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**International
Criminal
Court**

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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

**Decision on the supplemented applications by the legal representatives of
victims to present evidence and the views and concerns of victims**

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

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The Office of Public Counsel for Victims

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Defence Support Section

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Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision, with the Presiding Judge partly dissenting, on the supplemented applications by legal representatives of victims to present evidence and the views and concerns of victims (“Decision”). A Partly Dissenting Opinion of Judge Sylvia Steiner will be filed separately.

I. Background and submissions

1. On 21 November 2011, the Chamber issued its Order regarding applications by victims to present their views and concerns or to present evidence (“First Order”),¹ in which it specified the procedure to be followed by the legal representatives of victims if they wish to present evidence or the views and concerns of individual victims in this case.
2. On 6 December 2011, Maître Assingambi Zarambaud (“Maître Zarambaud”)² and Maître Marie-Edith Douzima-Lawson (“Maître Douzima”)³ filed written applications pursuant to the First Order (together, “Applications”), in which they requested authorisation to call 17 victims to testify and/or to present their views and concerns to the Chamber.

¹ Order regarding applications by victims to present their views and concerns or to present evidence, 21 November 2011, ICC-01/05-01/08-1935.

² 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.

³ Requête de la Représentante légale de victimes afin d’autoriser des victimes à comparaître 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 12 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.

3. The defence⁴ and the Office of the Prosecutor (“prosecution”)⁵ filed their observations on the Applications on 13 and 14 December 2011 respectively. Both parties argued, *inter alia*, that the Applications contained insufficient detail regarding the victims’ proposed evidence for meaningful observations to be made or for the Chamber to make a proper assessment.⁶ The parties also argued that the legal representatives’ proposal to call 17 victim witnesses was “excessive”,⁷ “unnecessary and disproportionate”,⁸ particularly in light of the crime-base evidence already presented by the prosecution.⁹
4. On 21 December 2011, the Chamber issued its “Second order regarding the applications by legal representatives of victims to present evidence and the views and concerns of victims” (“Second Order”),¹⁰ in which it (i) ordered the Legal Representatives to file a supplemented Application or Applications containing a short list of no more than eight individuals (together, “Relevant Victims”) along with comprehensive written statements for each Relevant Victim and proposed redactions to any identifying information; (ii) ordered the parties to provide their observations on the supplemented Application(s) no later than seven days after they are notified of the supplemented Application(s), the Relevant Victims’ written statements and relevant additional information to be provided by the Chamber and the Registry, including unredacted or lesser redacted versions’ of the Relevant Victims’ application forms and the relevant portions of the *ex parte* annexes to the Chamber’s victims’ participation decisions (together, “Additional Information”).

⁴ Defence Response to the Request of the Legal Representatives of Victims for victims to present their views or concerns, or to present evidence, 13 December 2011, ICC-01/05-01/08-2004-Conf.

⁵ Prosecution’s Observations on the Legal Representatives’ applications by victims to present their views and concerns or to present evidence, 14 December 2011, ICC-01/05-01/08-2009.

⁶ ICC-01/05-01/08-2004-Conf, paragraph 17; ICC-01/05-01/08-2009, paragraph 6.

⁷ ICC-01/05-01/08-2009-Conf, paragraph 2.

⁸ ICC-01/05-01/08-2004-Conf, paragraph 37.

⁹ ICC-01/05-01/08-2004-Conf, paragraphs 32-33.

¹⁰ 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.

5. On 23 January 2012, Maître Zarambaud¹¹ and Maître Douzima¹² filed their supplemented Applications pursuant to the Second Order, proposing to call in total eight victims. Along with the supplemented Applications, Mr Zarambaud submitted written statements for the two victims he proposes to call,¹³ while Ms Douzima submitted written statements for four out of the six victims she proposes to call.¹⁴ On 26 January 2012, Ms Douzima filed the written statement for a fifth victim, registered under number a/1317/10.¹⁵

6. By emails of 26 and 27 January 2012, the Chamber instructed the legal representatives to submit, by 31 January 2012, confidential *ex parte* versions of the written statements, along with proposed redactions to any information that could identify the victims, to their addresses and contact details, and to the names of third parties that may be mentioned in the written statements.¹⁶

¹¹ 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.

