

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/05-01/08 OA 8

Date: 9 September 2011

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Akua Kuenyehia

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

Confidential

Judgment

on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled “Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo”

shs

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

Mr Liriss Nkwebe
Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Mr Assingambi Zarambaud

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the ‘Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo’” of 2 September 2011 (ICC-01/05-01/08-1691-Conf),

After deliberation,

Unanimously,

Renders the following

DECISION

The victims represented by Mr Assingambi Zarambaud may participate in the present appeal.

And unanimously,

Delivers the following

JUDGMENT

The “Decision on the ‘Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo’” is confirmed. The appeal is dismissed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. Mr Jean-Pierre Bemba Gombo (hereinafter: “Mr Bemba”) is currently detained, pursuant to articles 60 (2) and 58 (1) (b) (i) of the Statute, on the grounds that his

detention is necessary to ensure his appearance at trial.¹ On 24 August 2011, Mr Bemba filed before Trial Chamber III (hereinafter: "Trial Chamber") an application for interim release in order for him to travel to the Democratic Republic of the Congo to register as a candidate for the upcoming presidential and parliamentary elections (hereinafter: "Application for Interim Release").² Mr Bemba provided the Trial Chamber with a letter from the President of the Congolese Senate to his counsel³ (hereinafter: "Letter of 22 August") which he argued "confirm[ed] [...] an agreement in principle of the Congolese Government in response to a request from [Mr Bemba] for the purpose of eliminating any risk of abscondment in the event of interim release into Congolese territory". He further argued that this letter constituted a material change in circumstances related to his detention warranting his interim release to the Democratic Republic of the Congo in order to obtain a voting card and to register as a candidate in upcoming presidential and parliamentary elections.⁴ Mr Bemba argued that, as the Congolese Government had agreed to receive him on interim release and to return him to the Court for trial, the Court should "seek urgent observations from the Democratic Republic of the Congo on its readiness to guarantee the security of [Mr Bemba] in its territory and to guarantee that he will return to appear at his trial before the Court".⁵

2. On 30 August 2011, after having heard from the Prosecutor⁶ and the participating victims,⁷ the Trial Chamber issued the "Summary of the Decision on the 'Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin

¹ See Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 19 August 2011, ICC-01/05-01/08-1626-Conf (OA 7).

² "Application for the interim release of Mr Jean-Pierre Bemba Gombo to allow him to perform his civic duties in the Democratic Republic of Congo", ICC-01/05-01/08-1639-Conf-tENG.

³ ICC-01/05-01/08-1639-Conf-AnxB.

⁴ Application for Interim Release, paras 5-10, 36.

⁵ Application for Interim Release, paras 10-11, 36 (b).

⁶ See "Prosecution's Response to the Defence 'Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo'", 29 August 2011, ICC-01/05-01/08-1661-Conf.

⁷ See "Observations on the « Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo » filed by Mr. Bemba on 24 August 2011", 29 August 2011, ICC-01/05-01/08-1659-Conf; "Observations de Maître Zarambaud Assingambi, Représentant légal de victimes, sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo, en date du 24 août 2011", 29 August 2011, ICC-01/05-01/08-1660-Red; "Observations de la Représentante légale de victimes relatives à la demande de mise en liberté provisoire de Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo", 29 August 2011, ICC-01/05-01/08-1670-Conf.

d'accomplir ses devoirs civiques en République Démocratique du Congo”⁸ (hereinafter: “Summary of the Impugned Decision”), rejecting the Application for Interim Release and indicating that an “opinion containing the Chamber’s full reasoning will follow in due course”.⁹ The Trial Chamber also decided that the time limit for the filing of an appeal should start running only once that “opinion” has been notified to Mr Bemba.¹⁰

