



Original: **English**

No.: ICC-01/05-01/08 OA3

Date: **24 September 2010**

APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF**

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

**Prosecution's motion to reject the Defence's requests for presentation of
additional evidence and extension of time limit**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massida

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

States Representatives

Competent authorities of
the Central African Republic

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 24 June 2010, Trial Chamber III issued a written decision finding the case against Jean-Pierre Bemba (“the Appellant”) admissible,¹ which was appealed by the Appellant.² The Prosecution responded to the Appellant’s Brief on 17 August 2010.³ On 13 September 2010 authorities of the Central African Republic (“CAR”) provided observations to both documents.⁴ The Prosecution and the Appellant responded to the Observations on 16 and 20 September, respectively.⁵
2. The Appellant attaches to its response a report from an alleged expert on CAR law (“Expert Opinion”). The Appellant had already requested, and Trial Chamber III rejected, the admission of this report on 27 April 2010. The Appellant challenges this ruling in the appeal lodged against the Decision on Admissibility. However, the Appellant seeks now to introduce the Opinion as new evidence on appeal under Regulation 62 and also requests the Appeals Chamber to grant him an extension of the time limit to seek leave to appeal the Trial Chamber’s ruling rejecting the Opinion. This course of action finds no support in the applicable statutory provisions or the Regulations of the Court (“RoC”). Accordingly, both requests should be dismissed *in limine*: the Appellant fails to meet the requirements of Regulation 62 of the RoC as the Opinion was available to him before the Trial Chamber; also, any application for leave to appeal, and/or submissions related to it, should have been filed before the Chamber which issued the ruling, Trial Chamber III, within the time limit prescribed in Rule 155, and not before this Chamber which does not have the authority to grant a post-hoc extension of time to make an application before the Trial Chamber.

¹ ICC-01/05-01/08-802 (“Decision on Admissibility”).

² ICC-01/05-01/08-841-Corr-RedOA3 (“Appeal Brief”).

³ ICC-01/05-01/08-855-Red OA3 (“Prosecution’s Response”).

⁴ ICC-01/05-01/08-881-Anx2, OA 3 (“the CAR Observations”).

⁵ ICC-01/05-01/08-885-Conf OA3 (Prosecution) and ICC-01/05-01/08-889-Conf OA3 (Defence). A public redacted version of the latter was filed on 21 September 2010; and the Appeals Chamber reclassified the former as public on 23 September (ICC-01/05-01/08-895OA3).

3. The Prosecution further requests that the Expert Opinion attached as Annex A be removed from the record of these appellate proceedings. The Chamber has disapproved of the tactic of submitting substantive materials before it has granted an application for leave to do so.

Statement of Facts⁶

4. On 25 February 2010, the Defence contested the admissibility of the case pursuant to Articles 17 and 19(2)(a) of the Statute (“Admissibility Challenge”).⁷ On 29 March 2010, the Prosecution responded to the Challenge,⁸ and the Defence replied on 14 April 2010.⁹ On 19 April 2010, the Registrar notified the observations of the CAR and the DRC.¹⁰ The Trial Chamber set a hearing for 27 April 2010 (“Admissibility Hearing”).¹¹
5. On 24 April 2010, the Appellant requested the Trial Chamber to admit into evidence a statement of an expert on CAR law and to allow the expert to present submissions during the Admissibility Hearing on 27 April.¹² The application stated in general terms that the expert would address a supposed contradiction in the CAR observations and provide an objective opinion on the CAR judicial proceedings.¹³ The Appellant added that he would provide a statement from the expert in advance of the hearing, though he then did not do so.¹⁴
6. On 27 April, at the beginning of the Hearing, the Trial Chamber denied this application, stating that “[i]n our judgment, this is, at most, a factual issue which can and should be addressed by counsel in their submissions, if they wish to deal

⁶ The Prosecution refers to the Prosecution Response, paras.5-23, for a complete presentation of the procedural background.

⁷ ICC-01/05-01/08-704.

