

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08
5 Presiding Judge Akua Kuenyehia
6 Appeals Decision
7 Tuesday, 3 May 2011
8 (The hearing starts in open session at 3.00 p.m.)
9 THE COURT USHER: All rise. The International Criminal Court is now in session.
10 Please be seated.
11 THE COURT OFFICER: Good afternoon, your Honour. We are in open session.
12 Thank you.
13 PRESIDING JUDGE KUENYEHIA: Good afternoon, everybody. Court officer,
14 please call the case.
15 THE COURT OFFICER: Good afternoon, your Honour. This is the situation in the
16 Central African Republic, the case of The Prosecutor versus Jean-Pierre Bemba
17 Gombo, case reference ICC-01/05-01/08. Thank you, your Honour.
18 PRESIDING JUDGE KUENYEHIA: Thank you very much. May I ask the parties to
19 introduce themselves for the record. I notice that Mr Bemba is not in court, but he is
20 represented by counsel. So may we start with counsel for Mr Bemba, please.
21 MR HAYNES: Your Honour, yes. My name is Peter Haynes. I am associate
22 counsel for Mr Bemba, who is of course currently present in Courtroom 2 hearing the
23 evidence in his trial.
24 PRESIDING JUDGE KUENYEHIA: Thank you. The Prosecution?
25 MR GUARIGLIA: Good afternoon, your Honour. My name is Fabricio Guariglia,

1 senior appeals counsel in the Office of the Prosecutor, and appearing with me today
2 are Reinhold Gallmetzer, appeals counsel, and Mr Eric Iverson, trial attorney in the
3 Office of the Prosecutor.

4 PRESIDING JUDGE KUENYEHIA: Thank you very much.

5 Today the Appeals Chamber is delivering its judgment on the appeals of both the
6 Prosecutor and Mr Bemba against the decision of Trial Chamber III of 19
7 November 2010, entitled "Decision on the admission into evidence of materials
8 contained in the Prosecution's list of evidence."

9 In a moment I shall summarise the Appeals Chamber's judgment on the appeals, but
10 before that I wish to emphasise that the actual judgment which will be filed and
11 notified to the parties and participants shortly and not the summary is authoritative.

12 The relevant procedural history:

13 Before considering the merits of these appeals, I shall begin with a brief account of the
14 procedural history preceding them. The present appeals arose from Trial Chamber
15 III's decision that, and I quote, "Any materials, including witnesses' written
16 statements and related documents previously disclosed to the Defence and which will
17 form part of the Prosecution's revised list of evidence, are prima facie admitted as
18 evidence for the purposes of the trial."

19 Judge Ozaki dissented from this decision and filed a dissenting opinion on
20 22 November 2010.

21 On 29 November 2010 the Prosecutor and Mr Bemba sought leave to appeal the
22 impugned decision, which the Trial Chamber granted on 26 January 2011. In its
23 decision granting leave to appeal, the Trial Chamber formulated the issue on appeal
24 as follows: Whether the legal framework of the ICC allows for prima facie
25 admission into evidence of materials as defined in paragraphs 9 and 10 of the

1 majority decision, including witnesses' written statements and related documents
2 previously disclosed to the Defence and which form part of the Prosecution's revised
3 list of evidence.

4 On 7 February 2011, Mr Bemba and the Prosecutor filed their respective documents in
5 support of the appeal against the impugned decision. On 18 February 2011, the
6 Prosecutor filed a response to Mr Bemba's document in support.

7 I will now address the effect of the impugned decision:

8 In addressing the issue on appeal, the Appeals Chamber at the outset notes that the
9 Trial Chamber decided that the items listed on the revised list of evidence are *prima*
10 *facie* admitted as evidence for the purposes of the trial.

11 The Appeals Chamber understands that the intended effect of this decision is that the
12 Trial Chamber at the end of the trial will be able to rely on all of those items as
13 evidence for its decision under Article 74(2) of the Statute. The Trial Chamber also
14 indicated that at the end of the trial it would evaluate the items on the revised list of
15 evidence and as part of that evaluation it will consider not only the weight, but also
16 the probative value and the potential prejudicial effect of the evidence. Furthermore,
17 the impugned decision foresees the possibility that the Trial Chamber will at a later
18 stage decide to exclude certain items of evidence either *proprio motu*, or as a result of
19 a challenge by a party.

