

1 The International Criminal Court

2 Appeals Chamber - Courtroom 2

3 Presiding Judge Anita Ušacka

4 Situation: Central African Republic - ICC-01/05-01/08

5 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo

6 Decision

7 Tuesday, 19 October 2010

8 (The hearing starts at 10 .00 a.m.)

9 THE COURT USHER: The International Criminal Court is now in session.

10 Please be seated.

11 JUDGE UŠACKA: Good morning. Before beginning with delivery of the
12 Appeals Chamber's judgment, I have granted the request of the photographers to take
13 pictures in the courtroom. Court officer, could you please invite the photographers to
14 enter for one minute.

15 (Photographs taken)

16 JUDGE UŠACKA: Would the court officer please call the case.

17 THE COURT OFFICER: Yes, your Honour. Situation in the Central African
18 Republic, in the case of the Prosecutor v Jean-Pierre Bemba Gombo, reference
19 ICC-01/05-01/08.

20 JUDGE UŠACKA: I would like to introduce myself. My name is Judge
21 Anita Ušacka and I am the Presiding Judge in this appeal arising from the case the
22 Prosecutor v Jean-Pierre Bemba Gombo.

23 May I ask the parties and participants to introduce themselves for the
24 record, starting with Mr Bemba, please. Defence.

25 MR KILOLO-MUSAMBA: (Interpretation) Thank you, your Honour.

1 The Defence team is represented today by, here on my right, by Maître Jean-Jacques
2 Kabongo, who is our case manager and legal assistant. Myself, I am Aimé Kilolo. I am
3 the associated counsel, and with your leave I shall present our client, Mr Jean-Pierre
4 Bemba. Thank you very much.

5 JUDGE UŠACKA: Officer of the Prosecutor.

6 MS CRISCITELLI: Thank you. I'm Sara Criscitelli from the Office of the
7 Prosecutor. With me are attorney -- appeals counsel Reinhold Gallmetzer and Mary
8 Regue.

9 JUDGE UŠACKA: Thank you. And finally, representative of OPCV.

10 MS YAZJI: Good morning, your Honour. My name is Maria Victoria Yazji,
11 counsel at the OPCV on behalf of the victims.

12 JUDGE UŠACKA: Thank you very much. And today the Appeals Chamber
13 is delivering its judgment on the appeal of Mr Bemba against the decision of Trial
14 Chamber III of 4 June 2010, entitled "Decision on the Admissibility and Abuse of Process
15 Challenges," ICC-01/05-01/08-802. In today's summary I will refer to this decision as the
16 impugned decision.

17 I shall now summarise the Appeals Chamber's judgment. Please note that
18 not this summary but the judgment which will be filed and notified to the parties and
19 participants shortly is authoritative.

20 On 25 February 2010 Mr Bemba filed an "Application Challenging the
21 Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute."

22 On 24 June, 2010 the Trial Chamber rendered the impugned decision,
23 deciding that the case of the Prosecutor v Jean-Pierre Bemba Gombo is admissible.
24 Mr Bemba appealed this decision on 28 June 2010.

25 On 26 July 2010 Mr Bemba argued in his Document in Support of the

1 Appeal, in the first ground of appeal, that the Trial Chamber erred in deciding that there
2 had been no decision not to prosecute within the meaning of article 17(1)(b) of the Statute;

3 In the second ground of appeal, that the Trial Chamber erred in rejecting his
4 request in the proceedings leading up to the impugned decision to provide evidence from
5 an expert on the application of the law of the Central African Republic;

6 In the third ground of appeal, that the Trial Chamber erred in deciding that
7 the Central African Republic was unable, within the meaning of article 17(1)(b) of the
8 Statute, genuinely to prosecute; and,

9 In the fourth ground of appeal, that the Trial Chamber erred in deciding that
10 Mr Bemba's submissions made before the courts of the Central African Republic in April
11 2010 constituted an "abuse of this court's process."

12 Determination of the Merits

13 *I will now turn to the determination of the merits of the appeal.

14 The parts of the impugned decision which give rise to the first and third
15 grounds of appeal concern the Trial Chamber's determination in relation to the article
16 17(1)(b) of the Statute, which provides that a case is inadmissible before the ICC where the
17 case has been investigated by a State which has jurisdiction over it, and the State has
18 decided not to prosecute the person concerned unless the decision resulted from the
19 unwillingness or inability of the State genuinely to prosecute.

20 I will therefore begin by summarising the Appeals Chamber's determination
21 in relation to the first ground of appeal and will continue with summary of the Appeals
22 Chamber's determination in relation to the third ground of appeal, because both the first
23 and third grounds of appeal are also related to the Trial Chamber's findings concerning
24 article 17(1)(b) of the Statute.

