

**International tribunals — Evidence and procedure — Errors of law and fact — Whether conviction exceeding scope of charges against appellant — Whether criminal acts not established beyond reasonable doubt to form part of facts and circumstances described in charges — Whether Appeals Chamber required to defer to Trial Chamber's factual findings — Whether appellant to be acquitted of crimes against humanity and war crimes**

**International criminal law — International Criminal Court — Rome Statute of the International Criminal Court, 1998, Article 28(a) — War crimes and crimes against humanity — Command responsibility — Requirements — Whether entailing strict liability of commander for crimes committed by subordinates — Effective control over military troops — Whether appellant having taken all necessary and reasonable measures to prevent commission of crimes by his troops — Whether appellant to be acquitted of crimes against humanity and war crimes**

**War and armed conflict — War crimes — Crimes against humanity — Murder, rape and pillage — Whether contextual elements of crimes against humanity established — Command responsibility — Concept of military necessity — Reasonableness — Whether acquittal of appellant appropriate**

**Damages — Reparations — Article 75 of Rome Statute of International Criminal Court, 1998 — Whether reparations order could be made against appellant following acquittal on appeal — Whether final decision on reparations within power of Trial Chamber — Whether appropriate for Chamber to make concrete findings on extent and scope of victimization — Whether appropriate to issue principles on reparations**

**Damages — Right to compensation for acquitted defendant — Article 85 of Rome Statute of International Criminal Court, 1998 — Whether grave and manifest miscarriage of justice — Whether award of compensation under Article 85(3) of Rome Statute appropriate — Whether acquitted person having right to be compensated — Whether grounds for exercise of discretion to make award of compensation — Damage to assets and property of acquitted person allegedly resulting from their mismanagement — Whether within scope of Article 85 of Rome Statute**

**Treaties — Interpretation — Application — Article 85 of Rome Statute of International Criminal Court, 1998 — Whether acquitted person having right to be compensated — Whether grave and manifest miscarriage of justice — Article 85(3) — *Travaux préparatoires* — Right to compensation — International human rights treaties — International Covenant on Civil and Political Rights, 1966 — Whether right to compensation for acquitted person having emerged as general principle of international human rights law — Treaties — Customary international law — Jurisprudence of regional and international human rights bodies — Practice of international ad hoc criminal tribunals — Relevant national legal systems**

**Human rights — Right to a fair trial — Duration of criminal proceedings — Reasonableness — Jurisprudence of European Court of Human Rights — Assessing reasonableness of length of proceedings in light of circumstances and certain criteria — Approach enshrined in Article 85(3) of Rome Statute of International Criminal Court, 1998 — Absence of statutory limits on duration of proceedings and of custodial detention — Whether case for review of Rome Statute — Whether length of proceedings excessive in this case**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

PROSECUTOR *v.* BEMBA

(“BEMBA CASE”)

(Case No ICC-01/05-01/08)

*International Criminal Court*

JUDGMENT ON THE APPEAL OF MR JEAN-PIERRE BEMBA  
 GOMBO AGAINST TRIAL CHAMBER III’S “JUDGMENT  
 PURSUANT TO ARTICLE 74 OF THE STATUTE”<sup>1</sup>

*Appeals Chamber.* 8 June 2018

<sup>1</sup> The Office of the Prosecutor was represented by Ms Fatou Bensouda and Ms Helen Brady. The appellant was represented by Mr Peter Haynes and Ms Kate Gibson. The Legal Representatives of Victims were represented by Ms Marie-Edith Douzima-Lawson.

PROSECUTOR *v.* BEMBA  
 199 ILR 1

3

(Van den Wyngaert, *Presiding Judge*; Eboe-Osuji, Monageng,  
 Morrison and Hofmański, *Judges*)

FINAL DECISION ON THE REPARATIONS PROCEEDINGS<sup>2</sup>

*Trial Chamber III. 3 August 2018*

(Henderson, *Presiding Judge*; Chung and Prost, *Judges*)

DECISION ON MR BEMBA'S CLAIM FOR COMPENSATION  
 AND DAMAGES<sup>3</sup>

*Pre-Trial Chamber II. 18 May 2020*

(Mindua, *Presiding Judge*; Akane and Aitala, *Judges*)

SUMMARY:<sup>4</sup> *The facts:*—On 21 March 2016, the appellant, Mr Bemba, a Congolese national who had been arrested in Belgium, was convicted by Trial Chamber III (“the Trial Chamber”), as a person effectively acting as a military commander, of the crimes against humanity of murder and rape and of the war crimes of murder, rape and pillage in the Central African Republic (“CAR”), pursuant to Article 28(a)<sup>5</sup> of the Rome Statute of the International Criminal Court, 1998 (“the Rome Statute”).<sup>6</sup> These crimes were committed from 2002 to 2003 during operations carried out by troops of the *Mouvement de libération du Congo* (“MLC”), a political party founded

<sup>2</sup> The Office of the Prosecutor was represented by Ms Fatou Bensouda, Mr James Stewart and Mr Jean-Jacques Badibanga. The appellant was represented by Mr Peter Haynes QC and Ms Kate Gibson. The Legal Representatives of Victims were represented by Ms Marie-Edith Douzima-Lawson.