¹² 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. On 24 January 2012, Ms Douzima filed a first Addendum à la « 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 », 24 January 2012, ICC-01/05-01/08-2062-Conf and confidential *ex parte* annex. The first addendum contains the last page of victim a/0866/10's written statement that was missing in document ICC-01/05-01/08-2061-Conf-Exp-Anxl.

¹³ Mr Zarambaud proposed to call two victims and submitted written statements for the victims registered under the numbers a/0511/08 and a/2475/10.

¹⁴ Ms Douzima proposed to call six victims registered under the numbers a/0866/10, a/0555/08, a/0542/08, a/0394/08, a/1317/10 and a/1356/10 and she filed written statements for victims a/0866/10, a/0555/08, a/0542/08 and a/0394/08.

¹⁵ Second Addendum à la « 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 », 26 January 2012, ICC-01/05-01/08-2066-Conf and confidential *ex parte* annex. The Second Addendum contains the written statement of victim a/1317/10.

¹⁶ Email from the Assistant Legal Officer of the Chamber to the Legal Representatives' case manager on 26 January 2012, at 17.39 and email from the Assistant Legal Officer of the Chamber to the Legal Representatives' case manager on 27 January 2012, at 15.42.

7. Accordingly, on 31 January 2012, Maître Zarambaud¹⁷ and Maître Douzima¹⁸ filed proposed redacted versions of the written statements for seven victims.¹⁹
8. On 1 February 2012, the Chamber issued its “Third order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims” (“Third Order”),²⁰ in which it (i) granted Maître Douzima’s request for an extension of time for the submission of the written statement for the victim registered under the number a/1317/10; (ii) rejected Maître Douzima’s request for an extension of time for the submission of the written statement for the victim registered under the number a/1356/10; (iii) reclassified as confidential redacted the redacted written statements provided by the legal representatives; (iv) specified that unredacted or lesser redacted versions of the Relevant Victims’ application forms and the relevant portions of the *ex parte* annexes to the Chamber’s decisions on victims’ applications will be provided once the Chamber has decided which victims will be authorised to present evidence or their views and concerns; and (iv) ordered the parties to file their observations on the supplemented Applications and the written statements of the Relevant Victims by 12.00 on 9 February 2012.

¹⁷ Expurgations des annexes du Représentant légal de victimes, Maître Assingambi Zarambaud, conformément à l’Ordonnance de la Chambre du 21 décembre 2011, 30 January 2012 (notified on 31 January 2012), ICC-01/05-01/08-2083-Conf and ICC-01/05-01/08-2058-Conf-Exp-AnxA-Red and AnxB-Red.

¹⁸ Expurgations des annexes de la Représentante légale de victimes, Maître Douzima-Lawson, conformément à l’Ordonnance de la Chambre du 21 décembre 2011, 30 January 2012 (notified on 31 January 2012), ICC-01/05-01/08-2090-Conf, ICC-01/05-01/08-2061-Conf-Exp-Anx1-Red to Conf-Exp-Anx4-Red and ICC-01/05-01/08-2066-Conf-Anx5-Red.

¹⁹ Redacted versions were filed in relation to the two written statements submitted by Mr Zarambaud in his filing of 23 January 2012 (a/0511/08 and a/2475/10), the four written statements submitted by Ms Douzima in her filing of 23 January 2012 (a/0866/10; a/0555/08; a/0542/08; a/0394/08) and the written statement submitted with the Second Addendum filed on 26 January (a/1317/10).

²⁰ Third order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 1 February 2012, ICC-01/05-01/08-2091.