⁸ ICC-01/05-01/08-739.

⁹ ICC-01/05-01/08-752-Corr-tEng.

¹⁰ ICC-01/05-01/08-758-Anx2A, ICC-01/05-01/08-758-Anx2B and ICC-01/05-01/08-758-Conf-Anx3 (CAR); and ICC-01/05-01/08-758-Conf-Anx1 (DRC).

¹¹ ICC-01/05-01/08-T-20-CONF-ENG.

¹² ICC-01/05-01/08-760.

¹³ ICC-01/05-01/08-790, paras.3-4.

¹⁴ Ibid., paras.14-15.

with the point during the course of today's arguments. This is not something which is, in our view, going to be materially assisted by the Court [...]" ("Oral Ruling").¹⁵

7. Counsel for the Appellant addressed the matters related to the CAR criminal procedure during the Hearing.¹⁶ Considering the novelty of these arguments, the Chamber gave the CAR authorities the opportunity to respond in written form, and for the Appellant to reply.¹⁷ The Appellant then urged again that the Chamber hear from its expert in CAR law.¹⁸ The Chamber indicated that it had already ruled – and rejected – the Appellant's request. The Chamber added that the Appellant had failed to provide a statement of the expert, as he had announced he would do in his application, so the Chamber was unaware of the detail and extent of the expert's purported submissions.¹⁹
8. The CAR authorities responded to the new submissions of the Appellant on 7 May 2010.²⁰ The Prosecution responded on 11 May 2010.²¹ The Appellant responded to the CAR's and the Prosecution's observations on 14 May 2010.²²
9. Trial Chamber III issued its Decision on Admissibility on 24 June 2010,²³ which was appealed by the Appellant.²⁴ The Prosecution responded to the Appellant's Brief on 17 August 2010.²⁵ On 13 September 2010 the CAR authorities provided observations to both documents.²⁶ The Prosecution responded to the Observations on 16 September.²⁷

¹⁵ T-22 (Admissibility Hearing), p.2, lns.7-15.

¹⁶ T-22, p.46, ln.25 to p.47, ln.18.

¹⁷ T-22, p.66, lns.3-12, 16 to p.67, ln.13.

¹⁸ T-22, p.69, lns.18-25.

¹⁹ T-22, p.70, lns.5-23. The Chamber recalled again that the Appellant had failed to indicate the kind and detail of evidence that the expert could provide.

²⁰ ICC-01/05-01/08-770, with annexes 1,2,3.

²¹ ICC-01/05-01/08-774.

²² ICC-01/05-01/08-776-Red2-tENG.

²³ ICC-01/05-01/08-802 ("Decision on Admissibility").

²⁴ ICC-01/05-01/08-841-Conf-CorrOA3. The same day it filed a public redacted version (ICC-01/05-01/08-841-Corr-RedOA3). ("Appeal Brief").

²⁵ ICC-01/05-01/08-855-Red OA3 ("Prosecution's Response").

²⁶ ICC-01/05-01/08-881-Anx2, OA 3 ("the CAR Observations"). The Observations were reclassified as Public pursuant to the Appeals Chamber's Order 01/05-01/08-887 OA3.

²⁷ ICC-01/05-01/08-885OA3.

10. On 20 September 2010 the Appellant filed his response to the CAR Observations.²⁸

In particular, the Appellant requests that the Appeals Chamber grant an extension of the time limit under Regulation 35(2) to seek leave to appeal Trial Chamber III's Ruling dismissing the Appellant's application to introduce the evidence of an expert in CAR law. The Appellant further requests authorization to introduce this Expert's Opinion as additional evidence pursuant Regulation 62 and attaches the Opinion as confidential Annex A.

