



Original: French

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

Date: 16 August 2010

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

**Defence Response to the Application by the Office of Public Counsel for Victims
(OPCV) of 5 August 2010**

Source: Defence Team 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

Fatou Bensouda
Fabricio Guariglia

Defence Counsel

Nkwebe Liriss
Aimé Kilolo Musamba

Legal Representatives of the Victims

Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence for Mr Bemba has noted the order of the Appeals Chamber of 11 August 2010¹ informing it that it may submit a response to the “Application by the OPCV in its Capacity as Legal Representative of the Victims for Participation in the Interlocutory Appeal Filed by the Defence Challenging the Decision of Trial Chamber III of 28 July 2010” of 5 August 2010 (ICC-01/05-01/08-848-tENG).
2. By way of preliminary comment, the Defence notes that the OPCV quite correctly points out that the victims’ right to present their observations on an interlocutory appeal is not automatic and that an application for leave to do so must be submitted to the Appeals Chamber. Under rule 91(2), the Defence has the right to respond to this type of application.²
3. Furthermore, the Defence wishes to recall the three grounds of appeal raised by the Defence against the Decision:
 - a. First ground: the newly established Trial Chamber III could not simply endorse the decisions rendered by the preceding Pre-Trial Chamber comprised of different judges. The Chamber should have carried out a new and thorough analysis of the legality of the continued detention of Mr Bemba.
 - b. Second ground: the Trial Chamber committed an error when it considered irrelevant the Defence’s request to the Chamber to order the Registry to assist Mr Bemba’s Defence team in identifying a host

¹ Appeals Chamber, *The Prosecutor v. Bemba*, Order on the filing of a response to the application by victims for participation in the appeal against the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” of Trial Chamber III, ICC-01/05-01/08-851, 11 August 2010.

² See: Appeals Chamber, *The Prosecutor v. Lubanga*, 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, 13 February 2007: “49. Should the Appeals Chamber permit the victims to participate in the appeal, the Prosecutor and the Defence shall be allowed to reply to any filing of the victims, in accordance with the provisions of rule 91(2) of the Rules of Procedure and Evidence.”

country which would provide guarantees that the accused would appear in court.

- c. Third ground: the Trial Chamber committed an error of law in considering itself bound to apply to a request to modify the detention regime a particularly strict criterion intended by the Statute solely for the issue of the continued detention or release of an accused person. In the alternative, the Chamber should have taken this relevant fact into account when assessing the risk that Mr Bemba might flee if granted interim release.

4. The grounds of appeal raised by the Defence are based on points of law of a technical nature which have to be decided prior to any decision on the interim release of Mr Bemba. Consequently, it cannot be argued that the “personal interests” of the victims are affected by the Defence’s appeal.
5. As the Appeals Chamber recalled in its judgment of 13 February 2007, “It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance”.³ The Appeals Chamber thus established a clear distinction between the trial stage and the appeal stage on the ground that “the subject matter and nature of any interlocutory appeal would, at that stage, have been unknown. Hence it would be impossible for the Pre-Trial Chamber, in effect, to deem it to be appropriate for victims to participate in that stage of the proceedings or to determine that their interests would be affected by that particular interlocutory appeal”.⁴ It is thus not the case that, because the

³ *Idem.*, para. 43. See also: Appeals Chamber, DRC Situation, *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*, ICC-01/04-503, 30 June 2008, para. 34.

⁴ Appeals Chamber, *The Prosecutor v. Lubanga, 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, 13 February 2007, para. 43.

decision rendered by the Trial Chamber concerned an issue affecting the personal interests of the victims, the same is necessarily true for the appeal stage of that decision.

6. In this same judgment, the Appeals Chamber states that, in relation to interlocutory appeals, pursuant to article 82(1)(b) of the Statute:

“an application should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is "appropriate" for the Appeals Chamber to permit their views and concerns to be presented. Furthermore, while it is for the Appeals Chamber to ensure that any views and concerns of victims must be presented “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”, any submissions from victims on these important rights would necessarily be considered by the Appeals Chamber in making its determination.”⁵

It further states:

“The Appeals Chamber limited its Decision to permit the victims to present their views and concerns respecting their personal interests in the issues raised on appeal. Observations to be received by the victims were therefore limited and had to be specifically relevant to the issues arising in the appeal rather than more generally.”⁶

It was thus incumbent on the OPCV to explain in its application how the interests of the victims it represents were affected by this particular interlocutory appeal and how the issues raised in the appeal were relevant to them.

7. However, in its application of 5 August 2010, the OPCV limited itself to stating that the personal interests of the victims are necessarily affected by an appeal on a decision on the detention and interim release of Mr Bemba. That is not sufficient to determine how the personal interests of the victims are affected by the three main issues raised by the Defence in its appeal.

⁵ Idem., para. 44.

⁶ Ibid., para. 55.

8. Therefore, as previously, in similar circumstances in the *Lubanga* case, the Appeals Chamber is bound to reject the OPCV's application and to conclude that:

"In the present appeal, [...] the Victims do not put forward any grounds capable of substantiating whether or how their personal interests are affected by the preliminary consideration of whether the appeal was correctly brought under article 82 (1) (b) of the Statute. The Victims also do not make any statement as to why it would be appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings."⁷

Thus it would not be "appropriate" to allow the OPCV to present the views and concerns of the victims on the points raised by the Defence in its appeal.

9. In the unlikely event that the Appeals Chamber were to consider that the OPCV had provided sufficient support for its application, it will note that the appeal makes no mention of any of the matters identified by the Chamber in its judgment of 13 June 2007 as affecting the personal interests of victims, that is to say, "the protection" of the victims or the "reparation" of injury caused.⁸ The interests put forward here by the OPCV exceed the personal interests of the victims and belong "instead to the role assigned to the Prosecutor".⁹ The victims cannot have a personal interest in participating in the determination of legal issues of a purely technical nature requiring resolution prior to any decision on the issue of detention and interim release.

10. The OPCV has therefore not shown any personal interests in participation in this particular, specific interlocutory appeal. If the OPCV were granted leave to participate, it could only present observations which are general, theoretical and not linked to the personal interests of the victims it represents. The OPCV

⁷ Appeals Chamber, *The Prosecutor v. Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007, para. 24.

⁸ *Idem.*, para. 28.

⁹ *Ibid.*

would thus be acting rather as *amicus curiae*¹⁰ than as legal representative of the victims.

11. Granting the OPCV the right to present its observations in the present appeal would therefore be prejudicial to the rights of the Defence. In supporting the role of the Prosecutor, the OPCV would leave the Defence facing a second opponent. The proceedings could therefore no longer be considered fair.

12. For these reasons, the Defence invites the Appeals Chamber to reject the OPCV's application "for Participation in the Interlocutory Appeal Filed by the Defence Challenging the Decision of Trial Chamber III of 28 July 2010".

[signed]

Aimé Kilolo Musamba
Associate Counsel

[signed]

Nkwebe Liriss
Lead Counsel

Done this 16 August 2010

At The Hague, The Netherlands

¹⁰ If it wishes to act in this capacity, the OPCV should fulfil the conditions of regulation 103, specifically addressing to the Chamber an application for leave to present its observations as *amicus curiae*. See in this regard: Pre-Trial Chamber I, *The Prosecutor v. Al Bashir, Decision on "Notification of public statement by the Prosecutor"*, ICC-02/05-01/09-105, 6 August 2008.