<sup>3</sup> The Office of the Prosecutor was represented by Ms Fatou Bensouda, Mr James Stewart and Ms Helen Brady. Mr Bemba was represented by Mr Peter Haynes QC and Ms Kate Gibson.

<sup>4</sup> Prepared by Dr S. Margariti and Ms Karen Lee, Co-Editor.

<sup>5</sup> Article 28(a) of the Rome Statute provided that: “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

<sup>6</sup> Unanimous judgment of 21 March 2016 of Trial Chamber III in *Prosecutor v. Bemba (Situation in the Central African Republic)*, Judgment pursuant to Article 74 of the Statute (Case No ICC-01/05-01/08).

by the appellant and of which he was the president, whose purpose was to support the then President of the CAR, Mr Patassé, with respect to a rebellion carried out by General Bozizé.

The appellant's notice of appeal against the unanimous decision of the Trial Chamber, entitled "Judgment pursuant to Article 74 of the Statute" ("the Conviction decision"), was filed on 4 April 2016. The Prosecutor and the Legal Representatives of Victims ("LRV") were invited to file their responses and observations and all parties were also invited to file their submissions on the contextual elements of crimes against humanity. The appellant raised six grounds of appeal:

- (1) that there had been a mistrial;
- (2) that the conviction had exceeded the charges against him ("the second ground of appeal");
- (3) that he was not liable as a superior for crimes committed by others ("the third ground of appeal");
- (4) that the contextual elements of crimes against humanity were not established;
- (5) that the Trial Chamber had erred in its approach to identification evidence; and
- (6) that other procedural errors invalidated the conviction.

With respect to the third ground of appeal, the appellant submitted that the Trial Chamber had erred in:

- (a) finding that he had had effective control over the MLC troops;
- (b) dismissing or ignoring relevant evidence;
- (c) finding that he had actual knowledge of the MLC crimes;
- (d) finding that he had not taken all necessary and reasonable measures ("the fourth part"); and
- (e) finding that the causation requirement was established.

With respect to the fourth part of the third ground of appeal, the appellant submitted that the Trial Chamber:

- (i) had failed to apply to his conduct the correct legal standard which would consist of whether all the necessary and reasonable measures were within his material ability to take;
- (ii) had not taken into account the limitations in his ability to conduct investigations in the CAR;
- (iii) had ignored directly relevant evidence showing that he had notified the Prime Minister of the CAR of the allegations of crimes committed by MLC troops;
- (iv) had taken into account irrelevant considerations, such as that his motives for the measures he ultimately took were ulterior, not genuine, and related to his desire to counter public allegations; and

- (v) had failed to make reasonable findings on the adequacy of the measures he had taken, had misstated the evidence or had taken into account irrelevant evidence.

On 21 June 2016, the Trial Chamber sentenced the appellant to eighteen years' imprisonment for his crimes.<sup>7</sup> The Prosecutor and the appellant appealed against the decision on sentence.

*Judgment of the Appeals Chamber of 8 June 2018 (Judgment on the Appeal of Mr Bemba Against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute")*

*Held* (by a majority, Judges Monageng and Hofmański dissenting):—The Conviction decision was reversed. The proceedings relating to the criminal acts under paragraph 116 of the present Judgment (“the Majority decision”) were to be terminated. The appellant was acquitted of all the remaining charges and his detention was to be discontinued. The Defence’s application to submit additional evidence on appeal and the Prosecution’s request to file additional authorities were both rejected.

(1) The second ground of appeal and the fourth part of the third ground, namely that the Trial Chamber had erred in finding that the appellant had not taken all the necessary measures to prevent or repress the commission of crimes by the MLC troops, were determinative of the outcome of the appeal. The remaining grounds were not addressed in the Majority decision (para. 32).

