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No. ICC-02/11-01/15 OA 6

Date: 31 July 2015

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung**

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO
AND CHARLES BLÉ GOUDÉ**

Public

Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’”

Reasons for a decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

The Office of Public Counsel for victims
Ms Paolina Massidda

Counsel for Mr Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Other Legal Representatives in cases before the Court

Mr Luc Walley
Ms Carine Bapita
Ms Sarah Pellet
Mr Dmytro Suprun
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika
Ms Marie Edith Douzima Lawson
Mr Wilfred Nderitu
Mr Fergal Gaynor
Ms Wanda Akin
Mr Raymond Brown
Mr Nick Kaufman
Ms Hélène Cissé

REGISTRY

Registrar
Mr Herman von Hebel

Victims Participation and Reparations Section
Ms Fiona McKay

Counsel Support Section
Mr Esteban Peralta Losilla

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” of 8 July 2015 (ICC-02/11-01/15-127-Red),

Having before it the “Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo’s detention (ICC-02/11-01/15-134-Red3)” dated 21 July 2015 and registered on 22 July 2015 (ICC-02/11-01/15-152),

Hereby renders its reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’” of 22 July 2015 (ICC-02/11-01/15-158).

I. RELEVANT PROCEDURAL HISTORY

1. On 8 July 2015, Trial Chamber I issued the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute”¹ (hereinafter: “Impugned Decision”).
2. On 14 July 2015, Mr Laurent Gbagbo (hereinafter: “Mr Gbagbo”) filed a notice of appeal against the Impugned Decision.²

¹ ICC-02/11-01/15-127-Conf; a public redacted version was registered on the same day (ICC-02/11-01/15-127-Red).

² “Acte d’appel de la Défense relatif à la «ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute» (ICC-02/11-01/15-127-Conf) de la Chambre de première instance I décidant du maintien en détention de Laurent Gbagbo”, ICC-02/11-01/15-134-Conf-Exp (OA 6); a confidential redacted *ex parte* version available to the Registrar, the Prosecutor and the Defence was registered on the same day (ICC-02/11-01/15-134-Conf-Exp-Red (OA 6)) and a confidential redacted *ex parte* version available to the Registrar, the Prosecutor, the Defence and the Legal Representative of Victims was also registered on the same day (ICC-02/11-01/15-134-Conf-Exp-Red2 (OA 6)). A public redacted version was registered on 20 July 2015 (ICC-02/11-01/15-134-Red3 (OA 6)), a translation of which was registered on 27 July 2015 (ICC-02/11-01/15-134-Red3-tENG (OA 6)). A confidential *ex parte* translation only available to the Registrar and the Defence was registered on 27 July 2015 (ICC-02/11-01/15-134-Conf-Exp-tENG (OA 6)).

3. On 16 July 2015, Mr Gbagbo filed the “Document à l’appui de l’appel de la «Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute » (ICC-02/11-01/15-127-Conf) du 8 juillet 2015”³ (hereinafter: “Document in Support of Appeal”).

4. On 22 July 2015, the Office of Public Counsel for victims (hereinafter: “OPCV”) filed a “Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo’s detention (ICC-02/11-01/15-134-Red3)”⁴ (hereinafter: “OPCV’s Request”).

5. On 22 July 2015, the Prosecutor filed the “Prosecution’s response to OPCV’s ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case’ (ICC-02/11-01/15-152)”⁵ (hereinafter: “Prosecutor’s Response”).

6. On 22 July 2015, the Appeals Chamber rendered its “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’”⁶ (hereinafter: “Decision on the OPCV’s Request”) granting the request and indicating that the reasons for the decision would be given in due course.

II. RELEVANT SUBMISSIONS OF THE PARTICIPANTS

A. The Victims’ Observations

7. At the outset, the victims represented by the OPCV⁷ respectfully request the Appeals Chamber to reverse its previous practice and “rule that victims authorised to

³ ICC-02/11-01/15-147-Conf-Exp (OA 6). A confidential redacted *ex parte* version available also to the Prosecutor was registered on 20 July 2015 (ICC-02/11-01/15-147-Conf-Exp-Red (OA 6)). A public redacted version was registered on 23 July 2015 (ICC-02/11-01/15-147-Red2 (OA 6)).

⁴ ICC-02/11-01/15-152 (OA 6). The document was dated 21 July 2015 and registered on 22 July 2015.

⁵ ICC-02/11-01/15-155 (OA 6).

⁶ ICC-02/11-01/15-158 (OA 6).