Submissions

11. The Appellant's submissions go beyond the scope of the right afforded to him by the Appeals Chamber to respond to those Observations²⁹ and include new and legally unsupported requests. As such, they should be dismissed *in limine*. Should the Appeals Chamber consider, however, that the Appellant may submit the Expert Opinion to the Chamber under Regulation 62, the Prosecution alternatively requests a proper opportunity to examine the document and respond to it, with the option as well of presenting its own evidence, as prescribed by Regulation 62(2).³⁰

12. The Prosecution also notes, as another procedural flaw, that the Appellant requests and argues for the out-of-time extension of time to seek leave to appeal and the admission of new evidence in a footnote in his Response. While that strategy tacitly acknowledges that these requests are not properly related to the Response to the CAR's submissions, the Prosecution notes that the Appeals Chamber has disapproved of the practice of placing substantial submissions in footnotes of documents filed before it.³¹

²⁸ ICC-01/05-01/08-889-Red OA3 with confidential Annex A ("Appellant's Response").

²⁹ ICC-01/05-01/8-818 OA3, p.4.

³⁰ The Prosecution will not address the substantive submissions of the Expert Opinion in this filing, but it notes that the submissions of the Expert differ from the initial submissions that the Appellant sought leave to adduce before the Trial Chamber, although no explanation is provided for this. See ICC-01/05-01/08-760, para.3.

³¹ See footnote 10, Appellant's Response. ICC-01/04-01/06-1445 OA13, 22 July 2008, para. 6.

The Expert Opinion is irrelevant for the purposes of determining the correctness of the Trial Chamber's Oral Ruling

13. As his Second Ground of Appeal, the Appellant challenges the Ruling of Trial Chamber III rejecting this proffered expert evidence.³² According to the Appellant, this Ruling constitutes a procedural error which had an impact on the Chamber's determination on whether there was an obligation to notify "the Bangui appeal notices and decisions, and the consequences of a failure to notify".³³ The Prosecution responded that this ground should be dismissed *in limine* as the alleged error does not affect the Trial Chamber's determination on the admissibility of the case.³⁴ In addition, the Appellant failed to show any error in the Chamber's exercise of its discretionary powers to decide on the admissibility of evidence pursuant to Articles 64(9) and 69(3) and (4).³⁵
14. For those same reasons, the Prosecution submits that the substantive submissions encompassed in the annexed Opinion with respect to CAR procedural law are irrelevant to the ultimate decision on admissibility, the only issue that is properly before this Chamber. Nor will the Opinion's explanation of CAR procedural law assist the Appeals Chamber in determining whether the Trial Chamber correctly exercised its discretion under Articles 64 and 69 when it decided to not entertain the expert's submissions.

³² Appeal Brief, paras.21-25.

³³ Appeal Brief, paras.22-23, referring to Decision, paras.232-233.

³⁴ Prosecution's Response, paras.63-65.

³⁵ Ibid., paras.66-68 and authorities cited in footnotes 134 and 135. The Prosecution refers to the arguments developed therein. See paras.61-72.

The Appellant cannot request an extension of the time limit to appeal the Oral Ruling

15. The time limit to seek leave to appeal the Oral Ruling issued by Trial Chamber III expired on 3 May 2010. More than four months beyond the expiration, the Appellant now requests the Appeals Chamber to extend the time limit.
16. This request should be dismissed *in limine* as the Appeals Chamber is not the Chamber that delivered the Ruling and therefore not the proper Chamber to deal with issues related to an application for leave to appeal that decision. Rather, the only competent body to entertain those submissions would be Trial Chamber III.
17. In addition, the Appellant has failed to make the necessary showing under Regulation 35 (2) (second sentence) justifying an extension of time after the lapse of the applicable time-limit.³⁶ The Appellant only argues that he did not seek leave to appeal the Ruling as he believed that it was part of the final decision on admissibility. Conversely, he also submits that he did not want to burden the Court by filing an interlocutory appeal at that time. Neither statement constitutes "exceptional circumstances" that would justify the late request, and the latter submission suggests that the Appellant was aware of his rights under Article 82(1)(d) and strategically chose not to exercise them.³⁷ For all these reasons, the Appellant's request for an extension of time limit under Regulation 35(2) should be dismissed.

