

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 October 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

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’”

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
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

AS

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor dated 14 August 2009 and entitled “Prosecution’s Appeal against ‘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-01/05-01/08-476),

Having before it 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” (ICC-01/05-01/08-479-tENG) of 18 August 2009 and,

Having before it 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” (ICC-01/05-01/08-492) of 31 August 2009,

Hereby, gives its reasons for the decision issued on 3 September 2009 (ICC-01/05-01/08-500):

I. RELEVANT PROCEDURAL HISTORY

1. On 18 August 2009 (registered on 19 August 2009), 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 was filed (hereinafter: Victims’ Observations).

2. On 26 August 2009, the Appeals Chamber issued the “Order on the Filing of responses to the ‘Observations of the Legal Representatives of the Victims on the

¹ ICC-01/05-01/08-479-tENG.

Participation of the Victims in the Interlocutory Appeal Filed by the Office of the Prosecutor under Article 81 (2)(b) of the Rome Statute' and the Prosecutor's request for suspensive effect" which designated 31 August 2009 as the time limit for the parties to respond to the Victims' Observations.²

3. On 31 August 2009, the "Prosecution's Response to the Observations of the Legal Representatives of Victims on their Participation in the Prosecution Appeal against the Decision on the Interim Release of Jean-Pierre Bemba Gombo" was filed.³ On the same day, the legal representatives of the victims (hereinafter: Legal Representatives) 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

II. SUMMARIES OF THE PARTICIPANTS' SUBMISSIONS

A. The Victims' Observations

4. The Victims' Observations is divided into two parts.

5. The first part of the Victims' Observations requests that the Appeals Chamber determine that victims authorised to participate in the proceedings of the case should, *a fortiori*, be authorised to participate in an interlocutory appeal arising from a decision taken by the Pre-Trial Chamber in the same case. The Legal Representatives rely on regulation 24 (2) of the Regulations of the Court, pursuant to which victims and their legal representatives may file a response to any document when they have been granted the right to participate in the proceedings in accordance with article 68 (3) of the Statute, rule 89 (1) of the Rules of Procedure and Evidence (hereinafter: Rules) and regulation 64 (4) of the Regulations of the Court, pursuant to which "participants" are entitled to file a response within 21 days of notification of the document in support of the appeal. The

² ICC-01/05-01/08-486.

³ ICC-01/05-01/08-489.

⁴ ICC-01/05-01/08-492.

Legal Representatives also point out that pursuant to regulation 86 (8) of the Regulations of the Court, a decision taken by a Chamber under rule 89 of the Rules shall apply throughout the proceedings in the same case.

6. In the second part of the Victims' Observations, the Legal Representatives plead in the alternative that if the Appeals Chamber does not accept their interpretation of the relevant provisions of the Statute, Rules and Regulations of the Court, that it accept the Victims' Observations as an application to participate in the appeal.

7. They note that, in respect of the request to participate, the Appeals Chamber has already recognised that victims' personal interests are affected by the issue of the detention of suspects and accused persons. For the same reasons, the victims' participation is appropriate because it "meets the requirements of the right of victims to be heard, as set out in article 68(3)".⁵ According to the Legal Representatives, since the Prosecution and the Defence may file a response to any document filed by a participant in the case pursuant to regulation 24 (1) of the Regulations of the Court, in accordance with the parameters of these regulations, the participation of victims is appropriate.

8. The Legal Representatives also aver generally that because the Statute, Rules and Regulations of the Court are designed to allow the participation of victims in the proceedings, while at the same time guaranteeing the rights of a fair trial, participation as such could not be contrary or prejudicial to the rights of the defence. In addition, the rights of the defence are safeguarded insofar as regulation 24 (1) of the Regulations of the Court permits the defence to respond to any document filed by the participants.

B. Responses of the Prosecutor and the Defence

9. The Prosecutor responds to the first part of the Victims' Observations by simply acknowledging that the Appeals Chamber has already set out, in a series of decisions, the

⁵ ICC-01/05-01/08-479-tENG, para. 18.

requirements for victim participation in appeals, noting also that these principles have been “consistently followed.”⁶

10. In respect of the second part of the Victims’ Observations, their applications to participate, the Prosecutor notes that the victims have been recognised by the Pre-Trial Chamber as victims in the case, that their personal interests are affected in an appeal concerning the conditional release of the accused, and that therefore their participation is appropriate. The Prosecutor avers that victims should be permitted to present their views and concerns regarding those issues through their legal representatives, consistent with the jurisprudence of the Appeals Chamber. For these reasons, the Prosecutor does not object to granting the victims the right to participate in this appeal.

11. Mr Bemba did not file a response to the Victims’ Observations.

III. REASONS FOR THE DECISION

A. Reasons for Permitting the Participation of Victims in the Appeal

12. The Appeals Chamber has established, in its previous jurisprudence on the subject, the requirements applicable, under article 68 (3) of the Statute, for victim participation in proceedings on interlocutory appeals under article 82 (1) (b) and (d) of the Statute.⁷

13. The requisites for victim participation were explained in a series of decisions⁸ starting with the 13 February 2007 Judgment in the case of the *Prosecutor v. Thomas*

⁶ ICC-1/05-01/08-489, para. 9.

⁷ “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824; “Decision on Participation of Victims in the Appeal”, 27 October 2008, ICC-02/04-164, para. 7 citing “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’”, 16 May 2008, ICC-01/04-01/06-1335, paragraphs 35 and 36; and “Decision on Victim Participation in the appeal of the Office of the Office of Public Counsel of 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”, 30 June 2008, ICC-01/04-503, para. 90.

