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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public

Prosecution's Observations 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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Introduction

1. On 28 June 2010 the legal representative of victims VPRS 3 and VPRS 6, authorized to participate in the investigation stage of the DRC situation, requested Pre-Trial Chamber I ("PTC I") to exercise its discretionary authority under Article 53(3)(b) ("Victims' Application").¹ The Victims request the Pre-Trial Chamber to review a purported decision of the Prosecutor to not investigate or prosecute Mr Jean Pierre Bemba for the crimes committed by his troops in Ituri, Democratic Republic of the Congo ("DRC"), and to order the Prosecutor to investigate him for those crimes. On 16 August 2010 the Single Judge of PTC I ordered the Prosecution to provide observations to the Application by 15 September 2010. Due to an unintentional oversight the Prosecution missed this time limit but hereby seeks to comply with the Single Judge's order of 24 September 2010.

2. The Victims' Application should be dismissed *in limine* on several grounds. First, the Victims lack legal standing to file the instant Application as their submissions do not relate to any judicial cause pending before any Chamber of this Court - an essential condition identified by the Appeals Chamber to permit the submission of victims' views and concerns under Article 68(1).² Second, the Prosecutor did not reject, on interests of justice grounds, the possibility of investigating or prosecuting Mr Bemba for crimes committed in Ituri. Accordingly, there is no decision of the Prosecutor under Article 53(1)(c) or (2)(c) that would permit the PTC I to exercise its discretionary authority under Article 53(3)(b).

¹ ICC-01/04-564. Article 53(3)(b) permits a Pre-Trial Chamber to review a decision taken by the Prosecutor to not investigate or prosecute on the sole grounds that the investigation or prosecution would no be in the interest of justice; see Article 53(1)(c) and (2)(c).

² As long as the other requirements set out in Rules 85 and 89 are also met.

Statement of Facts

3. On 17 January 2006, Pre-Trial Chamber I granted VPRS 3 and VPRS 6 the status of victims with right to participate in the investigation stage of the DRC situation.³ The Prosecution's request to appeal this decision was denied.⁴
4. On 24 December 2007 the Single Judge of PTC I granted the status of victims authorised to participate in the investigation stage of the DRC situation to more than 60 applicants.⁵ The Prosecution also sought leave to appeal this second decision, and in that instance its application was granted.⁶
5. On 19 December 2008, the Appeals Chamber reversed the later decision of 24 December 2007. It held that the Pre-Trial Chamber had erred when it granted to the applicants a "procedural status of victim" that entitled them to participate generally in the Prosecutor's investigations.⁷ The Appeals Chamber indicated that the reversed decision "treaded along the path earlier mapped" by the 17 January 2006 decision.⁸
6. On 28 June 2010 the legal representatives of VPRS 3 and VPRS 6 filed a "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".⁹ The Victims argue that the Prosecutor indicated that investigations into crimes committed in Ituri have been concluded, and therefore he has no intention to start proceedings against Jean-Pierre Bemba for the crimes committed by his troops in Ituri.¹⁰ They further submit that PTC I awarded them the status of "victims" within the DRC

³ ICC-01/04-101-tENG-Corr.

⁴ ICC-01/04-103 (Prosecution's application); ICC-01/04-135 (decision denying leave to appeal).

⁵ ICC-01/04-423 tENG-Corr.

⁶ ICC-01/04-428 (Prosecution's application); ICC-01/04-444 (decision granting leave to appeal).

⁷ ICC-01/04-556OA4,OA5,OA6, paras.43-45.

⁸ Ibid., para.3. See also para.42.

⁹ ICC-01/04-564 (the "Victims' Application").

