



Original: English

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

Date: 02/11/2016

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public

**Public Redacted Version of Defence application to present additional evidence in
the appeal against the *Judgment pursuant to Article 74 of the Statute*, ICC-01/05-
01/08-3343**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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I. INTRODUCTION

1. The presentation of Defence evidence in the present case concluded on 14 November 2013.¹ The Trial Chamber then called a witness who testified until 22 November 2013.² The evidence was declared closed pursuant to Rule 141(1) on 7 April 2014.³

2. On 21 March 2016, Trial Chamber III delivered its Judgement under article 74 of the Statute.⁴ The Trial Chamber convicted Mr. Jean-Pierre Bemba Gombo (“the Appellant”) for murder as a crime against humanity under Article 7(1)(a) of the Statute and as a war crime under Article 8(2)(c)(i) of the Statute; rape as a crime against humanity under Article 7(1)(g) of the Statute and as a war crime under Article 8(2)(e)(vi) of the Statute; and pillaging as a war crime under Article 8(2)(e)(v) of the Statute.⁵

3. On 20 June 2016, the Appellant filed an outline of the grounds he anticipated contesting on appeal, in compliance with the Appeals Chamber’s order ICC-01/05-01/08-3370.⁶ This filing alerted the Appeals Chamber to the weight ascribed by the Appellant, in the presentation of his appeal, to the Trial Chamber’s failure to safeguard the fairness of the proceedings against him.

4. On 19 September 2016, the Appellant filed his document in support of appeal (“Appeal Brief”). Almost a quarter of this document is dedicated to detailing how the fairness of the proceedings were undermined by the way in which the Prosecution and Trial Chamber approached suspicions of offences against the administration of justice.

¹ T-352-Conf-Eng-ET, p. 48, lines 19-22.

² T-357-Conf-Eng-ET, p. 119, lines 13-14.

³ ICC-01/05-01/08-3035.

⁴ ICC-01/05-01/08-3343.

⁵ ICC-01/05-01/08-3343, para. 752.

⁶ ICC-01/05-01/08-3398.

5. Material substantiating the Appellant's arguments can be found within the trial record of the present proceedings. Some material, however, only exists within the casefile of case ICC-01/05-01/13 ("Article 70 Case"). As such, the Appellant brings this limited and discrete application to admit additional evidence on appeal.

II. APPLICABLE LAW

6. Pursuant to article 83(1) of the Statute, in appeals proceedings "the Appeals Chamber shall have all the powers of the Trial Chamber". Rule 149 of the Rules of Procedure and Evidence specifies, *inter alia*, that provisions applicable at trial are applicable on appeal *mutatis mutandis*.

7. Regulation 62(1) of the Regulations of the Court provides that a participant seeking to present additional evidence before the Appeals Chamber shall file an application setting out: "(a) The evidence to be presented; and (b) The ground of appeal to which the evidence relates and, if relevant, the reasons why the evidence was not adduced before the Trial Chamber."

8. In addition to the criteria in regulation 62(1), the Appeals Chamber has held that "it is necessary to introduce the criterion that it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part."⁷

9. Moreover, article 69(4) of the Statute provides that "the Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to

⁷ ICC-01/04-01/06-3121-Red, para. 69.

a fair trial or to a fair evaluation of the testimony of a witness”. The Appeals Chamber held that:⁸

the criteria of relevance, probative value and potential prejudicial effect also apply to the admission of evidence at the appellate stage of proceedings. Indeed, it would be of no use to admit evidence into the record that is irrelevant, devoid of probative value or potentially prejudicial. As to relevance, the Appeals Chamber, noting regulation 62(1)(a) of the Regulations of the Court, considers that the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81(1) and (2) of the Statute.

10. In addition, the Appeals Chamber held that it enjoys discretion to admit additional evidence on appeal “despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.”⁹

11. Significantly, under the statutory framework of the Court, additional evidence on appeal **may** “relate to questions of whether the proceedings appealed from were unfair. Such an evaluation will depend on the circumstances of the case and the evidence sought to be admitted.”¹⁰

III. SUBMISSIONS

12. This application relates to a total of 23 documents. Each of the documents is in the possession of both parties, and was in their possession during the course of the trial. In fact, the very purpose of reliance on many of these documents is that they were in the possession of the Prosecution trial team in the Main Case while trial was ongoing, which had an impact on its fairness.

⁸ ICC-01/04-01/06-3121-Red, para. 54.

⁹ ICC-01/04-01/06-3121-Red, para. 62.

¹⁰ ICC-01/04-01/06-3121-Red, para. 60.

13. The documents fall into three categories: (i) Western Union documents obtained by the Main Case Prosecution team while the trial was ongoing; (ii) documents relating to the funding of Defence investigations during the Main Case; and (iii) intercepted telephone conversations that came into the Main Case Senior Trial Attorney's possession while the Main Case was ongoing.

14. These documents are relevant to the impact that the Prosecution's Article 70 investigations had on the fairness of the Main Case. These documents are not "fresh" or "additional" evidence in the usual sense. These are documents that merely reflect the information that was in the Prosecution's possession, which includes – as the Defence argues in its Brief – privileged and confidential information. They also include information that was used as the basis for extensive *ex parte* submissions to the Trial Chamber in the Main Case.

15. These 23 documents, accordingly, provide important chronology and context to the narrative underpinning a central ground of appeal. They illustrate the prejudice to the accused arising from his right to privileged communication with his lawyers;¹¹ the mistaken submissions that were conveyed to the Trial Chamber concerning the funding of Mr Bemba's defence that, without refutation, could not have failed to prejudice the minds of the Judges;¹² and the purported foundation for certain submissions that were made by the Prosecution to the Judges during its *ex parte* submissions.¹³

¹¹ CAR-OTP-0080-1402; CAR-OTP-0077-1407; CAR-OTP-0077-1414; CAR-OTP-0082-0663; CAR-OTP-0080-1369; CAR-OTP-0080-1370; CAR-OTP-0079-0114; CAR-OTP-0080-0228. See Appeal Brief, paras. 94, 99, 108.

