

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 February 2012

TRIAL CHAMBER III

**Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

**Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the
supplemented applications by the legal representatives of victims to
present evidence and the views and concerns of victims,
ICC-01/05-01/08-2138**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Petra Kneuer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

The Presiding Judge, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims.¹ For the reasons hereunder developed, I partly dissent from the Majority Decision with regard to the requirements for the presentation by victims of evidence and the refusal to allow some of the victims to give evidence and to present their views and concerns.

I. Background

1. In its Order of 21 November 2011, the Chamber set out the procedure to be followed by the legal representatives of victims if they wish to seek leave to give evidence or for individual victims to present their views and concerns to the Chamber.²
2. Following the legal representatives' initial application to call together 17 victims to testify and/or to present their views and concerns,³ the Chamber issued its Second Order, in which it stressed that, while it was important for the participation of victims to be meaningful, such participation must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, and in particular, the accused's right to be tried without undue delay.⁴ Following an estimation of the amount of time required to hear all 17

¹ Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012 (notified on 23 February 2012), ICC-01/05-08-2138.

² Order regarding applications by victims to present their views and concerns or to present evidence, 21 November 2011, ICC-01/05-01/08-1935, paragraph 3.

³ Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes, 6 December 2011, ICC-01/05-01/08-1989-Conf. A corrigendum was filed on 12 December 2011: Rectificatif à la justification relative à "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes", 12 December 2011, ICC-01/05-01/08-1989-Conf-Corr; Requête de la Représentante légale de victimes afin d'autoriser des victimes à comparaitre en tant que témoin et à faire valoir leurs vues et préoccupations devant la Chambre, 6 December 2011, ICC-01/05-01/08-1990. An English translation was filed on 9 December 2011: Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber, ICC-01/05-01/08-1990-tENG.

⁴ Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims. 21 December 2011. ICC-01/05-01/08-2027, paragraph 9.

victims, and with a view to expedite the proceedings, the Chamber instructed the legal representatives “to work together to narrow the list of 17 victims included in the Applications into a short list of no more than eight individuals”.⁵

3. In compliance with the Chamber’s Second Order, the legal representatives significantly reduced the number of victims proposed to be called and proposed in total eight victims.⁶
4. In addition, the required estimate questioning time was cut down from 138 hours⁷ to 32 hours.⁸
5. Finally, in compliance with the Chamber order, the legal representatives collected and submitted written statements for seven out of the eight victims they intended to call.⁹ For that purpose, the victims were contacted in their respective locations and provided detailed accounts of the events and the harm suffered.
6. Therefore, in my view, the Court has led the legal representatives to believe and to have a legitimate expectation that, by following all the specific instructions given by the Chamber in the Second Order, the victims would be authorised to testify and to present their views and concerns in person.
7. Before turning to the factual and legal basis underpinning my partly dissenting opinion, I wish to recall that the number of victims participating in the *Bemba* case is unprecedented in this Court. To date, a total of 2287 victims

⁵ ICC-01/05-01/08-2027, paragraph 12.

⁶ Complément de la requête afin d’autorisation de présentation d’éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012, 23 January 2012, ICC-01/05-01/08-2058-Conf and confidential *ex parte* annexes; Requête de la Représentante légale de victimes concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d’autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre, 23 January 2012 (notified on 24 January 2012), ICC-01/05-01/08-2061-Conf and confidential *ex parte* annexes.

⁷ ICC-01/05-01/08-2027, paragraph 10.

⁸ Maître Zarambaud requests two hours for each of the two victims he intends to call and Maître Douzima requests four hours for each of the five victims she intends to call.

⁹ ICC-01/05-01/08-2058-Conf and confidential *ex parte* annexes; ICC-01/05-01/08-2061-Conf and confidential *ex parte* annexes.

have been authorised to participate in the proceedings¹⁰ and a further 2903 applications are presently pending before the Chamber.¹¹ For the purpose of ensuring effective and expeditious trial proceedings, all participating victims are represented by two legal representatives.¹²

8. Furthermore, it must be recalled that victims authorised to participate in the proceedings have been allowed, through their legal representatives, to question witnesses under the conditions imposed by the Chamber in its *Corrigendum* to Decision on the participation of victims in the trial, on 86 applications by victims, made to date, to participate in the proceedings¹³ and in its Decision on Directions for the Conduct of the Proceedings¹⁴ and that at no point can their participation be seen as having had a negative impact on the expeditiousness of the trial.

