Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08 A**
Date: **09/12/2016**

**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*

**Appellant's reply to "Prosecution's response to Bemba's application to present additional evidence in the appeal"**

**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 *Bemba* case is only the second before the ICC in which the Appeals Chamber has had to consider its jurisdiction to receive additional evidence on appeal. The Appellant concurs with the Prosecution that such applications need to be considered within the statutory and regulatory framework.[1]

2. In the *Lubanga* case, the Appeals Chamber considered whether to admit entirely fresh witness testimony and ancillary documentary evidence of two persons depicted on videotape, and used centrally to convict the accused of recruiting child soldiers.[2] The evidence went directly to the issue of whether they were in fact children and hence to the accused's guilt or innocence.[3] Ultimately, the Appeals Chamber, confirmed that it had a wide discretion to admit further evidence, stating that:[4]

> "[…] even beyond those criteria, [Appeals Chambers enjoy] discretion to admit additional evidence, which should be done on a case-by-case basis and in the light of the specific circumstances of each case. In this respect the Appeals Chamber finds that it is within its 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."

3. In the instant case, the Appellant submits that there is nothing in the Statute, Rules of Procedure and Evidence, Regulations of the Court or relevant prior jurisprudence which stands in the way of admitting the proffered material herein and that the Appeal Chamber's discretion, properly exercised, should favour its admission.[5]

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[1] Articles 69(4) and 83 of the Statute, Rule 149 of the RPE, and Regulation 62 of the Regulations of the Court.
[2] *Lubanga* AJ, paras. 65-81.
[3] *Lubanga* AJ, para. 68. *See also*, ICC-01/04-01/06-2942-Red-tENG and ICC-01/04-01/06-3105-tENG.
[4] *Lubanga* AJ, para. 62.
[5] The Appellant files this reply as "Confidential" pursuant to regulation 23bis(2), since it responds to a confidential document and refers to confidential decisions. The Appellant will file a public redacted version, once public versions of the relevant documents are available.

## A. THE PROSECUTION SUBMISSIONS ARE PROCEDURALLY IMPERMISSIBLE

4. In its response to the Legal Representative of Victims' request for access to the 23 Documents herein,[6] the Prosecution argued that the Appeals Chamber should "maintain the Application, and any responses to it, as standalone motions on appeal" and make "interlocutory decisions on the Defence Application and the proposed additional evidence".[7] Even though the Prosecution made no explicit reference to the distinct procedures provided for in regulations 62(2)(a) and (b), the Appeals Chamber plainly understood the import of these submissions and rejected them.[8] In particular, the Chamber found that "in view of the nature of the first ground of appeal and the intended use of additional evidence, it is appropriate to follow the procedure set out in regulation 62(2)(b) of the Regulations of the Court. It will therefore rule on the admissibility of the additional evidence specified in the Additional Evidence Application jointly with other issues raised in the appeal".[9]

5. In spite of the Prosecution's glib (and unsupported) assertion that the Appeals Chamber's earlier decision "does not preclude it from" now effectively adopting the procedure under rule 62(2)(a),[10] its submissions that the Chamber "summarily dismiss" or "dismiss outright" the additional evidence application amount to a simple attempt to have a "second bite at the cherry" on the question of the appropriate procedure without showing good cause.

6. The request that the "the Appeals Chamber not to invest further time and resources"[11] is contrary to the procedure already foreseen by the Appeals Chamber and should be rejected on that basis alone.

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[6] ICC-01/05-01/08-3441-Conf.
[7] *Ibid*., para. 4
[8] *See* ICC-01/05-01/08-3446-Conf, paras. 2, 4-5.
[9] ICC-01/05-01/08-3446-Conf, para. 5.
[10] ICC-01/05-01-08-3471-Conf, para. 3.
[11] ICC-01/05-01-08-3471-Conf, para. 35.

## B. THE MATERIAL IS ADMISSIBLE, PROBATIVE AND RELEVANT

### 1. The Prosecution's reliance on Article 70 material supports admission

7. In only the second paragraph of the "Prosecution's Response to the Appellant's Document in support of Appeal" ("Response Brief") the following assertion is made:[12]

> Just as the Judgment portrayed Bemba's blithe refusal to carry out his duties as a superior, well within his ability, so has **his conduct in this trial reflected that same view that the rules do not apply to him**. They do.

8. No better illustration could have been provided of the manner in which the Prosecution has itself attempted to link the Main Case and the Article 70 case in these proceedings. This is precisely why it is appropriate and necessary that the full – and not just a partial – picture of the Article 70 proceedings be provided.