3. On 2 September 2011, the Trial Chamber issued the “Decision on the ‘Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo””¹¹ (hereinafter: “Impugned Decision”). The Trial Chamber found that the Letter of 22 August did not indicate any agreement by the Democratic Republic of the Congo to eliminate the risk of Mr Bemba’s flight if he were to be released to its territory.¹² It expressed doubt as to whether the President of the Senate had the authority to bind the Democratic Republic of the Congo and noted that Mr Bemba had not provided any information in that regard.¹³ The Trial Chamber found, in any event, that the Letter of 22 August 2011 contained no information bearing on the question of whether Mr Bemba constituted a flight risk and therefore did not constitute a change in circumstances under article 60 (3) of the Statute.¹⁴ The Trial Chamber further found that, as it was not considering conditional release, it was under no obligation to seek the views of the Democratic Republic of the Congo under rule 119 (3) of the Rules of Procedure and Evidence.¹⁵

B. Proceedings before the Appeals Chamber

4. On 1 September 2011, Mr Bemba filed the “Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 30 Août 2011 intitulée ‘*Summary of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République*”

⁸ ICC-01/05-01/08-1672.

⁹ Summary of the Impugned Decision, para. 4.

¹⁰ Summary of the Impugned Decision, para. 6 (c).

¹¹ ICC-01/05-01/08-1691-Conf. A public redacted version was filed on 6 September 2011 as ICC-01/05-01/08-1691-Red. All references herein are to the public redacted version.

¹² Impugned Decision, para. 11.

¹³ Impugned Decision, para. 15.

¹⁴ Impugned Decision, paras 10-17.

¹⁵ Impugned Decision, para. 26.

Démocratique du Congo”¹⁶ (hereinafter: “Notice of Appeal”) which was notified to the Appeals Chamber on 2 September 2011.

5. On 5 September 2011, Mr Bemba filed the “Document à l’appui de l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 30 Août 2011 intitulée ‘*Summary of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo*’ et sa version complète notifiée le 2 Septembre 2011”¹⁷ (hereinafter: “Document in Support of the Appeal”). Mr Bemba requested therein the Appeals Chamber to reduce to a minimum the time for submission of documents by parties and to decide the appeal by 11 September 2011, the deadline to submit applications for the next presidential and parliamentary elections in the Democratic Republic of the Congo.¹⁸

6. On 5 September 2011, the Appeals Chamber ordered the Prosecutor to file his response to the Document in Support of the Appeal by 7 September 2011¹⁹ (hereinafter: “Order of 5 September”).

7. On 5 September 2011, Mr Assingambi Zarambaud filed the “Demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer a [*sic*] la procédure d’appel suite a [*sic*] l’acte d’appel de la Défense du 1^{er} septembre 2011”²⁰ (hereinafter: “Application for Participation”), requesting to participate in the appeal on behalf of a group of victims he represents (hereinafter: “the victims”).

8. On 6 September 2011, the Appeals Chamber ordered that the victims may file their views and concern with respect to their personal interests in the issues raised in the appeal by 14h00 on Wednesday, 7 September 2011 and that Mr Bemba and the Prosecutor may respond by 14h00 on Thursday, 8 September 2011 to the Application

¹⁶ ICC-01/05-01/08-1690-tENG.

¹⁷ ICC-01/05-01/08-1702-Conf. Mr Bemba annexed to this filing an English version of the same filing. ICC-01/05-01/08-1702-Conf-Anx1. All references herein are to the English version.

¹⁸ Document in Support of the Appeal, p. 10.

¹⁹ “Order on the time limit for the filing of the Prosecutor’s response to the document in support of the appeal”, ICC-01/05-01/08-1705.

²⁰ ICC-01/05-01/08-1704-Conf.

for Participation and to the victims' views and concerns²¹ (hereinafter: "Order of 6 September").

9. On 7 September 2011, the Prosecutor submitted his response to the Document in Support of the Appeal²² (hereinafter: "Response to the Document in Support of the Appeal") in which he requests the Appeals Chamber "to dismiss [Mr Bemba's] Document in support of the Appeal [*sic*]"²³.