¹⁰ Victims' Application, pp.8-11.

situation and are therefore allowed to present their views and concerns.¹¹ Accordingly, they request the Pre-Trial Chamber “(i) to review [under Article 53(3)(b)] the decision of the Prosecutor not to prosecute Jean-Pierre Bemba in his capacity of military commander under Article 28(a) for the crimes that his troops have allegedly committed in Ituri; and (ii) to request the Prosecutor to remedy shortcomings of his investigation.”¹²

7. On 15 July 2010 the OPCD responded to the Victims’ Application and urged the Pre-Trial Chamber to reject it on the grounds that the Victims lack legal standing to participate in the proceedings and fail to identify a judicial proceeding which impacts upon their personal interests.¹³
8. On 16 August 2010 the Single Judge of PTC I ordered the Prosecutor to file observations in response to the Application by 15 September 2010.¹⁴
9. On 24 September 2010, the Single Judge noted that the Prosecutor had not submitted observations by the time limit set out in her First Order and issued a new Order to the Prosecutor to file by 1600 hours on 29 September 2010 observations to the Application, and detail the reasons for his failure to comply with the Order. She also warned the Prosecutor pursuant to Article 71 and Rule 171 that sanctions may be applied in case of breach of this Second Order.¹⁵
10. The Prosecutor hereby complies with the Second Order and responds to the Victims’ Application.

Submissions

11. The Prosecution explains below that it did not file its observations to the Application by the time limit set out in the 16 August 2010 Order due to an unintentional oversight. In addition, the Prosecution respectfully requests that the

¹¹ Ibid., pp.11-13.

¹² Ibid., pp.14-15.

¹³ ICC-01/04-566 (“the OPCD Response”).

¹⁴ ICC-01/04-572 (“the First Order”).

¹⁵ ICC-01/04-580 (“the Second Order”).

Victims' Application be dismissed *in limine* for the reasons developed below [see (ii) and (iii)].¹⁶

(i) The Prosecution did not file its observations by the time limit due to an unintentional oversight

12. The Prosecution acknowledges and deeply regrets that it failed to comply with the time limit imposed by the Single Judge. The failure was not intentional, but resulted from an internal miscommunication between different teams involved, as well as the unique situation. The application was made, and the Single Judge's order was issued, in the Situation of the DRC but it related to Mr. Bemba, who is being charged as a result of the investigation in the Situation of the Central African Republic (CAR). As a result, the DRC and CAR trial teams assumed that another team would respond. The failure to respond thus resulted from a lack of coordination and proper reaction. It was not the intent of the Prosecution to ignore the Order, and the Prosecution is establishing mechanisms to ensure that submissions or orders in Situations are handled promptly and appropriately and this failure to respond will not happen again.

(ii) The Victims lack legal standing to file their Application

13. The Victims' submissions do not relate to any judicial proceeding before a Chamber of this Court that affects their interests. Thus, according to Appeals Chamber's jurisprudence, they lack legal standing to file the instant Application and provide their views and concerns under Article 68(1).¹⁷ Hence, the Application should be rejected on that ground.

14. The Prosecution recognizes that the two Victims were awarded status to participate in the DRC situation by the PTC I on 17 January 2006.¹⁸ As indicated

¹⁶ The Prosecution does not deem necessary to address the veracity or correctness of the Victims' submissions with respect to certain statements of the Prosecutor quoted in their filing, and proceedings before this Court.

¹⁷ ICC-01/04-556 OA4OA5OA6, paras.45,55; ICC-02/05-177 OA2 OA3, para.7, pp.11,15 (quoting paras.45,55).

¹⁸ ICC-01/04-101-tENG-Corr.

above, the Prosecution attempted to appeal that decision, but the PTC I denied its application. Later, however, the PTC I did authorize appeal from a decision of the Single Judge on 24 December 2007 granting status on the same rationale to more than 60 victim applicants.¹⁹ The Appeals Chamber thereafter rejected the PTC I's rationale that the victims could participate in the investigation stage of the case.²⁰ The Appeals Chamber explained that victims can only participate in the context of judicial proceedings pending before a Chamber, and that "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".²¹ As a result, it reversed the impugned decision and the status granted to the more than 60 victims therein.²²

