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Date: **16 September 2009**

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

**SITUATION
CASE
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

Corrigendum, Application for Leave to Intervene as Amicus Curiae in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: Aprodec asbl

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

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States' Representatives

Competent authorities:
of the Kingdom of Belgium
of the French Republic
of the Federal Republic of Germany
of the Italian Republic
of the Kingdom of The Netherlands
of the Republic of South Africa

Amicus Curiae

Amnesty International
Women's Initiatives for Gender
Justice

REGISTRY

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Ms Silvana Arbia

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Pursuant to rule 103 of the *Rules of Procedure and Evidence* (the Rules) of the International Criminal Court (the Court):

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

2. The *Association pour la promotion de la démocratie et du développement de la République démocratique du Congo*, Aprodec asbl [*association sans but lucratif* (non-profit organization)], has the honour of filing this application to intervene as *amicus curiae* and submitting pertinent written observations¹ on: 1. the criteria, in a decision on conditional release, for the objective evaluation of the changed circumstances with respect to :-a) the risk of a suspect's absconding; and – b) endangering the victims and witnesses – such criteria being read in conjunction with articles 58(1), 60(2) and 3 of the Rome Statute; 2. the procedure for conditional release in terms of determining a receiving country and appropriate conditions in light of articles 66, 67, 86, 87 and 88 of the Rome Statute.

II. Presentation of Aprodec asbl

3. The *Association pour la promotion de la démocratie et du développement de la République démocratique du Congo*, Aprodec asbl, is a Belgian non-profit organization

¹ ICC-01/04-373, *Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence*, p. 5. para. 4. (Thomas Lubanga Dyilo case).

whose main goal is to defend the interests and rights of the Democratic Republic of the Congo, the Congolese and persons of Congolese origin in accordance with its Statutes.² Aprodec asbl is completely independent of any political, philosophical and religious ideology. Its activities are funded entirely by voluntary contributions from its members who are all unpaid.

4. Aprodec asbl has considerable expertise, particularly in national and international legal cases involving Congolese persons.³

5. In cases involving Congolese persons before the International Criminal Court, Aprodec asbl specifically ensures that the rights of the Victims and the Accused are strictly adhered to so that justice is delivered fairly and equitably. In this regard, the case of *The Prosecutor v. JP Bemba* is of interest to Aprodec asbl since thousands of law-abiding Congolese citizens residing in the Central African Republic were also the victims of acts of violence during the coup d'état which led to the overthrow of elected President Ange Félix Patassé and his government by General François Bozizé's rebel forces on 15 March 2003.

6. Lastly, Aprodec asbl hopes that the truth will be known about what really took place in the CAR between 25 October 2002 and 15 March 2003, so that all of the victims' rights are respected and so that the guilty answer for their acts before a court.⁴

² **Aprodec**, asbl, Association No. (*Moniteur belge*): 891.074.266, registered office: Rue des Vétérinaires, 89- 1070 Brussels (Belgium,) Tel/Fax: 0032.484.925.836, E-mail: aprodecasbl@gmail.com.

³ Aprodec asbl has, *inter alia*, highlighted the fact that Belgium's ratification of the Rome Statute is unconstitutional and the problem of the lawfulness of judicial cooperation between Belgium and the ICC. Letter to the Belgian senatorial commissions (Justice, Interior and Foreign Affairs) of 23 June 2008.

- Aprodec asbl has submitted several applications for leave to intervene as *amicus curiae* before the International Criminal Court (ICC-01/05-01/08-450, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>; ICC-01/05-01/08-420, <http://www.icc-cpi.int/NR/exeres/524DB6E0-1C9A-48D9-876E-2D8EA7271CDB.htm>)

⁴ FIDH Report, No. 355 of February 2003, "When the elephants fight, the grass suffers", p. 13.

III. Procedural History

7. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest for Jean-Pierre Bemba⁵ who was arrested on 24 May 2008 on the territory of the Kingdom of Belgium.

8. On 10 June 2008, Pre-Trial Chamber III issued the *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo*,⁶ on the basis of which it issued a further warrant of arrest which superseded the warrant of arrest of 23 May 2008.⁷

9. On 3 July 2008, Jean-Pierre Bemba was surrendered to the seat of the Court, where his first appearance took place before Pre-Trial Chamber III on 4 July 2008.⁸

10. On 20 August 2008, the Single Judge issued the *Decision on application for interim release* pursuant to article 60(2) of the Rome Statute in which it rejected Jean-Pierre Bemba's first application for interim release⁹ and decided that the suspect would remain in detention.¹⁰ The Defence appealed against that decision. The Appeals Chamber confirmed the judge's decision on 16 December 2008.¹¹

11. On 16 December 2008, the Single Judge issued a *Decision on Application for Interim Release*¹² pursuant to article 60(3) of the Statute, which rejected the second application for interim release and decided, *inter alia*, that the Accused would remain in detention.¹³

⁵ ICC-01/05-01/08-1-tENG, warrant of arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008.

⁶ ICC-01/05-01/08-14-tENG.

⁷ ICC-01/05-01/08-15-tENG, *Warrant of Arrest For Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008*.

⁸ ICC-01/05-01/08-T-3-ENG ET, English transcript.

⁹ ICC-01/05-01/08-49 and annex.

¹⁰ ICC-01/05-01/08-73-Conf, *Decision on application for interim release*.

¹¹ ICC-01/05-01/08-323, *Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"*, 16 December 2008.

¹² ICC-01/05-01/08-200-tENG and annex.

¹³ ICC-01/05-01/08-321, *Decision on Application for Interim Release*.