10. On 7 September 2011, the victims filed their observations on the appeal²⁴ (hereinafter: "Victims' Observations"). The victims argue that the appeal should be dismissed as premature in that the Summary of the Impugned Decision cannot properly be subject to appeal.²⁵ Alternatively, they argue that the appeal should be rejected on its merits.²⁶

11. On 8 September 2011, the Prosecutor responded simultaneously to the Application for Participation and to the Victims' Observations²⁷ (hereinafter: "Prosecutor's Response to the Victims' Observations"). With respect to the former, he argues that the victims should be allowed to participate in the appeal. Mr Bemba responded to the Victims' Observations²⁸ (hereinafter "Mr Bemba's Response to the Victims' Observations") but did not respond to the Application for Participation.

²¹ "Order on the filing of submissions by victims and by Mr Bemba Gombo and the Prosecutor", ICC-01/05-01/08-1711.

²² "Prosecution's Response to the 'Document à l'appui de l'Acte d'Appel de la Défense contre la décision de la Chambre de Première Instance III du 30 Août 2011 intitulée 'Summary of the Decision on the 'Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo' et sa version complète notifiée le 2 Septembre 2011'", ICC-01/05-01/08-1715-Conf.

²³ Response to the Document in Support of the Appeal, para. 32.

²⁴ "Observations de Maître Zarambaud Assingambi, Représentant légal de victimes sur le 'Document à l'appui de l'acte d'appel de la Défense contre la décision de la Chambre de première instance III du 30 aout 2011 et sa version complète notifiée le 2 septembre 2011'", ICC-01/05-01/08-1714-Conf.

²⁵ Victims' Observations, para. 18.

²⁶ Victims' Observations, paras 19 *et seq.*

²⁷ "Prosecution's Response to the Victims Legal Representative Mr Zarambaud Assingambi's Application for Participation (ICC-01/05-01/08-1704-Conf) and Observations (ICC-01/05-01/08-17140-Conf) to the Defence Document in Support of against the Summary and Decision on the 'Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo' (ICC-01/05-01/08-1702-Conf)", ICC-01/05-01/08-1718-Conf.

²⁸ "Réplique de la Défense aux observations du représentant légal de victimes au document à l'appui de l'Acte d'Appel de la Défense du 5 September 2011", ICC-01/05-01/08-1717-Conf.

II. PRELIMINARY ISSUES

A. Reasons for the Order of 5 September

12. In its Order of 5 September, the Appeals Chamber reduced the time limit for the filing of the Response to the Document in Support of the Appeal to Wednesday, 7 September 2011. Without this reduction, the time limit under regulation 64 (5) of the Regulations of the Court for the filing of the Response to the Document in Support of the Appeal would have expired on Saturday, 10 September 2011, and, pursuant to regulation 33 (1) (d) of the Regulations of the Court, the Response to the Document in Support of the Appeal would have had to be filed, at the latest, by Monday, 12 September 2011.

13. The Appeals Chamber issued the Order of 5 September under regulation 35 (2) of the Regulations of the Court according to which it may reduce a time limit “if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard”.

14. The Appeals Chamber noted that Mr Bemba had requested the Trial Chamber to be released in order to register as a candidate for the upcoming elections in the DRC. In his Notice of Appeal, he informed the Appeals Chamber that the time limit for the registration would expire on 11 September 2011 and substantiated this submission by reference to a press article on a recent decision of the Congolese electoral commission.²⁹ In the Document in Support of the Appeal, Mr Bemba repeated these submissions and requested the Appeals Chamber to reduce the time limits for the submissions of other participants to the proceedings.³⁰ The Appeals Chamber noted furthermore that the Trial Chamber had addressed Mr Bemba’s Application for Interim Release with great expeditiousness, issuing the Summary of the Impugned Decision six days after the Application for Interim Release was made, and that Mr Bemba filed the Document in Support of the Appeal on Monday, 5 September 2011, the next working day after the issuance of the Summary of the Impugned Decision, even though he would have had until 12 September 2011 to do so. The Appeals Chamber recalled that regulation 64 (5) of the Regulations of the Court already

²⁹ Notice of Appeal, para. 7.