II. Legal and factual basis for the partly dissenting opinion

9. In the present Decision, out of the eight victims proposed by the legal representatives, the Majority authorised two victims to give evidence and allowed three further individuals to present their views and concerns. This decision of the Majority is the result of (i) the implementation of a set of conditions and criteria with which, for the following reasons, I firmly disagree and (ii) in some cases, an unfounded choice, due to the apparent lack of any legal or factual basis to justify the conclusions taken.

¹⁰ ICC-01/05-01/08-320; ICC-01/05-01/08-807-Corr; ICC-01/05-01/08-1017; ICC-01/05-01/08-1091; ICC-01/05-01/08-1590-Corr; ICC-01/05-01/08-1862; ICC-01/05-01/08-2011.

¹¹ See tenth and fourteenth to twenty-second transmissions to the Trial Chamber of applications for participation in the proceedings: ICC-01/05-01/08-1559; ICC-01/05-01/08-1854; ICC-01/05-01/08-1884; ICC-01/05-01/08-1922; ICC-01/05-01/08-1957; ICC-01/05-01/08-1978; ICC-01/05-01/08-2017; ICC-01/05-01/08-2042; ICC-01/05-01/08-2073; ICC-01/05-01/08-2130.

¹² See Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005.

¹³ *Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, paragraphs 38-40.

¹⁴ Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, paragraphs 17-20.

10. Specifically, my partial disagreement with the Majority's decision is confined to (i) the adoption, in paragraph 23 of the Decision, of the strict condition according to which the testimony of a victim "needs to be considered to make a genuine contribution to the ascertainment of the truth"¹⁵; (ii) the adoption, in paragraph 24 of the Decision, of the strict criteria quoted from a decision of Trial Chamber II, which requires the victim's testimony to "bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges"¹⁶; and (iii) the subsequent assessment of the proposed victims' applications and the decision not to allow some of them to testify or present their views and concerns before the Chamber.
11. In my view, the strict limitations imposed by the Majority to the presentation of evidence by victims and the "case-by-case" analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognised for victims by the drafters of the Statute.
12. It has to be noted that, although the Decision states that it is granting "by Majority" to victims a/0866/10¹⁷ and a/1317/ 10¹⁸ the right to give testimony before the Chamber, such decision, although based on reasons with which I disagree, is a Chamber's decision in its conclusion, and therefore is not in dispute and will not be elaborated upon in the present partly dissenting opinion.

Requirements for the presentation of evidence by victims

¹⁵ Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with Rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, paragraph 20.

¹⁶ *Idem*, paragraph 30.

¹⁷ Decision, para.33

¹⁸ Decision, para.45

13. The Majority adopted a set of criteria, mainly established by Trial Chamber II in *The Prosecutor v. Katanga and Ngudjolo* case, in order to determine whether victims shall be authorised to present evidence. In particular, in its assessment of the applications, the Majority contemplated whether the presentation of evidence by a specific victim would “make a genuine contribution to the ascertainment of the truth” or “bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.”
14. I firmly disagree with the use of these criteria which are unduly and unfairly curtailing the victims’ rights to present evidence. These criteria have no legal basis and cannot be deduced from the statutory framework pursuant to its literal, systematic or teleological interpretation. In my view, the adoption of these criteria by the Majority reflects a utilitarian approach to victims’ rights rather than an attempt to ensure that the rights granted under the statutory provisions are exercised effectively and only within the limits specifically set out in these provisions.
15. It should be sufficient, in my view, to recall that the Appeals Chamber has detailed the requirements that are necessary in order to allow victims to present evidence, notably and most importantly for the purposes of my partly dissenting opinion: the demonstration of the personal interests that are affected by the specific proceedings; a determination of the appropriateness of the victim’s specific participation; and the consistency with the rights of the accused and the requirements of a fair trial.¹⁹
16. However, the Majority’s decision, in which the participatory rights of the victims are arbitrarily limited to two victims allowed to give testimony, is

¹⁹ ICC-01/04-01/06-1432, paragraphs 4 and 104, wherein it notably held that “[t]he Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.”

premised on the concept that the testimonies should be “useful” for the Chamber, make a “genuine contribution” and refer extensively to the need to avoid “undue” delays in the proceedings, which is not, in any of the findings of the Majority’s decision, justified or based on factual elements. As demonstrated in Section III of my partly dissenting opinion, I would have assessed the victims’ applications to present evidence in light of the Appeals Chamber requirements and after having determined whether the evidence intended to be presented is relevant and carrying probative value.

