

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: ICC-01/05-01/08  
Date: **21 December 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***

**Confidential**

**Observations of the Legal Representative of Victims on the “Defence application  
to present additional evidence in the appeal against the Judgment pursuant to  
Article 74 of the Statute”**

**Source: Ms Marie-Edith Douzima-Lawson, Legal Representative of Victims**

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

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Ms Helen Brady

**Counsel for the Defence**

Mr Peter Haynes

Ms Kate Gibson

**Legal Representative of Victims**

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**Unrepresented Victims**

**Unrepresented Applicants for  
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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman Von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. On 21 March 2016,<sup>1</sup> Trial Chamber III found Mr Bemba guilty of all the charges brought against him.
2. On 4 April 2016, the Defence filed a notice of appeal against the Judgment.<sup>2</sup>
3. On 15 April 2016, the Appeals Chamber ("the Chamber") found that victims who participated in the trial proceedings could participate in the ongoing appeal phase.<sup>3</sup>
4. On 19 September 2016, the Defence submitted its document in support of the appeal.<sup>4</sup> On the same day, it made an application for the admission of 23 documents as additional evidence<sup>5</sup> ("the Defence Application").
5. On 3 October 2016, the Legal Representative of Victims ("the Legal Representative") submitted a request for the Chamber to disclose to her the 23 documents referred to in the Defence Application, to enable her to submit informed observations on their admissibility if and when necessary.<sup>6</sup>
6. On 17 October 2016, the Chamber granted the Legal Representative's request and authorised her to present her clients' views and concerns "insofar as their personal interests are affected" by the said documents and the Defence Application.<sup>7</sup> On the same day, in a separate decision, it set out the procedure relating to the Defence Application. The Chamber decided to follow the procedure set out under regulation 62(2)(b) of the Regulations of the Court.<sup>8</sup>

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<sup>1</sup> ICC-01/05-01/08-3343, para. 752.

<sup>2</sup> ICC-01/05-01/08-3348.

<sup>3</sup> ICC-01/05-01/08-3369.

<sup>4</sup> ICC-01/05-01/08-3434-Conf.

<sup>5</sup> ICC-01/05-01/08-3435-Conf.

<sup>6</sup> ICC-01/05-01/08-3438-Conf.

<sup>7</sup> ICC-01/05-01/08-3445-Conf, para. 9.

<sup>8</sup> ICC-01/05-01/08-3446-Conf, para. 5. In accordance with regulation 62(2)(b), the Appeals Chamber may rule on the admissibility of the additional evidence "jointly with the other issues raised in the appeal".

It directed the Prosecution to submit its response on 21 November 2016, and the Legal Representative to submit her observations on 22 December 2016.<sup>9</sup>

7. On 21 November 2016, the Prosecution submitted a response to the Defence Application.<sup>10</sup>
8. On 9 December 2016, the Defence submitted its reply to the Prosecution's response.<sup>11</sup>

## II. CONFIDENTIALITY

9. In accordance with rule 23 *bis*(2) of the Regulations of the Court, the Legal Representative submits these observations as "confidential".

## III. SUBMISSIONS

### *(1) The personal interests of the victims affected by the Defence Application*

10. The Appeals Chamber granted the victims leave to present their views and concerns regarding the Defence Application "insofar as their personal interests are affected".<sup>12</sup>
11. As previously submitted by the Legal Representative, if Trial Chamber III's conviction decision were to be modified, her clients' interests would inevitably be affected insofar as they are victims of crimes for which Mr Bemba was found guilty, and because any reparations are contingent on the verdict.<sup>13</sup>
12. This argument was upheld in the Chamber's Decision in which the Legal Representative was granted access to the 23 documents listed in the Defence Application. The Chamber ruled that the personal interests of victims were

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<sup>9</sup> *Ibid.*, para. 6.

<sup>10</sup> ICC-01/05-01/08-3471-Conf.

<sup>11</sup> ICC-01/05-01/08-3482-Conf.