9. On 9 February 2012, the defence²¹ and the prosecution²² filed their observations on the supplemented Applications and the written statements of the Relevant Victims. For the reasons that are set out in more detail below, the defence requests the Chamber to (i) reject the Victims' Requests in their entirety; or, in the alternative, (ii) order that any victims authorised to give testimony are restricted to presenting evidence relevant to the charges as confirmed in the present case.²³ The prosecution submits that it (i) does not oppose the presentation of evidence by five victims, leaving it to the Chamber to determine how many of these victims should be called to testify and; (ii) does not oppose the presentation of the views and concerns of the two remaining victims.²⁴

II. Analysis

10. In accordance with Article 21(1) of the Rome Statute ("Statute"), in making its final determination on which of the victims should be permitted to testify or to express their views and concerns in person, the Chamber has considered Articles 64(2), 64(3)(c), 64(6)(c), (e) and (f), 67(1)(c), 68(1), 68(3) and 69(3) of the Statute, Rules 89(1) and 91 of the Rules of Procedure and Evidence ("Rules") and Regulations 35, 41, 54(e), 54(f) and 81 of the Regulations of the Court ("Regulations").
11. The Chamber has further considered the relevant jurisprudence of the Appeals Chamber,²⁵ which, while not binding upon this Chamber, is of

²¹ Defence Response to the Supplemental Applications of the Legal Representatives of Victims to present evidence, 9 February 2012, ICC-01/05-01/08-2125-Conf.

²² Prosecution's consolidated observations on the Legal Representatives' applications to present evidence and the views and concerns of victims, 9 February 2012, ICC-01/05-01/08-2126-Conf.

²³ ICC-01/05-01/08-2125-Conf, paragraph 40.

²⁴ ICC-01/05-01/08-2126-Conf, paragraphs 18-19. The five victims of the first category include victims a/1317/10; a/0866/10; a/0555/08; a/0511/08 and a/0394/08. The two victims of the second category include victims a/2475/10 and a/0542/08.

²⁵ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432; Appeals Chamber,

relevance in the present context. Additional guidance can be found in the relevant decisions of Trial Chambers I and II.²⁶

12. In light of the above, the Chamber addresses in turn (A) general principles pertaining to the presentation by victims of evidence or the expression of their views and concerns in person; (B) the requirements applicable to the presentation of evidence and the expression of views and concerns in person; and (C) an assessment, victim by victim, of whether the applicable requirements are met.

A. General principles pertaining to the presentation of evidence by victims or the expression of their views and concerns in person

Victims are not parties to the proceedings and are thus not vested with a self-standing right to present evidence

13. At the outset, the Chamber deems it appropriate to sketch out the relevant general principles established by the Appeals Chamber and endorsed by this Chamber. First and foremost, it was emphasised that “the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility and relevance of evidence in trial proceedings lies primarily with the parties.”²⁷

Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ICC-01/04-01/07-2288.

²⁶ Trial Chamber I, Annex to: Order issuing a public redacted version of “Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119; Trial Chamber I, Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial”, 26 June 2009, ICC-01/04-01/06-2032-Anx; Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG; Trial Chamber II, Corrigendum-Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr; ; Trial Chamber II, Decision authorising the appearance of Victims a/0381/09, a/0191/08, and pan/0363/09, 9 November 2010, ICC-01/04-01/07-2517-tENG.

²⁷ ICC-01/04-01/06-1432, paragraph 93; Adopted by this Chamber in 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, paragraph 31. See also ICC-01/04-01/07-2288, paragraph 39.

14. As set out by the Appeals Chamber, this general principle is premised on Article 66(2) of the Statute which provides that “[t]he onus is on the Prosecutor to prove the guilt of the accused”. It is further supported by the disclosure regime established in Rules 76 to 84 of the Rules which indicate that “the scheme is directed towards the parties and not victims”.²⁸

Victims are participants entitled to present their views and concerns in cases where their personal interests are affected. The presentation of views and concerns may include the expression of views and concerns by individual victims in person

15. Article 68(3) of the Statute establishes the right for victims to have their views and concerns represented and considered “in a manner which is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial”.

16. As to the modalities of the presentation of their views and concerns, this Chamber, in its previous composition, adopted the approach formulated by Trial Chamber I:²⁹

115. By article 68(3) of the Statute it is clear that victims have the right to participate directly in the proceedings, since this provision provides that when the Court considers it appropriate the views and concerns of victims may otherwise be presented by a legal representative.

116. The Chamber is aware, however, that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims’ common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should be joint representation and joint presentation of views and concerns by legal representatives at any particular stage in the proceedings.