25 Finally, I will then turn to the second and fourth grounds of appeal, which

1 both concern alleged procedural errors arising from the impugned decision.

2 First Ground of Appeal

3 As his first ground of appeal, Mr Bemba argues that the Trial Chamber erred
4 in deciding that an order issued on 16 September 2004 by the Bangui Regional Court's
5 Senior Investigating Judge in the Central African Republic did not constitute a decision
6 not to prosecute within the meaning of article 17(1)(b) of the Statute. In the order, the
7 Senior Investigating Judge of the Bangui Regional Court determined that the charges
8 against Mr Bemba which concerns the events that form the basis of the charges now
9 before the ICC in the case, the Prosecutor v Jean-Pierre Bemba Gombo, should be
10 dismissed.

11 Before discussing the merits of this ground of appeal, I would like to
12 provide some information about the procedural history of the proceedings in the Central
13 African Republic concerning the case against Mr Bemba. This case was called the Central
14 African Republic v Patassé et alia. On 16 September 2004, the Senior Investigating Judge
15 of Bangui Regional Court issued an order in the case which, among other things,
16 dismissed charges against Mr Bemba and ended the investigation with respect to him.

17 On 17 September 2004, the Public Prosecutor's Office in the Central African
18 Republic filed a notice of appeal with the Bangui Regional Court against the Senior
19 Investigating Judge's order.

20 On 16 December 2004, the Indictment Chamber of the Court of Appeal of
21 Bangui delivered the judgment on this appeal. In the judgment, the Court of Appeal of
22 Bangui partially annulled the Senior Investigating Judge's order of 16 September 2004.
23 Specifically, it determined that the charges against Mr Bemba must be upheld. However,
24 in recognising that the charges for these crimes fell within the jurisdiction of the ICC, the
25 Court of Appeal of Bangui severed these charges from others in the case and referred this

1 part of the case, including the charges against Mr Bemba, to the competent authorities in
2 the Central African Republic in order for them to refer the matter to the ICC.

3 This judgment of the Court of Appeal of Bangui was appealed. On 20
4 December 2004 a notice of appeal was lodged against the Court of Appeal of Bangui's
5 judgment and was subsequently heard by the Court of Cassation, the Central African
6 Republic's highest court. In the Court of Cassation's judgment, the Court held, among
7 other things, that the Senior Investigating Judge erred in not directing the case against
8 Mr Bemba and others to the ICC. The Court of Cassation specifically stated that "recourse
9 to international cooperation was the sole means of averting impunity in the case."

10 The Court of Cassation also specifically agreed with the Court of Appeal of
11 Bangui concerning its decision to uphold the charges against Mr Bemba and to refer the
12 case to competent authorities in order to seize the ICC, stating that the Court of Appeal of
13 Bangui had, and I quote, "applied the law in due fashion."

14 The consequence of these two appellate judgments rendered by the Court of
15 Appeal of Bangui and the Court of Cassation was these Courts expressly reversed the
16 Senior Investigating Judge's order to dismiss the charges against Mr Bemba.
17 Simultaneously, the appellate courts also directed that the case against him should be
18 referred to the ICC by the competent authorities with the Central African Republic.

19 Decision of the Merits of the First Grounds of Appeal

20 In the first ground of appeal Mr Bemba argues, firstly, that the Trial
21 Chamber did not accord sufficient weight to the order of the Senior Investigating Judge
22 who found that the case against Mr Bemba should be dismissed. He also argues that the
23 Trial Chamber erred in finding that the notice of appeal against the order of 16 September
24 2004 pertained to the entire order including the dismissal of the charges against
25 Mr Bemba.

1 In Mr Bemba's view, the submissions of the principal Public Prosecutor's
2 Office before the Court of Appeal of Bangui indicated that the principal Public
3 Prosecutor's Office did not intend to appeal the part of order which dismissed the charges
4 against Mr Bemba.

5 The Appeals Chamber considers that, at the outset, it should be underlined
6 that the issue before the Trial Chamber was whether the judicial proceedings in the case of
7 Central African Republic v Patassé, et alia, in the Central African Republic resulted in a
8 decision not to prosecute Mr Bemba within the meaning of article 17(1)(b) of the Statute
9 which could have rendered the case inadmissible before the ICC.

10 It was not the role of the Trial Chamber to review the decisions of the
11 Central African Republic courts to decide whether those courts applied their national law
12 correctly. In the view of the Appeals Chamber, unless presented with compelling
13 evidence indicating otherwise, a Trial Chamber should accept prima facie the validity and
14 effect of the decisions taken by domestic courts with a view to determining the status of
15 domestic judicial proceedings.