17. Furthermore, in my view, it would have been more appropriate, if not fairer, to analyse the impact of allowing victims to present evidence, in relation to the avoidance of “undue delays”, on the basis of what is stated in Regulation 43 of the Regulations of the Court: the Presiding Judge, in consultation with the Chamber, is entitled to determine the mode and order of questioning witnesses, in order to avoid delays and ensure the effective use of time.

Presenting views and concerns

18. Pursuant to Article 68(3) of the Statute, victims enjoy an unequivocal statutory right to present their views and concerns whenever their personal interests are affected. Limitations to such an autonomous statutory right shall be interpreted in a strict manner and in compliance with the statutory framework. To that effect, Article 68(3) of the Statute clearly determines the boundaries of the victims’ right to present their views and concerns by stating that they are to be “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.” The *ultima ratio* of this provision is not to alter victims’ right to present their views and concerns, which is unequivocal and autonomous, but rather to ensure that the modalities of their participation will not negatively impact the

integrity of the criminal proceedings at hand, that the stages of the proceedings in which the victims participate are appropriate, and the rights of the accused and a fair and impartial trial are not affected.

19. In my view, the Chamber has clearly and correctly recalled the strict limitations to the right of victims to present their views and concerns. The Chamber has in particular emphasised the need to be consistent with the right of the accused for expeditious proceedings. Without any doubt, the personal appearance of the 2287 victims already authorised to participate could affect the expeditiousness and the fairness of the proceedings. It is with this in mind that the Chamber, at paragraph 22 of the Decision, decided to resort to a fact-specific decision taking into account a set of elements.
20. While I fully agree with the need to ensure the expeditiousness of the trial, in particular by limiting the number of victims authorised to present their views and concerns in person, I strongly disagree with the assessment *in fine* made by the Majority which, in my view, departs from the applicable law recalled in paragraph 21 of the Decision and reflects a utilitarian approach rather than a legal one. In the following section, I will elaborate on the reasons underpinning my disagreement with the Majority's assessment, and demonstrate why, in my view and pursuant to the applicable legal framework, all victims selected by the legal representatives should have been authorised to express their views and concerns in person.
21. In addition, and as already mentioned above, it is crucial to recall that the number of victims participating in the *Bemba* case is unprecedented in this Court. In light of the circumstances of the case, I fail to understand how allowing 7 victims out of the 2287 already authorised to participate in the proceedings to express their views and concerns in person would affect the expeditiousness of the proceedings when authorising them to do so would

only take approximately 80 hours (18 hearing days)²⁰ at a time when 177 hearing days have already been dedicated to the prosecution's presentation of its evidence. It must be recalled that such length of time is just a very raw estimation given by legal representatives themselves.

22. To further illustrate my views, I finally refer to the precedents of the other Trial Chambers of this Court: Trial Chamber I authorised three victims to present evidence out of 129 participating victims, and Trial Chamber II had initially authorised four victims to present evidence out of 370 participating victims.

23. Therefore, the Majority, without any factual elements on which to base its assessment of the effect of the victims' participation on the expeditiousness of the trial, denied a number of victims their statutory rights to present their views and concerns which, depending on the modalities of participation that could be set by the Chamber at a later stage, could have been fully consistent with and not prejudicial to the rights of the accused.

III- Individual assessment of the requests by victims

24. As stressed in the Decision, the victims' right to participate pursuant to Article 68(3) of the Statute "needs to be interpreted so as to make participation by victims meaningful, which includes the possibility for victims to tender evidence relating to the guilt or innocence of the accused."²¹

25. It is my understanding that the concept of "meaningful participation" needs to be interpreted as a right conferred to the victims, and not as an useful tool for the parties or even the Chamber. It implies that victims have an

²⁰ This estimate follows the "extremely conservative approximation" proposed in the Chamber's Second Order, paragraph 10, and it is therefore based on the assumption that questioning by the parties takes together 1.5 times the amount of questioning time requested by the legal representatives.

²¹ Majority Decision, paragraph 18.

independent voice in the trials, a “right to be heard” which, in my view, constitutes one of the most significant features of the proceedings before the International Criminal Court. As a result of this interpretation which, in my view, is the only one compatible with the statutory framework, I am forced to disagree with the criteria set out in paragraphs 23 to 25 of the Decision. For the same reasons, I cannot agree with the conclusion that, as decided by the Majority, the victims’ testimony would not “contribute” to the proceedings on the basis of a hypothetical risk of unduly delaying the trial, and with the Majority’s decision to reject the major part of the requests formulated by the legal representatives.