<sup>12</sup> *Ibid.*

<sup>13</sup> ICC-01/05-01/08-3438-Conf, para. 12.

affected by the question of admitting the additional evidence: “[a]s the proposed additional evidence is adduced to support arguments on the basis of which Mr Bemba seeks ‘to vacate the [conviction decision]’”.<sup>14</sup> The Legal Representative therefore contends that the victims can present to the Chamber their views and concerns concerning the 23 documents listed in the Defence Application.

*(2) The views and concerns of the victims concerning the Defence Application and the evidence listed in it*

*(a) The applicable admissibility criteria*

13. The Legal Representative notes that, in addition to the provisions of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court on evidentiary regime,<sup>15</sup> the Appeals Chamber has already ruled in *Lubanga* on the admissibility criteria for additional evidence on appeal.<sup>16</sup>
14. The Appeals Chamber held that the criteria listed under article 69(4) also apply at the appellate stage.<sup>17</sup> It added that other criteria must also be taken into account, “given the distinct features of the appellate stage of the proceedings”.<sup>18</sup>
15. The Appeals Chamber also held that the additional evidence must be relevant to one of the grounds of appeal.<sup>19</sup> In addition it made it a requisite for the requester’s application to give the reasons why the evidence was not presented

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<sup>14</sup> ICC-01/05-01/08-3445-Conf, para. 8 (emphasis added).

<sup>15</sup> Statute, articles 69(4) and 83(1); Rules of Procedure and Evidence, rule 149; Regulations of the Court, regulation 62.

<sup>16</sup> ICC-01/04-01/06-3121-Red.

<sup>17</sup> *Ibid.*, para. 54: “the criteria of relevance, probative value and potential prejudicial effect also apply to the admission of evidence at the appellate stage of proceedings”.

<sup>18</sup> *Ibid.*, paras. 55-56: “The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings. Importantly, appellate proceedings at the Court are of a corrective nature, which finds expression in, *inter alia*, the standard of review on appeal.”

<sup>19</sup> *Ibid.*, para. 54.

before the Trial Chamber,<sup>20</sup> and to demonstrate that the additional evidence could have led that Chamber to enter a different verdict, in whole or in part.<sup>21</sup>

16. The Appeals Chamber held, however, that it enjoys discretion to admit additional evidence. Accordingly, it may admit additional evidence “if there are compelling reasons for doing so”,<sup>22</sup> even when such evidence fails to meet the above-mentioned criteria.
17. Both the Defence – in its Application – and the Prosecution – in its response – cited these various criteria.<sup>23</sup> The Defence’s reply,<sup>24</sup> however, appears to suggest that a distinction needs to be made between additional evidence directly relating to the Accused’s guilt or innocence – to which these criteria would be applicable – and evidence which is “merely illustrative of procedural aspects of the trial”, as in the instant case.<sup>25</sup> In fact, the Defence argues that “[t]he potential to change the verdict in the sense of changing factual findings may [...] be a relevant consideration, but different considerations apply in respect of new information whose purpose is to show unfairness in the proceedings”.<sup>26</sup>
18. The Legal Representative observes that the Chamber itself did not specify which criteria were to be taken into account, depending on the purpose of the evidence tendered for admission. Contrary to the Defence’s claims in the instant case, the additional evidence tendered by the Defence in *Lubanga* did not concern solely

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<sup>20</sup> *Ibid.*, para. 58.

<sup>21</sup> *Ibid.*, para. 59: “In the view of the Appeals Chamber, however, 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 [...]. Accordingly, **if the additional evidence is not shown to be of sufficient importance and could not have changed the verdict, there is no reason to allow its admission on appeal**” (footnote omitted, emphasis added).

<sup>22</sup> *Ibid.*, para. 62.

<sup>23</sup> Defence: ICC-01/05-01/08-3435-Conf, paras. 6-10; Prosecution: ICC-01/05-01/08-3471-Conf, paras. 6-8.

<sup>24</sup> ICC-01/05-01/08-3482-Conf, paras. 2-3.