12. On 14 April 2009, the Single Judge issued the *Decision on Application for Interim Release* pursuant to article 60(3) of the Statute, which rejected *inter alia* the Defence's third application for interim release¹⁴ and decided that the Accused would remain in detention.¹⁵

13. On 25 May 2009, Aprodec asbl submitted its application to intervene as *amicus curiae* for the purpose of respectfully submitting its observations on the admissibility of a case based on the gravity test corresponding to the mode of responsibility under article 28 of the Rome Statute, as well as on the threat to the fairness of the trial because of the continued failure to set out clearly the charges against Jean-Pierre Bemba.¹⁶

14. In her Decision of 29 May 2009, the Single Judge did not grant the application from Aprodec asbl on the sole ground that the Chamber cannot guarantee the right of the parties (the Prosecutor and the Defence) to respond to the said observations on account of a lack of time and because the Chamber itself will not have sufficient time to properly consider this *amicus curiae* and the parties' responses. In the view of the Single Judge, the chosen time limit of 24 June 2009 for issuing the final decision in the confirmation of charges proceedings could not be modified.¹⁷ However, whilst aware of the non-binding nature of its application, Aprodec asbl nevertheless notes that the Chamber eventually issued its decision on 15 June 2009, that is nine days before the said deadline.

15. On 15 June 2009, the Chamber issued the *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, in which it decided, *inter alia*, that there is sufficient evidence to establish

¹⁴ ICC-01/05-01/08-333-Conf and annexes.

¹⁵ ICC-01/05-01/08-403.

¹⁶ ICC-01/05-01/08-420, "*Demande d'autorisation d'intervenir comme Amicus Curiae dans l'Affaire le Procureur c. Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*", 25 May 2009. <http://www.icc-cpi.int/iccdocs/doc/doc693288.pdf>.

¹⁷ ICC-01/05-01/08-421, *Decision on the Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 29 May 2009.

substantial grounds to believe that the Accused is criminally responsible within the meaning of article 28(a) of the Statute for two counts of crimes against humanity and three counts of war crimes, and to commit him to the Trial Chamber for trial.¹⁸ The Prosecutor submitted an application for leave to appeal that decision¹⁹ on which the Chamber has yet to rule.

16. On 29 June 2009, the Single Judge held a hearing to consider any issue related to the Accused's pre-trial detention.²⁰ At the hearing, the Defence requested the Accused's interim release onto the territory of Belgium, France and Portugal.²¹ The parties were granted the opportunity to make further submissions in writing by 2 July 2009.

17. At the hearing of 29 June 2009, the Single Judge, as provided for under regulation 51 of the *Regulations of the Court*, also requested observations from Belgium, France, Portugal and the Netherlands (as Host State) by 10 July 2009 on the Accused's interim release and the conditions, if any, that would need to be imposed pursuant to rule 119 of the *Rules of Procedure and Evidence* to enable the States in which the Accused is seeking release, to accept him on their territory.²²

18. On 2 July 2009, the Defence²³ and the Prosecutor²⁴ filed supplementary written submissions as authorised at the hearing of 29 June 2009. That same day, the Defence requested that Germany, Italy and South Africa be added to the list of States on whose territory the Accused is seeking to be released.²⁵

¹⁸ ICC-01/05-01/08-424. *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009.

¹⁹ ICC-01/05-01/08-428.

²⁰ ICC-01/05-01/08-425, *Decision to Hold a Hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence*.

²¹ ICC-01/05-01/08-T-13-ENG WT, p.22, lines 2 to 6 and p.31, lines 5 to 8.

²² ICC-01/05-01/08-T-13-ENG WT, p.64, lines 11 to 20.

²³ ICC-01/05-01/08-432-Corr.

²⁴ ICC-01/05-01/08-431.

²⁵ ICC-01/05-01/08-433.

19. On 13 July 2009, Portugal,²⁶ France²⁷ and the Netherlands²⁸ presented their observations to the Single Judge, as they had been invited to do at the hearing of 29 June 2009.

20. On 15 July 2009, Aprodec asbl filed a second application for leave to intervene as *amicus curiae* for the purpose of respectfully submitting its observations solely on points of law relating to the Court's assessment of the relevance, probative value and admissibility of the evidence with respect to the impartiality of the Office of the Prosecutor's prosecutorial policy, as well as the ground for challenging the admissibility of this case before the Court on the basis of insufficient gravity under articles 17(1)(d) and 19 of the Rome Statute.²⁹

21. On 17 July 2009, the Single Judge rejected the Aprodec asbl application for leave to intervene as *amicus curiae* in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.³⁰ In that decision, the Single Judge stated that the observations of Aprodec asbl could not be taken into account for the proper determination of the case at this stage of the proceedings. Whilst reiterating that it is mindful of the non-binding nature of its application, Aprodec asbl notes, nevertheless, that the confirmation of charges process is not yet complete.

²⁶ ICC-01/05-01/08-448-Conf-Anx1.

²⁷ ICC-01/05-01/08-448-Conf-Anx2.

²⁸ ICC-01/05-01/08-448-Conf-Anx3.

²⁹ ICC-01/05-01/08-450 and annexes. "Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour", 15 July 2009, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>.

³⁰ ICC-01/05-01/08-453, *Decision on the Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 17 July 2009, <http://www.icc-cpi.int/NR/exeres/2B621C5E-8FEE-448F-BA7F-595D047D7549.htm>.

22. On 22 July 2009, the Defence filed a “*Requête aux fins de divulgation des éléments pertinents relatifs à l’admissibilité*”, correctly basing itself on the fact that the decision on the confirmation of charges of 15 June 2009 has not yet become final.³¹
23. On 24 July 2009, as requested, Belgium transmitted its observations to the Single Judge.³²
24. On 29 July 2009, Portugal transmitted supplementary observations on the application for the Accused’s interim release to the Single Judge.³³
25. On 4 August 2009, the Defence requested leave to respond to all of the States’ observations in order to provide general comments on points of law and of fact.³⁴
26. On 7 August 2009, Germany³⁵ and Italy³⁶ transmitted their observations to the Single Judge as requested in her decision of 10 July 2009.³⁷
27. On 12 August 2009, the Single Judge received South Africa’s observations.³⁸
28. On 14 August 2009, the Single Judge issued the *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*.³⁹ That same day, the Prosecutor appealed against that decision.⁴⁰

³¹ ICC-01/05-01/08-458, “*Requête aux fins de divulgation des éléments pertinents relatifs à l’admissibilité*”, 22 July 2009, <http://www.icc-cpi.int/NR/exeres/4E1E5098-4EC3-401F-BA2F-555D497A81BF.htm>.