15. Significantly, the Appeals Chamber also stated that both decisions (the 17 January 2006 decision that granted the status to the two Victims, and the impugned decision of 24 December 2007) and their legal reasoning were intrinsically linked. It noted that the impugned decision "treaded along the path earlier mapped by the decision of the Pre-Trial Chamber sitting en banc of 17 January 2006"²³ and "reflect the approach of the Pre-Trial Chamber in its decision of 17 January 2006 as to the implications of such participation".²⁴ Hence, the Appeals Chamber's decision rejecting the victim status for the more than 60 victims whose participation was approved on 24 December 2007 clearly applies to the two Victims whose participation was approved on 17 January 2006 and submit the current Application.

¹⁹ ICC-01/04-423-tENG-Corr.

²⁰ ICC-01/04-556 OA4 OA5 OA6. See also ICC-02/05-177OA2 OA3.

²¹ ICC-01/04-556 OA4 OA5 OA6, para.45.

²² Ibid., paras.2,59.

²³ ICC-01/04-556 OA4 OA5 OA6, para.3.

²⁴ Ibid., para.42.

(iii) *The Pre-Trial Chamber lacks statutory authority to grant the requested relief*

16. Under Articles 53 (1)(c) and (2)(c) the Prosecutor will decide not to start an investigation or prosecution if, considering the factors enumerated in those provisions, he considers that the investigation or prosecution would not serve the interest of justice. In such circumstances, and *only* in such circumstances, may “the Pre Trial Chamber [...] review a decision of the Prosecutor not to proceed [with an investigation or prosecution] [...]” pursuant to Article 53(3)(b).²⁵

17. In the context of the ongoing investigations within the DRC, the Prosecutor has not decided against an investigation or prosecution of Mr. Bemba on “interests of justice” grounds.²⁶ To the contrary, the Prosecutor decided to prosecute Bosco Ntaganda, Thomas Lubanga, Mathieu Ngudjolo and Germain Katanga for crimes committed in the Ituri district, within the DRC. For that purpose the Prosecutor requested - and was granted - respective warrants of arrest.²⁷ The latter three suspects were surrendered before the Court, their charges were confirmed, and two trials commenced before Trial Chamber I²⁸ and Trial Chamber II.²⁹

18. In this regard, Chambers of this Court have confirmed that an affirmative decision by the Prosecutor to prosecute an individual for particular charges - as in the above cases - cannot be interpreted as a tacit decision under Article 53(2) not to prosecute other persons or other crimes.³⁰ Hence, the grounds that could trigger the Pre-Trial Chamber’s authority under Article 53(3)(b) are not present in the instant case and the Application’s requests should also be dismissed on these grounds.

²⁵ ICC-01/09-19, para.3.

²⁶ Evidence of this is the fact that the Prosecution has not informed the Pre-Trial Chamber of any decision not to investigate or prosecute on such basis, as mandated by Article 53(1) and (2)(c).

²⁷ ICC-01/04-02/06-2; ICC-01/04-01/06-2; ICC-01/04-01/07-1; ICC-01/04-01/07-260.

²⁸ The proceedings in the Lubanga case have been stayed (ICC-01/04-01/06-2517-Red). The Prosecution has appealed this decision and requested the lifting of the stay (ICC-01/04-01/06-2544-Red OA18).

²⁹ Mr Bemba will be prosecuted before Trial Chamber III for crimes allegedly committed in the Central African Republic (CAR).

³⁰ See ICC-01/04-399, p.5; ICC-01/04-373, para.5. PTCI noted that no negative decision under Article 53(2) had been made in the DRC situation and that, on the contrary, the Office was prosecuting one person and further investigations in the DRC situation were ongoing. See also observation of PTC II that the Chamber does not deal with issues of case selection by the Prosecutor and prosecutorial policy: ICC-01/05-01/08-453, para.10.

Relief sought

19. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber dismiss *in limine* the Victims' Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of September 2010
At The Hague, The Netherlands