Lubanga Dyilo. In accordance with this jurisprudence, in order for a victim to participate in an appeal under articles 82 (1) (b) or (d)⁹ of the Statute, an application seeking leave to participate must be filed. The basis for this determination is article 68 (3) of the Statute, which provides:

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.

14. The Appeals Chamber held that article 68 (3) of the Statute “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.”¹⁰ Hence, regulation 86 (8) of the Regulations of the Court, which provides that “a decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case”, is “confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation.”¹¹ In the same way, regulations 64 (4) or (5) of the Regulations of the Court were not understood as granting victims an automatic right to participate in an interlocutory appeal, as this would preclude a specific determination by the Appeals Chamber that participation in the particular interlocutory appeal is appropriate. A separate application is necessary in order for the Appeals Chamber to make that determination. Thus, participation of victims may be permitted if it can be shown that the victims’ personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate.¹²

15. In accordance with the decisions of the Appeals Chamber, the application for participation in appeals proceedings “should include a statement from the victims in

⁸ ICC-01/04-01/06-1335; Decision on Victim Participation in the appeal of the Office of Public Counsel of the Defence against Pre-Trial Chamber I’s Decision of 3 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 6 December 2007”, 18 June 2008, ICC-02/05-138; and ICC-01/04-503.

⁹ See ICC-02/05-138, para. 24.

¹⁰ ICC-01/04-01/06-824, para. 40.

¹² ICC-01/04-01/06-824, para. 43.

¹² ICC-02/05-138, para.49; and ICC-01/04-503, para. 88.

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."¹³ In examining the applications, the Appeals Chamber will determine (i) whether their personal interests are affected by the issues on appeal, (ii) whether their participation is appropriate and (iii) that the manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.¹⁴ The Appeals Chamber has further explained that "[i]n seeking to demonstrate that their personal interests are affected, victims should generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal."¹⁵

16. In respect of the Victims' Observations, the Appeals Chamber observes that the Legal Representatives invite the Appeals Chamber to review its previous interpretation of the Statute, Rules and Regulations of the Court relating to the procedure for victim participation in interlocutory appeals. The Appeals Chamber declines to do so, as it does not find any convincing reasons to depart from its previous jurisprudence. The Legal Representatives have not advanced any new reasons, but instead, largely repeat the same legal arguments which were previously presented to the Appeals Chamber on this subject. Thus, the Appeals Chamber finds that the procedure for victim participation in appellate proceedings outlined in its previous decisions is applicable to the present proceedings.

17. In respect of the applications for participation, the Appeals Chamber considered that the victims' applications met the above-mentioned requirements for participation in the appeal. In the view of the Appeals Chamber, their personal interests are affected by the present appeal, having regard to the nature of the appeal itself.¹⁶ The Appeals Chamber further found that participation is appropriate given the subject matter and the desirability for the views of victims in appeals of this nature to be heard. Further, the

¹³ ICC-01/04-01/06-824, para. 44.

¹⁴ See ICC-02/05-138, para. 51; and ICC-01/04-503, para. 90.

¹⁵ "Decision on the Participation of Victims in the Appeal", 27 October 2008, ICC-02/04-01/05-324, para. 13; and ICC-02/04-164, para. 11.

¹⁶ See also, ICC-01/04-01/06-824, para. 54.

Prosecutor does not object to their participation. He acknowledged that this appeal may affect the personal interests of victims and that their participation is appropriate and is not inconsistent with the rights of the defence or a fair or impartial trial. Mr. Bemba has not filed a response in relation to the applications. In the view of the Appeals Chamber, participation would be appropriate and would not be prejudicial to or inconsistent with the rights of the accused or a fair trial.

18. For these reasons, the applications for participation by victims a/0271/08, a/0272/08, a/0273/08, a/0275/08, a/0277/08, a/0278/08, a/0279/08, a/0283/08, a/0284/08, a/0285/08, a/0286/08, a/0287/08, a/0288/08, a/0289/08, a/0290/08, a/0291/08, a/0292/08, a/0293/08, a/0294/08, a/0296/08, a/0297/08, a/0298/08, a/0390/08, a/0391/08, a/0393/08, a/0394/08, a/0395/08, a/0396/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, 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 and a/0481/08 were granted.

B. Reasons for Disregarding the Response

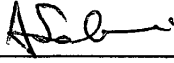
19. On 31 August 2009 the Legal Representatives filed the “Réponse des représentants légaux des victimes sur le ‘Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo’ déposé le 24 août 2009” (ICC-01/05-01/08-492), which by the decision of 3 September 2009, was disregarded. The Victims were nonetheless permitted to file, by 7 September 2009, their observations on the appeal.

20. The Appeals Chamber recalls that authorisation for victims to provide observations on an interlocutory appeal arises only when the Appeals Chamber decides that the victims may participate in the appellate proceedings.¹⁷ Thus, the response of 31 August 2009 was filed without the prior authorisation of the Appeal Chamber, necessitating that it be disregarded since a decision permitting victim participation in the appeal had not yet been rendered.

¹⁷ See ICC-02/05-138, para. 51; and ICC-01/04-503, para. 90.

Judge Song's reasons for his dissent will be provided in due course.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 20th day of October 2009

At The Hague, The Netherlands