The expert opinion does not constitute "additional evidence" under Regulation 62

18. The Appellant's request to introduce as additional evidence under Regulation 62 the Expert Opinion attached as Annex A fails to satisfy the requirements set out in

³⁶ The Appeals Chamber has held that the exception of regulation 35 (2) (last sentence) is only available in case the applicant can show the existence of "exceptional circumstances" to demonstrate that there is a "reason outside his/her control" that did not allow him to file within the prescribed time limit. See ICC-01/04-01/06-834OA8, para.9. In that instance the Appeals Chamber referred to incapacitating illness. See Defence Response, footnote 10. In addition, Chambers of this Court have indicated that no extension or reduction of time limits can be granted in relation to those established by the Statute or the Rules, which are preclusive. See ICC-01/04-01/07-466, p. 4.

³⁷ See Appellant's Response, footnote 10.

this provision for the admission of new evidence in appeal. First, the Appellant impermissibly files the expert submissions before being granted leave by the Appeals Chamber. This practice has been disapproved by the Appeals Chamber in analogous scenarios.³⁸ Second, he does not clearly indicate to which ground of appeal the Expert Opinion relates.³⁹ The Appellant refers to the Expert Opinion while addressing the CAR Observations to the First Ground of Appeal,⁴⁰ and again argues that his request is grounded in the interest of justice as he did not want to burden the Court with an interlocutory appeal against the Oral Ruling.⁴¹ But he does not identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains. Also, he does not indicate how this evidence could have had an impact upon the determination on admissibility by the Trial Chamber.⁴²

19. Third, the Appellant does not explain why he failed to adduce the Expert Opinion before the Trial Chamber when at that time he acknowledged that it was available to him. Indeed, and as the Trial Chamber noted,⁴³ the Appellant had expressly stated that he would submit the Expert Opinion before the Admissibility Hearing to be held on 27 April 2010.⁴⁴ The Appellant did not indicate at any point in time that he was facing difficulties to produce the report before the date indicated.⁴⁵ Because it was fully available to the Appellant at the time of the Hearing and he provides no “reasons [...] why the evidence was not adduced before the Trial Chamber”, he fails to meet the criteria for admission of additional evidence under Regulation 62.

³⁸ Regulation 62(1); see the Appeals Chamber’s jurisprudence on the need to seek leave to the Appeals Chamber before submitting substantive observations under Rule 103: ICC-01/05-01/08-602 OA2, 9 November 2009, para.9.

³⁹ Regulation 62 (1)(b).

⁴⁰ Appellant’s Response, paras.25-26.

⁴¹ Appellant’s Response, footnote 10.

⁴² See ICTY decision from the Appeals Chamber: *Prosecutor v. Sainovic et al.*, Decision on Nikola Sainovic’s Second Motion for Admission of Additional Evidence on Appeal, IT-05-87-A, 8 September 2010, paras.9,11. See also Prosecution’s Response, para.63 and authorities cited therein.

⁴³ T-22, p.70, lns.17-21.

⁴⁴ ICC-01/05-01/08-790, paras.14-15.

⁴⁵ *Prosecutor v. Sainovic et al.*, Decision on Nikola Sainovic’s Second Motion for Admission of Additional Evidence on Appeal, IT-05-87-A, 8 September 2010, para.7. According to the Appeals Chamber, pursuant to Rule 115 of the ICTY Rules of Procedure and Evidence “the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence”. “Counsel is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question”.

Conclusion

20. The Prosecution requests that the Appeals Chamber reject *in limine* the Appellant's request for adducing additional evidence in appeal and extension of time limit to seek leave to appeal Trial Chamber's III Oral Ruling. It also requests that the Annex A be removed from the record of the appeal proceedings. In the alternative, should the Appeals Chamber consider that the rejection is not warranted, and that the evidence could be examined under Regulation 62, the Prosecution requests appropriate time to respond to the Expert Opinion, including by submitting its own additional evidence.



Luis Moreno-Ocampo, Prosecutor

Dated this 24th day of September 2010

At The Hague, The Netherlands