

International Criminal Court—offenses against administration of justice—presenting false evidence, pursuant to Article 70(1)(b) of the ICC Statute—immunity of defense counsel—privileged communication—admission of evidence

PROSECUTOR V. BEMBA ET AL. Case No. ICC-01/05-01/13. Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido Against the Decision of Trial Chamber VII entitled “Judgment Pursuant to Article 74 of the Statute”; Judgment on the Appeals of the Prosecutor, Mr. Jean-Pierre Bemba Gombo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido Against the Decision of Trial Chamber VII entitled “Decision on Sentence Pursuant to Article 76 of the Statute.” At <http://www.icc-cpi.int>. International Criminal Court, March 8, 2018.

The case against Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido is the first case before the International Criminal Court (ICC) dealing with offenses against administration of justice. The case is exceptional in terms of scope and size in comparison to other international prosecutions dealing with this kind of offense. The charges concern a systematic scheme aimed at producing false testimony of a large number of witnesses. Five people, including members of a defense team in another case before the ICC, carried out this operation over a period of many years. The case also involves several interesting evidentiary and procedural issues, including the overall regime for admission of evidence before the ICC.

On October 19, 2016, Trial Chamber VII of the ICC rendered its judgment in the case (Judgment).¹ The proceedings against the accused had been initiated almost three years earlier with arrests in November 2013, through a law enforcement operation in four countries. On November 11, 2014, Pre-Trial Chamber II confirmed some of the charges against the accused. The trial commenced on September 29, 2015 and concluded with the parties’ closing statements on May 31 and June 1, 2016. Following the Judgment convicting the five accused, sentences against them were handed down in a decision of March 22, 2017 (Sentencing Decision).² Both the verdict and sentences were appealed, and on March 8, 2018, the Appeals Chamber rendered its judgments on both (Judgment on Appeal of Verdict and Judgment on Appeal of Sentencing, respectively).³

Bemba, a national of the Democratic Republic of Congo (DRC), was at the time of the alleged offenses in custody at the ICC Detention Centre and on trial for crimes against humanity and war crimes (Main Case). He was convicted of those crimes on March 21, 2016 but subsequently acquitted on appeal on June 8, 2018. Kilolo, a Belgian resident,

¹ Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute (Oct. 19, 2016).

² Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13-2123-Corr, Decision on Sentence Pursuant to Article 76 of the Statute (Mar. 22, 2017).

³ Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13-2275, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido Against the Decision of Trial Chamber VII entitled “Judgment Pursuant to Article 74 of the Statute” (Mar. 8, 2018); Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13-2276, Judgment on the Appeals of the Prosecutor, Mr. Jean-Pierre Bemba Gombo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido Against the Decision of Trial Chamber VII entitled “Decision on Sentence Pursuant to Article 76 of the Statute” (Mar. 8, 2018).

was the lead counsel in the Main Case at the time of his arrest. Mangenda, a United Kingdom resident, was case manager for Bemba's defense team in the Main Case at the time of his arrest. Babala, a resident of the DRC, was a close political associate of Bemba and a member of the DRC National Assembly. Finally, Arido, a resident of France, was listed as a defense witness in the Main Case but did not testify.

The case concerns offenses against administration of justice, committed between the end of 2011 and November 14, 2014 and involving fourteen witnesses in the Main Case. Specifically, the charges included corruptly influencing witnesses, presenting false evidence, and giving false testimony when under an obligation to tell the truth. The accused were charged with interfering with defense witnesses in the Main Case to ensure that these witnesses would provide evidence in favor of Bemba. Bemba, Kilolo, and Mangenda took various measures to effectively carry out and conceal the illegal activities. These measures included abuse of the privileged phone line at the ICC Detention Centre, money transfers to the witnesses through third persons, and distribution of telephones to the defense witnesses so that the defense team could stay in contact with them throughout their testimony, in breach of the Trial Chamber's instructions. Babala handled the payments to some of the witnesses, and Arido liaised with some of them and prepared them for their false testimony.

