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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Response of the Office of Public Counsel for the Defence to the “Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri”

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

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Unrepresented Victims

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Introduction

1. Although VPRS 3 and VPRS 6 were granted the right to participate in the investigation stage of the DRC situation by Pre-Trial Chamber I's decision of 17 January 2007,¹ their status as participating victims was reversed by the Appeals Chamber's judgment of 19 December 2008.²
2. VPRS 3 and VPRS 6 therefore have no legal standing to seize the Pre-Trial Chamber, and their request should be dismissed *in limine*.
3. In the alternative, the Appeals Chamber has very clearly stated that there is no procedural status of victim; alleged victims have no right to participate outside of the context of specific judicial proceedings. The right to participate as an alleged victim under article 68(3) of the Statute does not equate to a right to participate in the Prosecutor's investigations, nor does it give them a vehicle to act as a second prosecutor.
4. The filing of Legal Representatives of VPRS 3 and 6 dated 28 June 2010 must therefore be dismissed due to their failure to identify a specific proceeding in the DRC situation, which affects their personal interests, and which is capable of judicial resolution.

Procedural History

5. On 17 January 2006, Pre-Trial Chamber I granted VPRS 3 and VPRS 6 the right to participate in the investigation stage of the DRC situation.³
6. On 17 August 2007, the Pre-Trial Chamber decided that in light of the obligation of the OPCD under Regulation 77(4) of the Regulations of the Court to represent the

¹ Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS, 6 ICC-01/04-101-Corr, 17 January 2006.

² Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556

³ Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS, 6 ICC-01/04-101-Corr, 17 January 2006.

interests of the defence during the initial stages of the investigation, the OPCD would be appointed to respond to all future applications filed in the DRC situation.⁴

7. On 28 June 2010, the Legal Representatives for VPRS 3 and VPRS 6 filed the ‘Demande du représentant legal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri’.⁵
8. In this filing, the Legal Representatives requested the Pre-Trial Chamber to examine the decision of the Prosecutor not to investigate Jean-Pierre Bemba in his capacity as a military commander for crimes allegedly committed by his troops in Ituri, and to order that the Prosecutor remedy this deficiency in his investigations.
9. The OPCD hereby submits its response.

1. VPRS 3 and VPRS 6 have no standing to participate in the proceedings

10. On 28 February 2008, the Legal Representatives for VPRS 3 and VPRS 6 requested authorization from the Appeals Chamber to participate in the appeals of the Office of Public Counsel for the Defence (OPCD) and the Prosecutor against the decision of 24 December 2007 concerning victim participation in the DRC situation.⁶ In this request, the legal representatives asserted that the personal interests of VPRS 3 and VPRS 6 were affected by the appeal because the Appeals Chamber’s determination could affect their victim status and participatory rights.
11. In granting them a right to participate, the Appeals Chamber confirmed that if the appeals of the OPCD and OTP were upheld, the alleged victims would “be deprived of all procedural rights arising from their status as victims which they presently hold”.⁷

⁴ Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation ICC-01/04-374 at p. 23-24.

⁵ ICC-01-4-564

⁶ Request of the Legal Representatives of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6 and a/0071/06 for Leave to Participate in the Appeal Taken by the OPCD and the Prosecutor on 7 January 2008 and Authorised by Pre-Trial Chamber I on 6 February 2008 ICC-01/04-474.

⁷ Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007 ICC-01/04-503, 30 June 2008 at para 94.

12. In its ultimate judgment on the merits of the appeals of the OPCD and OTP, the Appeals Chamber also underscored that the impugned decision of 24 December 2007 was based on the same legal reasoning as the earlier decision of 17 January 2006.⁸ In finding that the decision of 24 December 2007 had applied the erroneous concept of a ‘procedural status of victim’, and had incorrectly found that the right to participate in the proceedings extended to a right to participate in investigations, the Appeals Chamber also reversed the legal underpinnings of the 17 January 2006 decision.

13. It is clear that by allowing all alleged victims to participate in the appeal, irrespective of the date on which they had been granted the right to participate, and by stressing the correlation between the decision of 17 January 2006 and the impugned decision of 24 December 2007, the Appeals Chamber intended to ensure uniformity of treatment between the alleged victims, who had been granted the right to participate by different decisions.