20 However, the Appeals Chamber observes that the Trial Chamber's decision was, and I
21 quote, "... based on a *prima facie* finding of the admissibility of the evidence."

22 Although the Chamber stated that, and I quote, "A ruling on the admissibility was not
23 a precondition for the admission of any evidence," and indicated that it would
24 consider the probative value of the evidence and the potential prejudice that it may
25 cause at the end of the trial, it nevertheless appears to have considered and ruled on

1 the admissibility of all items on the revised list of evidence. There is, however, no
2 indication in the reasoning of the impugned decision how the Trial Chamber reached
3 this finding.

4 Turning now to the merits of the appeals, the Appeals Chamber will proceed to
5 analyse the arguments raised by both appellants in light of this understanding of the
6 impugned decision.

7 The first is admitting the items into evidence before their submission. To begin with,
8 the Appeals Chamber will examine what is meant by "submission of evidence" within
9 the context of our statutory framework. In this regard, the Prosecutor submits that
10 he did not submit his revised list of evidence to the Trial Chamber as it was only a
11 case management tool; the primary purpose of which was to inform the Chamber and
12 the other participants of the materials he intended to use at trial.

13 The Appeals Chamber finds that, from a combined reading of Article 69(3) and
14 64(8)(b) of the Statute and Rule 64(1) and Rule 140 of the Rules of Procedure and
15 Evidence, it is clear that evidence is submitted if it is presented to the Trial Chamber
16 by the parties on their own initiative, or pursuant to a request by the Trial Chamber
17 for the purpose of proving or disproving facts in issue before the Chamber. The
18 submission of evidence must also conform to the directions of the Presiding Judge, or
19 the manner agreed upon by the parties.

20 The Appeals Chamber notes that, prior to rendering the impugned decision, the Trial
21 Chamber did not indicate that it would consider the filing of a list of evidence as the
22 submission of that evidence. The actual submission of the evidence by the
23 Prosecutor was to take place later in the proceedings, when the Prosecutor would call
24 witnesses or tender documents. Furthermore, the last sentence of Article 74(2) of the
25 Statute provides that a Trial Chamber may base its decision at the end of the trial only

1 on evidence that was submitted and discussed before it at the trial. Accordingly, the
2 Trial Chamber may not rely for the purposes of its final decision on items that have
3 come to the Chamber's knowledge, but that have not been submitted and discussed at
4 the trial.

5 By virtue of the impugned decision, the Trial Chamber admitted into evidence all
6 items on the revised list of evidence. Thus, there is a potential that not all items that
7 were admitted into evidence will have been submitted by the Prosecutor, bringing the
8 impugned decision into conflict with Article 74(2) of the Statute. Thus the Appeals
9 Chamber finds that, in light of the above, the Trial Chamber erred when it admitted
10 into evidence the items on the revised list of evidence when they had not yet been
11 submitted to the Chamber.

12 The parties' right to raise issues:

13 In a related argument the Prosecutor contends that the Trial Chamber, contrary to
14 Rule 64(1) of the Rules of Procedure and Evidence, denied the parties an opportunity
15 to raise issues regarding the relevance or admissibility of the items.

16 Rule 64(1) of the Rules of Procedure and Evidence entitles the parties to raise issues as
17 to the relevance, or admissibility, of evidence at the time when the evidence is
18 submitted to a Chamber. It ensures that the parties have the chance to raise
19 objections to the evidence before it is admitted by the Chamber.

20 In the present case, the Trial Chamber prior to rendering the impugned decision
21 sought submissions from the parties, and I quote, "... on the potential submission into
22 evidence of the witness statements of those witnesses to be called to give evidence at
23 the trial." However, the Trial Chamber did not indicate that it would admit into
24 evidence all the items on the lists of evidence, neither did it seek submissions on the
25 relevance or admissibility of these items.