³² ICC-01/05-01/08-461-Conf-Anx2.

³³ ICC-01/05-01/08-465-Conf-Anx2.

³⁴ ICC-01/05-01/08-467.

³⁵ ICC-01/05-01/08-472-Conf-Anx2.

³⁶ ICC-01/05-01/08-472Conf-Anx1.

³⁷ ICC-01/05-01/08-446.

³⁸ ICC-01/05-01/08-473-Conf-Exp-Anx2.

³⁹ ICC-01/05-01/08-475. Single Judge, *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*, 14 August 2009.

⁴⁰ ICC-01/05-01/08-476.

29. On 24 August 2009, the Prosecutor filed his observations in support of the appeal against the decision on the Accused's interim release. He further requested a suspension of the enforcement of the said decision on interim release.⁴¹

30. On 24 August 2009, the Defence filed a submission entitled *Defence Reply in Accordance with the Decision of Pre-Trial Chamber II of 14 August 2009 and Additional Defence Requests*, in which it (the Defence) requested the Single Judge: (1) to temporarily release the Accused onto the territory of the Host State pending enforcement of the 14 August 2009 decision; (2) to add the Democratic Republic of the Congo (the DRC) to the list of States where Jean-Pierre Bemba expressed his desire to be released and invited the DRC to participate in the public hearings scheduled for 7 to 14 September 2009; and (3) the Defence invited any other State Party to the Rome Statute to agree to the Accused's release on its territory.⁴²

31. On 31 August 2009, Belgium, France, Germany, Italy and Portugal filed a request with the Single Judge for the postponement of the public hearings scheduled for 7 to 14 September 2009.⁴³

32. On 3 September 2009, the Appeals Chamber issued a decision granting the Prosecutor's request for the said suspensive effect.⁴⁴

33. On 3 September 2009, the Single Judge eventually decided to suspend all of the hearings scheduled for 7 to 14 September 2009.⁴⁵

⁴¹ ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo".

⁴² ICC-01/05-01/08-484-Conf-tENG.

⁴³ ICC-01/05-01/08-494 and its annexes, The Registrar, "Transmission of Requests from the Italian Republic, the Federal Republic of Germany, the Kingdom of Belgium, the Republic of France and the Republic of Portugal for postponement of the hearings scheduled in the Decision on the Interim Release of Jean-Pierre Bemba on 14 August 2009", 31 September 2009.

⁴⁴ ICC-01/05-01/08-499, Appeals Chamber, *Decision on the Request of the Prosecutor for Suspensive Effect*, 3 September 2009.

⁴⁵ ICC-01/05-01/08-502, Single Judge, *Decision Postponing the Hearings with States on Mr. Jean-Pierre Bemba Gombo's Conditional Release and Considering the Defense's Additional Application*, 3 September 2009.

34. The Defence and the Legal Representatives of Victims were invited to file their observations on the Prosecutor's appeal. However, Aprodec asbl notes that to date, no documents pertaining thereto have been made publicly available on the Court's website.

IV. Subject of the intervention

A. The criteria, in a decision on conditional release, for the objective assessment of the changed circumstances with respect to: - a) the risk of absconding; and -b) the risk to the victims and witnesses; such criteria being read in conjunction with articles 58(1), 60(2) and 3 of the Rome Statute:

35. In the Prosecutor's appeal against the decision on the conditional release of Jean-Pierre Bemba of 24 August 2009,⁴⁶ the Prosecution contends that the Single Judge committed a first error of law in that there has been no overall change in circumstances since the most recent decision on conditional release of 14 April 2009 to warrant an amendment of the said decision.

36. In this respect, the Prosecutor states that at least seven of the nine factors considered by the Single Judge have not changed in accordance with article 60(3) of the Rome Statute. However, Aprodec asbl notes that the Prosecutor's document relies on circumstances which pre-date the decision of 14 April 2009 and arguments which formed the basis for the three decisions to deny interim release previously issued by the Single Judge,⁴⁷ as does the Appeals Chamber decision⁴⁸ of 16 December 2008. This is wholly inconsistent with article 60(3) of Rome Statute, which requires a genuine review of the circumstances that justified the continued detention of the Accused.

⁴⁶ ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo", 24 August 2009, p.10.

⁴⁷ ICC-01/05-01/08-323, ICC-01/05-01/08-321 and ICC-01/05-01/08-403, Decisions to deny interim release.

⁴⁸ ICC-01/05-01/08-323, *Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release*, 16 December 2008.

37. At paragraph 35 of the decision of 14 August 2009 on conditional release,⁴⁹ the Single Judge rightly recalls the following:

article 60(3) of the Statute, as any other statutory provision, must be interpreted and applied in accordance with internationally recognized human rights, as provided for in article 21(3) of the Statute. The right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention is enshrined in many international human rights instruments, such as article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples' Rights and article 7 of the American Convention on Human Rights.

38. In this respect, at paragraph 36 of the same decision, the Single Judge further recalls that in the 14 April 2009 decision, she had stressed that “when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule.”

39. The Single Judge then states at paragraph 37 that: “this fundamental principle, a corollary of the presumption of innocence provided in article 66 of the Statute, continues to be the guiding principle upon which the present review is based.”

40. Similarly, at paragraph 38, the Single Judge states that: “pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes.”

41. Moreover, at paragraph 41, the Single Judge quotes the Appeals Chamber as follows: “the decision on continued detention or release pursuant to article 60(2) read

⁴⁹ ICC-01/05-01/08-475. Single Judge, *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*, 14 August 2009, p.15.

with article 58(1) of the Statute is not of a discretionary nature. Depending on whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released". The Single Judge then states that this Appeals Chamber opinion also holds for review under article 60(3) of the Statute.