26. Against this background, I will now analyse, on a case-by-case basis, the written statements relating to the victims whose requests to testify were rejected by the Majority. To that end, I will take the opposite approach, considering that a victim’s request shall be rejected only if there are legal or factual reasons to believe that the presentation of evidence or of views and concerns by such victim would be prejudicial to, or inconsistent with, the rights of the accused. My analysis of whether the victims should be authorised to give evidence will further be guided by the criteria set out in the Chamber’s Decision on the admission of evidence, in which the Chamber held that the three steps to be examined in order to admit a piece of evidence are (i) relevance; (ii) probative value; and (iii) the potential prejudice to the accused.²²

27. In relation to victim a/0555/08, the Majority rejected her request to give evidence on the basis that “the major part of the events related in the victim’s written statement occurred after 15 March 2003 in the DRC. To the extent that such information would not be relevant to the charges (...) the Majority concludes that the testimony that could be expected from this victim would

²²Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, 9 February 2012. ICC-01/05-01/08-2012-Red. paragraphs 12–16.

likely make no genuine contribution to the determination of the truth”.²³ In addition, on the assumption that the victim’s account “is not representative of a larger number of victims”, the Majority denied the victim’s right to present her views and concerns.²⁴

28. I cannot concur with the Majority’s conclusion not to authorise this victim to give evidence or to present her views and concerns. First, I wish to emphasise once again that in my view, the concept of “genuine contribution to the determination of the truth” has no foundation in the statutory framework relevant to victims’ participation in the proceedings before this Court. Second, the finding that the evidence that could be provided by this victim is not relevant to the charges is factually incorrect and constitutes a premature assessment of the relevance of the evidence. As a matter of fact, and according to her written statement, this victim was raped and forced to accompany the MLC soldiers back to the DRC where she stayed with them for a prolonged period of time. The prosecution acknowledged that the information to be given by the victim is relevant, since it would “assist the Chamber to determine whether the perpetrators were MLC troops” and provide relevant information on “the scope of the geographical area where the MLC soldiers committed crimes in the CAR”.²⁵

29. As victim a/0555/08 claims to have suffered physical and psychological harm as a result of the rape and the abduction she suffered, that she would be able to recognise the origin of the direct perpetrators of the crimes allegedly committed, and that she could inform the Chamber of the alleged perpetrators’ retreat from the CAR to the DRC, I am of the view that her statement cannot be considered irrelevant to the charges. To the contrary, given the time spent with the MLC troops in the DRC, she could provide the Chamber with relevant information in relation to, for instance, the presence of

²³ Majority Decision, paragraph 36.

²⁴ Majority Decision, paragraphs 34-36.

²⁵ ICC-01/05-01/08-2126-Conf. paragraph 9.

pillaged goods or other abduction victims in that location. The victim comes from a locality from which no live testimony was called by the prosecution and, therefore, her statement would be important for the characterization of the widespread or systematic character of the crimes committed.

30. For all these reasons, the evidence proposed to be given by victim a/0555/08, in my view, is relevant, has probative value and, due to the limited amount of time required for her testimony, there is no indication that her testimony would be prejudicial to the rights of the accused. In these circumstances, I cannot find any legal or factual reasons justifying the rejection of her request to give evidence.
31. In the same vein, I am not able to see the basis for denying the victim's right to present her views and concerns. As confirmed in the decision on her application for participation in the proceedings, this victim *prima facie* suffered harm as a result of crimes confirmed against the accused, notably rape and the pillaging of her belongings, and her abduction. As such, she further represents the harm suffered by a significant number of victims. Finally, considering that the estimate time required for the presentation of her views and concerns is limited to one hour and a half, the presentation of her views and concerns can not be considered as being prejudicial to or inconsistent with the rights of the accused.
32. With regard to victim a/0542/08, the Majority rejected the victim's request to provide evidence, on the basis that her evidence "would likely be cumulative of evidence that has already been presented by the prosecution" and that "hearing the testimony of this victim would not make a genuine contribution to the determination of the truth."²⁶

²⁶ Majority Decision, paragraphs 37-39.