²⁸ ICC-01/04-01/06-1432, paragraph 93; ICC-01/04-01/07-2288, paragraph 74; ICC-01/05-01/08-807-Corr, paragraph 31.

²⁹ Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2009, ICC-01/05-01/08-807-Corr, paragraph 27; Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paragraphs 115-116.

17. Accordingly, in addition to the representation of the views and concerns of victims by their legal representatives, the Chamber was of the view that this approach would not preclude individual victims from submitting an application to express their views and concerns in person. For these reasons, in its First Order, the Chamber decided to follow the practice of Trial Chamber I and invited the Legal Representatives to file, on behalf of individual victims, written applications to, *inter alia*, express their views and concerns in person.³⁰

Victims may be authorised to present evidence in order to assist the Chamber in the determination of the truth

18. As acknowledged by the Appeals Chamber, the general principle that victims are not parties to the proceedings and, as such, do not have an automatic right to introduce evidence does not “preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused [...]”.³¹ This conclusion was considered to be premised on Article 69(3) of the Statute which vests the Court with “the authority to request the submission of all evidence that it considers necessary for the determination of the truth”. This conclusion was further considered to follow from Article 68(3) which establishes the right of victims to participate. This provision 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. Finally, this conclusion was deemed to be supported by Rule 91(3) of the

³⁰ ICC-01/05-01/08-1935, paragraph 3. This decision is consistent with the fact that in a number of decisions on victims’ applications, the Chamber invites victims who wish to appear in person, to file an application to that effect with the Chamber (see Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2012, ICC-01/05-01/08-807-Corr, paragraph 102; Decision on 772 applications by victims to participate in the proceedings, 18 November 2010, ICC-01/05-01/08-1017, paragraph 62 (e); Decision on 653 applications by victims to participate in the proceedings, 25 December 2010, ICC-01/05-01/08-1091, paragraph 37 (f)).

³¹ ICC-01/04-01/06-1432, paragraph 3.

Rules which leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.³²As this possibility was acknowledged by the Appeals Chamber and three Trial Chambers of this Court,³³ it is the established jurisprudence of this Court that victims may be authorised to present evidence in order to assist the Chamber in its determination of the truth.

The distinction between giving evidence and presenting views and concerns in person

19. Before turning to the requirements applicable to both concepts, the Chamber deems it important to underscore the differences between the presentation by individual victims of evidence and the expression of their views and concerns in person. An instructive illustration to that effect was provided by Trial Chamber I in the following terms:³⁴

[...] the process of victims "expressing their views and concerns" is not the same as "giving evidence". The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.

20. In line with these differences, the presentation by individual victims of evidence on the one hand and the expression of their views and concerns on the other is governed by different requirements, which are elaborated upon below. In particular, the threshold to grant applications by victims to

³² ICC-01/04-01/06-1432, paragraphs 95-98.

³³ Trial Chamber I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 108; Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paragraphs 81-83, 86, 94, 98-99; Trial Chamber III, 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 29-36.

³⁴ ICC-01/04-01/06-2032-Anx, paragraph 25.

give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person.

B. Requirements for the presentation by victims of their views and concerns and evidence

Presentation of views and concerns

21. Under Article 68(3) of the Statute, the duty of the Chamber to allow victims' views and concerns to be presented and considered is subject to the condition that they are presented "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." As previously underlined, "[a]mong the accused's statutory rights is the right '[t]o be tried without undue delay'",³⁵ the importance of which is demonstrated by the fact that the Chamber has a statutory duty to ensure that the trial proceedings are 'expeditious'.³⁶

22. The imperative of expeditiousness therefore requires the Chamber to determine which victims shall be authorised to present their views and concerns in person. In this context, the Chamber agrees with Trial Chamber I that this exercise requires "fact-specific decisions [...] taking into account the circumstances of the trial as a whole."³⁷ For that purpose and in the circumstances of the present case, the Chamber will consider whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of a

³⁵ ICC-01/05-01/08-2027, paragraph 9; Article 67(1)(c) of the Statute.

³⁶ Article 64(2) of the Statute.