9. The Response Brief is littered with similar references.[13] The claim that the Defence is attempting "to cloud the Bemba Main Case record" with Article 70 material[14] is unfounded and carries an unnecessary implication of bad faith. The Prosecution's assertions that the documents are "irrelevant to the Main Case"[15] or "not relevant to this appeal"[16] are contrary to the manifold ways in which the Prosecution has called for reliance on the "related case" to draw inferences prejudicial to the accused, while at the same time shielding from consideration the

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[12] ICC-01/05-01-08-3472-Conf. The submissions were underlined and repeated in the "Prosecution's notice of its intended response to Bemba's application to present additional evidence in the appeal"; ICC-01/05-01/08-3443-Conf, para. 1.

[13] *For example*, ICC-01/05-01-08-3472-Conf para. 8 reminds the Appeals Chamber that: "The trial withstood the **intentional attempts** by Bemba and some members of his defence team to **interfere with this Court's administration of justice**," and para. 56 that: "Bemba's claims in this context may be considered especially self-serving given the independent finding, beyond reasonable doubt, that Bemba and his then lead counsel, Kilolo, deliberately presented evidence of these Defence witnesses knowing full well that their evidence contained falsehoods and was the result of illicit coaching and bribery". Further references to the Article 70 proceedings can be found in the footnotes to the Response at fns. 8, 42, 62, 95, 104, 143, 153, 181.

[14] ICC-01/05-01-08-3471-Conf, para. 1.

[15] ICC-01/05-01-08-3471-Conf, para. 19.

[16] ICC-01/05-01-08-3471-Conf, para. 24.

manner in which that investigation was conducted and its potential impact on the fairness of the Main Case proceedings. The Prosecution's own submissions demonstrate the inconsistency of its position.

**2. The Defence application is in a proper form**

10. The 23 Documents could have formed part of the trial record in this case if they had been produced and/or disclosed earlier. The Prosecution's apparent argument that a party tendering additional evidence must produce a table in which the relevance of each document is particularized fetishizes regulation 62, elevates form over substance, and inserts an excessive formality whose consequence is to obstruct proceedings, and to make them more burdensome and costly.

11. The relevance of the documents is clear from the Defence submissions, even in the absence of a table. The Prosecution has likewise failed to offer any individualised submissions beyond general complaints about "irrelevan[ce] to the Main Case" and the failure of the Defence "to discharge its burden".[17]

12. The relevance of the documents is more manifest when viewed in conjunction with the submissions to which they lend support. No sensible reading of regulation 62 can support, as the Prosecution apparently advocates, rigorously divorcing an application for additional evidence from the submissions that that additional information will support.[18] Those submissions, and the citation of the additional evidence in question, directly indicates the grounds of appeal supported by the additional evidence.

[17] ICC-01/05-01-08-3471-Conf, para. 2.

[18] ICC-01/05-01-08-3471-Conf, para. 10, fn. 20. In fact the Prosecution's reference to the *Popović* decision is itself misconceived. There are significant differences between Rule 115 of the ICTY RPE and Regulation 62 in terms of the requirements of a notice to admit further evidence. The application in *Popović* related to only one report, and unlike in the instant case, there were no assertions as to relevance or probity made in the application itself, nor references to multiple paragraphs in the Grounds of Appeal.

13. In the interests of judicial economy, moreover, the Defence was entitled to present all of the material it sought admission of "in a wholesale manner".[19] Nothing in the regulatory framework requires an applicant to advance "concrete individualised reasons" for the admission of each document.[20] Indeed to do so would involve the parties and the Appeals Chamber in cumbersome and protracted collateral litigation. The Appeals Chamber's decision to utilise the procedure under regulation 62(2)(b), moreover, endorses the appellant's approach.

**3. The Prosecution's submissions as to relevance should be dismissed**

14. The Prosecution's submissions in relation to the instant documents go to weight not relevance. It claims that the Western Union documents "advance a partial and disjointed chronology of events relating to the Prosecution's contacts with Western Union".[21] Its claims to partiality and disjoinder are not elaborated, but the concession that the documents support a "chronology"[22] is significant.

15. In relation to the Category 2 documents it argues that support for the contended basis of relevance "is less than apparent" from the text of the proffered emails.[23] Again, these are mere submissions as to weight, not relevance.

16. The submission that conversations between Counsel and his Case Manager, and or Defence Witnesses (the so-called Category 3 documents) are not or may not fall within the definition of "privileged communications and information" under Rule 73 are inconsequential to their relevance. They are also incorrect. Kilolo's conversations with Mangenda were privileged both as a matter of fact and law.

[19] ICC-01/05-01-08-3472-Conf, para. 10.
[20] ICC-01/05-01-08-3471-Conf, para. 10, fn. 19.
[21] ICC-01/05-01-08-3471-Conf, para. 18.
[22] The Application suggests that they provide "important chronology and context" ICC-01/05-01/08-3435-Conf, para. 15.
[23] ICC-01/05-01-08-3471-Conf, para. 24.

