

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 Christine Van den Wyngaert, Judge Sanji Mmasenono Monageng,
6 Judge Howard Morrison, Judge Chile Eboe-Osuji, and Judge Piotr Hofmański
7 Appeals Judgment
8 Friday, 8 June 2018
9 (The hearing starts in open session at 4.01 p.m.)
10 THE COURT USHER: [16:02:00] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE VAN DEN WYNGAERT: [16:02:30] Good afternoon.
14 Will the court officer please call the case.
15 THE COURT OFFICER: [16:02:58] Thank you. Good afternoon, your Honours.
16 Situation in the Central African Republic in the case of The Prosecutor versus
17 Jean-Pierre Bemba Gombo, case number ICC-01/05-01/08.
18 For the record, your Honour, we are in open session.
19 PRESIDING JUDGE VAN DEN WYNGAERT: [16:03:17] Thank you.
20 My name is Christine Van den Wyngaert. I am the Presiding Judge in the appeals
21 arising from the case of The Prosecutor versus Jean-Pierre Bemba Gombo.
22 My fellow Judges in this appeal are Judge Chile Eboe-Osuji, Judge Morrison,
23 Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański.
24 May I ask the parties and participants to introduce themselves for the record starting
25 with the Defence.

1 MR HAYNES: [16:03:52] Good afternoon, your Honour. Counsel for Mr Bemba
2 today are myself, Peter Haynes, Kate Gibson and Mike Newton. We're assisted by
3 our case manager, Cécile Lecolle.

4 PRESIDING JUDGE VAN DEN WYNGAERT: [16:04:08] Thank you.
5 The Prosecution.

6 MR STEWART: [16:04:10] Good afternoon, Madam President, your Honours. My
7 name is James Stewart. I'm the Deputy Prosecutor appearing for the Prosecution this
8 afternoon. And I have the honour to appear with Fabricio Guariglia, director of the
9 Prosecution division, and Reinhold Gallmetzer, Meritxell Regue, Matteo Costi,
10 Matthew Cross and Priya Narayanan, counsel on appeals.

11 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you.
12 The Legal Representative of the Victims, please.

13 MS DOUZIMA LAWSON: [16:04:45] (Interpretation) Good afternoon, your
14 Honour. Good afternoon, your Honours. My name is Marie-Edith Douzima, Legal
15 Representative of Victims in this case. I am assisted today by Evelyne Ombeni, our
16 legal assistant in The Hague, Prisque Dipanga and Lydia El Halw, who are case
17 managers. Thank you.

18 PRESIDING JUDGE VAN DEN WYNGAERT: [16:05:09] (Interpretation) Thank
19 you very much, madam.

20 (Speaks English) The Appeals Chamber today is delivering today its judgment in
21 relation to the appeal of Mr Jean-Pierre Bemba Gombo against the decision of
22 Trial Chamber III of 21 March 2016. This decision convicted him of war crimes and
23 crimes against humanity. Our judgment of today is also in relation to the appeals of
24 Mr Bemba and the Prosecutor against the Sentencing Decision of Trial Chamber III of
25 21 June 2016. This Sentencing Decision sentenced him to a joint sentence of 18 years'

1 imprisonment.

2 I will hereafter refer to these decisions as the Conviction Decision and the Sentencing
3 Decision.

4 I shall first address the appeal against the Conviction Decision, starting with the
5 procedural background.

6 On 21 March 2016, the Trial Chamber convicted Mr Bemba for the crimes against
7 humanity of murder and rape and for the war crimes of murder, rape and pillaging
8 committed by troops of the Mouvement de libération du Congo, the MLC, in the
9 Central African Republic from on or about 26 October 2002 to 15 March 2003. The
10 Trial Chamber found that Mr Bemba, as a person effectively acting as a military
11 commander and with effective control over the MLC troops, was criminally
12 responsible for these crimes pursuant to Article 28(a) of the Statute.

13 Mr Bemba filed an appeal against the Conviction Decision on 4 April 2016, and filed
14 his appeal brief on 19 September 2016. Mr Bemba raises the following grounds of
15 appeal: Ground 1 - the trial was unfair; Ground 2 - the conviction exceeded the
16 charges; Ground 3 - Mr Bemba is not liable as a superior; Ground 4 - the contextual
17 elements were not established; Ground 5 - the Trial Chamber erred in its approach to
18 identification evidence; and Ground 6 - other procedural errors invalidated the
19 conviction.

20 The Prosecutor filed her response to the appeal brief on 21 November 2016 and the
21 victims filed their observations on the appeal brief on 17 January 2017. Mr Bemba
22 filed his reply to the response to the appeal brief on 23 January 2017 and his reply to
23 the victims' observations on 9 February 2017.

24 On 30 October 2017, the Appeals Chamber ordered the parties and participants to
25 make submissions on the contextual elements of crimes against humanity. These

1 were duly received between 13 November and 11 December 2017.

2 From 9 to 11 January 2018, the Appeals Chamber held a hearing. During this
3 hearing the parties and participants made submissions and observations on the
4 appeals concerning a number of specific questions that the Appeals Chamber had
5 identified in its order of 27 November 2017. The parties and participants were
6 thereafter invited to make further written submissions on the appeals by 19
7 January 2018.

