regulations 64(4) and (5) of the *Regulations of the Court*, which had not been suspended by the Appeals Chamber in its Order of 26 August 2009, the Legal

³ See the “Prosecution’s Appeal against ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa’”, ICC-01/05-01/08-476 OA2, 14 August 2009.

⁴ See the “Observations of the Legal Representatives of the Victims on the Participation of the Victims in the Interlocutory Appeal Filed by the Office of the Prosecutor under Article 82(1)(b) of the Rome Statute”, No. ICC-01/05-01/08-479-tENG, 18 August 2009.

⁵ See the “Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo”, No. ICC-01/05-01/08-485, 25 August 2009 (the “Document in Support of the Appeal”).

⁶ See the *Order on the filing of responses to the ‘Observations of the Legal Representatives of the Victims on the Participation of the Victims in the interlocutory Appeal Filed by the Office of the Prosecutor under Article 81(2)(b) of the Rome Statute’ and the Prosecutor’s request for suspensive effect* (Appeals Chamber), No. ICC-01/05-01/08-486 OA 2, 26 August 2009.

Representatives of the victims authorised to participate in the proceedings filed their observations with the Appeals Chamber in accordance with regulation 24(2) of the *Regulations of the Court*.⁷

8. On 3 September 2009, the Appeals Chamber issued its *Decision on the Request of the Prosecutor for Suspensive Effect*,⁸ granting the Office of the Prosecutor's request and according suspensive effect to the Appeal lodged by the latter regarding the interim release of the accused.

9. That same day, the Appeals Chamber issued the *Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*,⁹ stating that the Response filed by the Legal Representatives on 31 August 2009 should be disregarded, and inviting the Legal Representatives to present by 7 September 2009 their submissions regarding the Appeal lodged by the Office of the Prosecutor.

10. On the same day, the Single Judge issued the *Decision Postponing the Hearings with States on Mr Jean-Pierre Bemba Gombo's Conditional Release and Considering the Defence's Additional Applications*,¹⁰ postponing the consultation hearings with States.

11. Accordingly, the Legal Representatives of Victims a/0271/08, a/0272/08, a/0273/08, a/0275/08, a/0277/08, a/0278/08, a/0279/08, a/0283/08, a/0284/08, a/0285/08,

⁷ Regulation 24(2) of the *Regulations of the Court* provides: "Victims 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, subject to any order of the Chamber".

⁸ See the *Decision on the Request of the Prosecutor for Suspensive Effect* (Appeals Chamber), No. ICC-01/05-01/08-499 OA 2, 3 September 2009.

⁹ See the *Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"* (Appeals Chamber), No. ICC-01/05-01/08-500 OA2, 3 September 2009.

¹⁰ See the *Decision Postponing the Hearings with States on Mr Jean-Pierre Bemba Gombo's Conditional Release and Considering the Defence's Additional Applications* (Single Judge, Pre-Trial Chamber II), No. ICC-01/05-01/08-502, 3 September 2009.

a/0286/08, a/0287/08, a/0288/08, a/0289/08, a/0290/08, a/0291/08, a/0292/08, a/0293/08, a/0294/08, a/0296/08, a/0297/08, a/0298/08, a/0390/08, a/0391/08, a/0393/08, a/0394/08, a/0395/08, a/0396/08, 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, a/0467/08, a/0468/08, a/0469/08, a/0470/08, a/0471/08, a/0472/08, a/0473/08, a/0474/08, a/0475/08, a/0476/08, a/0477/08, a/0478/08, a/0479/08, a/0480/08 and a/0481/08 respectfully submit to the Appeals Chamber their submissions on the Appeal lodged by the Office of the Prosecutor regarding the Decision on the Interim Release of Jean-Pierre Bemba Gombo.

II. The Merits

12. In its Document in support of the Appeal, the Office of the Prosecutor maintains that the Single Judge committed two errors in her Decision on interim release:

- “[t]he Single Judge erred by finding ‘a substantial change of the circumstances since the issuance of the 14 April 2009 Decision’ sufficient to justify the Accused’s conditional release”(the “First Ground of Appeal”);¹¹ and
- “[t]he Single Judge erred in ordering conditional release without considering the conditions and specifying a State willing and able to enforce them” (the “Second Ground of Appeal”).¹²

13. In general, the Legal Representatives fully concur with the arguments put forward by the Office of the Prosecutor on these two grounds of appeal.

A. On the First Ground of Appeal raised by the Office of the Prosecutor

14. The Legal Representatives endorse the arguments put forward by the Prosecution on the First Ground of Appeal. More specifically, they note and support

¹¹ See the Document in support of the Appeal, footnote 5 above, p. 10, para. 23.

¹² *Idem*.

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.¹³ On the contrary, if it were to be considered that there had been a change of circumstances, this could only be 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 to trial. Thus, considering the five confirmed charges against the accused, and given the fact that the Court exercises jurisdiction with respect to the most serious crimes of concern to the international community as a whole, it is apparent that the alleged offences are of an extremely serious nature, in light of the penalties which the accused might incur¹⁴ - such that they can in no way justify the interim release of Jean-Pierre Bemba Gombo.

15. Moreover, the Legal Representatives note that the Single Judge failed properly to take into account, amongst the criteria that should have been examined in the Decision on Interim Release, the risks that could be incurred by the victims and witnesses, given the accused's pre-eminent position within the community offering him support, and the means that remain available to him. These are real risks, as is shown by the concerns expressed by the victims to their Legal Representatives.¹⁵ The Legal Representatives further note that the actions of members of Jean-Pierre Bemba's party, or of his sympathizers, constitute a constant threat for the victims and witnesses, as can be seen from a number of open-source documents containing reports of death threats and intimidation against possible witnesses.¹⁶

¹³ *Ibid.*, paras. 24-31.