³⁰ Document in Support of the Appeal, p. 10.

established a short time limit of only five days for the filing of responses to the document in support of the appeal and that reduction of this time limit should therefore be granted only in exceptional circumstances. Nevertheless, in the specific circumstances of this case, the Appeals Chamber considered that Mr Bemba had shown good cause for a reduction of the time limit for the filing of the Response to the Document in Support of the Appeal.

15. In the specific circumstances of the present case, the Appeals Chamber considered that it was not appropriate to seek the views of the Prosecutor even though he was the party most affected by the reduction. To do so would have defeated the purpose of the reduction.

B. Reasons for the Order of 6 September

16. In its Order of 6 September, the Appeals Chamber set time limits for the filing of submissions by the victims as well as for responses by Mr Bemba and the Prosecutor to those submissions and to the Application for Participation.

17. The Appeals Chamber recalled that, in accordance with article 68 (3) of the Statute, the participation of victims in proceedings is conditioned on such participation taking place at an appropriate stage of proceedings and being conducted in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Appeals Chamber considered that, in light of its subject matter, it was appropriate in the present appeal to consider the Application for Participation and, if the application was granted, to afford the victims the opportunity to submit observations on the appeal. However, given the circumstances of this appeal, any participation of victims should not prevent the Appeals Chamber from rendering its judgment on the appeal before 11 September 2011, at which date the appeal would become moot.

18. The Appeals Chamber recalled that the participation of victims in the appeal is dependent upon the victims submitting an application to participate and that, pursuant to rule 89 (1) of the Rules of Procedure and Evidence, the Prosecutor and the defence have a right to reply to such an application within a time limit set by the Chamber.³¹

³¹ See *Prosecutor v. Thomas Lubanga Dyilo*, "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

Once such replies have been received, the Appeals Chamber rules on whether and in what manner the victims may participate in the appeal.³² The Appeals Chamber further recalled that, if the Appeals Chamber granted victims the right to participate in the appeal, the Prosecutor and the defence would be permitted, pursuant to rule 91 (2) of the Rules of Procedure and Evidence, to reply to any observations of the victims.³³

19. The Appeals Chamber recalled that its usual procedure is to decide upon applications for participation by victims, taking into account all replies thereto, before authorising victims to submit observations. The Appeals Chamber considered that, subject to the requirements of the Statute and the Rules of Procedure and Evidence, it established the procedure governing the participation of victims in appeals for the purpose of the unimpeded and expeditious conduct of appellate proceedings.³⁴ The Appeals Chamber could modify this procedure where exceptional circumstances so require.³⁵

20. The Appeals Chamber considered that if it were to adopt its usual procedure in the present appeal, it would be impossible, even with the shortest of time limits, to decide upon the Application for Participation and, if the filing of observations by the victims was authorised, to receive the observations of victims and replies thereto before 11 September 2011. Accordingly, the Appeals Chamber considered it necessary in the circumstances of the present appeal exceptionally to allow the victims to file their observations and the Prosecutor and Mr Bemba to file replies thereto before the Appeals Chamber decided on the Application for Participation and the replies thereto. However, only if the Appeals Chamber were to grant the Application for Participation and to permit the victims to participate in the present

provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: “*Lubanga OA 7 Judgment*”), para. 47.

³² See *Lubanga OA 7 Judgment*, para. 48.

³³ See *Lubanga OA 7 Judgment*, para. 49.

³⁴ See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, “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 (OA9 and OA10), para. 14.

³⁵ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, 28 January 2010, ICC-02/05-01/09-70 (OA), paras 11-12 (accepting on an exceptional basis applications for the participation of victims submitted after the time limit for the filing of the response to the document in support of the appeal as required by the Appeals Chamber’s procedure and accepting the filing of substantive observations of victims submitted before the Appeals Chamber decided on their ability to participate in proceedings).

appeal would the Appeals Chamber consider their observations and the replies thereto.