(2) The following standard of review was to be applied for legal, factual and procedural errors, or for other grounds that might have affected the fairness or reliability of the decision:

(a) regarding errors of law, the Appeals Chamber could only intervene in the Trial Chamber’s legal findings if the Trial Chamber had made an error of law which would have materially affected its decision (paras. 35-7);

(b) regarding factual errors, the Appeals Chamber could only overturn the Trial Chamber’s factual findings if they were not clear and unassailable in terms of the available evidence and rationale and, as such, could reasonably be called into doubt (paras. 38-46);

(c) regarding procedural errors related to the Trial Chamber’s exercise of discretion, the Appeals Chamber had to be satisfied that there was an improper exercise of discretion, such as a lack of, or insufficient, reasoning, which had materially affected its decision (paras. 47-56);

(d) regarding any other grounds alleging unfairness, the Appeals Chamber had to be satisfied that the appellant had set out how this unfairness affected the reliability of the decision. However, the appellant was not under an

<sup>7</sup> *Prosecutor v. Bemba*, Decision on Sentence pursuant to Article 76 of the Statute (Case No ICC-01/05-01/08-3399).

obligation to prove that the Trial Chamber had made a factual error; it sufficed for him to identify sources of doubt about the accuracy of the Trial Chamber's findings and thus to oblige the Appeals Chamber to conduct an independent review of the Trial Chamber's reasoning (paras. 57-66).

(3) With respect to the second ground of appeal, the Trial Chamber had erred in convicting the appellant for acts not falling within the "facts and circumstances described in the charges".<sup>8</sup> The appellant's central argument in this respect was that he was partly convicted for crimes that had not been confirmed in the Pre-Trial Chamber's Decision pursuant to Article 61(7)(a) and (b) of the Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo<sup>9</sup> ("the Confirmation decision"), whereas the scope of his trial should have been limited to criminal acts confirmed therein. For this reason, the Appeals Chamber had first to determine the scope of the Conviction decision and, secondly, to examine whether the Conviction decision had exceeded the scope of the charges confirmed in the Confirmation decision (paras. 99-100).

(4) The disposition of the Conviction decision, which clarified the crimes of which the appellant was convicted, was formulated in the most general terms and had to be understood in the context of the other findings made therein. Even so, these findings only described in broad terms the temporal and geographical parameters of the crimes as well as the affiliation of the direct perpetrators; important information was still missing. Thus, the appellant should have been convicted only of the specific criminal acts (of murder, rape and pillage) that the Trial Chamber found to be established beyond reasonable doubt and that were reiterated in the concluding sections of the Conviction decision. The broad disposition and conclusions relating to the crimes against humanity and war crimes of murder, rape and pillage constituted only summaries of the Trial Chamber's findings about the specific criminal acts that had been established beyond reasonable doubt and of which the appellant was convicted. The Prosecutor's submission that the appellant was charged with, and convicted of, murder, rape and pillaging committed by the MLC troops in general, and that the specific instances of those crimes were the facts and circumstances of the present case, was rejected (paras. 101-4).

(5) Pursuant to Article 74(2) of the Rome Statute, to determine whether the appellant's conviction exceeded the scope of the charges against him, "the facts and circumstances described in the charges" should be determined as well as whether these corresponded to, or encompassed, the criminal acts of which the appellant was convicted. The Confirmation decision and the Conviction decision were both too broad in that they referred to categories of crimes, without any further qualification. Similarly, the pre-confirmation Amended

<sup>8</sup> For the relevant part of Article 74(2) of the Rome Statute, see para. 105 of the Majority decision.

<sup>9</sup> *Prosecutor v. Bemba*, Decision pursuant to Article 61(7)(a) and (b) of the Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (Case No ICC-01/05-01/08), 15 June 2009.

Document Containing the Charges,<sup>10</sup> while providing some more detail, still contained too broad a description of the charges and did not allow for a meaningful application of Article 74(2). However, both the Confirmation decision and the Amended Document Containing the Charges provided more specific factual allegations as to the crimes for which the appellant was to be tried at the level of individual criminal acts and which were within the scope of this case. Criminal acts that were mentioned in the Amended Document Containing the Charges but which were not relied upon for the confirmation of charges by the Pre-Trial Chamber still formed part of “the facts and circumstances described in the charges” and were within the scope of this trial. Any criminal acts added after the Confirmation decision had been issued did not form part of “the facts and circumstances described in the charges”, to the extent that the charges were not amended accordingly, and therefore, the appellant could not be convicted of them (paras. 105-15).