1 The Appeals Chamber is not persuaded by the Trial Chamber's reasoning that the
2 parties would later on have the opportunity to raise issues relating to the relevance, or
3 admissibility, of the evidence.

4 Rule 64(1) allows for later objection, and I quote, "... only when those issues were not
5 known at the time when the evidence was submitted." Furthermore, it is unclear
6 whether the parties would always be able to rely on this exception in the situation
7 created by the impugned decision.

8 Therefore, the Appeals Chamber finds that by admitting into evidence the items on
9 the revised list of evidence, without first giving the parties an opportunity to raise
10 issues as to their relevance or admissibility, the Trial Chamber failed to give effect to
11 Rule 64(1) of the Rules of Procedure and Evidence.

12 The wholesale finding of admissibility:

13 As to the argument raised by both the Prosecutor and Mr Bemba that the Trial
14 Chamber erred when it made a prima facie finding of the admissibility of all items on
15 the revised list of evidence without assessing them on an item-by-item basis, the
16 Appeals Chamber recalls that, according to Article 69(4) of the Statute, when the Trial
17 Chamber decides to rule on the relevance or admissibility of evidence, it must assess
18 the evidence taking into account inter alia its probative value and any prejudice to a
19 fair trial, or to a fair evaluation of the testimony of a witness that such evidence might
20 cause.

21 Furthermore, Article 69(7) of the Statute and Rule 71 of the Rules of Procedure and
22 Evidence stipulate that certain evidence may not be admitted. The scheme
23 established by Article 69(4) and (7) of the Statute and Rule 71 of the Rules of
24 Procedure and Evidence thus anticipates that a Chamber's determination of the
25 relevance or admissibility of evidence be made on an item-by-item basis.

1 Whether evidence is relevant, has probative value, or would be prejudicial to the
2 accused, will depend on the specific characteristics of each item of evidence. The
3 factors that will require consideration will not be the same for all items of evidence.
4 Thus, whether evidence was obtained in violation of the Statute, or human rights, or
5 relates to the prior or subsequent sexual conduct of a victim or witness, can only be
6 determined on an item specific basis.

7 However, in the impugned decision there is no indication that the Trial Chamber
8 carried out an item specific analysis as a basis for its prima facie finding of the
9 admissibility of this evidence. Thus, in the view of the Appeals Chamber, the Trial
10 Chamber ruled incorrectly on the admissibility of the evidence.

11 Furthermore, the Appeals Chamber is not persuaded by the Trial Chamber's
12 reasoning that the prima facie admission of the evidence without the need to rule on
13 each piece of evidence as it is presented will save significant time during the
14 proceedings and expedite matters.

15 While expeditiousness is an important component of a fair trial, it cannot justify a
16 deviation from statutory requirements. Thus, if a Chamber decides to rule on the
17 admissibility of evidence, it must do so correctly. Therefore, the Appeals Chamber is
18 of the view that the Trial Chamber erred when it made a prima facie finding of the
19 admissibility of the evidence listed on the revised list of evidence without assessing
20 the evidence on an item-by-item basis.

21 Requirement to give reasons for rulings on evidentiary matters:

22 Additionally the Prosecutor submits that, having failed to assess the evidence on an
23 item-by-item basis, the Trial Chamber also failed to give reasons for its decision in
24 violation of Rule 64(2) of the Rules of Procedure and Evidence.

25 The Appeals Chamber recalls that, pursuant to Rule 64(2), a Chamber shall give

1 reasons for any rulings it makes on evidentiary matters. As already stated, rulings
2 on the admissibility of evidence must be made on an item-by-item basis. This
3 analysis must be reflected in the reasons.

4 This is not to say that a Trial Chamber may not rule on the relevance, or admissibility,
5 of several items of evidence in one decision. However, it must be clear from the
6 reasons of the decision that the Chamber carried out the required item-by-item
7 analysis.

8 In the present case, aside general statements as to the legal basis and the potential
9 value of admitting the evidence, the impugned decision did not explain why the
10 material was found to be prima facie admissible. This amounted to a breach of
11 Rule 64(2) of the Rules of Procedure and Evidence.