42. Lastly, at paragraph 42 the Single judge "generally clarifies that when, within the confines of article 21 of the Statute, reference is made to the jurisprudence of other international courts, in particular the ad hoc tribunals, accurate attention must be paid to the courts' legal framework and the particular circumstances of the case."

43. Considering the Prosecution's legitimate concerns, Aprocdec asbl recalls that in any event, a presumption must operate in favour of the Accused, thereby requiring the Prosecutor to seek irrefutable substantive evidence in support of his theoretical allegations of unchanged circumstances in the case at issue (with respect to the very latest decision to deny interim release of 14 April 2009) – evidence which can justify the continued detention of the Accused, whilst ensuring strict compliance with the requirements of articles 66 and 67 of the Rome Statute governing the presumption of innocence as well consistency with the rights of the Accused to a fair and equitable trial.

44. By way of illustration, in its 24 August 2009 submission, the Prosecution argues, *inter alia*, that the risk of absconding is increased by the fact that the multiple charges against the Accused were confirmed by the Pre-Trial Chamber on 15 June 2009 and that the charges the Accused is facing are of such gravity that they may result in multiple convictions leading to an overall lengthy sentence.⁵⁰

45. Nevertheless, Aprocdec asbl observes that although the Prosecution's aforementioned position has some jurisprudential support, it is purely speculative

⁵⁰ ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo", p.10, para.26.

and above all, premature, since the decision on the confirmation of charges of 15 June 2009 is not yet final as the time limits for appeals have not expired.⁵¹ In this regard, the Defence has yet to avail itself of its right to challenge before the Appeals Chamber the admissibility of the evidence which enabled the Pre-Trial Chamber to find that there is sufficient evidence to establish substantial grounds to believe that the Accused is criminally responsible, within the meaning of article 28(a) of the Rome Statute, for the crimes within its jurisdiction.⁵² Moreover, the Defence has not yet availed itself of the right to object to the Court's jurisdiction (by filing a challenge to jurisdiction), or to the admissibility of this case by filing a challenge to its admissibility before the Court on the ground of insufficient gravity, under articles 17 and 19 of the Rome Statute. Indeed, any accused person is entitled to file such a challenge just once during proceedings and prior to the actual commencement of his or her trial.⁵³

46. With respect to the grounds which led the Prosecution to believe that, if released rather than detained, the Accused is likely to intimidate or endanger the lives of victims and witnesses, Aprodec asbl maintains that this, too, is pure speculation since that argument was already rejected by the Single Judge in her decision of 14 August 2009.⁵⁴ In this respect, the Single Judge rightly observed that the Prosecutor did not provide any irrefutable substantive evidence to back up his allegations. Simply put, the Prosecution was unable to prove that the Accused intends to flee should the decision on interim release be implemented or that there is

⁵¹ ICC-01/05-01/08-458, "Requête aux fins de divulgation des éléments pertinents relatifs à l'admissibilité", 22 July 2009, p. <http://www.icc-cpi.int/NR/exeres/4E1E5098-4EC3-401F-BA2F-555D497A81BF.htm>.

⁵² ICC-01/05-01/08-450 and annexes, "Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour", 15 July 2009, pp. 7 to 18, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>.

⁵³ ICC-01/05-01/08-450 and annexes, "Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour", 15 July 2009, pp. 18 to 19, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>.

⁵⁴ ICC-01/05-01/08-475, Single Judge, *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*, 14 August 2009, p. 27, para. 73.

a criminal plan to intimidate or endanger the lives of the alleged victims and prosecution witnesses.⁵⁵

47. In this regard, Aprodec asbl further observes that since the Single Judge's 14 August 2009 decision on the conditional release of the Accused was made public, all sorts of ugly scenarios have been unfolding, both in the Central African Republic and in the Democratic Republic of the Congo, which provide the Prosecution with a pretext for Jean-Pierre Bemba's remaining in detention. Hence the two attacks against two members of the Congolese government during the nights of 29 and 30 August 2009 were presented as intimidation orchestrated by the Accused's supporters.⁵⁶ And therefore, what does this say about the reliability of the testimony already admitted by the Pre-Trial Chamber⁵⁷ in its decision of 15 June 2009?

48. Aprodec asbl further observes that in the Prosecutor's 24 August 2009 submission to the Appeals Chamber, the Prosecution refers to an open letter dated 19 August 2009 to the Presidency of the Court, purportedly from Ms Euphrasie Goungayé, a French national residing in France and the widow of Mr Goungayé Nganatouwa Wanfiyo (also French and of Central African origin), the former President of the *Ligue centrafricaine des droits de l'homme* [Central African Human Rights League] who died as a result of a violent road accident. In the said open letter, Ms Euphrasie Goungayé expresses her deep concern about Jean-Pierre Bemba's possible involvement in the road accident, which has yet to be resolved by the Central African authorities and which cost her late husband his life.⁵⁸ In this regard,

⁵⁵ ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo", p. 11.

⁵⁶ "Des présumés témoins à charges impliqués dans un grossier montage contre Jean-Pierre Bemba" <http://www.congoindependant.com/article.php?articleid=4908>, <http://www.radiookapi.net/index.php?i=53&a=24513>.

⁵⁷ ICC-01/05-01/08-424. *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009.

⁵⁸ ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo", p.14, para. 30.

the Prosecution further adds that the content of that letter is confirmed by other communications it (the Prosecution) has received.