<sup>25</sup> ICC-01/05-01/08-3473, para. 9(ii); ICC-01/05-01/08-3482-Conf, para. 3.

<sup>26</sup> ICC-01/05-01/08-3482-Conf, para. 18.

the guilt or innocence of the Accused. The admission of evidence in connection with the fairness of the trial had also been sought.<sup>27</sup>

19. The Defence has provided no legal grounds neither has it substantiated its approach in any way. It has also failed to define the admissibility criteria for evidence concerning the procedural aspects of the trial, merely referring to the Chamber's discretion, which, it argues, if "properly exercised, should favour its admission".<sup>28</sup> The Defence, however, has given no "compelling reasons" for the documents listed in its Application to be admitted as additional evidence.

20. The Legal Representative considers, therefore, that the criteria to be taken into account in the instant case are those set out by the Chamber in *Lubanga*, irrespective of the purpose of the evidence tendered for admission in the Application.

*(b) The form of the Application*

21. The Defence notes in its Application that the 23 documents listed could be grouped into three categories: the Western Union related documents, those relating to the funding of Defence investigations and the recordings of Defence telephone conversations.<sup>29</sup> The Prosecution, however, accuses the Defence of treating these different documents "in a wholesale manner", and of failing to specify individualised reasons, **for each category**, in support of their admission.<sup>30</sup> Furthermore, when the Defence states in its reply that "[t]he Prosecution's apparent argument that a party tendering additional evidence

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<sup>27</sup> See, for example, ICC-01/04-01/06-2942-Red, para. 29: "The evidence pertaining to the failure to disclose a list of FPLC soldiers relates to the following grounds of appeal: the Trial Chamber erred in considering that it had remedied any prejudice which may have been caused to the Accused by the incomplete or late disclosure of evidence and that it had thus guaranteed him a fair trial."

<sup>28</sup> ICC-01/05-01/08-3482-Conf, para. 3.

<sup>29</sup> ICC-01/05-01/08-3435-Conf, para. 13.

<sup>30</sup> ICC-01/05-01/08-3471-Conf, para. 10.

must produce a table in which the relevance of each document is particularized",<sup>31</sup> it fails to address the concerns of the Prosecution.

22. The Legal Representative notes that, in *Lubanga*, the Defence filed two requests on appeal for the admission of additional evidence. In both requests, the evidence was grouped into different categories and the Defence presented the reasons why the evidence contained in each category was admissible.<sup>32</sup>

23. In the instant case the Defence argues that presenting a table stating the pertinence of each document would be "[...] an excessive formality whose consequence is to obstruct proceedings, and to make them more burdensome and costly."<sup>33</sup> Yet, this is the procedure that was applied before the Trial Chamber.<sup>34</sup>

24. In any event, the Legal Representative observes that the Defence Application is not consistent with any of the above-mentioned "models". Although the Defence has identified several categories of documents, it merely states, in general terms, that these documents "provide important chronology and context to the narrative underpinning a central ground of appeal" and are relevant to the impact that the Prosecution's Article 70 investigations had on the fairness of proceedings in the instant case.<sup>35</sup> The Defence states in its reply that "[t]he relevance of the documents is more manifest when viewed in conjunction with the submissions to which they lend support".<sup>36</sup> The Prosecution contends that "[m]ere references to its Brief do not, in any case, relieve the Defence of its

<sup>31</sup> ICC-01/05-01/08-3482-Conf, para. 12 (emphasis added).

<sup>32</sup> See, for example, ICC-01/04-01/06-2942-Red: evidence for which the request for admission was made was grouped into four categories, namely: "Evidence pertaining to Witness D-0041" (paras. 16-19); "Evidence pertaining to Witness P-0297" (paras. 20-28); "Evidence pertaining to the failure to disclose a list of FPLC soldiers" (para. 29-41). See also, ICC-01/04-01/06-3105.

<sup>33</sup> ICC-01/05-01/08-3482-Conf, para. 12.

