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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. Jean-Pierre Bemba Gombo

Public

Public Redacted Version of Defence Response to 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées'

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 18 June 2015, the Legal Representative of Victims filed her ‘Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées’, with ‘annexes confidentielles EX PARTE réservées au BCPV, à la SPVR et l’UAVT’ (“LRV Request”).¹

2. The LRV Request asks Trial Chamber III (“the Chamber”) to authorise the continued participation of nine deceased victims, through individuals who she submits are authorised by the families of the deceased.

B. CONFIDENTIALITY

3. The Defence files the present document confidentially, as it responds to the confidential LRV Request.

C. APPLICABLE LAW

4. Article 68(3) of the Rome Statute provides that ‘when the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered’.

5. The Presiding Judge of Trial Chamber III has previously held, while sitting as a Single Judge in the *Katanga & Ngudjolo* case, that:²

La juge unique rappelle que la règle 89-3 du Règlement indique qu'une demande de participation peut être introduite par une personne agissant au nom de la victime concernée si elle a donné son consentement, ou au nom de celle-ci lorsqu'il s'agit d'un enfant ou d'une personne invalide. Aucune disposition n'autorise

¹ ICC-01/05-01/08-3256-Conf.

² ICC-01/04-423-Corr, para. 138.

toutefois le dépôt d'une demande de participation au nom d'une personne décédée. La règle 89-3 autorise le dépôt d'une demande de participation au nom d'une personne à condition qu'elle y consente. La juge unique fait observer qu'un tel consentement ne peut être donné par une personne décédée. Elle estime donc que les personnes décédées ne peuvent être considérées comme des personnes physiques au sens de la règle 85-a du Règlement.

6. This approach has been adopted in later decisions, with applications on behalf of deceased persons being rejected, and applications from deceased relatives only being accepted when 'the person making the application alleges moral harm resulting from the death of his or her relative'.³ This is because:⁴

no provision permits the submission of an application for participation on behalf of a deceased person. Rule 89(3) authorises the submission of an application for participation on a person's behalf provided the person consents. The Single Judge notes that such consent cannot be given by a deceased person. She is therefore of the opinion that deceased persons cannot be considered to be natural persons within the meaning of rule 85(a).

7. Nor has the **continued** participation of victims, following their death, been deemed appropriate. In *Ngudjolo*, the Appeals Chamber recently clarified that, given that the requirements of Article 68(3) mandate that victim participation be based on the personal interests that are affected, the resumption of a deceased victim's participation by an heir/successor was not deemed appropriate.⁵

D. SUBMISSIONS

(i) Request for provision of the supporting documentation

³ ICC-01/04-01/07-579, para. 63.

⁴ ICC-01/04-01/07-579, para. 62.

⁵ ICC-01/04-02/12-140, para. 26.

8. Without prejudice to the generality of the submissions above as to the propriety of the orders sought, in order for the Defence to make more specific submissions on the LRV's Request, it must be provided with the supporting documentation upon which the request is based.

9. The LRV has submitted as follows:

les annexes qui l'accompagnent sous la classification confidentielle «ex parte», car celles-ci contiennent des informations permettant d'identifier et de localiser d'autres membres de la famille des victimes concernées (en sus du repreneur d'action), qui ne devraient pas être communiquées au Bureau du Procureur ou à la Défense, en conformité avec les mesures de protection ordonnées par la Chambre, afin de protéger la sécurité ainsi que le bien-être physique et psychologique des personnes concernées

10. The LRV cites to no particular protective measures orders, or explains how the family members of participating victims fall within the protective measures ordered in the present proceedings. More specifically, no submissions are advanced as to why the supporting documentation cannot be provided in redacted form to the parties.

11. In other cases, this information has been provided to the Prosecution and Defence in order to facilitate their submissions on the request concerning deceased victims. In *Katanga & Ngudjolo*, in order to obtain the observations of the parties, Trial Chamber II ordered, *inter alia*, that the Prosecution and the Defence be provided with a redacted version of the documents containing additional information pertaining to the four deceased victims in question, whose family members were seeking to participate in their stead.⁶

⁶ ICC-01/04-01/07-2827, Décision relative à la divulgation de l'identité de victimes aux parties et invitant le Procureur et la Défense à présenter leurs observations sur les informations supplémentaires concernant certaines victimes décédées, 11 April 2011.