12 Rights of the accused:

13 Now, Mr Bemba argues that the submission into evidence of all the items on the
14 revised list of evidence without an item-by-item assessment of their admissibility
15 violates some of his rights under Article 67 of the Statute. These arguments will now
16 be examined.

17 First, Mr Bemba contends that the Trial Chamber's intention to consider the
18 admissibility of the items it introduced into evidence only at the end of the trial
19 violates his right under Article 67(1)(a) of the Statute to be informed promptly and in
20 detail of the nature, cause and content of the charge against him, as he would know
21 the precise nature of the Prosecutor's evidence against him only after the close of the
22 Defence case.

23 The Appeals Chamber understands Mr Bemba's argument to be that his right to be
24 informed of the charges was violated because the Trial Chamber did not make a
25 definitive ruling on the admissibility of the evidence that it admitted.

1 The Appeals Chamber is not persuaded by this argument, because Article 67(1)(a) of
2 the Statute is not concerned with the timing of rulings on the admissibility of
3 evidence. The accused person enjoys the right to be informed of the nature, cause
4 and content of the charges against him.

5 This information has already been provided to Mr Bemba. Mr Bemba was at the
6 pre-trial stage served with a document containing the charges, the evidence
7 supporting those charges and the confirmation decision. The evidence upon which
8 the Prosecutor intends to rely at trial has also been disclosed to him. In addition, the
9 Trial Chamber ordered the Prosecutor to submit an updated in-depth analysis chart
10 setting out in detail how the documentary evidence and witness statements related to
11 the Prosecutor's factual allegations.

12 Thus, Mr Bemba has been made fully aware of the factual and legal allegations
13 against him. Accordingly, Mr Bemba's argument that his right to be informed of the
14 charges was violated is misconceived and therefore dismissed.

15 Mr Bemba further submits that the impugned decision impacts on his right under
16 Article 67(1)(b) of the Statute to have adequate time and facilities for the preparation
17 of the defence. He maintains that the admission into evidence of all the items on the
18 revised list of evidence means that he has, and I quote, "... to investigate and seek to
19 defend against large swathes of evidence which may ultimately be disregarded by the
20 Chamber, which has the potential to greatly increase the scope of his investigations."

21 The Appeals Chamber notes that Mr Bemba argues that his right under Article 67(1)(b)
22 of the Statute could be violated by the impugned decision. The Appeals Chamber
23 finds this argument speculative, as it is not possible at this stage to determine the
24 impact of the impugned decision on this right. Moreover, it is not unusual that prior
25 to the beginning of the trial the Defence does not know on which evidence the Court

1 will eventually rely and which evidence will be ruled inadmissible.

2 Therefore, irrespective of the approach that the Trial Chamber takes to the admission
3 of evidence, Mr Bemba must at this stage of the proceedings expect that all the
4 evidence listed on the revised list of evidence might be used against him and prepare
5 his defence accordingly. For these reasons, the Appeals Chamber dismisses
6 Mr Bemba's assertions in this regard.

7 Mr Bemba further submits that admission into evidence of the items on the revised
8 list of evidence infringes his right to be tried without undue delay which is protected
9 by Article 67(1)(c) of the Statute as he, and I quote, "... will now be required to lead
10 evidence to rebut the factual allegations contained in thousands of pages of evidence."

11 As with Mr Bemba's argument on his right to prepare his defence, the Appeals
12 Chamber finds the submissions as to the alleged breach of Article 67(1)(c) to be
13 speculative at this point in time.

14 Having said that, the Appeals Chamber considers that the Trial Chamber in
15 exercising its discretion under Article 69(4) of the Statute to rule on the admissibility
16 of the evidence without first giving the parties an opportunity to raise issues in this
17 regard failed to effectively evaluate any potential prejudice that such evidence may
18 cause to a fair trial; in particular, Mr Bemba's right to a trial without undue delay.

19 Referring to Article 67(1)(i) of the Statute, Mr Bemba submits that the prima facie
20 admission of all the evidence constitutes a de facto reversal of the burden of proof
21 because, rather than placing the onus on the Prosecutor to prove the admissibility of
22 the evidence, it places the burden on Mr Bemba to challenge it.

