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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 IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre BEMBA GOMBO***

Public Document

**Application by the OPCV in its Capacity as Legal Representative of the Victims
for Participation in the Interlocutory Appeal Filed by the Defence Challenging the
Decision of Trial Chamber III of 28 July 2010**

Source: The legal representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0293/08, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09

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

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**Victims Participation and Reparations
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Other

I. Procedural History

1. On 28 July 2010, Trial Chamber III issued the *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*, in which it decided to keep the accused in detention.¹

2. On 29 July 2010, the Defence filed the “*Acte d’appel de la Défense contre la décision de la Chambre de Première Instance III du 28 juillet 2010 intitulée ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’*”.²

3. On 4 August 2010, the Defence filed the “*Mémoire à l’Appui de l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 28 juillet 2010 intitulée ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’*”.³

4. The Lead Counsel of the Office of Public Counsel for Victims, in her capacity as legal representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0293/08, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09

¹ See *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence* (Trial Chamber III) No. ICC-01/04-01/08-843, 28 July 2010.

² See “*Acte d’appel de la Défense contre la décision de la Chambre de Première Instance III du 28 juillet 2010 intitulée ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’*” No. ICC-01/04-01/08-844 OA 4, 29 July 2010.

³ See “*Mémoire à l’Appui de l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 28 juillet 2010 intitulée ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’*”, No. ICC-01/04-01/08-847 OA 4, 4 August 2010.

and a/0653/09,⁴ (the “Legal Representative”) respectfully submits the following observations.

II. The right of the victims permitted to participate in the case to participate also in the interlocutory appeal filed by the Defence

5. Under regulation 24(2) of the Regulations of the Court, “victims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68(3) and rule 89, sub-rule 1, subject to any order of the Chamber”. Regulation 64(4) and (5) of the Regulations of the Court further provide that participants may file a response to the document in support of the appeal. The term “participant”, used in both provisions, refers to all participants in the proceedings, including victims.⁵

6. It should be recalled that victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0293/08, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 were permitted to participate in the relevant stage of the case after Trial Chamber III had checked that their applications for participation met the four

⁴ See *Decision on the Observations on legal representation of unrepresented applicants* (Trial Chamber III), No. ICC-01/05-01/08-651, 9 December 2009, p. 10. See also *Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants* (Trial Chamber III), No. ICC-01/08-01/05-699, 22 February 2010, para. 23.

⁵ See in this regard the dissenting opinion of Judge Song included in the *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”* (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, paras. 3 and 4. See also *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”*, No. ICC-01/04-01/06-2205 OA 15 and OA 16, 8 December 2009.

criteria under rule 85 of the Rules of Procedure and Evidence.⁶ However, regulation 86(8) of the Regulations of the Court provides that “[a] *decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case*”.

7. Furthermore, the Legal Representative notes that the Appeals Chamber has already acknowledged that the issue of the release of an accused person affects the personal interests of the victims permitted to participate in the proceedings.⁷ Consequently, the Legal Representative is of the view that the victims permitted to participate in the proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* are therefore entitled, pursuant to regulation 64(4) of the Regulations of the Court, to respond to the document filed by the Defence in support of its appeal, without it being necessary for them to apply to participate in the appeal proceedings.

8. However, in its *Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, the Appeals Chamber held that “in order for victims to participate in an appeal under article 82(1)(b) of the Statute, an application seeking leave to participate in the appeal must be filed.”⁸ This obligation on the part

⁶ See *Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants* (Trial Chamber III), No. ICC-01/08-01/05-699, 22 February 2010, p. 21. See also *Corrigendum to the Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings* (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010.

⁷ See *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”* *supra* footnote 5, para. 54. See also *Decision on the Participation of Victims in the Appeal* (Appeals Chamber), No. ICC-01/04-01/06-1452 OA 12, 6 August 2008 and the *Decision on the Participation of Victims in the Appeal against 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”* (Appeals Chamber), No. ICC-01/05-01/08-623 OA 2, 27 November 2010.

⁸ *Idem*, para. 38.

of the victims was reiterated by the Appeals Chamber in its decision of 13 June 2007,⁹ which also involved an appeal under article 82(1)(b) of the Rome Statute.