⁷ OPCV’s Request, para. 5.

participate in the case have an automatic right to intervene in any interlocutory appeal arising from said case”.⁸ The OPCV submits that the Appeals Chamber, by virtue of article 21 (2) of the Statute, “is not bound by its prior interpretation of the law” and “may therefore revisit its past interpretation of regulations 64(4) and (5) and 86(8) of the Regulations of the Court”.⁹

8. In support of its argument that victim participation in interlocutory appeals should be automatic, the OPCV relies on regulation 24 (2) of the Regulations of the Court, pursuant to which victims or their legal representatives may file a response to any document when they have been permitted to participate in the proceedings in accordance with article 68 (3) of the Statute and rule 89 (1) of the Rules of Procedure and Evidence.¹⁰ Furthermore, the OPCV avers that regulation 64 (4) and (5) of the Regulations of the Court entitles a participant to file a response within 21 days of notification of the document in support of the appeal and that the term “participant” mentioned in this regulation includes victims.¹¹

9. In the case at hand, the OPCV asserts that with respect to the 467 victims currently participating at the trial stage of the proceedings, the relevant criteria under rule 85 of the Rules of Procedure and Evidence have already been assessed by the relevant Chamber and as such the victims are permitted to participate and should, in this appeal, be permitted to automatically file a response to the document in support of the appeal, without seeking prior authorisation from the Appeals Chamber.¹² In the event that the Appeals Chamber declines to revisit its previous practice the OPCV submits, in the alternative, an application for leave to participate in the present appeal.¹³

⁸ OPCV’s Request, para. 16.

⁹ OPCV’s Request, para. 14.

¹⁰ OPCV’s Request, para. 10.

¹¹ OPCV’s Request, para. 10.

¹² OPCV’s Request, paras 11-13.

¹³ OPCV’s Request, paras 18-35.

B. Responses of the Prosecutor and Mr Gbagbo

10. The Prosecutor is unopposed to the OPCV's Request that the Appeals Chamber vary its previous practice and order that victims authorised to participate in a case have an automatic right to participate in any interlocutory appeal arising in that case.¹⁴

11. Mr Gbagbo did not file a response to the OPCV's Request.

III. REASONS FOR THE DECISION ON THE OPCV'S REQUEST

12. The Appeals Chamber has, since the year 2007, former Judge Sang-Hyun Song and Judge Van den Wyngaert dissenting,¹⁵ consistently applied its interpretation of the provisions regulating victim participation in interlocutory appeals pursuant to article 82 (1) (b) and (d) of the Statute.¹⁶ By virtue of its interpretation of article 68 (3) of the Statute, the Appeals Chamber determined that victim participation in an interlocutory appeal "mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration".¹⁷ Thus, pursuant to this interpretation, in order for victims to participate in an appeal, an application seeking leave to participate is necessary. Participation is then permitted where it is demonstrated that the victims' personal interests are affected by the issues on appeal and if the Appeals Chamber deems such

¹⁴ Prosecutor's Response, para. 1.

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, "Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims", ICC-01/04-01/06-824 (OA7), p. 55, para. 2; *Prosecutor v. Thomas Lubanga Dyilo*, "Separate Opinion of Judge Sang-Hyun Song and Judge Christine Van den Wyngaert with respect to the 'Decision on the participation of victims in the appeals' issued on 20 October 2009", 8 December 2009, ICC-01/04-01/06-2205 (OA 15) (OA 16), p. 42.

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, "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'", 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: "Judgment Lubanga OA 7"); *Prosecutor v. Thomas Lubanga Dyilo*, "Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06-1335 (OA 9) (OA 10); *Situation in Darfur, Sudan*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 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 6 December 2007", 18 June 2008, ICC-02/05-138 (OA) (OA 2) (OA 3); *Situation in the Democratic Republic of the Congo*, "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", 30 June 2008, ICC-01/04-503 (OA 4) (OA 5) (OA 6).

¹⁷ Judgment Lubanga OA 7, para. 40.

participation to be appropriate.¹⁸ With respect to regulation 86 (8) of the Regulations of the Court, the Appeals Chamber determined that such a decision was “confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation”.¹⁹ In the same way, the Appeals Chamber interpreted regulations 64 (4) and 65 (5) of the Regulations of the Court as not recognising victims to be participants with an automatic right to participate in an interlocutory appeal.²⁰

13. In the Decision on the OPCV’s Request, the Appeals Chamber, being seized with the OPCV’s Request to revisit its interpretation of the abovementioned provisions and to find that victims, as participants for the purposes of regulation 24 and 64 (4) and (5) of the Regulations of the Court, have an automatic right to file a response to the document in support of the appeal, found merit in the request and, for the reasons that follow, granted same.