16 In respect of Mr Bemba's arguments on appeal, the Appeals Chamber
17 observes that it is apparent from the Court of Appeals of Bangui's judgment of 16
18 December 2004 that the Court itself understood that the appeal against the Senior
19 Investigating Judge's Order included the part of his Order which had dismissed the
20 charges against Mr Bemba. This is because the Court of Appeal of Bangui specifically
21 reversed this part of the Order and determined that the charges against Mr Bemba must
22 be upheld.

23 The Appeals Chamber also observes that the Court of Appeal's judgment
24 was thereafter confirmed by the Court of Cassation on 11 April 2006, which held that, and
25 I am paraphrasing from a translation, "in altering the Senior Judge's decision to refer

1 Jean-Pierre Bemba and his men to the Criminal Court and to direct the Prosecution
2 Service to submit the matter to the competent authority and thereby seize the
3 International Criminal Court, the Court of Appeal applied the law in due fashion."

4 Thus, the Order of the Senior Investigating Judge was not a decision not to
5 prosecute within the meaning of article 17(1)(b) of the Statute because it was not the final
6 decision in the case before the Central African Republic courts. This Order was
7 subsequently appealed and the portion of the Order concerning Mr Bemba was
8 overturned on appeal. The charges against Mr Bemba were upheld by the appellate
9 courts, and at the same time, both the Court of Appeal of Bangui and the Court of
10 Cassation directed that the matter should be referred by the competent authorities in the
11 Central African Republic to the International Criminal Court.

12 In sum, there is nothing to indicate to the Appeals Chamber that the Trial
13 Chamber erred in its determination that there was no "decision not to prosecute" within
14 the meaning of article 17(1)(b) of the Statute. In the view of the Appeals Chamber, the
15 Trial Chamber correctly relied on the judgments of Court of Appeal of Bangui and the
16 Court of Cassation as indicating *prima facie* the current status of the judicial proceedings
17 in the case of Central African Republic v Patassé, et alia.

18 Finally, the Appeals Chamber also finds that these appellate decisions of the
19 Central African Republic courts also were not decisions not to prosecute within the
20 meaning of article 17(1)(b) of the Statute, because the Appeals Chamber has previously
21 held on 25 September 2009, in a judgment also relating to the admissibility of the case in
22 the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, that a 'decision not to
23 prosecute' in terms of article 17(1)(b) of the Statute does not cover decisions to close
24 judicial proceedings in order to refer the matter to the International Criminal Court.

25 For these reasons, the Appeals Chamber determines that no error has been

1 identified in relation to the first ground of appeal.

2 Third Ground of Appeal

3 The third ground of appeal concerns the Trial Chamber's discussion in the
4 impugned decision of the additional factors contained in article 17(1)(b) of the Statute,
5 namely whether a State's decision not to prosecute resulted from the "unwillingness or
6 inability of the State genuinely to prosecute." Mr Bemba argues that the Trial Chamber
7 erred in its determination that the Central African Republic was unable to genuinely
8 prosecute. The Trial Chamber's determination was based, in part, on its findings that the
9 Central African Republic did not have the capacity or the human resources required to
10 conduct a trial of this kind, which Mr Bemba argues was not adequately supported by the
11 evidence.

12 As the Appeals Chamber has previously held, in the same judgment I
13 previously mentioned from the Katanga and Ngudjolo case concerning admissibility, it is
14 only once it has been established that there was a decision not to prosecute within the
15 meaning of article 17(1)(b) of the Statute that the question arises whether the decision
16 resulted from the unwillingness or inability of the State genuinely to prosecute.

17 The Appeals Chamber therefore determines that the issue presented in the
18 third ground of appeal does not arise in the context of this case, since the Appeals
19 Chamber has concluded in relation to the first ground of appeal that the Trial Chamber
20 did not err in deciding that there was no decision not to prosecute Mr Bemba within the
21 meaning of article 17(1)(b) of the Statute. For this reason, the Appeals Chamber has
22 decided not to consider Mr Bemba's arguments under the third ground of appeal.

23 Second Ground of Appeal

24 In the second ground of appeal, Mr Bemba argues that the Trial Chamber
25 erred in rejecting his request to submit evidence from an expert on the law of Central

1 African Republic in support of his application challenging the admissibility of the case.

2 The decision of the Trial Chamber rejecting Mr Bemba's request was made in
3 a status conference held on 27 April 2010 in the proceedings leading up to the impugned
4 decision. The Trial Chamber rejected Mr Bemba's request because, in its view, the matter
5 on which Mr Bemba requested to submit expert evidence was a factual issue that did not
6 require expert legal opinion.