III. DECISION ON THE APPLICATION FOR PARTICIPATION

21. As stated in the previous appeal in this case,

The Appeals Chamber has consistently held that with respect to victims' participation in appeals brought under article 82 (1) (b) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.³⁶

22. The Appeals Chamber finds that the Application for Participation fulfils these four criteria. The victims are victims participating in the case whose personal interests would be affected if Mr Bemba would not appear for trial and the trial would be discontinued.³⁷ Their participation in this appeal in the form of written submissions to which Mr Bemba and the Prosecutor may reply would not cause prejudice to or be inconsistent with the rights of the accused or a fair and impartial trial. The Appeals Chamber therefore considers that the Application for Participation should be granted and decides to consider the merits of the Victims' Observations and the replies thereto in substance.

IV. ADMISSIBILITY OF THE APPEAL

23. The victims challenge the admissibility of the appeal on the bases that, first, the appeal is premature in that it was lodged against the Summary of the Impugned Decision and not the Impugned Decision and, second, there has been no change in circumstances since the last decision by the Appeals Chamber in relation to a decision denying Mr Bemba interim release.³⁸ Whether or not there has been a change in circumstances goes to the merits of the appeal and will be discussed below. The

³⁶ "Decision on the Participation of Victims in the Appeal against the 'Decision on Applications for Provisional Release' of Trial Chamber III", 14 July 2011, ICC-01/05-01/08-1597-Conf, para. 7 (citation omitted).

³⁷ See "Decision on the Participation of Victims in the Appeal against the 'Decision on Applications for Provisional Release' of Trial Chamber III", 14 July 2011, ICC-01/05-01/08-1597-Conf, paras 9-10 and citations therein.

³⁸ Victims' Observations, paras 18 and 18 *bis*.

Appeals Chamber confines its consideration of the admissibility of the appeal to the victims' first argument.

24. Both the Prosecutor and Mr Bemba argue that the appeal is admissible. The Prosecutor argues that the appeal was not premature "given the unique circumstances of this litigation and the need for expedition".³⁹ Mr Bemba argues that he had a right to appeal automatically the Summary of the Impugned Decision under article 82 (1) (b) of the Statute and rule 154 (1) of the Rules of Procedure and Evidence and that the Trial Chamber confirmed through a legal officer that he could lodge an appeal on the basis of the Summary of the Impugned Decision.⁴⁰

25. The Appeals Chamber is not persuaded by the victims' arguments and finds the appeal admissible for the following reasons.

26. The Appeals Chamber recalls that the Summary of the Impugned Decision was issued within six days of the Application for Interim Release and within one day of receiving the Prosecutor's response thereto and victims' observations thereon. The Impugned Decision was issued two working days later. The Appeals Chamber notes that the Trial Chamber issued the Summary of the Impugned Decision on 30 August "[b]ecause the defence has requested that a decision be issued before the end of August" and that, in issuing the Summary of the Impugned Decision, the Trial Chamber stated that "[a]n opinion containing the Chamber's full reasoning will follow in due course".⁴¹

27. The Appeals Chamber notes that, while its title may have created some confusion among the parties and participants, the Summary of the Impugned Decision constituted, in itself, a decision denying provisional release, albeit in summary form.⁴² The Impugned Decision does not constitute a new decision but rather was issued for the purpose of providing "the Chamber's full reasoning" to its summary decision⁴³ and did not contain any operative part. Thus, in the exceptional circumstances of needing to issue a decision within a very short timeframe, the Trial Chamber issued

³⁹ Prosecutor's Response to the Victims' Observations, para. 7.

⁴⁰ Mr Bemba's Response to the Victims' Observations, para. 6.

⁴¹ Summary of the Impugned Decision, para. 4.

⁴² See Summary of the Impugned Decision, para. 6.