14. The legal weight of this judgment is buttressed by the fact that the Appeals Chamber rendered an identical judgment in the Darfur situation,⁹ and furthermore emphasized the applicability of these judgments to the Uganda situation.¹⁰

15. Accordingly, as foreshadowed by the Appeals Chamber in its decision granting VPRS 3 and VPRS 6 the right to participate in the appeal, the inevitable consequence of the fact that the Appeals Chamber granted the appeals of the OPCD and OTP was that all

⁸ See for example, para 3 “In so holding, the Single Judge treaded along the path earlier mapped by the decision of the Pre-Trial Chamber sitting en banc of 17 January 2006.”, and para 42, “Evidently, the Impugned Decisions reflect the approach of the Pre-Trial Chamber in its decision 55 of 17 January 2006 as to the implications of such participation.” Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008.

⁹ Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, ICC-02/05-177, 2 February 2009.

¹⁰ “The Appeals Chamber notes furthermore that the Pre-Trial Chamber did not grant leave to appeal in respect of the question of whether victims may be granted general participatory rights in relation to the Prosecutor’s investigations (see above, paragraphs 4 and 5). The Appeals Chamber recalls its judgments of 19 December 2008² and of 2 February 2009.³ The present judgment, which addresses the narrow issue recapitulated at paragraph 32 above, is not meant to alter those judgments in any respect.” Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, ICC-02/04-01/05-371, 23 February, 2009 at para 33.

alleged victims participating in the DRC situation, including VPRS 3 and VPRS 6, were “deprived of all procedural rights arising from their status as victims”.¹¹

16. It therefore follows that since VPRS 3 and VPRS 6 have no participatory rights in the DRC situation, there is no basis for them to seize the Pre-Trial Chamber of the current request, and it should thus be dismissed *in limine*.

2. VPRS 3 and VPRS 6 have failed to identify a judicial proceeding which impacts upon their personal interests

17. In its judgment of 19 December 2008, the Appeals Chamber enunciated the general principle that alleged victims “are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations.”¹² They nonetheless attached two important caveats to this principle: firstly, the Appeals Chamber unequivocally stated that there is no such thing as a procedural status of victim - applicants may only be granted the status of ‘victim’ for the express purpose of facilitating their participation in a specific judicial proceeding which affects their personal interests; and secondly, the Chamber held that prosecution investigations cannot be considered to be judicial proceedings:

What emerges from the case law of the Appeals Chamber is that participation can take place only within the context of judicial proceedings. Article 68 (3) of the Statute correlates victim participation to “proceedings”, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.¹³

¹¹ Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 ICC-01/04-503, 30 June 2008 at para 94.

¹² Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008 at para 56.

¹³ Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008 at para 45.

18. It therefore follows that whilst alleged victims could in principle participate in specific judicial proceedings concerning prosecution investigations,¹⁴ article 68(3) cannot be used as a vehicle to influence the outcome of prosecution investigations outside of the context of any specific judicial proceedings.

19. The existence of judicial proceedings at the situation phase concerning the Prosecutor's investigative strategy is also necessarily delimited by the statutory powers of the Pre-Trial Chamber at this stage: the Pre-Trial Chamber cannot grant alleged victims the right to participate in judicial proceedings which the Chamber has no power to convene. As held by the Appeals Chamber,

The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

The domain and powers of the Prosecutor are outlined in article 42 of the Statute, paragraph 1 of which reads:

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source.

Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.¹⁵

20. The burden of identifying firstly, the existence of an appropriate judicial proceeding, and secondly, that their personal interests are affected by the factual or legal issues addressed in this proceeding, falls on the alleged victims.¹⁶

¹⁴ Provided that the other criteria set out in article 68(3) of the Statute were also met.

¹⁵ At paras 51-52.

¹⁶ Prosecutor v. Lubanga, Decision on Victim Participation, ICC-01/04-01/06-1119, 18 January 2008 at para 103; Darfur Situation, Decision of the Appeals Chamber on the OPCV's Request for Clarification and Order of the Appeals Chamber on the Date of Filing of Applications for Participation and on the Time of the Filing of the Responses thereto by the OPCD and the Prosecutor, ICC-02/05-129, 28 February 2008; Prosecutor v. Lubanga, Oral decision, Transcript of 8 April 2008, 8 April 2009 ICC-01/04-01/06-T-167 at pages 6-8. As concerns the fact that the general burden of establishing that all the criteria for participation are met falls on the applicants, see Prosecutor v. Bemba, Fourth Decision on Victim's Participation, ICC-01/05-01/08-320 12 December 2008 at para 31; Prosecutor v. Kony, Judgment on the appeals of the Defence against the decisions