<sup>34</sup> See, for example, the *"Requête de la Représentante légale de victimes en vue de soumettre des documents en tant qu'éléments de preuve selon l'article 64(9) du Statut de Rome"*, ICC-01/05-01/08-2866, and the table annexed, ICC-01/05-01/08-2866-Anx. The procedure was also applied by Trial Chambers I and II, see Decisions ICC-01/04-01/06-1981 and ICC-01/04-01/07-2635.

<sup>35</sup> ICC-01/05-01/08-3435, paras. 14-15.

<sup>36</sup> ICC-01/05-01/08-3482-Conf, para. 12.



burden to meet the formal requirements of such applications or to advance substantive and pertinent argument.”<sup>37</sup>

25. As she considers that the Defence Application is not sufficiently grounded, the Legal Representative concurs with the Prosecution’s submission. Absent any grounds, it is difficult to analyse the pertinence of the 23 documents, even when they are examined with reference to the appeal brief.

*(c) The substance of the Application*

26. According to the Defence, the **Western Union related documents** “illustrate [...] the purported foundation for certain submissions that were made by the Prosecution to the Judges during its *ex parte* submissions”.<sup>38</sup> According to the Prosecution, however, these documents are not relevant: “[n]one of these documents – individually or together – advances that claim, nor has the Defence argued in any detail that it is so”.<sup>39</sup> The Defence argues in its reply that the Prosecution’s submissions concern the weight of the evidence, not its relevance.<sup>40</sup>

27. The Legal Representative recalls that Trial Chamber III held that evidence is relevant if it is “logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable”.<sup>41</sup>

28. In its document in support of the appeal, the Defence calls into question neither the legality nor the content of the communications between the Prosecution and Western Union. What it challenges is the fact that the information obtained was disclosed to the Trial Chamber as part of *ex parte* submissions, which it claims

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<sup>37</sup> ICC-01/05-01/08-3471-Conf, para. 10.

<sup>38</sup> ICC-01/05-01/08-3435-Conf, para. 15.

<sup>39</sup> ICC-01/05-01/08-3471-Conf, para. 18.

<sup>40</sup> ICC-01/05-01/08-3482-Conf, para. 14.

<sup>41</sup> ICC-01/05-01/08-2012-Red, para. 14.

affected the fairness of the trial.<sup>42</sup> According to the Legal Representative, therefore, this evidence<sup>43</sup> has no “potential to influence the Chamber’s determination on at least one fact that needs to be determined” for it to rule on appeal.<sup>44</sup> As a result, its relevance is not established.

29. The Defence submits that the **documents relating to the funding of Defence investigations** “illustrate [...] the mistaken submissions that were conveyed to the Trial Chamber [by the Prosecution in its *ex parte* submissions] concerning the funding of Mr Bemba’s defence”<sup>45</sup> in accordance with the Court’s legal aid scheme.<sup>46</sup> The Defence claims in its document in support of the appeal that, as Prosecution submissions concerning it were made *ex parte*, the Defence was unable to correct the information and, consequently, to refute the suggestion that any non-Registry payments to witnesses were evidence of an improper purpose.<sup>47</sup> It was alleged that the evidence in question<sup>48</sup> illustrated “the expenses of mission costs supported by the defence team”.<sup>49</sup> In fact, as pointed out by the Prosecution, these are e-mail messages between the Defence team and the Counsel Support Section concerning an “[TRANSLATION] advance allowance for the [anticipated] mission” of Mr Kilolo in March 2012 (which was rejected owing to the “[TRANSLATION] short notice given”). The Defence fails to explain in its document or in its Application how these documents substantiate its allegations that the Prosecution’s *ex parte* submissions were improper and inappropriate and affected the Trial Chamber’s assessment of the Defence. The Chamber was fully aware that the Defence was not remunerated by the Court’s

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<sup>42</sup> ICC-01/05-01/08-3434-Conf, paras. 52-56, 67.

<sup>43</sup> 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.