³⁷ ICC-01/04-01/06-2032-Anx, paragraph 27.

larger number of victims. In particular, the assessment will take into account the nature of the harm suffered and the location of the events alleged by the victims who were proposed to express their views and concerns.

Requirements for the presentation by victims of evidence

23. As indicated above, the possibility for victims to testify is subject to a number of conditions and criteria that have been identified by other Chambers of this Court as follows:

- (i) As for any participatory rights that have been recognised for victims, the presentation of evidence needs to be consistent with the rights of the accused and a fair and impartial trial. This requirement includes the accused's right to an expeditious trial, as set out above, as well as the right to have adequate time and facilities to prepare his defence according to Article 67(1)(b) of the Statute.³⁸
- (ii) The testimony of the victims authorised to present evidence needs to be considered to "make a genuine contribution to the ascertainment of the truth".³⁹
- (iii) Victims are not allowed to testify anonymously.⁴⁰

24. In the view of the Majority, these conditions entail a number of criteria that will assist in determining which victims are best placed to present evidence by personally appearing before the Court. Trial Chamber II identified these criteria as follows:⁴¹

³⁸ ICC-01/04-01/07-2288, paragraph 114.

³⁹ 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.

⁴⁰ ICC-01/04-01/07-1665-Corr, paragraph 22.

⁴¹ See ICC-01/04-01/07-1665-Corr, paragraph 30.

a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.

c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.

d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.

25. Against the background of these criteria and in light of the information provided with regard to each Relevant Victim as well as the observations formulated by the parties, the Majority turns to an analysis the supplemented Applications victim-by-victim in order to determine which victims should be authorised to present evidence or to express their views and concerns in person. The Presiding Judge will file a partly dissenting opinion, pertaining to the factual and legal basis for the assessment carried out by the Majority and expressing her preference for the conditions set out by Trial Chamber I.

C. Assessment of the proposed victims in light of the applicable requirements

26. In light of the above, the Majority now considers whether the Relevant Victims fulfil the requirements to be authorised to give evidence or, in the alternative, to express their views and concerns in person.

Victims proposed by Maître Douzima

27. Before turning to the merits of Maître Douzima's supplemented Application, the Majority addresses two issues that relate to all victims listed in the supplemented Application.

28. First, the Majority notes that Maître Douzima seeks leave for those victims authorised to appear as witnesses to be additionally allowed to present their views and concerns in person after giving testimony.⁴² In this regard, the Majority is of the view that such a possibility should be determined on a case-by-case basis at the end of the victims' testimony.

29. Second,⁴³ Maître Douzima did not fully comply with the procedure set out in the Second Order requiring the Legal Representatives to explain for each victim and on a victim-by-victim basis, *inter alia*, (i) how the presentation of the victim's testimony and/or views and concerns would affect the overall interests of the participating victims in this case; (ii) the relevance of the victim's testimony to the charges; (iii) how the victim's testimony would assist in the Chamber's determination of the truth in this case; and (iv) the reasons why the victim's testimony would not be cumulative of evidence that has been presented to date.⁴⁴ As a result, the defence submits that Maître Douzima's supplemented Application "should be rejected as not conforming with the procedure set out by the Appeals Chamber or the Second Order."⁴⁵ Consequently, with regard to Maître Douzima's supplemented Application, the defence argues that it was not in a position to provide its observations on a victim-by-victim basis.

⁴² ICC-01/05-01/08-1990-tENG, paragraph 27; ICC-01/05-01/08-2061-Conf, paragraph 4.

⁴³ ICC-01/05-01/08-2125-Conf, paragraphs 14 to 19.

⁴⁴ ICC-01/05-01/08-2027, paragraph 17.

⁴⁵ ICC-01/05-01/08-2125-Conf, paragraph 19.

30. Indeed, Maître Douzima provided collective submissions applicable to all victims included in her supplemented Application. While the Majority agrees with the defence that this approach, strictly, does not comply with the requirements of the Second Order, the Majority is of the view that in order not to prejudice the victims proposed by Maître Douzima, this shortcoming should not serve to exclude the proposed victims. Considering further that the Chamber and the parties have been provided with all relevant information to submit observations or take a decision on the applications, the Majority accepts, on an exceptional basis, to decide on Maître Douzima's supplemented Application on the basis of the written statements and the collective information provided in her filing.