The Trial Chamber convicted the accused of giving false testimony when under an obligation to tell the truth; presenting false evidence; and corruptly influencing witnesses in violation of Article 70(1)(a)–(c) of the ICC Statute. While the Appeals Chamber upheld the Trial Chamber's findings with regard to giving false testimony and corruptly influencing witnesses, it reversed the Trial Chamber's findings on presenting false evidence.

Article 70(1)(b) makes “[p]resenting evidence that the party knows is false or forged,” an offense against the administration of justice falling under the ICC's jurisdiction. Interpreting this offense, the Trial Chamber reasoned that the perpetrator must be a “party” to the proceedings and thus, with regard to the defense, someone who is either formally authorized to present evidence or “who, *de facto*, plays a significant role in the defense team's decisions on the strategy of the accused's representation, including the presentation of evidence” (Judgment, paras. 32, 34, emphasis in original). This would include the accused, Bemba (Judgment, paras. 35–36). Interpreting the term “evidence,” the Trial Chamber concluded that it encompasses all types of evidence, including oral evidence (Judgment, para. 38). Oral evidence would be “presented,” “at least when a witness appears before the Court and testifies” (Judgment, para. 40).

The Appeals Chamber, however, disagreed with this interpretation and reversed the Trial Chamber's findings. Specifically, the Appeals Chamber disagreed with the Trial Chamber's understanding of the term “presented.” The actual presentation of oral testimony is not an act of a party, the Appeals Chamber held, but an autonomous act that could only be controlled by the witness himself (Judgment on Appeal of Verdict, para. 709). Calling a witness in the hope or belief that he or she will testify falsely thus does not meet the elements of Article 70(1)(b). The Appeals Chamber concluded therefore that the term “evidence” in this provision only refers to documentary evidence (Judgment on Appeal of Verdict, para. 710). Since the evidence in the case only concerned oral testimony, the Appeals Chamber reversed the convictions of Bemba, Kilolo, and Mangenda under Article 70(1)(b).

The Trial Chamber found the accused guilty pursuant to different modes of liability. With regard to Bemba, Kilolo, and Mangenda, the Trial Chamber found that they contributed to a

common plan amounting to the offenses set out in Article 70(1)(b) and (c) of the ICC Statute. In this respect, they were held responsible as co-perpetrators pursuant to Article 25(3)(a). The Appeals Chamber clarified that the contributions of co-perpetrators do not have to form the *actus reus* of the crime or be criminal in nature—it is sufficient that the contributions are “essential” (Judgment on Appeal of Verdict, para. 810). Kilolo and Bemba were also found guilty of having induced and solicited, respectively, the false testimony of fourteen witnesses, pursuant to Article 25(3)(b). Mangenda and Babala were found guilty of having aided and abetted in the giving of false testimony with regard to some witnesses. Finally, Arido was found guilty of having corruptly influenced four witnesses, pursuant to Article 25(3)(a). The Appeals Chamber affirmed these findings.

A large number of procedural and evidentiary issues were also addressed in the judgments.⁴ The most important of these issues are addressed below.

One key set of issues concerned immunity. The defense predicated some of its arguments concerning inadmissibility of documentary evidence on Kilolo’s and Mangenda’s purported immunity from legal process as members of Bemba’s defense team, citing Article 48(4) of the ICC Statute, the Agreement on Privileges and Immunities of the ICC,⁵ and the Headquarters Agreement between the ICC and the Host State.⁶ The ICC presidency had already dealt with this matter during the pre-trial phase of the case. Pursuant to Article 26(2) of the Agreement on Privileges and Immunities of the ICC, privileges and immunities for counsel and persons assisting defense counsel can be waived by the presidency. In its decision, the presidency concluded that no immunity attached to the acts allegedly committed by Kilolo and Mangenda. Nevertheless, the presidency decided that even if such immunity existed, it would be waived pursuant to Article 26 of the Agreement on Privileges and Immunities of the ICC (Judgment on Appeal of Verdict, para. 208).

The defense raised the matter before the Appeals Chamber, focusing in particular on the period before the presidency had waived immunity. The Appeals Chamber found, however, that there was no legal basis for immunity. It clarified that the purpose of immunity in this context is to ensure the effective and independent functioning of the ICC (Judgment on Appeal of Verdict, paras. 215–16). The mentioned legal instruments therefore provide immunities that are applicable externally (that is, between the ICC and states), but not internally within the Court (in this case, between members of the defense team and the ICC) (Judgment on Appeal of Verdict, paras. 214, 217).