(6) The second ground of appeal was upheld. The Trial Chamber had erred in convicting the appellant of criminal acts that did not fall within “the facts and circumstances described in the charges”, in accordance with Article 74(2) of the Rome Statute. However, these criminal acts could be taken into account with respect to the contextual element of crimes against humanity. The only criminal acts that the Trial Chamber found to be established beyond reasonable doubt that were within the scope of the charges were one murder, the rape of twenty persons and five acts of pillaging (paras. 116-19).

(7) With respect to the fourth part of the third ground of appeal, the Trial Chamber had erred in finding that the appellant had failed to take all the necessary and reasonable measures to prevent the commission of crimes. The finding was unreasonable because it was tainted by serious errors.

(a) An assessment of whether all the necessary and reasonable measures were taken by a commander for the prevention of crimes required taking into account what measures were at his disposal in the circumstances at the relevant time, as well as what measures could reasonably be taken under the circumstances, considering the operational realities on the ground. In the present circumstances, the Trial Chamber had failed to consider that the appellant was acting as a remote commander to the MLC troops operating in a foreign country and had not referred expressly to testimony which demonstrated evidence of the appellant’s limited power to investigate crimes committed in the CAR (paras. 166-73).

(b) In view of the appellant’s claim that he had written to the Prime Minister of the CAR requesting the establishment of an international commission of inquiry and the Trial Chamber’s contrary finding that he had made no effort to refer the matter to the CAR authorities, the Trial Chamber should have given clear reasons why it had disregarded the appellant’s claim (paras. 174-5).

<sup>10</sup> *Prosecutor v. Bemba*, Annex 3 to “Prosecution’s Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence” (Case No ICC-01/05-01/08-395-Anx3), 31 March 2009.



(c) The extent to which the appellant was driven by motivations related to the countering of public allegations or the preservation of the reputation of his troops was not determinative of the overall assessment of the necessity and reasonableness of the measures taken (paras. 176-9).

(d) Finally, the Trial Chamber had erred in: (i) attributing to the appellant any limitations in the mandate, execution and results of the measures he took as well as the lack of empowerment of other MLC officials to undertake investigations of crimes; (ii) not providing an approximate number of the committed crimes and not assessing the impact of such a number on the determination of the necessity and reasonableness of the measures taken; and (iii) invoking the redeployment of MLC troops as a measure available to the appellant when the appellant was not sufficiently notified of this factual allegation as a necessary and reasonable measure (paras. 180-9).

(8) The Trial Chamber's conclusion that the appellant had not taken all necessary and reasonable measures for the prevention and repression of crimes and had failed to submit the matter to the competent authorities for investigation and prosecution was materially affected by the errors identified above. One of the elements of command responsibility, as formulated in Article 28(a) of the Rome Statute, was not established. Accordingly, the appellant could not be held accountable under this provision for the crimes committed by the MLC troops during the 2002-3 operations. In relation to the crimes of which the appellant was convicted, namely one murder, the rape of twenty persons and five acts of pillaging, his conviction was reversed as the error of the Trial Chamber on the necessary and reasonable measures extinguished in full his criminal liability for these crimes. While the continued detention of the appellant seemed unnecessary on the basis of the present case, it rested with Trial Chamber VII to decide whether his detention should continue in light of a different case pending before it (paras. 194-200).

*Dissenting Opinion of Judges Monageng and Hofmański:* (1) The Conviction decision should have been upheld. The standard of review applied by the Appeals Chamber with respect to factual findings was incorrect. The second ground of appeal and the fourth part of the third ground should have been rejected. The remaining grounds of appeal, which were not discussed in the Majority decision, even when examined under the standard of review applied for alleged factual errors in the present case, did not warrant the reversal of the Conviction decision (para. 1).

(2) The standard of review applied by the Majority was inconsistent with the relevant jurisprudence of international courts and tribunals on the standard of appellate review for factual errors. The Majority had departed from the established standard by: (i) not giving the required margin of deference to the factual findings of the Trial Chamber, which was better placed than the Appeals Chamber to assess the reliability of the totality of the evidence laid before it; (ii) interfering with the Trial Chamber's findings on the ground that



non-interference would lead to a miscarriage of justice; (iii) introducing “serious doubts” about the accuracy of a given finding as a basis upon which the Appeals Chamber could be satisfied that the Trial Chamber had not respected the standard of proof; (iv) according itself the duty to overturn any Trial Chamber findings that “could reasonably be called into doubt”, contrary to Article 83(2) of the Rome Statute, which required that an error must have materially affected the decision; (v) not requiring the appellant to substantiate the errors he alleged on appeal and how these errors had affected the Conviction decision, thus conflating the notion of burden of proof before a Trial Chamber which weighed upon the Prosecutor and the notion of substantiation of arguments on appeal which weighed upon the appellant; and (vi) considering only individual items of evidence to determine whether a finding could be reached beyond reasonable doubt and thus resulting in impressionistic conclusions and in forming an insufficient basis upon which the Trial Chamber’s findings were overturned (paras. 2-18).

