

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 9 December 2009

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO**

Confidential
Ex parte Registrar only

Decision on the Observations on legal representation of unrepresented applicants

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby delivers the following Decision on the "Observations on legal representation of unrepresented applicants" of the Office of Public Counsel for Victims ("OPCV").¹

I. Background and Submissions

1. On 12 September 2008, the Single Judge acting on behalf of Pre-Trial Chamber III issued a "Decision on Victim Participation" in which she ruled that "the Registry shall assist the victims for the purpose of ensuring their legal representation, and that where no legal representative has been appointed by the victims, the Office of Public Counsel for Victims shall, as assigned by the Registry, act as legal representative of the victims from the time they submit their applications for participation".²
2. At the status conference held by the Trial Chamber on 7 October 2009, Principal Counsel of the OPCV sought clarification from the Chamber on the issue of legal representation of unrepresented applicants. The Bench requested the Principal Counsel to file written submissions.³
3. On 9 October 2009, the OPCV submitted observations in which it noted that the Office currently represents 35 victims, 20 of whom have already been authorised to participate⁴ by virtue of the "Fourth Decision on Victims' Participation" of Pre-Trial Chamber III.⁵
4. The OPCV further submitted that a number of participating victims for whom the Office had been originally appointed as a result of the Single Judge's

¹ Observations on legal representation of unrepresented applicants, 9 October 2009, ICC-01/05-01/08-547.

² Decision on Victim Participation, 12 September 2008, ICC-01/05-01/08-103-tENG-Corr, page 5, paragraph d).

³ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 25, lines 16 – 25.

⁴ ICC-01/05-01/08-547, paragraph 5.

⁵ Fourth Decision on Victims' Participation, 12 December 2008, ICC-01/05-01/08-320.

Decision⁶ had indicated their wish to continue to be represented by Principal Counsel, and that some applicants have signed a power of attorney in favour of Principal Counsel, and thus the OPCV is currently appearing in the proceedings as their legal representative.⁷

5. The Chamber observes that the Pre-Trial Chamber appointed the OPCV to act as legal representative for those victims without representation until they organised legal representation. Once victims have been granted leave to participate, the Single Judge held that they should be represented by counsel from their own country, unless there were objections.⁸ The OPCV observed that the Registry is of the view that the Decision of the Single Judge applies only to the stage of the case prior to the confirmation of the charges. However, the OPCV observed that during the period which includes the hearing on the confirmation of charges up until the transmission of the case record to Trial Chamber III, applications continued to be filed with the Registry, and therefore some of the applicants may not be represented.⁹
6. Principal Counsel submitted that the period prior to the decision on the application to participate is critical since there are a number of issues that may arise for which the applicants will need legal assistance.¹⁰ In addition, the OPCV submitted that it seems unlikely that conflicts of interest would arise, given the homogeneous nature of the group of victims and the ambit of the charges, and bearing in mind that no conflicts of interest have arisen thus far.¹¹ Finally, the OPCV requested to be consulted prior to any decision that is taken by the Chamber involving the assistance it is to provide to victims, due to its limited resources and the constraints relating to the support and

⁶ ICC-01/05-01/08-103-tENG-Corr, paragraph 10.

⁷ ICC-01/05-01/08-547, paragraph 6.

⁸ Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, 16 December 2008, ICC-01/05-01/08-322, paragraph 14.

⁹ ICC-01/05-01/08-547, paragraphs 7 and 8.

¹⁰ ICC-01/05-01/08-547, paragraph 10.

¹¹ ICC-01/05-01/08-547, paragraph 14.

assistance it is able to provide to the victims or the legal representatives in other cases.¹²

II. Relevant Provisions

7. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1 The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Rule 89(1) of the Rules of Procedure and Evidence

Application for participation of victims in the proceedings

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

[...]

Rule 90 of the Rules of Procedure and Evidence

Legal representatives of victims

1. A victim shall be free to choose a legal representative.

¹² ICC-01/05-01/08-547, paragraph 15.

2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

3. If victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68.1, are represented and that any conflict of interest is avoided.

[...]

Regulation 80 of the Regulations of the Court

Appointment of legal representatives of victims by a Chamber

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.

2. The Chamber may appoint counsel from the Office of Public Counsel for Victims.

Regulation 81 of the Regulations of the Court

Office of Public Counsel for victims

[...]