A second set of issues revolved around whether various categories of documentary evidence should have been excluded from consideration pursuant to Article 69(7) of the ICC Statute. According to this provision, evidence obtained in violation of the ICC Statute or “internationally recognized human rights” shall not be admissible if “[t]he violation casts substantial doubt on the reliability of the evidence” or if “[t]he admission of the evidence would be

⁴ Among the issues that could not be covered within the narrow scope of this case note is the applicability of Articles 69(7) and (8) and the ICC’s power to review application of national law (see, for example, Judgment on Appeal of Verdict, paras. 283–99, 340–46), and the appropriateness of ordering the prosecution to file so-called “updated documents containing the charges,” taking into account the Pre-Trial Chamber’s decision confirming the charges (Judgment on Appeal of Verdict, paras. 195–200).

⁵ Agreement on Privileges and Immunities of the International Criminal Court, Adopted by the Assembly of State Parties, ICC-ASP/1/3, September 3–10, 2002.

⁶ Headquarters Agreement Between the International Criminal Court and the Host State, ICC-BD/04-01-08, March 1, 2008.

antithetical to and would seriously damage the integrity of the proceedings.” One of the evidentiary issues addressed by both the Trial and Appeals Chambers related to attorney-client privilege. The defense argued that evidence derived from intercepts of telephone conversations between Bemba and his defense attorney, Kilolo, should be excluded from consideration. Such communication is privileged, the defense argued, and in the absence of an explicit exception in the ICC Statute or Rules of Procedure and Evidence, any implied “crime/fraud exception” should be construed narrowly (Judgment on Appeal of Verdict, para. 431). In interlocutory decisions during the trial, the Trial Chamber rejected the defense’s arguments and found no violation of Article 69(7) (Judgment on Appeal of Verdict, paras. 420–21). The Appeals Chamber found that the defense misconstrued the scope and extent of this privilege in the ICC legal framework. It observed that, pursuant to Rule 73(1) of the ICC’s Rules of Procedure and Evidence, privileged communications are only those that are “made in the context of the professional relationship between a person and his or her legal counsel” (Judgment on Appeal of Verdict, paras. 431–34). This would exclude communications made in the context of implementing criminal activity. In other words, it was not a matter of applying an exception to the privilege; the relevant conversations were simply not covered by Rule 73(1) in the first instance (Judgment on Appeal of Verdict, paras. 432, 434).

The defense also challenged the Trial Chamber’s overall approach to admission of evidence, which the Trial Chamber summarized as follows:

The participants were permitted to submit evidence (i) in writing through a “bar table” application; (ii) by email[;] or (iii) orally during the hearing. . . . [A]ny objections to the relevance or admissibility of evidence were then received upon submission. Significantly, and with only rare exceptions, no *prima facie* assessment of the standard evidentiary criteria (relevance, probative value, potential prejudice) was made at the point of submission. These considerations were instead deferred to when the Chamber deliberated its judgment.

However, when objections were raised relating to procedural bars which could foreclose the Chamber’s consideration of the standard evidentiary criteria, these were ruled upon at the point of submission. (Judgment, paras. 190–91)⁷

The Trial Chamber emphasized that it considered all corresponding objections to all “recognized” submitted evidence during its deliberations. However, it also acknowledged that not all evidentiary items were discussed in the Judgment, as this was not required by Article 74(5) of the ICC Statute (Judgment, para. 193). According to this provision, the judgment “shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.”