¹⁴ See article 77 of the *Rome Statute*.

¹⁵ On this issue, see also the points raised in paras. 18 to 20 below.

¹⁶ See, by way of examples: Digitalcongo.net, "*Menace de mort visant A. Thambiwe Mwamba et J. Endundo: la CPI n'affirme pas que ces deux ministres sont témoins contre JP Bemba*", 5 September 2009, available at the following address: <http://www.digitalcongo.net/article/60822>, consulted on 7 September 2009. See also *Mail & Guardian* online, "DRC ministers threatened in Bemba war crimes case", 31 August 2009, available at the following address: <http://www.mg.co.za/article/2009-08-31-drc-ministers-threatened-inbemba-warcrimes-case>, consulted on 7 September 2009; *Mouvement de Libération du Congo en France*,

B. On the Second Ground of Appeal raised by the Office of the Prosecutor

16. The Legal Representatives also concur fully with the arguments advanced by the Office of the Prosecutor concerning the Second Ground of Appeal, and wish to add further arguments in support of this ground of appeal.

17. The Legal Representatives associate themselves fully with the arguments put forward by the Office of the Prosecutor regarding rule 119 of the *Rules of Procedure and Evidence*. They submit further that, under rule 119(3) of the *Rules of Procedure and Evidence*, all the victims participating in the proceedings against Jean-Pierre Bemba Gombo, as well as the victims who have communicated with the Court in that case, should have been invited to submit their observations before any decision by the Single Judge to amend the conditions restricting the defendant's freedom. However, the Single Judge failed to implement the procedure under this provision before taking her Decision on Interim Release. In this respect, the Legal Representatives note that the observations filed *proprio motu* by the Principal Counsel of the Office of Public Counsel for Victims, in her capacity as Legal Representative of certain victims who have been admitted to participate in the case, should not be regarded as an implementation of the procedure in question. In effect, those observations simply responded to additional arguments submitted by the Office of the Prosecutor and the Defence following the hearing of 29 June 2009, and therefore cannot be considered to represent the observations of the victims on Jean-Pierre Bemba Gombo's possible release, or on the conditions attached to such release.

18. This view of the matter would remain the same even if it were to be accepted that the criteria concerning the victims are of a cumulative nature. Thus, even conceding that only "the victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or

"Leonard She Okitundu agressé à Londres", 14 October 2006, available at the following address: http://www.mlc-france.org/article.php?id_article=301, consulted on 7 September 2009.

conditions imposed”¹⁷ are entitled to submit their observations on this issue, it cannot be denied that the Single Judge has failed in this obligation, because no victim, not even those with the dual status of victim and witness, was consulted beforehand.

19. This conclusion is further strengthened by the fact that the French version of rule 119(3) of the *Rules of Procedure and Evidence* uses the conditional tense in relation to the risks incurred by the victims.¹⁸ Therefore, given the existence of doubt, and in accordance with the obligation to protect victims pursuant to article 68(1) of the *Rome Statute*, the Single Judge should have asked the victims for their observations, particularly since, in the Decision on Interim Release, she expressly explains, in relation to the risks faced by the victims if Jean-Pierre Bemba Gombo were to be granted interim release, as emphasised by the Office of the Prosecutor and by the Office of Public Counsel for Victims, that “the submissions of the Prosecutor and the OPCV ought to be based on more concrete information”.¹⁹ Yet, having said this, the Single Judge nonetheless rendered her Decision, without asking for the observations of the victims concerned, in breach of rule 119(3) of the *Rules of Procedure and Evidence*.

20. Furthermore, Article 68 of the *Rome Statute* places particular emphasis on the nature of the crime: “[...]where the crime involves sexual or gender violence or violence against children”. In the instant case, a large number of the violent acts with which the accused is charged are of a sexual, or indeed gender-based, nature, and some were committed against minors. Moreover, even if the identities of the victims appear to be protected, the fact remains that the victims are not safe, given that many of them, and indeed many of the witnesses, are easily accessible. In effect, the distance of some of the victims from urban centres exposes them to chance

¹⁷ Emphasis added.

¹⁸ The English version is in identical terms and reads as follows: “[...]victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed” (emphasis added).

¹⁹ See the Decision on Interim Release, footnote 2 above, para. 72.

encounters. The Representatives of the victims thus fear that there is a risk that victims might be suborned, and their lives placed in danger.

21. With regard to rule 119(3) of the *Rules of Procedure and Evidence*, the Legal Representatives further note that, because that rule puts the competent Chamber under an obligation to consult the victims who could be placed at risk as a result of the release or the conditions imposed, it follows *a fortiori* that those conditions should be determined prior to the decision on release itself; otherwise the victims will not be in a position to present their observations.

For the reasons set out above,

The Legal Representatives respectfully request the Appeals Chamber:

- to reverse the *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*;²⁰ and
- to order the continued detention of Jean-Pierre Bemba Gombo.

²⁰ *Idem*, paras. 5 and 6.

[signed]

[signed]

Ms Paolina Massidda

Ms Marie Edith Douzima-Lawson

Legal Representatives of the Victims

Dated this 07 September 2009,
At The Hague, The Netherlands