7 As the Appeals Chamber has previously held in the Prosecutor v Joseph
8 Kony, et alia, which was also a judgment from an appeal on a decision concerning the
9 admissibility of a case, "an appellant is obliged not only to set out the alleged error, but
10 also to indicate with sufficient precision how this error would have materially affected the
11 impugned decision."

12 The Appeals Chamber finds that Mr Bemba fails to meet the minimum
13 requirements for consideration of the merits of the second ground of appeal because
14 Mr Bemba has not set out with sufficient precision how the alleged error of the Trial
15 Chamber to reject Mr Bemba's proposed submission of evidence from an expert materially
16 affected the impugned decision.

17 In his Document of Support of the Appeal, Mr Bemba neither indicates how
18 the proposed expert evidence would have deviated from the Trial Chamber's reading of
19 the relevant provisions of the law of the Central African Republic, nor demonstrates how
20 the Trial Chamber would have reached a different conclusion regarding the admissibility
21 of the case had it considered the testimony of an expert.

22 For these reasons, the Appeals Chamber concludes that Mr Bemba fails to
23 meet the minimum requirements for consideration of the merits for the second ground of
24 appeal, and accordingly, it is dismissed.

25 Fourth Ground of Appeal

1 Turning now to the fourth ground of appeal, Mr Bemba argues that the Trial
2 Chamber erred in deciding that his several submissions made this year on 6, 8, and 16
3 April 2010 before the Court of Appeal of Bangui and the Court of Cassation were an
4 "abuse of this court's process." In these filings before the courts of Central African
5 Republic, Mr Bemba requested amongst other things a reversal of the Appeals Court of
6 Bangui's Judgment of 16 December 2004.

7 He argued before the Trial Chamber that the result of his filings was that
8 they would suspend an effect of the Judgment of the Court of Appeal of Bangui which
9 was rendered on 16 December 2004. This was the appellate judgment that I mentioned
10 previously which had reversed the Senior Investigating Judge's Order to dismiss the
11 charges against Mr Bemba.

12 In relation to these April 2010 filings, the Trial Chamber observed that these
13 applications were filed in the Central African Republic courts approximately four years
14 after the judgment of the Court of Cassation was delivered on 6 April 2006 and more than
15 two years after these national decisions were disclosed by the ICC Prosecutor to
16 Mr Bemba. The Trial Chamber concluded that no sufficient or acceptable explanation had
17 been provided for why these applications were made before the Central African Republic
18 courts so late into the process.

19 For these reasons, the Trial Chamber declined to take them into
20 consideration in the impugned decision. In the opinion of the Trial Chamber, Mr Bemba's
21 filing in April 2010 before the Central African Republic courts constituted "an abuse of this
22 court's process."

23 As I have mentioned previously, the Appeals Chamber has held that "an
24 appellant is obliged not only to set out the alleged error, but also to indicate with
25 sufficient precision how the error would have materially affected the impugned decision."

1 In this respect, the Appeals Chamber also finds that Mr Bemba fails to meet
2 the minimum requirements for consideration of the merits of this grounds of appeal. This
3 is because Mr Bemba does not advance any argument in the Document in Support of the
4 Appeal to indicate how the outcome of the impugned decision would have been different
5 had the Trial Chamber considered his argument that his 16 April 2010 filing before the
6 Court of Cassation suspended the effect of judgment of the Court of Appeal of Bangui of
7 16 December 2004.

8 Mr Bemba merely states that the alleged error of the Trial Chamber
9 "significantly affected the fair and expeditious conduct of current proceedings." The rest
10 of his submission in relation to this ground of appeal concerns the importance the Trial
11 Chamber previously accorded to this issue and the difficulties the Defence team faced
12 which prevented it from submitting this filing sooner, but not that the alleged error
13 materially affected the outcome of the impugned decision.

14 In light of the above, the Appeals Chamber concludes that Mr Bemba fails to
15 meet the minimum requirements for a consideration of the merits of the fourth ground of
16 appeal and accordingly it is dismissed.

17 Conclusions

18 For the reasons I have summarised, the Appeals Chamber confirms the
19 impugned decision and dismisses the appeal.

20 This concludes my summary of the judgment. I would like to thank the
21 interpreters, court reporters and court officers for their assistance during the hearing.
22 Thank you very much.

23 The session is now closed.

24 THE COURT USHER: All rise.

25 (The hearing ends at 10.29 a.m.)

CORRECTION REPORT

1

2 The following correction has been made to the transcript:

3 * On page 3, line 13

4 "I will now turn to the determination of the parties of the appeal."

5 is corrected by

6 "I will now turn to the determination of the merits of the appeal."