⁴³ Impugned Decision, para. 3.

its decision in two parts, with the operative part of the decision being followed by the reasons for the decision. Accordingly, the Appeals Chamber finds that the appeal filed upon the notification of the Summary of the Impugned Decision was admissible.

V. MERITS OF THE APPEAL

28. Mr Bemba sets out two grounds of appeal, namely:

First Ground; The Trial Chamber has committed a manifest error in its assessment of the facts in its evaluation of the letter from the [Democratic Republic of the Congo], and in finding that there were no new circumstances requiring an amendment to the current state of detention pursuant to Article 60 (3) of the Rome Statute;⁴⁴ [and]

Second Ground: the Trial Chamber committed a manifest error of fact-finding by not taking into account relevant factors proposed by the defense as a condition of release.⁴⁵

29. The Appeals Chamber observes that Mr Bemba argues that the two grounds of appeal are interrelated in that he avers that the Trial Chamber “failed to establish how the putting in place of [conditions of release], combined with the state guarantee of the [Democratic Republic of the Congo] would fail to negate the risk of flight of Mr. Jean-Pierre Bemba during his brief stay of one hour on Congolese soil”.⁴⁶ Accordingly, the Appeals Chamber considers the two grounds of appeal together, beginning with the alleged guarantee of the Democratic Republic of the Congo.

30. The Appeals Chamber recalls that Mr Bemba is presently detained, pursuant to articles 60 (2) and (3) and 58 (1) (b) (i) of the Statute, in order to ensure his appearance at trial.⁴⁷ For Mr Bemba to be released from detention under article 60 (3) of the Statute, there must be a relevant change in circumstances. As the Appeals Chamber recently stated in this case,

The Appeals Chamber has previously held that changed circumstances means a “change in some or all the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”. Thus, a Chamber reviewing a person's detention under article 60 (3)

⁴⁴ Document in Support of the Appeal, p. 5.

⁴⁵ Document in Support of the Appeal, p. 9.

⁴⁶ Document in Support of the Appeal, para. 27.

⁴⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, 19 August 2011, ICC-01/05-01/08-1626-Conf (OA 7) (hereinafter “*Bemba* OA 7 Judgment”).

must “revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute”.⁴⁸

31. The essence of Mr Bemba’s claim before the Appeals Chamber is that the Trial Chamber erred in finding that the Letter of 22 August did not constitute a changed circumstance with respect to the question of whether or not Mr Bemba’s continued detention is necessary to ensure his appearance at trial. Mr Bemba argues that the letter constitutes an authoritative indication of the Democratic Republic of the Congo’s willingness that it will put in place measures to ensure his appearance at trial if released to the Democratic Republic of the Congo.⁴⁹ He submits that the Letter of 22 August must be seen as a response to, and in light of, Mr Bemba’s counsel’s letter of 28 June 2011 to the Congolese Deputy Prime Minister in charge of the Interior⁵⁰ (hereinafter: “Letter of 28 June”). In the Letter of 28 June, Mr Bemba’s counsel requested the Deputy Prime Minister in charge of the Interior to put in place measures to ensure Mr Bemba’s security and surveillance, to confirm that Mr Bemba would benefit from a security detail and to guarantee that Mr Bemba would be returned to the Court immediately after enrolling in the electoral register. Mr Bemba argues that the Letter of 22 August should be seen as the agreement of the Democratic Republic of the Congo to these requests.⁵¹ Mr Bemba also challenges the Trial Chamber’s finding that it was unclear whether the President of the Senate had the authority to bind the Congolese State.⁵² To the extent that there was any doubt as to the ability of the President of the Congolese Senate to speak on behalf of the Democratic Republic of the Congo or as to the extent of the latter’s guarantee to ensure Mr Bemba’s appearance at trial, Mr Bemba submits that the Trial Chamber should have sought further submissions from the Democratic Republic of the Congo.⁵³

32. The Prosecutor argues that the Letter of 22 August evinces neither the willingness nor the ability of the Democratic Republic of the Congo to enforce measures to ensure his appearance at trial and that the President of the Congolese

⁴⁸ *Bemba* OA 7 Judgment, para. 71 (citations omitted).