¹² CAR-D20-0005-0270 ; CAR-D20-0005-0280 ; CAR-D20-0005-0281. See Appeal Brief, para. 33.

¹³ CAR-OTP-0092-0018, CAR-OTP-0091-0351; CAR-OTP-0092-0021-R01; CAR-OTP-0092-0022-R01; CAR-OTP-0092-0024; CAR-OTP-0092-0892-R01; CAR-D24-0002-1363; CAR-OTP-0092-0028-R02; CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032. See Appeal Brief, paras. 18-21.

16. Each of the 23 documents came into the possession of the Appellant after the close of the evidence in the present proceedings.¹⁴ As such, they were not adduced before the Trial Chamber. The admission of the materials causes no party prejudice. As noted above, each of the documents is already in the possession of the parties, and were in the parties' possession during the Main Case. Indeed, it is the fact that these materials were in the Prosecution's possession that makes many of them relevant and probative of issues raised in Chapter II of the Appellant's document in support of appeal, warranting their admission.

IV. RELIEF SOUGHT

17. The Appellant respectfully request the Appeals Chamber to

GRANT the Defence Request; and

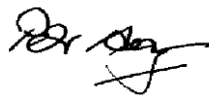
ADMIT the following documents into evidence:

- i. CAR-OTP-0092-0018: [REDACTED].
- ii. CAR-OTP-0091-0351: [REDACTED].

¹⁴ CAR-OTP-0092-0018, disclosed in Trial Rule 77 Package 36, 04 November 2015; CAR-OTP-0091-0351, disclosed in Trial Rule 77 Package 31, 05 October 2015; CAR-OTP-0092-0021-R01, disclosed in Trial Rule 77 Package 36, 04 November 2015; CAR-OTP-0092-0022-R01 disclosed in Trial Rule 77 Package 36, 04 November 2015; CAR-OTP-0092-0024 disclosed in Trial Rule 77 Package 36 04 November 2015; CAR-OTP-0092-0892-R01 Trial Rule 77 Package 41 23 February 2016; CAR-D24-0002-1363 Trial Cross-Examination Package 3 ARIDO, 2 November 2015; CAR-OTP-0092-0028-R02 Trial Rule 77 Package 37, 20 November 2015; CAR-OTP-0092-0029 disclosed in Trial Rule 77 Package 36, 04 November 2015; CAR-OTP-0092-0030 disclosed in Trial Rule 77 Package 39, 22 January 2016; CAR-OTP-0092-0031 Trial Rule 77 Package 39, 22 January 2016; CAR-OTP-0092-0031 Trial Rule 77 Package 39, 22 January 2016; CAR-OTP-0092-0032 Trial Rule 77 Package 39, 22 January 2016; CAR-D20-0005-0270; CAR-D20-0005-0280; CAR-D20-0005-0281 received from Counsel Support Section on 24 July 2015; CAR-OTP-0080-1402 disclosed in Pre-Confirmation INCRIM Package 15, 20 June 2014; CAR-OTP-0077-1407 disclosed in Pre-Confirmation INCRIM package 7, 18 March 2014; CAR-OTP-0077-1414, disclosed in Pre-Confirmation INCRIM package 7, 18 March 2014 and Trial INCRIM Package 26 19 June 2015; CAR-OTP-0082-0663, disclosed in Pre-Confirmation INCRIM Package 16, 27 June 2014; CAR-OTP-0080-1369 disclosed in Pre-Confirmation INCRIM Package 15, 20 June 2014; CAR-OTP-0080-1370 disclosed in Pre-Confirmation INCRIM Package 15, 20 June 2014; CAR-OTP-0079-0114 disclosed in Pre-Confirmation INCRIM package 9, 17 April 2014 and Trial INCRIM Package 26, 19 June 2015; CAR-OTP-0080-0228 disclosed in Pre-Confirmation INCRIM package 11, 21 May 2014.

- iii. CAR-OTP-0092-0021-R01: [REDACTED].
- iv. CAR-OTP-0092-0022-R01: [REDACTED].
- v. CAR-OTP-0092-0024: [REDACTED].
- vi. CAR-OTP-0092-0892-R01: [REDACTED].
- vii. CAR-D24-0002-1363: [REDACTED].
- viii. CAR-OTP-0092-0028-R02: [REDACTED].
- ix. CAR-OTP-0092-0029: [REDACTED].
- x. CAR-OTP-0092-0030: [REDACTED].
- xi. CAR-OTP-0092-0031: [REDACTED].
- xii. CAR-OTP-0092-0032: [REDACTED].
- xiii. CAR-D20-0005-0270: [REDACTED].
- xiv. CAR-D20-0005-0280: [REDACTED].
- xv. CAR-D20-0005-0281: [REDACTED].
- xvi. CAR-OTP-0080-1402: [REDACTED].
- xvii. CAR-OTP-0077-1407: [REDACTED].
- xviii. CAR-OTP-0077-1414: [REDACTED].
- xix. CAR-OTP-0082-0663: [REDACTED].
- xx. CAR-OTP-0080-1369: [REDACTED].
- xxi. CAR-OTP-0080-1370: [REDACTED].
- xxii. CAR-OTP-0079-0114: [REDACTED].
- xxiii. CAR-OTP-0080-0228: [REDACTED].

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 2 November 2016

It is hereby certified that this document contains a total of 2006 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.