49. Simply put, the Prosecution seeks to place the responsibility for Mr Goungayé's death on Jean-Pierre Bemba and gives credence to what may constitute slander and libel and also insult the Accused's honour. It would therefore be unsurprising if the CAR police – on François Bozizé's orders – were soon to present us with entirely false evidence of Jean-Pierre Bemba's involvement in the purported "attack" which cost Mr Goungayé his life, to the great satisfaction of all of those who support or gain from such machinations which belong to a bygone age. Accordingly, Aprodec asbl would draw the Court's attention to the need to ensure that it does not allow itself to be manipulated by the Accused's political opponents and to the risk that such grotesque fabrications could be repeated on a large scale during the trial.

50. It is nevertheless appropriate to emphasize that any human rights activist interested in the Central African Republic is fully aware that the late Mr Goungayé regularly received threats from forces loyal to the former rebel turned CAR President, François Bozizé, as a result of his dedication to the international community's setting up an inter-CAR political dialogue and to the ICC's Office of the Prosecutor's opening an investigation into those crimes ascribed to President François Bozizé, which are not subject to any statute of limitations and which took place between the events of 2002-2003 and 2008. This was purely a result of Mr Goungayé's instigation of the complaint filed with the ICC by the victims of acts of violence committed by forces loyal to François Bozizé.⁵⁹ Moreover, these threats have been very well documented by THE FIDH, the OMCT⁶⁰ and the UN.⁶¹ It is particularly striking that that the road accident which cost Mr Goungayé his life

⁵⁹ Press articles on the murders, rapes and pillaging ascribed to François Bozizé http://www.sangonet.com/afriqg/PAFF/Dic/ActualiteC13/ManipulationMatos_Bossangoa.html, <http://www.sangonet.com/afriqg/PAFF/Dic/ActualiteC13/OppositionaffaiblitAFP.html>,

⁶⁰ FIDH/OMCT press release on death threats to Mr Goungayé, <http://www.fidh.org/Graves-menaces-CAF-001-0106-OBS>.

⁶¹ UNHCR: *Me. Goungayé menacé de mort par les homes de François Bozizé*, <http://www.unhcr.org/refworld/country,,IFHR,,CAF,,486e051648,0.html>

occurred in northern CAR, President François Bozizé's stronghold.⁶² Furthermore, the *Union internationale des avocats* addressed several press releases and open letters *in tempore non suspecto* to François Bozizé, demanding an end to the threats and intimidation to Mr Goungayé and his fellow human rights activists.⁶³

51. In this regard, Aprodec asbl takes the view that this attempt by “dark forces” to manipulate Mr Goungayé's widow and the Prosecution's use thereof as a pretext in the absence of irrefutable substantive evidence of the Accused's alleged “dangerousness”, constitute further evidence which not only confirms the Prosecutor's bias, but also the discriminatory or selective prosecutorial policy of which Jean-Pierre Bemba has been a victim since this case started – all of which seriously jeopardize the possibility of his receiving a fair and equitable trial.⁶⁴

52. At the same time, some so-called human rights NGOs have abandoned their restraint.⁶⁵ Unlike the NGO Amnesty International, which, in its press release of 14 August 2009, rightly argued for strict adherence to the presumption of innocence and the right of the Accused to receive a fair and equitable trial and requested the Netherlands to agree to receiving Jean-Pierre Bemba on its territory,⁶⁶ the *Fédération Internationale des Ligues des droits de l'homme* (FIDH) issued a very biased press release⁶⁷ on 3 September 2009, which is in breach of its own statutes in several respects.

⁶² Rfi: *Décès suspect de Me Goungayé*, http://www.rfi.fr/actu/fr/articles/108/article_76630.asp

⁶³ Letters and press release of the *Union Internationale des Avocats* about Mr Goungayé: http://dlh.uianet.org/uploads/tx_hhuiadlh/lettre_UIA_deces_Me_Goungaye.pdf; http://dlh.uianet.org/uploads/tx_hhuiadlh/Lettre_UIA_-_Goungaye_24_06_02.pdf; http://dlh.uianet.org/uploads/tx_hhuiadlh/Lettre_UIA_-_Goungaye_24_06_02.pdf.

⁶⁴ Aprodec asbl press release, <http://www.congoone.net/Allstory.php?Id=1681>

⁶⁵ *La France est montrée du doigt par la presse congolaise*, <http://www.congoindependant.com/article.php?articleid=4908>.

⁶⁶ Amnesty International press release: <http://www.reporterfreelance.info/2009/08/amnesty-international-calls-on-dutch-government-to-receive-jean-pierre-bemba/>

⁶⁷ See the very biased FIDH press release dated 3 September 2009, <http://www.fidh.org/CPI-Jean-Pierre-Bemba-La-FIDH>.

53. In its press release of 3 September 2009, the FIDH was quick to comment on a court decision and put pressure on the receiving countries to refuse to receive Jean-Pierre Bemba on their territory, despite the fact that Mr Bemba is still presumed innocent. The FIDH went as far as indirectly putting pressure on the Appeals Chamber judges to decide against conditional release of the Accused; the FIDH then refers to the alleged instability of the Central African Republic, whereas the country is relatively stable. As proof of this, the deposed president Ange Félix Patassé returned home⁶⁸ after participating in a national peace and reconciliation process last year with the current president, François Bozizé;⁶⁹ and lastly, the FIDH stated that the Congolese are likely to see the decision on conditional release as an acquittal of Mr Bemba and, as a result, that the Appeals Chamber must keep him in detention as releasing might cause a disturbance of law and order. Apropdec asbl is particularly outraged by this argument from the FIDH, which is both scornful of and insulting to the Congolese people and its entire intellectual class.

54. Further, Apropdec asbl draws the Court's attention to possible interference by the French Ministry of Foreign Affairs, the Quai d'Orsay, in this case. In this regard, Apropdec asbl denounces the fact that the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor is headed by a French woman, Ms Béatrice le Fraper du Hellen,⁷⁰ who is also Adviser to the French Ministry of Foreign Affairs.⁷¹ This conflict of interest is sufficient proof of the potential

⁶⁸ The return of the deposed president Ange-Félix Patassé to Bangui, <http://fr.allafrica.com/stories/200909030194.html>.