Victim a/0866/10

31. On the basis of the statement provided, Victim a/0866/10 is a victim of pillage and repeated rape in Mongoumba, including gang rape by a group of *Mouvement de Libération du Congo* ("MLC") soldiers. She also witnessed several instances of pillage and two instances of murder in various locations. Moreover, she was forced by the MLC troops to carry the loot to their base and was able to understand the soldiers as she understands Lingala.⁴⁶

32. The prosecution submits that her testimony would cover a wide range of crimes and she could provide additional information on the *modus operandi* of the MLC troops, relevant for the identification of the perpetrators of crimes committed in the Central African Republic ("CAR"). Accordingly, the prosecution is of the view that the evidence that this victim could

⁴⁶ ICC-01/05-01/08-2061-Conf-Anx I-Red.

provide would not duplicate the evidence that has been presented to date.⁴⁷

33. The Majority is of the view that the evidence that could be provided by Victim a/0866/10 would likely make a genuine contribution to the determination of the truth. For that purpose, considering the fact that the victim was forced to accompany the MLC troops and was able to understand their conversations, the Majority is of the view that, on the assumption that her evidence will reflect her statement, her testimony could bring to light new information that is relevant to the issues to be considered by the Chamber in its assessment of the charges. In these circumstances, the Majority concludes that Victim a/0866/10 shall be authorised to present evidence.

Victim a/0555/08

34. Victim a/0555/08, according to the information provided in the written statement,⁴⁸ was intercepted by MLC soldiers while she was fleeing to the fields. She is a victim of rape, she was taken by MLC soldiers from Bossembélé to Bossangoa and she was forced to accompany MLC soldiers to the Democratic Republic of the Congo ("DRC").

35. The prosecution submits that this victim's testimony would assist the Chamber to determine whether the perpetrators in the locations she was taken to were MLC troops and provide relevant information on the geographical scope of crimes committed by MLC soldiers in the CAR.⁴⁹

⁴⁷ ICC-01/05-01/08-2126-Conf, paragraph 8.

⁴⁸ ICC-01/05-01/08-2061-Conf-Anx2-Red.

⁴⁹ ICC-01/05-01/08-2126-Conf, paragraph 9.

36. However, the Majority notes 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 likely make no genuine contribution to the determination of the truth. In addition, considering the specific nature of the harm suffered by this victim, namely her abduction to the DRC, the Majority is of the view that the account that could be provided by this victim is not representative of a larger number of victims. For these reasons, the Majority decides that Victim a/0555/08 should not be authorised to present evidence or to express her views and concerns in person.

Victim a/0542/08

37. On the basis of the statement provided, Victim a/0542/08 is a victim of pillage and rape by MLC soldiers in Bossangoa.⁵⁰ The prosecution is of the view that the victim does not meet the requirements to testify as the evidence she could provide would be cumulative of evidence that Victim a/0555/08 could present and would therefore not substantially assist the Chamber in its determination of the truth.⁵¹

38. The Majority is of the view that as the evidence that would be provided by this victim would likely be cumulative of evidence that has already been presented by the prosecution,⁵² hearing the testimony of this victim would not make a genuine contribution to the determination of the truth. Accordingly, the Majority decides that Victim a/0542/08 shall not be authorised to present evidence.

⁵⁰ ICC-01/05-01/08-2061-Conf-Anx3-Red.

⁵¹ ICC-01/05-01/08-2126-Conf, paragraph 13.

⁵² See for example the testimonies of prosecution Witnesses 80, 81 and 82.

39. Nevertheless, the Majority notes that the harm suffered by Victim a/0542/08 reflects the experience of a significant number of victims in Bossangoa. Since the experience of victims from Bossangoa has not been represented in the proceedings to date, the Chamber is of the view that Victim a/0542/08 should be authorised to express her views and concerns in person.

