

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08 OA 2

Date: 27 November 2009

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 CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR

v.

JEAN-PIERRE BEMBA GOMBO

Public Document

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”

Dissenting Opinion of Judge Sang-Hyun Song

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Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Mr Nkwebe Liriss
Mr Karim A.A.Khan

Legal Representative of Victims
Ms Marie Edith Douzima-Lawson

The Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Ms Silvana Arbia

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Dissenting Opinion of Judge Sang-Hyun Song

1. On 18 August 2009, 54 victims participating in the pre-trial proceedings in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* filed before Appeals Chamber the “Observations of the Legal Representatives of the Victims on the Participation of the Victims in the Interlocutory Appeal Filed by the Office of the Prosecutor under Article 81(2)(b) of the Rome Statute”¹ (hereinafter: “Victims’ Observations”). They stated that in their view, they have an automatic right to make observations to the Appeals Chamber on the appeal brought by the Prosecutor against Pre-Trial Chamber II’s “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”.² They invited the Appeals Chamber to change its current jurisprudence, which requires victims to make an application to participate in appeals brought under article 82 (1) (b) of the Statute.³ On 31 August 2009, the victims filed the “Réponse des représentants légaux des victimes sur le « Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo » déposé le 24 août 2009”⁴ (hereinafter: “Victims’ Response”), responding to the Prosecutor’s document in support of the appeal.⁵

2. On 3 September 2009, the Appeals Chamber rendered 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’”⁶ (hereinafter: “Decision on Victims’ Participation”), rejecting the Victims’ Response, but nevertheless allowing the 54 victims to make submissions on the appeal. On 20 October 2009, the Appeals Chamber gave its

¹ ICC-01/05-01/08-479-tENG.

² ICC-01/05-01/08-475, 14 August 2009.

³ Victims’ Observations, paras 5-10.

⁴ ICC-01/05-01/08-492.

⁵ “Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-485, dated 24 August 2009 and registered on 25 August 2009.

⁶ ICC-01/05-01/08-500.

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reasons for the Decision on Victims' Participation⁷ (hereinafter: "Reasons"). I dissented from the Decision on Victims' Participation and shall summarise the reasons for my dissent below.

3. In accordance with the Appeals Chamber's previous jurisprudence, the Decision on Victims' Participation was grounded on the view that in order for victims to participate in an appeal under article 82 (1) (b) of the Statute, they must first make an application to the Appeals Chamber, which then has to render a decision on their requested participation before they may file submissions.⁸ The majority of the Appeals Chamber adopted this approach in a judgment of 13 February 2007 in the case of *Prosecutor v. Thomas Lubanga Dyilo*⁹ (hereinafter: "Judgment of 13 February 2007"). I dissented from the majority's approach to victims' participation in the Judgment of 13 February 2007 and set out the reasons for my dissent in an opinion attached to that judgment¹⁰ (hereinafter: "Dissenting Opinion of 13 February 2007"). I underlined that in my view, victims who participated in the proceedings giving rise to an appeal under article 82 (1) (b) of the Statute should be considered "participants" in terms of regulation 64 (4) and (5) of the Regulations of the Court and should therefore have an automatic right to file a response to the document in support of the appeal.¹¹ I continue to hold the view that this is the correct interpretation of the Court's legal instruments.

4. In my Dissenting Opinion of 13 February 2007, I stated that in my opinion, "the approach of the majority [...] leads to unnecessary procedural steps that are bound to slow down the appellate process."¹² This prediction has been confirmed by the Appeals Chamber's practice over the past two and a half years. For every appeal under article 82 (1) of the Statute in which victims wish to participate, the Appeals Chamber needs to render a decision on their right to do so. Each time the Chamber grants an application for

⁷ "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"', ICC-01/05-01/08-566.

⁸ Reasons, paras 12-15.

⁹ "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», ICC-01/04-01/06-824, paras 37-55.

¹⁰ Judgment of 13 February 2007, pp. 55-57.

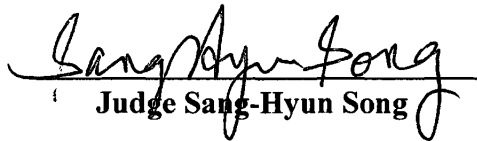
¹¹ Dissenting Opinion of 13 February 2007, para. 3.

¹² Dissenting Opinion of 13 February 2007, para. 2.

participation, there is another round of submissions. This inevitably, and in my view unnecessarily, delays the appellate proceedings.

5. Therefore, I would have accepted the Victims' Response in the present case. It was unnecessary to reject the Victims' Response and then permit the victims to file their observations again.

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


Judge Sang-Hyun Song

Dated this 27th day of November 2009

At The Hague, The Netherlands