⁶⁹ The Peace Agreements in the CAR, <http://www.africa-live.com/nc/news/article/bozize-patasse-le-calumet-de-la-paix-384.html>, <http://www.lesafriques.com/centrafrique/centrafrique-bozize-patasse-et-kolingba-se-repentent.html?Itemid=46?articleid=12157>.

⁷⁰ Structure of the Office of the Prosecutor, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>

⁷¹ *Le répertoire des Agents en fonction à l'extérieur du Ministère des Affaires Etrangères de la République française*, http://www.diplomatie.gouv.fr/fr/IMG/pdf/repertoire_mobiles_2008.pdf

manipulation of the Office of the Prosecutor by the French state, which is a belligerent in the conflict in the CAR.⁷²

55. Aprodec asbl further observes that some so-called human rights NGOs are also under the influence of the French Ministry of Foreign Affairs. In this regard, Aprodec asbl does not see how the current FIDH management (whose headquarters are in Paris) could avoid the control of the Quai d'Orsay, all the more so as the President of the FIDH, Ms Souhayr Belhassen,⁷³ a Tunisian national, is very close to the French Presidency. Secondly, or rather firstly, Mr Antoine Bernard, Executive Director of the International Office⁷⁴ of the FIDH (a French national), whose relations with the Quai d'Orsay are well known to all human rights defenders at international level, may have been acting as a vector of Quai d'Orsay policy inside the FIDH for almost twenty years.

56. Indeed, the irremovable Mr Bernard controls all FIDH Representative Offices in the major international institutions, *inter alia*, the UN, the European Union, the African Union (...) and, of course, the International Criminal Court. In addition, Mr Bernard has under his control a number of colleagues of French nationality occupying key positions in the FIDH Executive Office, including Mr Florent Geel, Assistant Director of the Africa Desk, Ms Karine Bonneau, Director of the International Justice Desk and Mr Antoine Madelin, Director for IGOs and permanent delegate to the European Union. Aprodec asbl concludes therefore that the biased press release published by the FIDH on 3 September 2009 (just after the Appeals Chamber decision of 3 September 2009 on the suspensive effect of the decision on the conditional release of Mr Bemba) is not only a result of "short-

⁷² ICC-01/05-01/08-450 and annexes, *Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*, of 15 July 2009, p.14, para.69, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>, press release by Aprodec asbl, <http://www.congoone.net/Allstory.php?Id=1681>.

⁷³ Structure of the International Office of the FIDH, <http://www.fidh.org/-Bureau-international->

⁷⁴ Structure of the International Executive Secretariat of the FIDH, <http://www.fidh.org/-Secretariat-international->

circuiting” in the decision-making bodies of the FIDH at the behest of the French State⁷⁵ (a belligerent⁷⁶ in the conflict in the CAR), but in particular the said press release reveals a serious dysfunction within the International Executive Secretariat of this human rights NGO.

57. In this regard, Aprodec asbl also concludes that the network woven by the Quai d’Orsay particularly within the Office of the Prosecutor of the ICC and at the FIDH underpins the policy of discriminatory or selective criminal prosecutions (Discriminatory Intent and Discriminatory Effect) of which Mr Bemba is a victim.⁷⁷ In this respect, how can the Court understand that the deposed president, Ange-Félix Patassé, moreover referred to as a co-perpetrator of crimes committed by the soldiers of Jean-Pierre Bemba’s MLC, is not being prosecuted for the same crimes? In addition, how can the Court accept that the Prosecutor did not issue an arrest warrant for Ange-Félix Patassé, or simply order that a request for judicial assistance be sent⁷⁸ so that Patassé be called as a major witness, given the senior positions he held (President of the CAR and Supreme Commander of the Central African armed forces) during the period relevant to the facts of the case, while a number of the Prosecutor’s witnesses state quite clearly that Ange-Félix Patassé issued criminal orders⁷⁹ to MLC soldiers (without the knowledge of Jean-Pierre Bemba) for the

⁷⁵ Letter from the deposed president Ange-Félix Patassé denouncing the assistance given by the French army to the rebel general François Bozizé Yangouvanda, <http://www.afrique-express.com/archive/CENTRALE/rca/rcapol/272lettrespataste.htm>,

⁷⁶ Shelling of Central African towns by the French army
<http://communisme.wordpress.com/2007/11/03/exactions-militaires-en-centrafrique-la-francecomplice/#>.

⁷⁷ ICC-01/05-01/08-450 and annexes, *Demande d’autorisation d’intervenir comme Amicus Curiae dans l’affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*, of 15 July 2009, p.14, paras.41-65, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>, press release by Aprodec asbl, <http://www.congoone.net/Allstory.php?Id=1681>.

⁷⁸ ICC-01/05-01/08-450 and annexes, *Demande d’autorisation d’intervenir comme Amicus Curiae dans l’affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*, of 15 July 2009, p.14, paras.41-81, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>.

⁷⁹ Testimonies on the criminal orders given by Ange-Félix Patassé to MLC troops: ICC-01/05-01/08-424, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against*

purpose of implementing a real policy of terror against his own people? Therefore, Aprocdec asbl is paying close attention to how the Court responds to its legitimate questions, as the credibility of this prestigious international court is at stake.

58. Finally, Aprocdec asbl is concerned that the discriminatory effect of the Prosecutor's criminal prosecution policy, of which Mr Bemba is a victim, may permanently adulterate not only the historical truth but also the judicial truth of the events that took place in the CAR between 2002 and 2003. Further, Aprocdec is also concerned that the strength of feeling and particularly the media build-up generated by this case may incite some of Mr Bemba's political opponents in power in the DRC,⁸⁰ as well as other belligerents in the CAR conflict⁸¹ (who are also presumed responsible for crimes not subject to the statute of limitations, *inter alia* François Bozizé, Ange-Félix Patassé, and Martin Koumtam Madji alias Abdoulaye Miskine) to themselves endanger the lives of victims and Prosecution witnesses,⁸² in order to put all the blame on the sole Accused in the Central African conflict, who, in short, has become a scapegoat or sacrificial victim. Aprocdec asbl respectfully requests the Court therefore to take into account all the legal and judicial consequences of this situation.