**4. There is no absolute requirement that each piece of proffered material could have changed the verdict**

17. The Prosecution places too narrow a constraint upon the ability of the Appeals Chamber to receive new evidence. The Appeals Chamber's discretion is sufficiently wide to receive evidence, notwithstanding any apparent technical deficiencies in the application, if it deems it just so to do.[24]

18. Further, the Prosecution ignores entirely the difference between evidence intended to undermine a factual finding and information tending to show that the proceedings were unfair. The information being tendered is nothing like a new eyewitness being found who can undermine central findings of fact of a trial which – for good reason – is subject to a test of particular stringency. The potential to change the verdict in the sense of changing factual findings may in such cases be a relevant consideration, but different considerations apply in respect of new information whose purpose is to show unfairness in the proceedings. In any event, the absence of such a quality does not does not prevent its admission,[25] especially when that assessment can only be made by a full and cumulative assessment of the information in conjunction with other information that is already before the Appeals Chamber as part of the appeal.

**5. The Prosecution's submissions concerning the availability of the material should be dismissed**

19. The Prosecution further places an unrealistic responsibility upon the Appellant to have used these documents when first they came to his attention.

20. In relation to the Western Union documents, for example, it complains that he did not seek relief from the Trial Chamber, when they were not fully in his

[24] *Lubanga* AJ, para. 62.
[25] *Ibid*.

possession[26] until 18 months after he had filed his final trial brief, 15 months after he had presented his closing oral arguments and 26 days before the Judgment was handed down (and 14 days after the related scheduling order).[27] All but one of the documents is dated October-November 2012,[28] more than 3 years before disclosure.[29]

21. It is regrettable that the Prosecution should chose to point to the Appellant's apparent tardiness in employing these documents against a background of non-disclosure that led to these documents coming belatedly into the possession of the Bemba Main case Defence team absent any sensible context. The true relevance of and inter dependence between the Western Union Documents, the Defence's correspondence with the Registry and the Prosecution's *ex parte* submissions could not crystallise until well into the Article 70 disclosure process. Indeed, the Appellant has no grounds for confidence that he has received all relevant material to date. He continues to receive disclosure in the appeal phase of the case[30] and still has access only to a redacted version of the transcript of the ominous *ex parte* status conference of 9 April 2013.[31]

22. The suggestion that the Appellant seeks to adduce these documents on appeal, the disclosure and significance of which he could never have anticipated, as part of some "litigation strategy"[32] is absurd and unfair. There was no lack of due diligence on the part of the Defence in this matter, particularly in light of the piecemeal and tardy disclosure of material relevant to the Article 70 proceedings.

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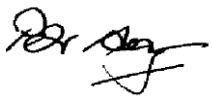
[26] ICC-01/05-01-08-3471-Conf, para. 20.
[27] ICC-01/05-01-08-3121-Conf; T-365-CONF-ENG; ICC-01/05-01-08-3343; ICC-01/05-01-08-3329.
[28] CAR-OTP-0092-0018; CAR-OTP-0091-0351; CAR-OTP-0092-0021-R01; CAR-OTP-0092-0022-R01; CAR-OTP-0092-0024; CAR-OTP-0092-0892-R01; CAR-D24-0002-1363; CAR-OTP-0092-0028-R02; CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032.
[29] ICC-01/05-01/08-3471-Conf, para. 20.
[30] The Prosecution disclosed to the Defence documents related to the Article 70 case on 23 August, 18 October and 7 November 2016 (Rule 77 Packages 1, 2 and 3).
[31] T-303-CONF-Red2-ENG.
[32] ICC-01/05-01-08-3471-Conf, para. 13.

**6. There is no prejudice occasioned by the admission of these documents**

23. The Prosecution does not suggest that there is any prejudice to any party in the admission of the proffered items. The vast majority of them were produced by the Prosecution, have been in its possession for a number of years, and for various portions of that time have been kept from the Defence. Their provenance, probity and reliability is beyond question. The Prosecution has been able to address their relevance and weight and substantively to deal with the legal and factual submissions they are said to underpin.[33] It, moreover, had the right (apparently now waived) to adduce further evidence itself.[34]

24. On the contrary, despite the Prosecution's submissions that these matters are only relevant to the Article 70 Case, this is the only appellate chamber which can review the impact of these matters upon the fairness of Bemba's Main Case trial. Exclusion of these items would demonstrably impede that process.

The whole respectfully submitted.



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Done at The Hague, The Netherlands, 9 December 2016

It is hereby certified that this document contains a total of 2,536 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.

[33] *For example,* ICC-01/05-01/08-3472-Conf, paras. 64, 66, 70 and 94 together with fns. 164, 176 and 190.
[34] ICC-01/05-01/08-3446-Conf, p. 3.