14. Article 21 (2) of the Statute provides that “[t]he Court may apply principles and rules of law as interpreted in its previous decisions”. Thus, the Appeals Chamber is not obliged to follow its previous interpretations of principles and rules of law through binding *stare decisis*;²¹ rather it is vested with discretion as to whether to do so. In this respect, the Appeals Chamber has previously stated that absent “convincing reasons” it will not depart from its previous decisions.²² Thus, in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not

¹⁸ See *Situation in Darfur, Sudan*, “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 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 6 December 2007”, 18 June 2008, ICC-02/05-138 (OA) (OA 2) (OA 3), para. 49; and *Situation in the Democratic Republic of the Congo*, “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”, 30 June 2008, ICC-01/04-503 (OA 4) (OA 5) (OA 6), para. 88.

¹⁹ Judgment *Lubanga* OA 7, para. 43.

²⁰ *Ibid.*

²¹ See O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), article 21, paragraph 2, p. 711.

²² See *Prosecutor v. Jean-Pierre Bemba Gombo*, “Reasons for 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”’, 20 October 2009, ICC-01/05-01/08-566 (OA 2), para. 16.

readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions.

15. In the case at hand, the Appeals Chamber considers that, with the benefit of hindsight, the current practice of requiring victims to seek authorisation to participate in an interlocutory appeal, has resulted in considerable delays in the proceedings given the added procedural steps involved. These include the time spent in: (i) deciding on the applications for participation in each appeal; (ii) waiting for the victims to file their substantive observations on the appeal; and (iii) waiting for the parties to file their responses thereto. In view of the delay occasioned by these procedural steps and the need for more efficient proceedings, the Appeals Chamber is convinced that a modification of its interpretation of the relevant provisions of the Statute, Rules of Procedure and Evidence and Regulations of the Court is necessary in order to make the participation of victims in interlocutory appeals more efficient.

16. The Appeals Chamber is persuaded by the interpretation of the relevant statutory framework relating to victim participation first espoused by former Judge Sang-Hyun Song.²³ As a result, the Appeals Chamber interprets the term “participant” in regulations 64 (4) and 65 (5) of the Regulations of the Court to include victims. The Appeals Chamber considers that this interpretation of these regulations obviates the need for a “specific determination” by the Appeals Chamber, pursuant to article 68 (3) of the Statute, on the appropriateness or otherwise of victim participation in a particular interlocutory appeal.

17. Furthermore, the Appeals Chamber notes that regulation 86 (8) of the Regulations of the Court provides in relevant part, that “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case”. In this regard, because appeals pursuant to article 82 (1) (b) and (d) of the Statute involve issues arising from the proceedings *a quo*, the Appeals Chamber considers such interlocutory appeals to be an extension of the proceedings before the relevant Pre-Trial or Trial Chamber in that “same case”. As such, the Appeals Chamber will not, in the absence of compelling reasons, overturn prior decisions of a relevant

²³ *Prosecutor v. Thomas Lubanga Dyilo*, “Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims”, ICC-01/04-01/06-824 (OA 7), p. 55.

Chamber on the status, personal interest and/or participatory rights accorded to victims in that case. Instead, these criteria underlying victim participation will be assumed for the purposes of the interlocutory appeal, given the victims' prior participation in the proceedings which gave rise to the appeal.

18. However, in the event that the Appeals Chamber considers that the personal interests of victims are not affected by the issues arising in a particular appeal or that the participation of victims would be inappropriate, it could issue an order to that effect. This is expressly acknowledged by regulation 86 (8) of the Regulations of the Court, whereby a prior decision of a Chamber concerning victim participation is "subject to the powers of the relevant Chamber in accordance with rule 91 (1)". In addition, any participation of victims that would exceed the filing of a response to the document in support of the appeal pursuant to regulation 64 (4) and (5) and 65 (5) of the Regulations of the Court, would require prior authorisation of the Appeals Chamber.

19. Consequently, the Appeals Chamber determines that, for appeals arising under article 82 (1) (b) and (d) of the Statute, victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal.

20. The Appeals Chamber notes that regulation 24 (2) of the Regulations of the Court provides for victims or their legal representatives to file a response to any document when they are permitted to participate. In this respect, regulation 24 (4) of the Regulations of the Court provides that "[a] response referred to in sub-regulation 1-3 may not be filed to any document which is itself a response or reply". Consequently, the latter provision precludes the possibility of an automatic response by the parties to the victims' response, except with the leave of the Appeals Chamber, pursuant to regulation 24 (5) of the Regulations of the Court.

21. In light of the above and given that in the case at hand the appeal is raised pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber determines that victims represented by the OPCV, who participated in the proceedings that gave rise

to this appeal, may file a response to the Document in Support of the Appeal pursuant to regulation 64 (4) and (5) of the Regulations of the Court.

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



Judge Piotr Hofmański
Presiding Judge

Dated this 31st day of July 2015

At The Hague, The Netherlands