33. It has to be noted that the prosecution submits that the information this victim can provide is cumulative of evidence that victim a/0555/08 could present.²⁷ However, as explained above, the Majority decided not to authorise victim a/0555/08 to give evidence or present her views and concerns and therefore, the prosecution's argument fails as a justification for the Majority's rejection of the victim's request. Victim a/0542/08 comes from the same locality as victim a/0555/08, and she claims to have been raped by MLC soldiers. Although the prosecution has already presented evidence pertaining to the alleged crime of rape, it is to be noted that none of the witnesses called by the prosecution come from the locality represented by victims a/0555/08 and a/0542/08. In other words, the victim also comes from a village from which no live testimony was called by the prosecution and, therefore, her statement would be important for the characterization of the widespread or systematic character of the crimes committed.
34. Therefore, the evidence that could be provided by victim a/0542/08 is relevant, bears probative value, is not cumulative of any other testimony given by prosecution witnesses to date and, as such, would not unfairly prejudice the defence. For these reasons, I see no legal or factual reason justifying a rejection of the victim's request to give evidence.
35. On the other hand, the Majority authorised victim a/0542/08 to present her views and concerns on the basis that "the harm suffered by Victim a/0542/08 reflects the experience of a significant number of victims in Bossangoa" and that "the experience of victims of Bossangoa has not been represented in the proceedings to date".²⁸ For me, this conclusion contradicts the reasoning underpinning the rejection of the victim's request to give evidence, and therefore supports my conviction that this victim should have been authorised to testify.

²⁷ ICC-01/05-01/08-2126-Conf, paragraph 13.

²⁸ Majority Decision, paragraph 39.

36. With regard to victim a/0394/08, the Majority rejected his request to give evidence on the basis that “Witnesses 63 and 209 have testified about pillage committed in Damara and, as such, the evidence likely to be given by Victim a/0394/08 would not make any substantial contribution to the determination of the truth by the Chamber.”²⁹
37. I cannot agree with this conclusion. To the contrary, I agree with the prosecution’s argument that the detailed evidence that could be provided by this victim would “complement, without duplication, the evidence already provided by some Prosecution witnesses, notably Witness CAR-OTP-PPPP-0063 and CAR-OTP-PPPP-0209.”³⁰ In this respect, it should be emphasised that, as opposed to Witnesses 63 and 209 and on the basis of his written statement, victim a/0394/08 is a direct victim of pillage and could further provide indirect evidence in relation to a several instances of murder, rape and pillage allegedly committed by the MLC soldiers. In addition, the victim could provide relevant information relating to the identification of the MLC soldiers, on the basis of their weaponry, their uniforms and their language. Finally, the victim states that he personally saw how the pillaged items were loaded in a helicopter and he reports about the failure to punish the soldiers for the alleged crimes.
38. In light of the amount and the nature of the information that could be provided by this victim, even the “genuine contribution” expected by the Majority could have been given by victim a/0394/08. In any case, I am convinced that his evidence is relevant, bears probative value and would not be prejudicial to the rights of the accused. For these reasons, I would have authorised this victim to give evidence.
39. In relation to victim a/2475/10, the legal representative’s request was rejected on the basis that the information that could be provided by this victim

²⁹ Majority Decision, paragraph 41.

³⁰ ICC-01/08-2126-Conf. paragraph 11.

“would not assist the Chamber in its determination of the truth as the relevant evidence likely to be provided by him is limited to indirect evidence related to rape which has already been presented by a number of prosecution witnesses.”³¹

40. Moreover, considering the fact that “the rape was not suffered by the victim in person”,³² the Majority concluded that this victim was not best placed to represent the harm suffered by a significant number of victims and denied the victim the right to present his views and concerns.³³

41. It is to be noted that victim a/2475/10 was indeed shot at by MLC soldiers and therefore suffered personal harm through physical injury. In this respect, I wish to recall the Chamber’s finding in its decision on victims’ applications to participate in the proceedings:³⁴

[T]he Chamber considers that whenever an applicant has been deliberately shot at and not merely hit by a stray bullet, it can *prima facie* be inferred that the alleged perpetrator had the intent to cause the death of that applicant and has accordingly taken action commencing the execution of the charged crime of murder, by means of a substantial step, namely by deliberately shooting at the applicant with a deadly weapon. However, the alleged perpetrator did not achieve the act because of circumstances independent of his or her intentions. In such instances, the Chamber considers that such acts clearly constitute an attempt to commit the charged crime of murder within the framework of the Rome Statute.

42. It follows from victim a/2475/10’s written statement as well as from his victim’s application form that his injury was caused by such a deliberate shot. As a consequence, he is a victim of attempted murder and, as such, could give relevant direct evidence. He further saw the presence of alleged MLC troops in his neighbourhood and he eye witnessed crimes, including rapes. Therefore, in my view, the Majority’s assertion that the only evidence that could be given by victim a/2475/10 is indirect evidence is ill founded, and cannot be sustained as a basis for rejecting the victim’s request. Consequently,

³¹ Majority Decision, paragraph 49.