59. It seems important therefore that the Chamber be respectfully informed of the points of law on the criteria for evaluation of the circumstances with respect to: a) risk of absconding; and b) endangering victims and witnesses, in a decision on conditional release, read in conjunction with articles 58(1), 60(2) and (3) of the Rome

Jean-Pierre Bemba Gombo, 15 June 2009, para.143, para.262, para.188, para.392, para.393, para.394, para.395, para.397.

⁸⁰ Report by the NGO Human Rights Watch of 28 November 2008 on the tyranny of Joseph Kabila's regime, entitled "*On va vous écraser*", <http://www.hrw.org/fr/reports/2008/11/25/va-vous-craser-0>

⁸¹ ICC-01/05-01/08-450 and annexes, *Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire le Procureur contre Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*, of 15 July 2009, p.14, paras.41-65, <http://www.icc-cpi.int/NR/exeres/F1BCF0D7-B3F3-4236-BCC8-7AC4B05BB009.htm>, press release by Aprocdec asbl, <http://www.congoone.net/Allstory.php?Id=1681>.

⁸² Intimidation of Central African human rights defenders by the security forces of François Bozizé Yangouvanda, <http://www.unhcr.org/refworld/country,,JFHR,,CAF,,486e051648,0.html>, http://www.leconfident.net/Le-General-Bombayeke-est-victime-de-l-arbitraire-,dixit-Me-Morouba_a358.html

Statute. Aprodec asbl is acting not only without bias for the benefit of all parties involved, but also to assist the Appeals Chamber in reaching a decision here.

B. Procedure for conditional release and the issue of determining a receiving country and adequate conditions, on the basis of articles 66, 67, 86, 87 and 88 of the Rome Statute:

60. In the appeal application filed by the Prosecutor against the decision to release the Accused conditionally, the Prosecutor maintains that the Single Judge committed a second error of law in granting the Accused conditional release without first determining which country would receive the accused or the adequate security conditions pertaining to his release.⁸³

61. Furthermore, in her decision of 14 August 2009 on conditional release, the Single Judge ordered a deferral of the implementation of her decision until the Chamber had decided what conditions to impose on Mr Bemba and in which country to release him, and until all the necessary provisions had been made.⁸⁴

62. In the same decision of 14 August 2009, the Single Judge is of the belief that: “seeking the views on the conditions to be imposed *before* the decision on interim release would be premature and would give the impression of pre-determination of the Single Judge with regard to the said decision.⁸⁵ Thus, the conditions to be imposed will be determined subsequently by the Single Judge, after the views of the Prosecutor, Mr Jean-Pierre Bemba, the relevant States and victims in that case have been sought. As to the Defence, the Single Judge will consider the proposed

⁸³ ICC-01/05-01/08-485, Prosecution’s Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo, 24 August 2009, p.15.

⁸⁴ ICC-01/05-01/08-475, single judge, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, of 14 August 2009, p.28, para. 78.

⁸⁵ ICC-01/05-01/08-475, single judge, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, of 14 August 2009, pp. 28-9, para. 82.

conditions and 'personal guarantees' offered during the Hearing of 29 June 2009 and provided in writing thereafter."

63. As underlined in paragraphs 37, 38, 39 and 40 of Aprodec asbl's application (see above), the right to conditional release is a fundamental right guaranteed by all international treaties and agreements.

64. Aprodec asbl also recalls articles 86 and 88 of the Rome Statute, which oblige all States Parties to cooperate fully with the Court and to amend their constitutions in order to facilitate such cooperation.

65. In this regard, article 87 paragraph 7 of the Rome Statute provides the following: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

66. However, at the same time as European countries are preparing to receive compatriots who have been held in preventive detention at the US army base in Guantanamo, Cuba for active complicity in the terrorist attacks on New York, Washington, Shanksville and Pennsylvania on 11 September 2001 and which cost the lives of 2,974 American citizens, most of the countries in which Mr Bemba (the Accused), a Congolese national, has expressed a wish to stay for the whole period of his conditional release (Belgium, France, Holland, Germany, Portugal, Italy and South Africa) have given either a categorical refusal or expressed reservations about the request for cooperation with the Court. Such hostility is all the more surprising for Member States of the European Union, whose Parliament welcomed (Report of the European Parliament of 14 April 2009) the full cooperation of certain Member States, particularly Belgium and Portugal, in the arrest and transfer of Bemba to the

ICC.⁸⁶ Would it be more appropriate to call this flexible, not full, cooperation? The Belgian attitude here is most paradoxical.

67. In addition, Aprodec asbl observes that most States Parties agree to cooperate with the Court only if it is in their own political and economic interest to do so. In this regard, the great majority of these States Parties have not amended their national constitutions in relation to the Rome Statute. For example, article 27 of the Rome Statute does not recognise any form of immunity, whatever the suspect's official capacity. Accordingly, no one is exempt from criminal responsibility for the most serious crimes falling within the jurisdiction of the International Criminal Court. In this case, Germany, Belgium, France, Italy, the Netherlands and Portugal are still not in full compliance with article 27 of the Rome Statute. In other words, all these States have ratified the Rome Statute unconstitutionally, in contradiction to their own national constitutions.⁸⁷

68. As an illustration, more than ten years after ratifying the Rome Statute, Belgium has still not amended its constitution in relation to immunities and other jurisdictional privileges. On this subject, article 88 of the Belgian Constitution enshrines the inviolability of the King's person, while article 103 of the same constitution confers jurisdictional privileges on Ministers. Therefore, the Belgian King, ministers and parliamentarians are all protected from any criminal prosecution by the ICC.⁸⁸

69. Aprodec observes moreover that the Rome Statute is enforced in full for those subject to trial from Third World countries. However, the said Statute is all but inoperative for European citizens subject to trial. Indeed, as the ICC is only a court of

⁸⁶ Report of the European Parliament of 14 April 2009 on human rights in the world <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2009-0264+0+DOC+XML+V0//EN>.