⁴⁹ Document in Support of the Appeal, paras 11-23.

⁵⁰ ICC-01/05-01/08-1639-Conf-AnxA.

⁵¹ Document in Support of the Appeal, para. 11.

⁵² Document in Support of the Appeal, paras 14, 16-17. *See also* Impugned Decision, para. 15.

⁵³ Document in Support of the Appeal, para. 13.

Senate has no authority to bind the Congolese government with respect to any such measures.⁵⁴ With respect to the need to solicit further submissions from the Democratic Republic of the Congo, the Prosecutor argues that the jurisprudence cited by Mr Bemba does not support his claim and that it is Mr Bemba's obligation to establish that there has been a change in circumstances and that any documents submitted are sufficiently clear in that respect.⁵⁵

33. The victims agree with the Prosecutor that the Letter of 22 August was not sent on behalf of the Congolese State and does not indicate the agreement of the Democratic Republic of the Congo to receive Mr Bemba on interim release and to ensure his appearance at trial.⁵⁶ Mr Bemba responds that the Letter of 22 August can only be understood as a response to his counsel's Letter of 28 June, and, when seen in this light, it is clear that the letter of 22 August constitutes the agreement of the Democratic Republic of the Congo to receive Mr Bemba and to establish a system of security and surveillance which would ensure his appearance at trial.⁵⁷

34. The resolution of this appeal therefore turns on the appropriate interpretation of the Letter of 22 August. As this is a question of fact, the Appeals Chamber recalls that:

The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.⁵⁸

35. The Appeals Chamber can find no error in the Trial Chamber's interpretation that the Letter of 22 August did not constitute a changed circumstance in relation to the question of whether or not Mr Bemba's detention was necessary to ensure his appearance at trial. As noted by the Trial Chamber, "[o]n its face, the [Letter of 22 August] does not express any agreement – in principle or otherwise – to eliminate the

⁵⁴ Response to the Document in Support of the Appeal, paras 17-22.

⁵⁵ Response to the Document in Support of the Appeal, paras 23-26.

⁵⁶ Victims' Observations, paras 27-29.

⁵⁷ Mr Bemba's Response to the Victims' Observations, paras 2-4.

⁵⁸ *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', 14 July 2011, ICC-01/04-01/10-283 (OA), para. 17.

risk of flight if the accused were released into the territory of the [Democratic Republic of the Congo]’’.⁵⁹ The Letter of 22 August merely states that Mr Bemba may enrol in the electoral register at the moment that he comes to submit his candidacy.⁶⁰ There is no indication from the Letter of 22 August that the Democratic Republic of the Congo will put in place any measures to ensure Mr Bemba’s appearance at trial.

36. Notwithstanding the lack of any indication of a guarantee from the Democratic Republic of the Congo in the Letter of 22 August, Mr Bemba argues that such a guarantee can be implied when the Letter of 22 August is read in light of his counsel’s Letter of 28 June. Mr Bemba argues that the two letters are related in that they have the same subject line. However, the mere fact that the letters may be related does not imply any guarantee. The Letter of 22 August makes no mention, even indirectly, of any arrangements which might be understood to reduce the risk of Mr Bemba not appearing at trial. The absence of any such indications is all the more striking given the specific requests directed at the Deputy Prime Minister in the Letter of 28 June. Far from suggesting any guarantee by the Democratic Republic of the Congo to ensure Mr Bemba’s appearance at trial, the lack of any response to the requests of Mr Bemba’s counsel clearly indicates that the Letter of 22 August did not constitute any such guarantee, let alone that the Trial Chamber clearly erred in attaching this interpretation to the letter.