³² Majority Decision, paragraph 49.

³³ Majority Decision, paragraphs 46-49.

³⁴ ICC-01/05-01/08-1091, paragraph 30.

I am persuaded that his evidence is relevant, bears probative value for the charges at hand and would not prejudice the defence. For these reasons, I would have granted the victim's request to give evidence.

43. Furthermore, I refer to my views expressed above in relation to the Chamber's duties to ensure that participation by victims is meaningful. In this respect, the Majority has not provided any legal or factual basis that justifies the request of the victim to present his views and concerns being rejected as well.

44. Finally, in relation to victim a/0511/08, the Majority rejected the victim's request to present evidence on the basis that "the evidence that could be expected from victim a/0511/08 would likely be cumulative of evidence that has already been presented by prosecution witnesses. For example, one instance of murder in Bangui was reported by prosecution Witness 87."³⁵ Contrary to this assertion, I note the prosecution's submission that, given that the type of crime and the location of this incident have not been mentioned by any of the prior witnesses in this case, this victim's testimony would shed additional light on the widespread nature of the crimes committed by the MLC troops and would not be cumulative of evidence that has thus far been presented to the Chamber.³⁶

45. As a matter of fact, the victim witnessed the murder of his mother, and he is a victim of attempted murder and pillaging. As a result, given that his evidence is relevant to the charges of the present case, has probative value, and absent any indication that allowing the victim's testimony would prejudice the defence, I cannot see any justification for his request to be denied.

46. Furthermore, the Majority decided to authorise victim a/0511/08 to present his views and concerns, on the basis that "that the harm suffered by the victim, and in particular the killing of his mother, is representative of the harm

³⁵ Majority Decision, paragraphs 50-54.

³⁶ ICC-01/05-01/08-2126-Conf, paragraph 10.

suffered by a significant number of victims.”³⁷ In my view, and with all due respect, this conclusion contradicts the reasoning underpinning the rejection of the victim’s request to give evidence and demonstrates that his request to testify should have been granted.

IV. Conclusions

47. In light of my firm and unequivocal interpretation of the role of victims in the proceedings before this Court, and of their right to give evidence or to present their views and concerns, and having thoroughly analysed the relevant victims’ written statements, their relevance to the case, their probative value and the potential prejudice to the defence, I am of the view that the Majority’s decision does not provide any factual or legal basis that would justify why most of victims proposed by legal representatives were denied the possibility to give evidence or the right to present their views and concerns in person.

48. To the contrary, I am fully convinced that all seven victims , on a prima facie assessment, (i) are victims of crimes allegedly committed by MLC troops; (ii) have suffered or eye witnessed the commission of one or more crimes covered by the charges; (iii) are willing to testify and to present their views and concerns; and (iv) would be in a position to provide information that is relevant to the facts of the case, including in relation to the contextual elements of the crimes charged, bears probative value and would not prejudice the defence.

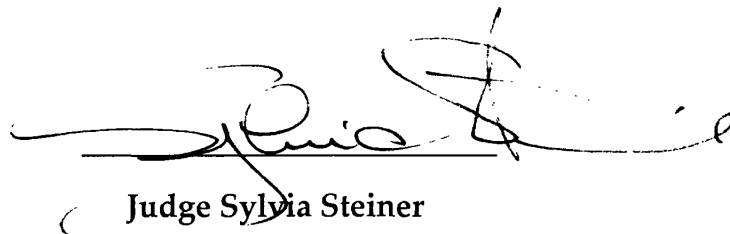
49. Finally, I am convinced that the presentation of evidence and/or of the views and concerns by the victims could be implemented without unduly delaying the proceedings and in a manner that is not prejudicial to or inconsistent with the rights of the accused. In particular the 32 hour estimate for the victims’

³⁷ Majority Decision, paragraph 54.

examination by the legal representatives is all but unreasonable when compared with the number of participating victims in this case.

50. For all these reasons, the Presiding Judge, partly dissenting from the Majority, would have granted the legal representatives' request also for victims a/0555/08; a/0542/08; a/0394/08; a/2475/10 and a/0511/08 to be authorised to give evidence and, if they so wish, to present their views and concerns in person in the present case.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner

Dated this 23 February 2012

At The Hague, The Netherlands