9. However, as explained above, the Legal Representative is of the view that victims permitted to participate in the proceedings in the case should be permitted *a fortiori* to participate in an interlocutory appeal arising out of a decision of the Trial Chamber in the same case.

10. Nonetheless, in light of the decisions of the Appeals Chamber on the subject of victim participation in interlocutory appeals, the Legal Representative submits observations with a view to securing leave for her clients to participate in the appeal filed by the Defence.

III. Submissions for purposes of participation in the interlocutory appeal filed by the Defence

11. In its Judgment of 13 February 2007, the Appeals Chamber stated that applications to participate in the interlocutory appeal should include submissions setting out how the personal interests of the victims are affected by the appeal, explaining why the presentation of their views and concerns would be appropriate at this stage of the proceedings and demonstrating that their participation would not be prejudicial to or inconsistent with the rights of the Defence.¹⁰

12. In accordance with the decisions of the Appeals Chamber regarding victim participation in interlocutory appeals,¹¹ the Legal Representative will address the following issues in turn: (1) how the personal interests of the victims are affected by the appeal; (2) why the presentation of their views and concerns is appropriate at

⁹ See *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber"* of 2 February 2007 (Appeals Chamber), No. ICC-01/04-01/06-925 OA 8, 13 June 2007, para. 23.

¹⁰ See *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"* *supra* footnote 5, paras. 38-55.

¹¹ *Idem*. See also *supra* para. 7 and the relevant footnotes.

this stage of the proceedings; and (3) why their participation is not prejudicial to or inconsistent with the rights of the Defence.

1. The personal interests of the victims are affected

13. The case law of the Chambers has already acknowledged that the personal interests of the victims are affected by the issue of detention of suspects and accused persons.

14. Thus, as in the present case, the Appeals Chamber, ruling on the application by the victims to participate in the appeal filed by Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I to dismiss his application for interim release, expressly acknowledged that “the interests of the victims were affected by the circumstances of the current case, having regard to the nature of the appeal itself.”¹²

15. Similarly, the Single Judge of Pre-Trial Chamber I expressly acknowledged that “a Defence request for interim release [...] affects the interests of the victims [...]”.¹³ This is also a view which appears to be shared by Trial Chamber III, as well as by Trial Chambers I and II, which, at the periodic reviews of their decisions to keep Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui, Germain Katanga and Jean-Pierre Bemba Gombo in detention, have always asked the victims to submit their observations on the detentions in question.¹⁴

¹² See *Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo” supra footnote 5*, para. 54.

¹³ See *Decision Establishing a Deadline in Relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-465 of 22 September 2006, p. 2.

¹⁴ See, *inter alia*, *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-1252-tENG of 29 June 2009; *Decision Inviting Observations from the Participants Concerning the Detention of Germain Katanga (Rule 118(2) of the Rules of Procedure and Evidence)* (Trial Chamber II), No. ICC-01/04-01/07-942-tENG of 5 March 2009; *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-748-tENG of 13 November 2008, and *Decision concerning observations on the review of the pre-trial detention of Germain Katanga* (Pre-Trial Chamber I), No. ICC-01/04-01/07-668 of 9 July 2008. See also “*Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Rule 118-2)*” (Trial Chamber II), No. ICC-01/04-01/07-

2. Victim participation is appropriate

16. The Legal Representative submits that participation by victims in the interlocutory appeal filed by the Defence is appropriate, because their interests are affected by the outcome of the proceedings for the release of the accused.¹⁵

17. The Legal Representative is also of the view that victims permitted to participate in proceedings which have given rise to a decision which has been appealed must be permitted *a fortiori* to participate in the interlocutory appeal in question, all the more so where, as in the present case, the interlocutory appeal involves an issue which, as explained above, directly affects their interests.¹⁶

18. Finally, it is appropriate for the victims to participate in the interlocutory appeal filed by the Defence, since this accords with the requirements of the right of victims to be heard as set out in article 68(3) of the Rome Statute. Thus, an analysis of all the articles and rules governing victim participation in the proceedings before the Court clearly shows that victim participation is not restricted to specific stages and is therefore possible at all stages of the proceedings, including interlocutory appeals.¹⁷

19. Furthermore, victim participation in the interlocutory appeal filed by the Defence accords perfectly with the requirements of a fair trial, since their participation will allow the views of victims whose personal interests are undeniably

1192 of 5 June 2009; *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-904-tENG of 18 February 2009; *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-732-tENG of 30 October 2008, and *Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-602 of 17 June 2008.