23 In the view of the Appeals Chamber, the burden of proof referred to in Article 67(1)(i)
24 of the Statute refers to the burden on the Prosecutor to prove the case against the
25 accused beyond reasonable doubt. This burden does not shift as a result of the

1 impugned decision. Accordingly, the burden of proof is not implicated and the
2 Appeals Chamber finds Mr Bemba's argument in this regard to be misconceived.
3 However, the Appeals Chamber notes that under Rule 64(1) of the Rules of Procedure
4 and Evidence the parties have the right to raise issues concerning the relevance or
5 admissibility of the evidence when it is submitted.

6 As discussed previously, the Trial Chamber failed to give effect to this right before
7 admitting the evidence. Therefore, rather than merely having to raise issues as to the
8 relevance or admissibility of the evidence, Mr Bemba now has the additional burden
9 of disproving the admissibility of items on which the Chamber has already ruled. It
10 is in this sense that the Appeals Chamber finds merit in Mr Bemba's submission on
11 this point.

12 I now come to the orality of the proceedings and the right of the accused to examine
13 witnesses against him:

14 Lastly, both parties argue that the admission of all prior written witness statements
15 into evidence in the way that the Trial Chamber did violates the principle of primacy
16 of orality enshrined in Article 69(2) of the Statute.

17 The Appeals Chamber finds that the direct import of the first sentence of Article 69(2)
18 of the Statute is that witnesses must appear before the Trial Chamber in person and
19 give their evidence orally. This sentence makes in-court personal testimony the rule,
20 giving effect to the principle of orality. Nevertheless, the Appeals Chamber recalls
21 that in-court personal testimony is not the exclusive mode by which a Chamber may
22 receive witness testimony and observes that the first sentence of Article 69(2) also
23 provides for exceptions; namely, for measures taken under Article 68 of the Statute or
24 under the Rules of Procedure and Evidence to protect victims, or an accused.

25 For the case at hand, the most relevant exception is enshrined in Rule 68(b) of the

1 Rules of Procedure and Evidence which provides for the introduction of previously
2 recorded testimony subject to strict conditions. In deviating from the general
3 requirement of in-court personal testimony and receiving into evidence any prior
4 recorded witness testimony, a Chamber must ensure that doing so is not prejudicial to
5 or inconsistent with the rights of the accused, or with the fairness of the trial
6 generally.

7 The Appeals Chamber notes that there is no indication in the impugned decision that
8 the Trial Chamber considered in respect to each witness statement whether the
9 conditions for its admission under Rule 68(b) of the Rules of Procedure and Evidence
10 were met, nor whether admission of a given statement would be prejudicial to or
11 inconsistent with the rights of the accused. Instead, the Chamber admitted into
12 evidence indiscriminately all the witness statements on the revised list of evidence.

13 In the Appeals Chamber's view, this mode of receiving evidence was an improper
14 exercise of the Trial Chamber's discretion. It resulted in the Chamber paying little or
15 no regard to the principle of orality, to the rights of the accused, or to trial fairness
16 generally.

17 For these reasons, the Appeals Chamber concludes that the decision of the Trial
18 Chamber to admit all prior recorded statements without a cautious item-by-item
19 analysis was incompatible with Article 69(2) of the Statute and with Rule 68 of the
20 Rules of Procedure and Evidence.

21 The appropriate relief:

22 On an appeal pursuant to Article 82(1)(b) or (d) of the Statute, the Appeals Chamber
23 may confirm, reverse, or amend the decision appealed. For the reasons I have
24 summarised, the Appeals Chamber unanimously reverses the decision to admit into
25 evidence materials contained in the Prosecution's list of evidence.

- 1 This concludes the summary of the judgment. It only remains for me to thank our
- 2 interpreters and court reporters, our audience and the parties. The session is now
- 3 closed. Thank you very much.
- 4 THE COURT USHER: All rise.
- 5 (The hearing ends at 3.32 p.m.)