Victim a/0394/08

40. On the basis of the statement provided, Victim a/0394/08 is a victim of pillage in Damara and he could provide indirect evidence in relation to the crimes of murder and rape.⁵³ The prosecution submits that his evidence would “complement, without duplication, the evidence already provided by some Prosecution witnesses, notably [Witnesses 63 and 209] and would assist the Chamber in its determination of the truth.”⁵⁴

41. The Majority, however, is not persuaded by the prosecution’s argument that Victim a/0394/08’s evidence would not be cumulative of evidence that has already been presented by the prosecution. Indeed, 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.

42. However, as the harm suffered by Victim a/0394/08 is illustrative of the harm suffered by a significant number of victims in Damara, the Majority decides that Victim a/0394/08 shall be authorised to express his views and concerns in person.

⁵³ ICC-01/05-01/08-2061-Conf-Anx4-Red.

⁵⁴ ICC-01/05-01/08-2126-Conf, paragraph 11.

Victim a/1317/10

43. Victim a/1317/10 is a victim of pillage and he could provide information about murder, rape and pillage committed by the MLC. Furthermore, he witnessed the alleged visit of Mr Bemba in Sibut.⁵⁵

44. According to the prosecution, the testimony of this victim could provide the Chamber with information relating to the criminal responsibility of the accused and therefore “shed additional light on the case”.⁵⁶

45. The Majority is of the view that the testimony of Victim a/1317/10 could make a genuine contribution to the determination of the truth, notably in relation to issues pertaining to the criminal responsibility of the accused, which, as highlighted by the Appeals Chamber,⁵⁷ may include evidence pertaining to the role of the accused. For these reasons, the Majority finds that Victim a/1317/10 should be authorised to present evidence.

Victims proposed to be called by Maître Zarambaud

Victim a/2475/10

46. On the basis of the statement provided, Victim a/2475/10⁵⁸ was injured by gunshot and he could provide indirect evidence regarding the rape of his neighbour’s wife. Maître Zarambaud submits that the evidence that would likely be provided by this witness would not be cumulative of evidence that has already been presented by the prosecution as it would be the first case of a victim who has suffered injuries by gunshot in PK12 and who

⁵⁵ ICC-01/05-01/08-2066-Conf-Anx5-Red.

⁵⁶ ICC-01/05-01/08-2126-Conf, paragraph 7.

⁵⁷ ICC-01/04-01/07-2288, paragraph 112.

⁵⁸ ICC-01/05-01/08-2058-Conf-AnxA-Red.

witnessed a rape of an individual who is not a member of his family. According to Maître Zarambaud, his testimony would further contribute to the Chamber's search of the truth as the defence asserts that the rapes, injuries and murders in PK12 were committed by the rebels of Mr Bozizé. Finally, Maître Zarambaud explains that the events experienced by this witness reflect the experience of a number of victims most of whom, in the absence of any witnesses, face difficulties to prove their accounts.⁵⁹

47. The prosecution is of the view that Victim a/2475/10 does not meet the requirements to present evidence before the Chamber. To that end, the prosecution argues that the information likely to be provided by Victim a/2475/10 would "largely duplicate evidence already provided by Prosecution's witnesses [...] and would not assist the Chamber in its determination of the truth."⁶⁰

48. The defence submits that the victim does not fulfil the requirements to provide evidence as instances of injuries are not relevant to the charges and, as such, the only link to the charges in this case would be "hearsay indirect evidence" in relation to rape.⁶¹

49. The Majority agrees with the defence and the prosecution that the testimony of Victim a/2475/10 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 relating to rape which has already been presented by a number of prosecution witnesses. Considering further that the rape was not suffered by the victim in person, the Majority finds that the victim is not best placed to represent the harm suffered by a significant number of victims. In these circumstances, the Majority

⁵⁹ ICC-01/05-01/08-2058-Conf, paragraphs 13-1 to 13-6.

⁶⁰ ICC-01/05-01/08-2126-Conf, paragraph 12.

⁶¹ ICC-01/05-01/08-2125-Conf, paragraphs 22-23.

concludes that Victim a/2475/10 should not be authorised to present evidence or his views and concerns.

