

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/05-01/08**
Date: **26 October 2011**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
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***

Confidential

**Defence reply to the observations of the Legal Representative of Victims dated
24 October 2011**

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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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence hereby submits its reply to the observations of the Legal Representative of Victims dated 24 October 2011.¹

I. The discretion of the Trial Chamber to identify and set forth the conditions of release

2. In his observations, the Legal Representative of Victims advances the argument that the discretion of the Chamber encompasses both article 58(1)(b) and article 119.²
3. It must be noted that Trial Chamber III's decision to invite observations from [REDACTED] on the conditions of the appellant's possible release implies that, in adjudging the matter at hand, the Chamber necessarily considered that conditions could be implemented to mitigate the risks enumerated in article 58 of the Statute. Were this not so, Trial Chamber III would have dismissed the application for release without seeking observations from [REDACTED] on the conditions to be implemented pursuant to rule 119 of the Rules of Procedure and Evidence.
4. For [REDACTED] to clarify which conditions it is able and willing to apply, Trial Chamber III needs to specify further to [REDACTED] those conditions in relation to which it must respond. In this respect, the Chamber erred in law in considering that it was for [REDACTED] itself to propose first all of the conditions which it is able to implement. Indeed, the question put by Trial Chamber III was itself vague and abstract in that it was confined to inquiring as to its ability to apply one or more of the conditions enumerated in rule 119 of Rules of Procedure and Evidence. [REDACTED] replied in the affirmative to this sole question.
5. Finally, the specific conditions proposed by [REDACTED] are purely the result of the Defence's *proprio motu* endeavours to suggest non-exhaustive conditions to [REDACTED] both in its 20 September 2009 letter and in verbal suggestions which are based on its knowledge of examples of model State guarantees

¹ ICC-01/05-01/08-1860-Conf-tENG, 24 October 2011.

² ICC-01/05-01/08-1860-Conf-tENG, 24 October 2011, paras. 13-17.

that actually culminated in decisions to grant release by the International Criminal Tribunal for the Former Yugoslavia. In any event, it is inequitable to expect the Defence to second-guess those conditions which the Chamber considered satisfactory at the time of deciding to inquire of [REDACTED] as to the conditions of release.

II. The risk of abscondment

6. As a result of a manifest misdetermination of the terms of the 9 June 2011 letter from [REDACTED]³ whereas [REDACTED] undertook to guarantee the appellant's return to the Seat of the Court for trial and to cooperate fully with the Court. It is therefore clear that [REDACTED] undertook to implement any condition to be set by the Court.
7. What is more, even submissions from the Office of the Prosecutor to the Appeals Chamber acknowledge that where conditions may be altered to reduce the attendant risks, the appellant is entitled to release.
8. Accordingly, Trial Chamber III cannot assert that no possible condition exists to reduce considerably or negate the risk of the appellant's abscondment when, in its 2 December 2009 decision, the Appeals Chamber recognised that the fact of Mr Jean Pierre Bemba Gombo being at all times escorted by police, as was the case in July 2009 in Belgium, resulted in a considerable reduction or negation of the risk of abscondment.⁴

III. The risk of witness intimidation

9. As a result of a manifest misdetermination of the terms of the 28 July 2011 letter from [REDACTED]⁵ Trial Chamber III found that that State had not propounded any measure to negate the risk of witness intimidation.
10. In fact, [REDACTED] undertook to take all necessary steps that Trial Chamber III considers necessary to prevent the Accused from influencing or intimidating any witnesses whatsoever, either in [REDACTED] or elsewhere.

³ ICC-01/05-01/08-1621-Conf-Anx1-tENG, 4 August 2011, p. 4.

⁴ ICC-01/05-01/08-631-Conf, 2 December 2009, paragraph 83, p. 26.

⁵ ICC-01/05-01/08-1621-Conf-Anx1-tENG, 4 August 2011, pp. 1-4.

11. It would have sufficed for the Chamber to request from [REDACTED] details of the practical measures that it was intending to implement in furtherance of its commitment to take all necessary steps.
12. In any event, it is to be noted that the monitoring of telephone calls is merely cited as a non-exhaustive example, it being for the Trial Chamber and not for [REDACTED] to determine the conditions.

FOR THESE REASONS,

The Defence respectfully prays the Appeals Chamber to allow its notice of appeal and document in support of the appeal, and to set aside the impugned decision of Trial Chamber III.

[signed]

Aimé Kilolo Musamba
Associate Counsel

Dated this 26 October 2011

At The Hague, The Netherlands