37. Given that the Letter of 22 August did not constitute a guarantee to ensure Mr Bemba’s appearance at trial, the Appeals Chamber finds it unnecessary to consider whether the author of the letter had the authority to provide such a guarantee on behalf of the Democratic Republic of the Congo.

38. With respect to the alleged error in not seeking further submissions from the Democratic Republic of the Congo, the Appeals Chamber finds Mr Bemba’s arguments to be without merit. The Appeals Chamber finds that the Letter of 22 August was sufficiently clear as to its meaning that the Trial Chamber committed no error in not requiring any further submissions. The Appeals Chamber agrees with the Prosecutor⁶¹ that the reliance of Mr Bemba on the Appeals Chamber’s recent

⁵⁹ Impugned Decision, para. 11.

⁶⁰ Letter of 22 August.

⁶¹ See Response to the Document in Support of the Appeal, paras 23-25.

jurisprudence in this case to suggest that the Trial Chamber should have sought observations from the Democratic Republic of the Congo is misplaced. In its prior judgment cited by Mr Bemba, the Appeals Chamber found that “[i]f a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber”.⁶² That judgment dealt specifically with a situation where a State had indicated its willingness and ability to receive a detained person on interim release and to impose conditions restricting his or her liberty pursuant to rule 119 of the Rules of Procedure and Evidence. In that case, it was unclear only what specific conditions the State was willing or able to impose. That judgment in no way indicated a general obligation on the Trial Chamber to seek observations in the case of doubt as to submissions by a State in relation to interim release, let alone in a situation such as the present where the State has not indicated its willingness or ability to receive the said person.

39. As stated above, the Trial Chamber did not commit any error in finding that the Letter of 22 August did not constitute a changed circumstance in relation to the necessity of continuing detention to ensure Mr Bemba’s appearance at trial. As there was no change in circumstances and as the Democratic Republic of the Congo had not indicated its willingness and ability to receive Mr Bemba or to impose conditions, the Trial Chamber also had no reason to consider the conditions for his release to the Democratic Republic of the Congo pursuant to article 60 (3) of the Statute. It is only once a State willing and able to enforce conditions upon release has been identified that the Trial Chamber must examine the appropriateness of such conditions.⁶³

VI. APPROPRIATE RELIEF

40. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of


⁶² *Bemba* OA 7 Judgment, para. 1.

⁶³ See “Judgment on the appeal of 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 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 109.

Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision.

Judge Sang-Hyun Song appends a separate opinion related to the participation of victims in this appeal.

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



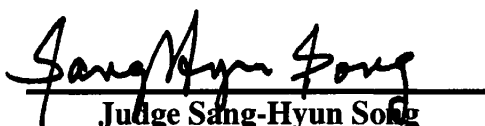
Judge Sang-Hyun Song
Presiding Judge

Dated this 9th day of September 2011

At The Hague, The Netherlands

Separate Opinion of Judge Sang-Hyun Song

I fully concur in the judgment of the Appeals Chamber on the appeal. This separate opinion concerns solely my reasons for not joining the majority's reasoning in the Order of 6 September and its subsequent decision on the Application for Participation. It has been my consistent view that, as a matter of law, victims participating in pre-trial or trial proceedings have the automatic right to participate in appeals on such proceedings.⁶⁴ There is no need for victims to apply to participate in proceedings or for the Appeals Chamber to decide on such applications. Moreover, this appeal highlights the practical challenges the extra procedural requirements established by the majority pose to ensuring both the expeditious consideration of urgent appeals and meaningful victim participation within reasonable time limits. Accordingly, I consider that the victims had the automatic right to participate in the proceedings and that there was no need either to request observations on the Application for Participation or to decide on its merits. However, I join the Appeals Chamber's Order of 6 September insofar as it was necessary to set a time limit for the filing of victims' substantive observations and the replies thereto of the Prosecutor and Mr Bemba.


Judge Sang-Hyun Song

⁶⁴ See *Lubanga* OA 7 Judgment, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims.