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No.: **ICC-01/05-01/08**

Date: **18 August 2009**

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song, Presiding Judge  
Judge Akua Kuenyehia  
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**

**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**

**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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**Unrepresented Victims**

**Unrepresented Applicants  
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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**

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**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*, granting, *inter alia*, 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*.<sup>1</sup>

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*<sup>2</sup> ("the Decision on Interim Release"), granting conditional interim release to Mr Jean-Pierre Bemba Gombo, deferring the implementation of the said Decision until a State agrees to accept him on its territory and inviting the aforementioned States to submit detailed observations on the issues relating to Jean-Pierre Bemba Gombo's interim release on their territory at hearings to be held between 7 and 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

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

<sup>2</sup> 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), 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”<sup>3</sup> (“the Prosecutor’s Appeal”) pursuant to article 82(2)(b) of the Rome Statute and regulation 64(1) of the *Regulations of the Court*.

4. The Legal Representatives of the Victims with leave to participate in the proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* respectfully submit the following observations to the Appeals Chamber.

## MAIN SUBMISSION

### II. The right of the victims with leave to participate in the case to also participate in the interlocutory appeal lodged by the Office of the Prosecutor

5. 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, subject to any order of the Chamber.” Under regulations 64(4) and (5) of the *Regulations of the Court*, any participant may file a response to a document filed in support of an appeal. The term “participant” used in these two provisions denotes all of the participants in the proceedings including the victims.<sup>4</sup>

6. It is appropriate to recall that the Single Judge of Pre-Trial Chamber III granted certain persons the status of victim at the case stage, having verified that their application for participation met the four criteria set out at rule 85 of the *Rules of*

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<sup>3</sup> See the “Prosecution’s Appeal against the ‘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’”, ICC-01/05-01/08-476 OA2, 14 August 2009, (“the Prosecutor’s Appeal”).

<sup>4</sup> In this regard, see the dissenting opinion of Judge Song included in the *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”* (Appeals Chamber), No. ICC-01/04-01/06-824, 13 February 2007, paras. 3 and 4.

*Procedure and Evidence*.<sup>5</sup> Furthermore, under regulation 86(8) of the *Regulations of the Court* “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case”.

7. The Legal Representatives of the Victims further note that the Appeals Chamber has already acknowledged that the issue of the release of an accused person affects the personal interests of those victims authorised to participate in the proceedings.<sup>6</sup> Accordingly, the Legal Representatives of the Victims consider that pursuant to regulation 64(4) of the *Regulations of the Court*, the victims authorised to participate in the proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* may therefore respond to the document filed in support of the appeal which the Office of the Prosecutor will file soon afterwards, without the need to request to participate in the appeals proceedings.

8. However, in its *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, the Appeals Chamber considered that “in order for victims to participate in an appeal under article 82 (1) (b) of the Statute, an application seeking leave to participate in the appeal must be filed”.<sup>7</sup> This obligation placed on the victims was reiterated by the Appeals Chamber in its decision of 13 June 2007<sup>8</sup> which also concerned an appeal lodged under article 82(1)(b) of the Rome Statute.

9. As indicated above, the Legal Representatives are of the opinion that those victims authorised to participate in the proceedings of the case should, *a fortiori*, be

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<sup>5</sup> See the *Fourth Decision on Victims’ Participation* (Single Judge, Pre-Trial Chamber III), *supra* note 1.

<sup>6</sup> See the *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, *supra* note 4, para. 54.

<sup>7</sup> *Idem*, para. 38.

<sup>8</sup> See the *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007* (Appeals Chamber), No. ICC-01/04-01/06-925, 13 June 2007, para. 23.

authorised to participate in an interlocutory appeal arising from a decision taken by the Pre-Trial Chamber in the same case.

10. Nevertheless, in the alternative and in light of the Appeals Chamber's jurisprudence on victim participation in interlocutory appeals, in the event that the Appeals Chamber were not to concur with the said interpretation of the provisions, the Legal Representatives hereby submit observations for their clients to be granted leave to participate in the appeal lodged by the Office of the Prosecutor.

## **ALTERNATIVE SUBMISSION**

### **III. Submissions in favour of participation in the interlocutory appeal lodged by the Office of the Prosecutor**

11. In its Judgment of 13 February 2007, the Appeals Chamber indicated that applications for participation in the interlocutory appeal had to include a statement specifying how the personal interests of the victims were affected by the said appeal, explaining why the presentation of their views and concerns would be appropriate at this stage and showing that such participation would not be inconsistent with or prejudicial to the rights of the Defence.<sup>9</sup>

12. Pursuant to Appeals Chamber jurisprudence on victim participation in interlocutory appeals,<sup>10</sup> the Legal Representatives respond successively to the following questions: (1) how are the personal interests of the victims affected by that appeal? (2) why is the presentation of their views and concerns appropriate at this stage? and (3) why is such participation not prejudicial to or inconsistent with the rights of the Defence?

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<sup>9</sup> See the *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, *supra* note 4, paras. 38-55.

<sup>10</sup> *Idem*. See also *supra* para. 8 and accompanying footnotes.

## 1. The victims' personal interests are affected

13. The Chambers' jurisprudence has already recognised that victims' personal interests are affected by the issue of the detention of suspects and accused persons.

14. When ruling, as is the case here, on an application from victims to participate in the appeal lodged by Thomas Lubanga Dyilo against Pre-Trial Chamber I's decision to dismiss his application for interim release, the Appeals Chamber expressly acknowledged that "the interests of the victims were affected by the circumstances of the case, having regard to the nature of the appeal itself".<sup>11</sup>

15. Similarly, the Single Judge of Pre-Trial Chamber I expressly acknowledged that "a Defence request for interim release (...) affects the interests of the victims (...)".<sup>12</sup> This opinion also appears to be shared by Pre-Trial Chamber I and Trial Chamber II which, during the periodic review of their decisions to keep Mathieu Ngudjolo Chui and Germain Katanga in detention, have always requested the anonymous and non anonymous victims to file observations on the said detention.<sup>13</sup>

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<sup>11</sup> See the *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, *supra* note 4, para. 54.

<sup>12</sup> See the *Decision establishing a Deadline in Relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-465, 22 September 2006, p. 2.

<sup>13</sup> See the *Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2)* (Trial Chamber II), No. ICC-01/04-01/07-1252, 29 June 2009; the *Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve)* (Trial Chamber II), No. ICC-01/04-01/07-942, 5 March 2009; the *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (rule 118(2))* (Trial Chamber II), n° ICC-01/04-01/07-748-tENG, 13 November 2008 and the *Decision concerning observations on the review of the pre-trial detention of Germain Katanga*, (Pre-Trial Chamber I), No. ICC-01/04-01/07-668, 9 July 2008. See also the *Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Règle 118-2)* (Trial Chamber II), No. ICC-01/04-01/07-1192, 5 June 2009; the *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-904-tENG, 18 February 2009; the *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-732-tENG, 30 October 2008 and the *Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui*, (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-602, 17 June 2008.

## 2. The victims' participation is appropriate

16. The Legal Representatives submit that the victims' participation in the Prosecution interlocutory appeal is appropriate since their interests are affected by the outcome of the proceedings on the release of the accused.<sup>14</sup>

17. The Legal Representatives of the Victims are also of the opinion that the victims authorised to participate in the proceedings which gave rise to the decision under appeal should, *a fortiori*, be authorised to participate in the interlocutory appeal in question, especially because the instant interlocutory appeal concerns an issue which, as stated above, directly affects their interests.<sup>15</sup>

18. Lastly, the victims' participation in the Prosecution interlocutory appeal is appropriate since it meets the requirements of the right of victims to be heard, as set out in article 68(3) of the Rome Statute. An analysis of all of the articles and rules which govern victim participation in proceedings before the Court clearly shows that their participation is not confined to specific stages and is therefore possible at all stages in the proceedings, including interlocutory appeals.<sup>16</sup>

19. Moreover, the victims' participation in the Prosecution interlocutory appeal corresponds exactly to the requirements of a fair trial since such participation would allow for an objective and thorough consideration of the views of the victims whose personal interests are undeniably affected by the outcome of the appeal in question.<sup>17</sup>

20. Lastly, the Legal Representatives recall the possibility for the Prosecutor and the Defence to file a response "*to any document filed by any participant in the case*"

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<sup>14</sup> See *supra* paras. 13-15.

<sup>15</sup> *Idem*.

<sup>16</sup> See France's proposals, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also Costa Rica's proposal, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and Colombia's proposal, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the *travaux préparatoires*, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

<sup>17</sup> See *supra* paras. 13-15.



pursuant to regulation 24(1) of the *Regulations of the Court*. Hence, the appropriateness of the participation of the victims in the said interlocutory appeal is guaranteed by the restrictions placed upon it.

3. **The victims' participation is not inconsistent with or prejudicial to the rights of the Defence**

21. First, the Legal Representatives of the Victims are of the opinion that the protection of the rights of the Defence constitutes a fundamental principle, in the absence of which the integrity of criminal proceedings cannot be guaranteed and justice cannot be delivered.

22. The Legal Representatives note that the participation of the victims in the proceedings before the Court is *per se* unlikely to affect the rights of the Defence. As stated by Judge Blattmann:

*both the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.*<sup>18</sup>

23. In this regard, the Legal Representatives of the Victims further observe that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly on 29 November 1985 sets out the principle of victims' access to justice and the right to fair treatment.<sup>19</sup>

24. Furthermore, the Legal Representatives recall that the role of victims should not be confused with that of the Prosecution. Hence, the participation of the victims in the said interlocutory appeal simply concerns the effective exercise of the rights granted to them in the Rome Statute and therefore does not affect the rights of the Defence.

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<sup>18</sup> See the separate and dissenting opinion of Judge René Blattmann included in the *Decision on victims' participation* (Trial Chamber I), No. ICC-01/04-01/06-1119, para. 26, p. 64.

<sup>19</sup> See United Nations General Assembly resolution 40/34 of 29 November 1985 available at the following URL: <http://www2.ohchr.org/english/law/victims.htm>, principles 4 to 7.

25. Furthermore, the participation of the victims in this interlocutory appeal would be neither inconsistent with nor prejudicial to the rights of the Defence, since under regulation 24(1) of the *Regulations of the Court*, the Defence may file a response to any document that the victims file as a result.<sup>20</sup>

26. Moreover, the Legal Representatives submit that the participation of victims is an integral part of the concept of a fair and impartial trial, since it is expressly embodied in the Court's texts. Furthermore, this right granted to victims is consistent with international human rights law and is recognised in many national systems. Consequently, the equilibrium within criminal trials would not be affected by the participation of victims. On the contrary, taking their interests into account constitutes one of the contributory factors in balancing these proceedings, especially because the proceedings concern a violation of the fundamental rights of the victims themselves.<sup>21</sup> Accordingly, the participation of the victims in the said interlocutory appeal would not prejudice the interests of the Defence.<sup>22</sup>

**For the above reasons,**

If the Appeals Chamber's interpretation of the relevant provisions of the texts of the Court were to differ from that of the Legal Representatives of the Victims, the Legal Representatives respectfully request the Appeals Chamber to rule that the personal interests 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, 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,

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<sup>20</sup> Voir *supra* para. 20.

<sup>21</sup> See the "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the «Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a /0035/07 to a/0038/07»", No. ICC-02/05-116, 17 December 2007, para. 30, pp. 9-10.

<sup>22</sup> See DONAT-CATTIN (D.), "Article 68" in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute."

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 are affected by the interlocutory appeal lodged by the Office of the Prosecutor, that the presentation of their views and concerns appears appropriate at this stage, and that such participation is neither inconsistent with nor prejudicial to the rights of the Defence.

The Legal Representatives further request the Appeals Chamber to grant the victims leave, within a time limit to be determined by the Chamber, to file their observations on the document to be filed in support of the appeal, and to now generally grant the Legal Representatives leave to submit, in the manner determined by the Chamber, written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appeal proceedings.

[stamped]

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Tel 61.82.35

[illegible]

[signed]

**Ms Paolina Massidda**

[signed]

**Ms Marie Edith Douzima-Lawson**

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**Legal Representatives of the Victims**

Done this 18 August 2009

At The Hague, The Netherlands and Bangui, Central African Republic