Victim a/0511/08

50. On the basis of the statement provided, Victim a/0511/08 was injured by a gunshot fired by MLC soldiers and he was an eyewitness to the murder of his mother.⁶² Maître Zarambaud submits that his testimony would not be cumulative of evidence already presented by the prosecution since the events expected to be reported by the victim occurred in a zone that was not mentioned by any of the prosecution witnesses and since it would be the first time that the Chamber would hear a victim who has suffered severe injuries and personally witnessed the murder of his mother. In addition, Maître Zarambaud submits that the testimony of this victim would assist the Chamber in its search for the truth as the events occurred in front of several eyewitnesses and “because the victim received treatment by a European doctor who appears on a photograph with the victim.”⁶³

51. The prosecution supports Maître Zarambaud’s assertion that given the type of the crime and the location of this incident, the evidence that would be provided by this victim would not be cumulative with the evidence that has been provided by the prosecution.⁶⁴

52. The defence submits that the victim’s proposed testimony in relation to his injury is irrelevant to the charges while the murder of his mother is cumulative of evidence that has already been presented to the Chamber. In addition, the defence submits that the precise zone of the alleged events is

⁶² ICC-01/05-01/08-2058-Conf-AnxB-Red.

⁶³ ICC-01/05-01/08-2058-Conf, paragraphs 12-4 to 12-6.

⁶⁴ ICC-01/05-01/08-2126-Conf, paragraph 10.

located in Bangui "about which the Prosecution has presented a profusion of evidence."⁶⁵

53. The Majority agrees with the defence 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, an instance of murder in Bangui was reported by prosecution Witness 87.⁶⁶ Accordingly, the Majority decides that Victim a/0511/08 should not be authorised to present evidence.

54. This being said, the Majority is satisfied that the harm suffered by the victim, and in particular the killing of his mother, is representative of the harm suffered by a significant number of victims. Accordingly, the Majority authorises Victim a/0511/08 to express his views and concerns in person.

III. Conclusion and Orders of the Trial Chamber

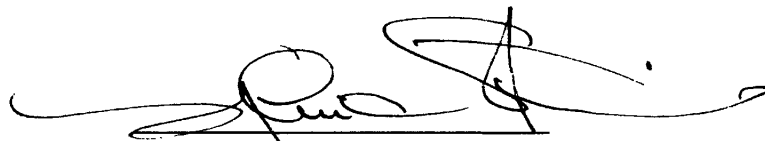
55. In light of the foregoing, the Majority, the Presiding Judge partly dissenting, hereby:

- a. Authorises Victims a/0866/10 and a/1317/10 to present evidence;
- b. Authorises Victims a/0542/08, a/0394/08 and a/0511/08 to express their views and concerns in person;
- c. Decides that any procedural issues relating to the implementation of the present Decision will be addressed separately.

⁶⁵ ICC-01/05-01/08-2125-Conf, paragraph 24.

⁶⁶ Transcript of hearing of 11 January 2011, ICC-01/05-01/08-T-44-Red-ENG, page 29, lines 7-24; Transcript of hearing of 12 January 2011, ICC-01/05-01/08-T-45-Red-ENG, page 6, lines 2-14 and page 9, lines 17-21.

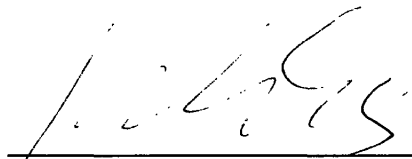
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 22 February 2012

At The Hague, The Netherlands

**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 comparaître 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.

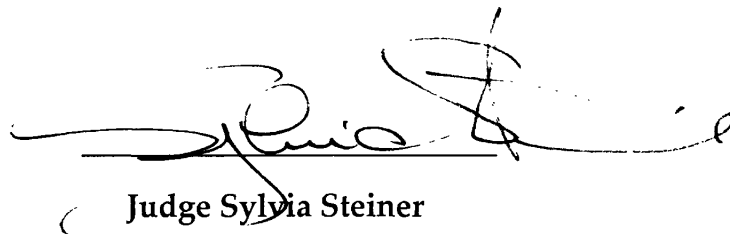
49. Finally, I am convinced that the presentation of evidence and/or of the views and concerns by the victims could be implemented without unduly delaying the proceedings and in a manner that is not prejudicial to or inconsistent with the rights of the accused. In particular the 32 hour estimate for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