The Appeals Chamber concluded that it was within the Trial Chamber’s discretion to decide when to consider and decide on the admission of evidence (Judgment on Appeal of Verdict, para. 598). When a Trial Chamber considers the relevance and probative value of

⁷ The Trial Chamber referred in this respect to a decision, rendered before the start of trial, setting out the approach. Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf, Decision on Prosecution Requests for Admission of Documentary Evidence (Sept. 24, 2015).

particular items of evidence as part of a holistic assessment of all evidence at the time it is deciding on the guilt or innocence of the accused, no separate ruling on admissibility of all evidence is required (Judgment on Appeal of Verdict, paras. 598–600). Judge Henderson disagreed with the majority in this respect. He concluded that the Trial Chamber’s approach “essentially consists in leaving the parties entirely in the dark until the end of the trial and then . . . withhold[ing] any explanation as to why certain exhibits are relied upon and others not mentioned” (Separate Opinion of Judge Geoffrey Henderson, para. 50). In line with submissions by Bemba, Babala, and Arido, Judge Henderson found that the Trial Chamber’s decision not to give individual rulings on the admissibility of individual items of evidence was erroneous as a matter of law and prejudicial to the defendants.

As mentioned above, the Trial Chamber decided on sentencing in a separate decision several months after the rendering of the Judgment convicting the defendants. According to Article 70(3) of the ICC Statute, offenses against the administration of justice carry a sentence of imprisonment not exceeding five years or a fine, or both. The lengthier sentences in this case were reserved for the two members of the Bemba defense team in the Main Case: Kilolo was sentenced to imprisonment of two years and six months and a 30,000 EUR fine, and Mangenda was sentenced to two years imprisonment. Bemba was sentenced to one year of imprisonment, to be served after the service of his sentence in the Main Case, and a fine of 300,000 EUR. Arido was sentenced to eleven months’ imprisonment, and Babala was sentenced to six months’ imprisonment (Sentencing Decision, paras. 67, 97, 147, 195, 198, 250).

The Appeals Chamber found that the Trial Chamber committed a number of errors with respect to the sentences imposed on Bemba, Mangenda, and Kilolo. For example, it found that the Trial Chamber had erred when considering the gravity of the offense by giving some weight to the fact that the false testimony concerned “non-merit” issues in the case. For the Appeals Chamber, the fact that false testimony pertains to “merit” or “non-merit” issues of a case (for example, issues related to credibility of witnesses) was not in itself reflective of the gravity of the offense. The assessment of gravity should be made “*in concreto*” rather than based on an artificial hierarchy of gravity (Judgment on Appeal of Sentencing, paras. 43–45). The Appeals Chamber reversed the sentences and remanded the matter to the original Trial Chamber for reconsideration.

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As a preliminary matter, it bears noting that both the trial and appeals judgments in this case are extraordinarily lengthy; the trial Judgment is more than 450 pages, the appeals judgment about 700 pages, and the two decisions on sentencing are together approximately 250 pages. The case concerns no less than five accused and has its fair number of complex issues, but the length of the judgments seems to be primarily due to the style of legal drafting, with extensive and repetitive summaries of the parties’ arguments and, in the appeals judgment, of sections of the trial Judgment. The Chambers clearly allowed themselves to draft in a manner that would not have been possible in most ICC cases, where the amount of evidence is larger and the number and complexity of issues addressed is greater. In some instances, this style of legal drafting tends to obscure the Chambers’ legal reasoning and it generally makes the judgments less accessible to the parties and the public.

As mentioned above, one substantial issue extensively addressed by the Appeals Chamber is the applicability of Article 70(1)(b) of the ICC Statute solely to documentary evidence. Since

it led to reversals of several convictions, the Appeals Chamber's conclusion might appear dramatic. However, the actual impact of this restriction is limited. In the present case, the conduct of "the party" was covered by other provisions in Article 70(1). It is also worth noting that even with the restriction, the article encompasses witness testimony when presented in written form. As in the case of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and other international courts and tribunals, the ICC legal regime allows for the presentation of testimony in written form pursuant to Article 69(2) of the ICC Statute and Rule 68 of the ICC Rules of Procedure and Evidence.

The Appeals Chamber also draws certain conclusions about privileged communication and the scope of Rule 73(1) of the Rules of Procedure and Evidence. While the scope of privileged communication might be clear in principle, the challenges obviously arise in the application to a concrete conversation. The Appeals Chamber acknowledges this in its discussion on conversations of "mixed nature" (Judgment on Appeal of Verdict, para. 439). It states:

communications which are considered to have been made in the context of a suspected criminal scheme (rather than in the context of the professional relationship) do not gain privileged status simply because they also contain portions of which are unrelated to the criminal activity at issue.