4. The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate:

(a) Legal research and advice; and

(b) Appearing before a Chamber in respect of specific issues.

Regulation 116 of the Regulations of the Registry

Information provided by the Registrar to the Office

When member of the Office act as duty counsel or as legal representative of victims or appear before the Chamber on behalf of a victim or victims in respect of specific issues, the Registrar shall, having regard to confidentiality, provide them with such information received in the application sent by victims and such further information and documents as are necessary for the fulfilment of those functions.

III. Analysis

8. The relevant provisions of the statutory framework envisage that the OPCV may fulfil a wide variety of functions during the trial stage. Rule 90(1) of the Rules of Procedure and Evidence ("Rules") establishes the right for victims to

choose a legal representative. The Chamber, under Regulation 80 of the Regulations of the Court, has the power to appoint a legal representative, *inter alia*, from the OPCV, and Regulation 81(4) of the Regulations of the Court requires the OPCV to provide support and assistance to victims and to their legal representatives by providing legal research and advice and appearing before the Chamber. It is to be stressed that in critical respects it is for the Chamber – and not the OPCV – to determine the precise nature of the role of the Office in a particular case. Although victims have a right (“are free”) to choose a legal representative, it is for the Chamber to determine whether or not that representative should come from the OPCV (Regulation 80(2) of the Regulations of the Court). As indicated by the use of the term “may” in this provision, a decision of a Chamber pursuant to Regulation 80(2) of the Regulations of the Court is discretionary.

9. The Chamber is of the view that it is necessary that the power to determine the role of the OPCV is vested in the Chamber, in particular because of the latter’s responsibility to manage the proceedings and to ensure the fair and expeditious conduct of the trial.
10. As stated above, Pre-Trial Chamber III appointed the OPCV as legal representative of victims without representation, for the period during which those victims were unable to organise representation. Once victims have been granted leave to participate, the Single Judge decided that they should be represented by a counsel from their own country, unless objections were raised.¹³
11. The Chamber observes that during the pre-trial phase, two counsel from the Central African Republic (“CAR”), Mr Goungaye Wanfiyo and Ms Marie Edith Douzima Lawson, were appointed as legal representatives for victims,

¹³ ICC-01/05-01/08-103-ENG-Corr, page 5, operative paragraph d); ICC-01/05-01/08-322, paragraph 14.

while the OPCV continued acting as legal representative for those victims who had not selected a legal representative or had expressed their wish to be represented by the OPCV.

12. However, regrettably, one of the legal representatives, Mr Wanfiyo, passed away on 27 December 2008.¹⁴ He was representing twenty-nine of the victims who had been authorised to participate in the proceedings.¹⁵ Since Ms Douzima Lawson was the only other registered counsel from the CAR in the List of Counsel, the Registry appointed her as the common legal representative for victims authorised to participate in the proceedings, with the exception of those victims who had been represented by the OPCV.¹⁶ Furthermore, the Registry informed the Pre-Trial Chamber that, following its decision on common legal representation, three of the victims authorised to participate expressed their preference not to select a common legal representative from the CAR, and instead, they wished to be represented by the OPCV.¹⁷ On 9 January 2009, the Registry informed the Pre-Trial Chamber that all victims represented by the OPCV expressed their wish to continue to be represented by the Office.¹⁸

¹⁴ This is the date given in the most recent filing on the matter, Report on the status of applications for participation in the proceedings or for reparations received by the Victims Participation and Reparations Section, 5 October 2009, ICC-01/05-01/08-541, pages 15 – 16; however the Registrar's filing Information à la Chambre du décès de Maître Goungaye Wanfiyo, représentant légal des victimes a/0277/08, a/0284/08, a/0285/08, a/0286/08, a/0287/08, a/0288/08, a/0286/08, a/0290/08, a/0390/08, a/0391/08, a/0393/08, a/0394/08, a/0395/08, a/0396/08, a/0468/08, a/0469/08, a/0470/08, a/0471/08, a/0472/08, a/0473/08, a/0474/08, a/0475/08, a/0476/08, a/0477/08, a/0478/08, a/0479/08, a/0480/08, et a/0481/08, 5 January 2009, ICC-01/05-01/08-338-Corr, paragraph 1 states the date of death as being 28 December 2008; furthermore, the Registrar's Désignation d'un représentant légal commun pour les victimes autorisées à participer à la procédure dans l'affaire Le Procureur c. Jean-Pierre Bemba, 5 January 2009, ICC-01/05-01/08-343, page 4 states that he passed away on 24 December 2008.