(3) Regarding the second ground of appeal, the appellant had failed to show that the Trial Chamber had committed a legal error by issuing a conviction that exceeded the facts and circumstances described in the charges. For the purpose of Article 74(2) of the Rome Statute, their description in the Conviction decision was adequate, as the temporal and geographical scope of the charges was further specified by the description of the localities through which the MLC troops advanced and from which they withdrew. The Prosecutor had the discretion to formulate the charges at a broader level; in the present case, she based the description of the charges on geographical, temporal and other factual parameters, such as the commission of mass crimes by the MLC troops, the remote position of the appellant during their commission and the mode of liability he was charged with as a military commander (paras. 39-40).

(4) Regarding the fourth part of the third ground of appeal, the Majority failed to show how the Trial Chamber’s findings were erroneous or unreasonable with respect to the appellant’s failure to take all the necessary and reasonable measures to prevent the commission of crimes. In considering that it was not required to review all the evidence comprehensively but simply overturn the factual findings of the Trial Chamber in case of doubt, the Majority failed to determine whether a reasonable trier of fact could have reached the same conclusions, based on the evidence presented before the Trial Chamber. In considering the appellant’s limited ability to take measures, the Majority’s approach was flawed as the appellant had failed to show that the Trial Chamber misappreciated any limitations in its disciplinary authority or ability to investigate. In considering that the Trial Chamber did not take into account relevant evidence showing that a letter was sent to the CAR Prime Minister requesting the establishment of an international commission of inquiry, the Majority failed to carry out its own assessment of whether the letter was actually sent. In concluding that the Trial Chamber coloured its entire assessment of the adequacy of the measures taken by the appellant’s

motivations, the Majority relied on its subjective view without being based on any reasoning found in the Conviction decision. In failing to hold a military commander responsible not only for his actions but also for his failures, the Majority was basing itself on an erroneous interpretation of the Conviction decision. In concluding that the Trial Chamber failed to indicate an approximate number of crimes committed, the Majority raised but left unanswered the question of the extent of the criminal activity, which would be determinative of the sufficiency of the measures taken by the appellant. Finally, the Majority misapplied the standard of review by assessing the case through the lens of the appellant's arguments without considering other factual findings that informed the Trial Chamber's conclusions or the evidence on which they were based (paras. 50-110).

(5) Examination of the remaining parts of the third ground of appeal, which were not addressed in the Majority decision, showed that: (i) it was not unreasonable for the Trial Chamber to conclude that the appellant had had effective control over the MLC troops in the CAR; (ii) the appellant had not demonstrated that the Trial Chamber had overlooked relevant evidence or that it had been unreasonable to reach the conclusions it did based on the totality of the evidence before it; (iii) it was not unreasonable for the Trial Chamber to conclude that the appellant had knowledge of the crimes committed or about to be committed by the MLC troops; and (iv) the element of causation between the crimes committed and the measures that the appellant could have taken was closely linked to the Trial Chamber's assessment of the adequacy of the measures he had ultimately taken and thus, no error was committed in the interpretation of Article 28(a). For these reasons, the totality of the appellant's arguments under the third ground of appeal was rejected (paras. 111-379).

(6) The remaining grounds of appeal did not warrant a reversal of the Conviction decision either. Regarding the first ground, namely that the appellant's right to a fair trial was violated due to procedural errors relating to the investigation into offences against the administration of justice, irregularities were indeed found but without rendering the totality of the proceedings unfair. Under the fourth ground, namely that the Trial Chamber failed to establish the contextual elements of crimes against humanity, the appellant failed to show: (i) any legal error in the Trial Chamber's finding that he knew that the MLC conduct was part of a widespread attack against the civilian population; (ii) any legal or factual error in the Trial Chamber's finding that there was an organizational policy to commit an attack against the civilian population; and (iii) any legal or factual error in the Trial Chamber's consideration of the war crime of pillage. Under the fifth ground, namely that the Trial Chamber misappreciated identification evidence, the appellant failed to show any error in the Trial Chamber's reasoning regarding the MLC affiliation of the perpetrators of rape, murder and pillage. Finally, under the sixth ground, namely that other alleged procedural errors invalidated the Conviction decision, the appellant failed to show that the Trial Chamber erred in its