This is easy to agree with. However, the important question is how to determine that the communication was made in this context in the first place. In this respect, the Appeals Chamber provides limited guidance. It is a delicate exercise and it is important that Trial and Appeals Chambers resist any temptation to categorize communications wholesale as falling outside the context of the professional relationship by the mere existence of non-professional elements in the communication. The safest approach ought to be the presumption that a conversation is privileged until it is shown to be otherwise.

The Trial Chamber followed an approach in admitting and considering evidence in this case that differs from that of other judicial institutions in international criminal law. The latter tribunals have generally adopted a two-step approach according to which an evidentiary item is first admitted (if relevant and of probative value) and then weighed against all the evidence in the case. While the rules and practice governing the admission of evidence might seem a mere technical matter, they are of enormous importance for the functioning of international criminal justice where the amount of evidentiary material raises serious challenges to proper case management, and by extension, to fair trial rights. While the Trial Chamber framed the issue as a question primarily about *when* admissibility decisions should be taken, the Appeals Chamber reasoned that the question was *if* such decisions needed to be taken at all. Judge Henderson raises many important and convincing points in his separate opinion. While the Trial Chamber's approach might cause little concern in a case in which the trial lasted only a few months and in which evidentiary material was limited, it might be entirely different when applied in a complex prosecution involving war crimes, crimes against humanity, or genocide before the ICC. In such cases, Judge Henderson's comments about the importance of transparency for the parties might be seen in a very different light.

Finally, a few words about sentencing. Considering the vast and systematic scope of the criminal enterprise carried out by the conspirators, the leniency of the sentences appears remarkable. The Trial Chamber found (upheld by the Appeals Chamber) that an accused and members of his defense team engaged in an operation to falsify vast amounts of evidence

over an extended period of time with the purpose of misleading a Trial Chamber. If this does not warrant the highest sentences provided for in Article 70(3) of the ICC Statute, it is difficult to imagine what would.

Notwithstanding the sentencing issue, the judgments against Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido constitute a clear signal by the ICC about the intolerability of witness interference. They provide for a thorough review of the evidence in the case and a careful analysis of a large number of related procedural and evidentiary issues. In this manner, the ICC deals forcefully with an extreme form of violations against the administration of justice.

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Inter-American Court of Human Rights—principle of individual autonomy—right to identity—rectification of gender identity information—protection of different models of the family—evolutionary interpretation—protection of same-sex couples including same-sex marriage

GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME SEX COUPLES. STATE OBLIGATIONS CONCERNING CHANGE OF NAME, GENDER IDENTITY, AND RIGHTS DERIVED FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES (INTERPRETATION AND SCOPE OF ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18, AND 24, IN RELATION TO ARTICLE 1, OF THE AMERICAN CONVENTION ON HUMAN RIGHTS). Advisory Opinion OC-24/17. Series A, No. 24. At http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf. Inter-American Court of Human Rights, November 24, 2017.

In its advisory opinion, OC-24/17 (Advisory Opinion), the Inter-American Court of Human Rights (IACtHR or Court) addressed globally debated issues concerning gender identity, same-sex relationships, and the rights of LGBTI persons. As discussed below, the Court reached conclusions more progressive than those of its European counterpart, due to its finding that the principle of individual autonomy is embedded in the foundations of human rights law and permeates individual self-determination, the free development of one's personality, and the protection of different models of the family. In line with an apparent trend in the Court's case law, the Advisory Opinion rejects the idea that domestic societies are sometimes entitled, by virtue of a margin of appreciation, to choose among different possibilities for protecting human rights, provided that certain international legal limits are observed—an idea addressed in the dissenting opinion.

Costa Rica requested the Advisory Opinion in May 2016.¹ After informing members of the Organization of American States (OAS) and OAS bodies that they could present observations in response to the request, the Court invited civil society, international organizations,

¹ After publication of the Advisory Opinion, Costa Rican president Luis Guillermo Solís welcomed the decision, stressing his championing of rights for same-sex couples during his election campaign. Costa Rican Government Press Release, *Somos un Estado Respetuoso del Derecho Internacional* (Jan. 10, 2018).