12. This approach recognizes that the provision of this supporting documentation is a pre-requisite to any meaningful submissions from the parties. In other cases, requests for the participation of family members on the part of deceased victims have been refused (or judgement reserved) by the Trial Chamber on the basis that the supporting documentation, for example, (i) does not contain a death certificate;⁷ or does not show that the victim's family explicitly mandated that individual to resume the action initiated before the Court.⁸ The Defence is unable to make submissions on these (or other) potential failings or concerns while the documents remain *ex parte*.

13. Nor is the Defence in a position to make submissions on whether the LRV fulfilled her obligation to inform the Chamber 'as soon as the Legal Representatives learn[ed] of the death of a victim'.⁹ In this context, the Defence notes that the Trial Chamber set 16 September 2011, nearly four years ago, as the final deadline for the submission to the Registry of any new victims' applications for participation in the trial.¹⁰ While the Defence has not yet been informed when the LRV learnt about the death of the nine victims in question, the matter is being raised at an extremely late stage of the proceedings, which would certainly justify a ruling by the Trial Chamber that the relatives in question could and should wait for the next phase of the proceedings to seek participatory rights.

14. The Defence accordingly requests that the Chamber order that the parties be provided with the documents which support the LRV Request, following which the Defence seeks leave to file further and fuller submissions.

15. On this point, the Defence notes that seven of the nine victims, at the time of their respective applications, did not oppose their identities being provided to

⁷ ICC-01/04-01/07-3018-tENG, para. 29.

⁸ ICC-01/04-01/07-3018-tENG, para. 23.

⁹ ICC-01/04-01/07-3018-tENG, para. 8.

¹⁰ ICC-01/05-01/08-1590, para. 25.

the Defence when asked this specific question.¹¹ In each of these cases, the Defence made a request that their identities be provided and their application forms be disclosed in a lesser-redacted form.¹² This request was consistent with the practice whereby Trial Chambers and Pre-Trial Chambers have ordered LRVs to liaise with victim applicants who have not opposed their identity being disclosed to the Defence, seek confirmation that their identities can indeed be provided, and thereafter implement this disclosure.¹³

16. While this opportunity has now been lost for the seven victims in question, the Defence reiterates its request that the Chamber follow the practice as adopted by other Chambers concerning those witnesses who have indicated that their identities can be provided to the Defence.

(iii) Observations on the victim applicants in question

17. While maintaining its request for provision of the supporting documentation to the LRV Request, the Defence makes the following brief submissions on the victims in question, which are relevant to the Chamber's consideration of their continued participation. In this context, the Defence notes that the Chamber's decisions authorizing the participation of these nine victims were rendered at the beginning of the trial process, and prior to the commencement of the Defence presentation of evidence.¹⁴ Since that time, the

¹¹ a/1841/10, a/16402/11, a/2695/10, a/2291/10, a/1829/10, a/1710/10.

¹² a/1841/10, ICC-01/05-01/08-1053, para. 12; a/16402/11, ICC-01/05-01/08-2163, paras. 41-42; a/2695/10, ICC-01/05-01/08-1413-Conf-AnxA, p.113; a/2291/10, ICC-01/05-01/08-945, para. 18; a/1829/10, ICC-01/05-01/08-1082, para. 18; a/1710/10, ICC-01/05-01/08-1053, para. 12.

¹³ See, for example, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1650, Deuxième décision relative à la divulgation de l'identité des victimes aux parties, 18 November 2009 at paras. 4-5; *Prosecutor v. Ruto et al.*, Decision on the Defence Requests in relation to the victims' applications for participation in the present case, ICC-01/09-01/11-169, 8 July 2011, paras. 9-16.

¹⁴ ICC-01/05-01/08-1091, Decision on 653 applications by victims to participate in the proceedings, 23 December 2010; ICC-01/05-01/08-2162, Decision on 471 applications by victims to participate in the proceedings, 9 March 2012; ICC-01/05-01/08-2401, Decision on 799 applications by victims to participate in the proceedings, 5 November 2012; ICC-01/05-01/08-2219-Conf-Exp-AnxA Decision on 1400 applications by victims to participate in the proceedings, 21 May 2012; ICC-01/05-01/08-

parties and the Chamber has heard both Prosecution and Defence evidence impacting on the credibility of the claims made by the victims in question.

18. Victim a/1710/10 is claiming [REDACTED], which he alleges occurred in [REDACTED]. Even if it were possible for [REDACTED], the date provided undermines any attempt to identify the perpetrators as the “Banyamulenge”.¹⁵ Nor is any factual basis provided for a link back to either the MLC or Mr. Bemba.