⁸⁷ France is not in line with the Rome Statute, <http://www.cfcpf.fr/spip.php?article280>.

⁸⁸ Cooperation between Belgium and the ICC is unconstitutional, <http://www.congoone.net/Allstory.php?Id=1252>.

complementarity, the Office of the Prosecutor may never prosecute a single ordinary European citizen. In this respect, some analysts say, rightly or wrongly, that the Court was established to try people from the Third World only. Unfortunately, in line with this, some Member States from the African Union are threatening to withdraw their signature from the Rome Statute because of the risk of manipulation of the Court by political racketeering lobbies active in certain regions of the world, including Sub-Saharan Africa.⁸⁹

70. On the other hand, supposing that the decision to release the Accused conditionally is not rendered enforceable due to the lack of a receiving country, there will be cause to wonder whether such a situation would arise if he (the Accused) was tried and sentenced to imprisonment at the end of his trial. Stated otherwise, if there is a conviction, and given the fact that the ICC only has a small detention centre for provisional detention in the Dutch prison in Scheveningen, which State Party to the Rome Statute would agree to receive the Accused in one of its prisons where he could serve his sentence? That is the question.

71. In this respect, Aprocdec asbl further recalls that the Charter of Fundamental Rights of the European Union, signed in Nice on 7 December 2000 by the Council of Europe, obliges Member States of the European Union not to tolerate any form of discrimination or injustice on their territories.⁹⁰ In this case, the Defence is entitled to consider taking proceedings to a court which deals with urgent applications in the various States that refuse to cooperate with the Court, with the possibility of a final appeal to the European Court of Human Rights (ECHR).

72. In this case, despite the fact that the Single Judge suspended her own decision of 14 August 2009 until it is decided to which country the Accused would be released

⁸⁹ Some African States want to withdraw from the Rome Statute, <http://www.hrw.org/en/news/2009/07/30/african-civil-society-urges-african-states-parties-rome-statute-reaffirm-their-commi>.

⁹⁰ The Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf

and which conditions would be imposed on him,⁹¹ the Prosecutor characterised the said decision by the Single Judge as premature.⁹² The Defence also considered premature the Prosecutor's request for suspensive effect on the implementation of the conditional release.⁹³ Finally, the Appeals Chamber acceded to the Prosecutor's request whilst conceding that the Defence's arguments were also convincing.⁹⁴ Moreover, Aprodec asbl recalls that by virtue of article 66(3) of the Rome Statute the Accused should have the benefit of reasonable doubt.

73. All this legal vagueness led the Single Judge to postpone the public hearings scheduled from 7 to 14 September 2009 with the States' Representatives.⁹⁵ However, Aprodec asbl is of the opinion that the outcome of these hearings would have provided the Appeals Chamber with all the necessary and sufficient information for its own determination in this case, with regard to respect for the Accused's right to a just and equitable trial.

74. Lastly, the procedure for conditional release, as described above, fully justifies Aprodec asbl's respectfully submitting its observations to enable the Appeals Chamber to settle this thorny issue and to move forward not only the current proceedings but also all future proceedings.

⁹¹ ICC-01/05-01/08-475, Single Judge, *Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa*, of 14 August 2009, p.30, para.78.

⁹² ICC-01/05-01/08-485, "Prosecution's Document in support of the Appeal against Decision on Interim Release of Jean-Pierre Bemba Gombo", 24 August 2009, p.15.

⁹³ ICC-01/05-01/08-499, Appeals Chamber, *Decision on the Request of the Prosecutor for Suspensive Effect*, 3 September 2009, p.7, para.13.

⁹⁴ ICC-01/05-01/08-499, Appeals Chamber, *Decision on the Request of the Prosecutor for Suspensive Effect*, 3 September 2009, p.7, para.13.

⁹⁵ ICC-01/05-01/08-502, Single Judge, *Decision Postponing the Hearings with States on Mr. Jean-Pierre Bemba Gombo's Conditional Release and Considering the Defence's Additional Application*, 3 September 2009.

V. Conclusion

75. For all these reasons, Aprodec asbl respectfully requests that it be granted leave, *without discrimination*, to file its brief, unbiased, written observations (25 pages maximum) for the Court's attention, solely on elements of law concerning: 1. the criteria on the objective evaluation of the changed circumstances with respect to :-a) the risk of a suspect's absconding; and – b) endangering the victims and witnesses – such criteria being read in conjunction with articles 58(1), 60(2) and 3 of the Rome Statute; 2. the procedure for conditional release in terms of determining a receiving country and sufficient conditions in light of articles 66, 67, 86, 87 and 88 of the Rome Statute and to do so for the purpose of assisting the proper administration of justice, pursuant to rule 103 of the *Rules of Procedure and Evidence*.

76. In addition, since the Pre-Trial Chamber has authorised some human rights NGOs, *inter alia* Amnesty International⁹⁶ and Women's Initiatives for Gender Justice,⁹⁷ to intervene as *Amicus Curiae* in this case, the Appeals Chamber will note that the legal issues about which Aprodec asbl wishes to intervene again are such as to assist it ruling correctly at the end of this procedure for conditional release.⁹⁸

[signed]

Mr Benjamin Stanis Kalombo
Chair
for the Board of Governors of Aprodec asbl

Dated this 16 September 2009

At Brussels, Belgium

⁹⁶ ICC-01/05-01/08-401, *Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 9 April 2009, p.5, para12.

⁹⁷ ICC-01/05-01/08-451, *Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 17 July 2009, p.6.

⁹⁸ ICC-01/04-01/06-1289, Appeals Chamber, *Decision on Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence*.