¹⁵ See *supra* paras. 13-15.

¹⁶ *Idem*.

¹⁷ See the proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also the proposal submitted by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and the proposal submitted by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the preparatory work, see Bitti (G.) and Friman (H.), "Participation of Victims in the Proceedings", in Lee (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

affected by the outcome of the appeal in question to be taken into consideration in an objective and in-depth fashion.¹⁸

20. Finally, the Legal Representative recalls the right of the Prosecutor and the Defence under regulation 24(1) of the Regulations of the Court to respond “to any document filed by any participant in the case”. Thus, the appropriateness of victim participation in the interlocutory appeal in question is underwritten by the limits set in this regard.

3. Victim participation is not prejudicial to or inconsistent with the rights of the Defence

21. First, the Legal Representative is of the view that protecting the rights of the Defence is a fundamental principle without which the integrity of criminal proceedings could not be safeguarded and justice could not be done.

22. The Legal Representative notes that victim participation in the proceedings before the Court is not, in itself, liable to affect the rights of the Defence. As Judge Blattmann pointed out:

[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims’ participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.¹⁹

23. In this regard, the Legal Representative also notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985 lays down the principle of access to justice for victims and the right to fair treatment.²⁰

¹⁸ See *supra* paras. 13-15.

¹⁹ See the Separate and Dissenting Opinion of Judge René Blattmann appended to the *Decision on victims’ participation* (Trial Chamber I), No. ICC-01/04-01/06-1119, para. 26.

²⁰ See United Nations General Assembly Resolution 40/34 of 29 November 1985 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, principles 4 to 7.

24. The Legal Representative would further point out that the role of the victims should not be confused with that of the Prosecution. Thus, the purpose of victim participation in the interlocutory appeal in question is simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the Defence.

25. Moreover, victim participation in the present interlocutory appeal cannot be prejudicial to or inconsistent with the rights of the Defence, since regulation 24(1) of the Regulations of the Court allows the Defence to respond to any document submitted by the victims pursuant to such participation.²¹

26. The Legal Representative further submits that victim participation constitutes an integral part of the concept of a fair and just trial, since it is expressly provided for in the texts of the Court. Furthermore, this right afforded to victims is consistent with the view of international human rights law as a continuum, and is recognised in a large number of national systems. It follows that the balance of criminal trials cannot be affected by victim participation. On the contrary, taking victims' interests into consideration is one of the factors that help to balance such trials, particularly when it is the violation of the fundamental rights of the victims themselves that is involved.²² Thus, participation by the victims in the interlocutory appeal cannot prejudice the interests of the Defence.²³

²¹ See *supra* para. 20.

²² See "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the *Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a/0035/07 to a/0038/07*", No. ICC-02/05-116 of 17 December 2007, para. 30, pp. 9-10.

²³ See Donat-Cattin (D.), "Article 68", in Triffterer (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute".

For the reasons set out above,

The Legal Representative, having noted the case law of the Appeals Chamber in this regard, respectfully calls upon that Chamber to rule that the personal interests of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0293/08, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 are affected by the interlocutory appeal filed by the Defence, that the presentation of their views and concerns appears appropriate at this stage, and that their participation is neither prejudicial to nor inconsistent with the rights of the Defence.

The Legal Representative further requests the Appeals Chamber to permit the victims to file their observations on the document in support of the appeal, within a time limit to be set by the Chamber, and, more generally, to give the Legal Representative immediate authorisation to submit written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appellate proceedings, in accordance with the modalities set by the Chamber.

[signed]

Ms Paolina Massidda
Lead Counsel

Dated this 5 August 2010

At The Hague, The Netherlands