19. Victim a/1892/10 claims that he was the victim of [REDACTED] on [REDACTED], undermining any claim that the alleged perpetrators were in fact MLC troops.¹⁶ Interestingly, he claims that ‘Ange-Felix Patassé, François Bozizé and Jean-Pierre Bemba’ are responsible for the harm he suffered, giving rise to questions about the credibility of his claim, and also casting significant doubt as to whether or not any alleged prejudice suffered can be linked to the charges in the present case.

20. Victim a/2695/10 claims that she was the victim of [REDACTED]. Although the name of the village is redacted (despite the victim not opposing her identity being disclosed to the Defence), the Defence notes [REDACTED].¹⁷ The victim also makes no plausible link between [REDACTED] and the “Banyamulenge”, given that she does not understand Lingala, [REDACTED].

21. Victim a/16402/11 claims that [REDACTED] by alleged Banyamulenge. This allegation does not form part of the charges in the present case, and cannot form the basis for any finding of prejudice as a result of the crimes charged.

1590-Conf-Exp-AnxA Corrigendum to the Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry, 21 July 2011; ICC-01/05-01/08-1017-Conf-Exp-AnxA, Decision on 772 applications by victims to participate in the proceedings, 18 November 2010; ICC-01/05-01/08-2011, Decision on 418 applications by victims to participate in the proceedings, 15 December 2011.

¹⁵ ICC-01/05-01/08-3121-Conf, paras. 364-366.

¹⁶ ICC-01/05-01/08-3079-Conf, para. 83; ICC-01/05-01/08-3121-Conf, paras. 346-360.

¹⁷ ICC-01/05-01/08-3079-Conf, para. 83.

22. Victim a/2291/10 claims that she was the victim of crimes which occurred on [REDACTED], which undermines her claims that they were committed by the Banyamulenge.¹⁸ No concrete basis is provided in support of her claim that the crimes were in fact committed by MLC troops.

23. Victim a/1433/10 is claiming compensation for [REDACTED], which he alleges occurred in [REDACTED]. He does not, however, provide any factual justification for identification of the perpetrators as the “Banyamulenge”.

24. At this stage, the Defence is not seeking a review of the Chamber’s decision granting participatory rights to these individuals. However, the credibility of their claims is, in the Defence submission, properly before the Chamber in consideration of whether their participatory rights should be transferred to family members.

(ii) The participation of family members of deceased victims must be contingent on the suffering of personal harm within the parameters of the confined charges.

25. As noted above, the victims in question are alleged to have suffered harm personally, in the form of losing personal property as a result of pillage, or having been beaten or otherwise attacked. There is no indication that their subsequent death is as a result of any acts within the parameters of the confirmed case.

26. Accordingly, their relatives have not suffered harm as a result of incidents falling within the confined charges. In such circumstances, the participation of their relatives falls outside the recognized scope of victims’ participation at the

¹⁸ ICC-01/05-01/08-3121-Conf, paras. 364-366.

ICC, where Trial Chambers have been consistent in holding that, as most recently enunciated in *Ntaganda*:¹⁹

while it is possible to submit an application on behalf of victims, relatives of a deceased person will not be able to participate in these proceedings unless they show that they have suffered harm personally. The suffered harm is as a result of an incident falling within the parameters of the confirmed charges

27. It is undeniable that, as recognized by Trial Chamber II, ‘a person acting on behalf of a deceased person cannot be in a position to convey the views and concerns of the deceased accurately, in the sense of article 68(3) of the Statute.’²⁰ The views and concerns of these nine victims have, according to the logic of common legal representation, already shaped the submissions of the LRV throughout the entire course of the trial, and remain on the record. In this context, their continued involvement through their relatives is of little substantive benefit. If their continued participation is being sought to ensure the involvement of their relatives in any forthcoming reparations phase, this is inconsistent with the loss in question having been suffered by the deceased victims themselves during the course of their lifetime, and not by their relatives as a result of their death.

E. RELIEF REQUESTED

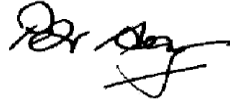
28. In light of the above, the Defence respectfully requests that the Trial Chamber:

ORDER the provision of the supporting documentation to the LRV Request to the parties, and authorise the making of further submissions upon receipt of this material; and

¹⁹ ICC-01/04-02/06-449, para. 48.

²⁰ ICC-01/04-01/07-1491-Red, para. 54.

ORDER the LRV to liaise with those victims who did not oppose their identities being disclosed to the Defence, and provide disclosure of unredacted versions of their application forms once confirmation is obtained.



Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

12 April 2016