<sup>44</sup> ICC-01/05-01/08-2012-Red, para. 14.

<sup>45</sup> ICC-01/05-01/08-3435-Conf, para. 15.

<sup>46</sup> ICC-01/05-01/08-3434-Conf, para. 33.

<sup>47</sup> *Ibid.*, para. 51.

<sup>48</sup> CAR-D20-0005-0270, CAR-D20-0005-0280 and CAR-D20-0005-0281.

<sup>49</sup> ICC-01/05-01/08-3434-Conf, footnote 43.

legal aid scheme. In fact, it did make the decisions ordering the Registry to **front** the costs of Mr Bemba's Defence.<sup>50</sup>

30. The Legal Representative therefore contends that the evidence listed holds no "potential to influence the Chamber's determination on at least one fact that needs to be determined" for it to rule on appeal.<sup>51</sup> Consequently, its relevance has not been established.

31. The Defence claims in its Application that the **Defence's intercepted telephone conversations**, which were revealed to the Prosecution during its investigations in *Case ICC-01/05-01/13*, illustrate the prejudice to the Accused arising from the violation of his right to privileged communications [with his lawyers].<sup>52</sup> The Defence contends in its document in support of the appeal that "the Prosecution had possession, during the Defence case, of conversations between Mr Bemba and his Defence team, and amongst members of the Defence team, that the Pre-Trial Chamber [II, in *Case ICC-01/05-01/13*,] characterised as concerning 'defence strategies'".<sup>53</sup> The Defence claims that the Prosecution also had access to "confidential" information, such as conversations between Counsel and existing or prospective witnesses.<sup>54</sup>

32. The Prosecution submits in turn that whether these conversations were privileged and were, as alleged, improperly revealed to it are questions beyond the remit of this appeal, as Trial Chamber III has at no time ruled on the legality of the investigative measures taken with respect to *Case ICC-01/05-01/13*.<sup>55</sup>

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<sup>50</sup> As the Defence itself noted, see *ibid.*

<sup>51</sup> ICC-01/05-01/08-2012-Red, para. 14.

<sup>52</sup> ICC-01/05-01/08-3435-Conf, para. 15.

<sup>53</sup> ICC-01/05-01/08-3434-Conf, para. 108. The documents listed in the footnote are the following: CAR-OTP-0079-0114 and CAR-OTP-0080-0228. In fact, these are conversations between Jean-Jacques Mangenda Kabongo (former Case Manager) and Aimé Kilolo Musamba (former Lead Counsel). Contrary to Defence claims, Mr Bemba is not involved.

<sup>54</sup> ICC-01/05-01/08-3471-Conf, para. 98.

<sup>55</sup> *Ibid.*, para. 29.

The Chamber found that it was not competent to review decisions taken by Pre-Trial Chamber II.<sup>56</sup>

33. The Legal Representative observes that, contrary to Defence claims,<sup>57</sup> the documents do not illustrate the prejudice to the Accused arising from the disclosure of these communications to the Prosecution. She adds that **although prejudice is mentioned in general terms in the Defence document in support of the appeal, the Defence fails to specify its nature and to establish its existence.** The Legal Representative therefore expresses her doubts as to the relevance of this evidence, which, according to the Defence, “could have led the Trial Chamber to enter a different verdict, in whole or in part”.<sup>58</sup>

#### IV. RELIEF SOUGHT

IN THE LIGHT OF THE SUBMISSIONS ABOVE, the Legal Representative of Victims respectfully requests the Appeals Chamber to take into account these observations when ruling on the admissibility of the 23 documents listed in the “Defence application to present additional evidence in the appeal against the Judgment pursuant to Article 74 of the Statute”.

[signed]

Ms Douzima-Lawson Marie-Edith

Dated this 21 December 2016,

At Bangui, Central African Republic

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<sup>56</sup> ICC-01/05-01/08-3255, para. 17.

<sup>57</sup> ICC-01/05-01/08-3435-Conf, para. 15.

<sup>58</sup> *Ibid.*, para. 8.