¹⁵ ICC-01/05-01/08-338-Corr, paragraph 3.

¹⁶ ICC-01/05-01/08-343.

¹⁷ ICC-01/05-01/08-343, page 5.

¹⁸ Report on legal representation of victims for whom the Office of Public Counsel for Victims had been appointed as Legal Representative, 9 January 2009, ICC-01/05-01/08-357, paragraphs 4 and 5.

13. As a result, during the Confirmation Hearing, the OPCV represented twenty victims¹⁹ while Ms Douzima acted as the legal representative for the remaining thirty four victims.²⁰
14. As noted by the OPCV, Pre-Trial Chamber I in the context of the situation in the Democratic Republic of the Congo, ordered the Registrar to appoint the OPCV automatically as the legal representative for victim applicants who were without a legal representative.²¹ Following this approach in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I held that those victim applicants who were represented by the OPCV would continue to be represented in this way until decisions on their applications to participate were taken. Thereafter, the Registrar was to arrange for another legal representative to act for them, unless there were specific reasons as to why this course was detrimental to individual participating victims.²²
15. In the present case, the Registry informed the Chamber that subsequent to the deadline set by Pre-Trial Chamber III for participation in the confirmation of charges, a number of new applications have been received. Out of the ninety five new applications, nine have chosen the OPCV as their legal representative, three have chosen Ms Douzima, twenty seven remain unrepresented and fifty six were represented by the late Mr Wanfiyo.²³
16. With regard to the unrepresented victims, the Chamber remarks that the Victims Participation and Reparations Section ("VPRS") recommended that

¹⁹ Transcript of hearing on 12 January 2009, ICC-01/05-01/08-T-9-ENG-ET, page 32, lines 5 – 9.

²⁰ ICC-01/05-01/08-T-9-ENG-ET, page 36, line 4.

²¹ Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374, paragraph 43.

²² Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, 6 March 2008, ICC-01/04-01/06-1211, paragraph 34.

²³ ICC-01/05-01/08-541-Conf-Exp, page 16.

the Chamber appoints the OPCV to represent their interests until they choose a legal representative or an order on common legal representation is made.²⁴

17. Addressing those victim applicants who were represented by Mr Wanfiyo, the Chamber requests the VPRS to obtain their views on legal representation and thereafter to report to the Chamber. Their position will be dealt with in a later decision on common legal representation.

IV. Conclusions

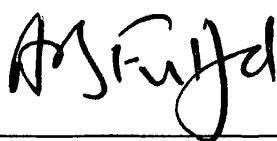
18. Given the circumstances set out above, the Trial Chamber orders that:

- a) The OPCV shall continue to represent the victim applicants it currently represents until the Chamber issues a decision on their application to participate.
- b) The OCPV shall represent those victim applicants who have not chosen a legal representative until a decision is made on their application to participate.
- c) Thereafter, for the applicants in b), the Registrar shall arrange for another legal representative to act for them, unless there are specific reasons, to be set out in a filing addressed to the Chamber and the Registry only, within 7 days of the decision of the Registrar, as to why this course may be detrimental to individual participating victims.

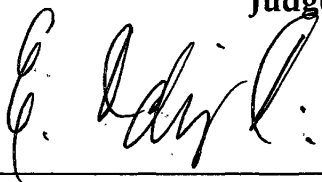
²⁴ ICC-01/05-01/08-541-Conf-Exp, pages 16 and 17.

- d) For those victim applicants originally represented by Mr Wanfiyo , the VPRS shall submit a report on their legal representation. The position of these applicants will be dealt with in a later decision on common legal representation.
- e) Ms Douzima Lawson shall continue to represent the victims she represented during the confirmation of charges phase of the case.

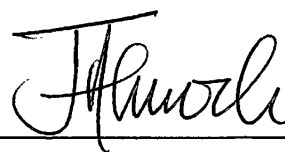
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 9 December 2009

At The Hague, The Netherlands