21. In their filing, VPRS 3 and VPRS 6 invoke article 53(3)(b) of the Statute, which provides that the “Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed [with the prosecution of a case] if it is based solely on paragraph 1(c) or 2 (c)”.
22. At this point in time – to the knowledge of the OPCD – there are no extant proceedings pursuant to article 53(3)(b) concerning the Prosecution’s investigations in the DRC, and alleged victims do not have the power to trigger such a review.¹⁷
23. The Pre-Trial Chamber can also only exercise its *proprio motu* power under article 53(3)(b) if firstly, the Prosecutor has decided not to prosecute a case, and secondly, this decision was motivated by the discretionary factors set out in article 53(2)(c), as opposed to a lack of evidence. The filing of VPRS 3 and VPRS 6 fails to demonstrate that either of these two criteria are met.
24. As concerns the existence of a decision not to prosecute Jean-Pierre Bemba Gombo for the events in question, the jurisprudence of Pre-Trial Chamber I supports the proposition that in order to justify the use of its article 53(3)(b) powers, the Prosecutor should have formally notified the Pre-Trial Chamber that the Prosecution had decided not to prosecute the case in question;¹⁸ mere speculation or supposition concerning the status of Prosecution investigations or prosecutions is not sufficient.¹⁹

entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, ICC-02/04-01/05-371, 23 February 2009 at para 36.

¹⁷ R. Cryer, H. Friman, D. Robinson, E. Wilmhurst Introduction to International Criminal Law and Procedure (Cambridge University Press, 2010) at page 488.

¹⁸“ CONSIDERING therefore that, since the Prosecutor has not taken any decision under article 53(l)(c) or (2)(c) of the Statute, the request made by the legal representative of the victims that the Chamber review, pursuant to article 53 (3) (b) of the Statute, the decision of the Prosecutor regarding the investigation in the Situation in the DRC is not appropriate at the present stage and has no legal basis”, Decision on the Requests of the Legal Representative for victims VPRS1 to VPRS 6 regarding "Prosecutor's information on further investigation" ICC-01/04-399, 26 September 2007 at page 5.

¹⁹ The press releases and reports cited by VPRS 3 and VPRS do not support their conclusion that the Prosecution has decided not to investigate any alleged offences committed by the MLC in DRC. These press releases merely state that the Prosecutor has completed a particular targeted inquiry in Ituri (phase one of its investigations); this does not exclude the possibility that the Prosecutor has opened or could open other targeted inquiries in Ituri concerning different events. Indeed, given the fact that the Prosecution frequently emphasizes the need to protect the confidentiality of its investigations, no conclusions can be drawn from the fact that the Prosecutor does not reveal his investigative strategy as concerns a specific armed group or alleged perpetrator.

25. Even if the Prosecutor has made a strategic decision not to prosecute the alleged events referred to by VPRS 3 and VPRS 6, they have failed to demonstrate that the decision not to prosecute was unrelated to either a lack of evidence or inadmissibility issues. In order to commence the prosecution of a case, the Prosecutor must, at the very least, be satisfied that there is a “sufficient legal or factual basis to seek a warrant or summons under article 58”. The evidential standard under article 58(1)(a) is ‘reasonable grounds to believe that the person has committed a crime under the jurisdiction of the Court’.
26. The possibility that the Prosecutor has referred to certain incidents during the Bemba confirmation hearing does not in itself establish that the evidence cited would meet the ‘reasonable grounds to believe’ test, in particular, the gravity requirements, and chapeau elements of the war crimes or crimes against humanity provisions.
27. In any case, if the Prosecutor were to rely on such events to found its current case against Jean-Pierre Gombo Bemba, the Prosecutor could be precluded from initiating a second prosecution based on the same events under the principle of *ne bis in idem*, as set out in article 20(1) - “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been acquitted or convicted by the Court”.

3. Relief Sought

28. For the reasons set out above, the OPCD requests the Honourable Pre-Trial Chamber to dismiss the ‘Demande du représentant legal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes donts ses troupes sont présumées coupables en Ituri’.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this Thursday, 15th day of July 2010

At The Hague, The Netherlands