8 I will now give you an overview of the Appeals Chamber's decision.

9 The judgment in the appeal concerning the Conviction Decision is issued by majority.

10 Judge Eboe-Osuji, Judge Morrison and myself form the majority. The majority has
11 limited its assessment to ground 2 and a part of ground 3, as it is of the opinion that
12 these issues are determinative of the appeal, and although we are not together on
13 everything, we agree on the outcome.

14 In addition, Judge Eboe-Osuji, Judge Morrison and I will issue separate opinions on
15 other aspects of the appeal.

16 Judge Monageng and Judge Hofmański disagree with the reasoning of the majority
17 and the outcome of the appeal and they issue a joint dissenting opinion.

18 At this juncture, I would like to highlight that, while the Appeals Chamber has sought
19 to reach a unanimous decision, it has not been able to do so. Judgments taken by
20 majority are a common feature in many domestic and indeed international
21 jurisdictions where judges from different legal traditions come together to decide on
22 often new and complex legal and factual issues.

23 I will now address the standard of review.

24 Looking at the Trial Chamber's factual findings, the majority assessed whether or not
25 the Trial Chamber applied the standard of proof correctly. The Appeals Chamber

1 must be satisfied that the factual findings that are made beyond reasonable doubt are
2 clear and unassailable, both in terms of evidence and rationale. Accordingly, when
3 the Appeals Chamber is able to identify findings that can reasonably be called into
4 doubt, it must overturn them. Furthermore, the Trial Chamber must accompany its
5 finding with reasoning of sufficient clarity. This reasoning must unambiguously
6 demonstrate the evidentiary basis upon which the finding is based as well as the
7 Trial Chamber's analysis of this evidence. If the Trial Chamber fails to do so, the
8 Appeals Chamber has no choice but to set aside the affected finding. It is also
9 important that the duty of a convicted person to substantiate errors in the Conviction
10 Decision should not lead to a reversal of the burden of proof.

11 I shall now briefly summarise the views of the majority on ground 2 and the part of
12 ground 3 that we consider to be determinative of the appeal. I shall then summarise
13 the views of the minority Judges on these grounds. Please note that the judgment
14 and the attached opinions, and not the present summary, are authoritative.

15 I will now address the second ground of appeal.

16 Mr Bemba's second ground of appeal relates to the scope of the charges against him.

17 During the confirmation process in the Document Containing the Charges, the

18 Prosecutor listed a number of alleged criminal acts of murder, rape and pillaging.

19 However, through the use of expressions such as "include" or "include but are not

20 limited to," the Prosecutor indicated that this list was not exhaustive. The Pre-Trial

21 Chamber then confirmed the charges in broad terms. Subsequently, the Prosecutor

22 provided information on individual criminal acts which had not been expressly

23 mentioned in the Document Containing the Charges and the confirmation decision.

24 The Trial Chamber convicted Mr Bemba with respect to a number of such acts.

25 On appeal, Mr Bemba alleges that, quote, "nearly two thirds of the underlying acts for

1 which he was convicted were not included or improperly included in the Amended
2 Document Containing the Charges and fall outside the scope of the charges" end
3 quote. He asserts that the Trial Chamber erred in law by relying on these acts for the
4 conviction.

5 The Appeals Chamber notes that the Conviction Decision makes no reference to even
6 an approximate number of the individual criminal acts of murder, rape and pillage
7 that the Trial Chamber found established. Nor does it make any further
8 demarcation of the scope of the conviction. The conviction would therefore appear
9 to cover, potentially, all such crimes committed by MLC soldiers in a territory of more
10 than 600,000 square kilometres and over a period of more than four and a half
11 months.

12 The majority of the Appeals Chamber considers that the Conviction Decision must be
13 understood as convicting Mr Bemba for the specific criminal acts of murder, rape and
14 pillage that the Trial Chamber found to be established beyond a reasonable doubt and
15 which were recalled in the concluding sections of the Conviction Decision in relation
16 to each crime. The broad disposition in the Conviction Decision and the only
17 slightly less broad conclusions of the Trial Chamber in relation to the crimes charged
18 do not in reality reflect what Mr Bemba was convicted for. Rather, they are
19 summaries of the Trial Chamber's findings in relation to the criminal acts of murder,
20 rape and pillage that had been established beyond reasonable doubt. The conviction
21 of Mr Bemba, however, was entered in relation to these specific criminal acts only.

22 I will now turn to the scope of the charges.

23 Having determined the scope of the conviction, I will now address the scope
24 of the charges. The Appeals Chamber, by majority, Judge Monageng and
25 Judge Hofmański dissenting, considers that both the formulation in the operative part

1 of the confirmation decision as well as in the relevant parts of the Document

2 Containing the Charges are too broad to amount to a meaningful description of the

3 charges in terms of Article 74(2) of the Statute. Simply listing the categories of

4 crimes with which a person is to be charged or stating, in broad general terms, the

5 temporal and geographical parameters is not sufficient to comply with the

6 requirements of Regulation 52(b) of the Regulations of the Court and does not allow

7 for a meaningful application of Article 74(2) of the Statute.

8 However, the Appeals Chamber notes that both the Amended Document Containing

9 the Charges and the confirmation decision contained more specific factual allegations

10 as to the crimes for which Mr Bemba was to be tried, namely, in the form of the

11 identified criminal acts. These were prominently mentioned in the operative part of

12 the Amended Document Containing the Charges. They were also taken up as part

13 of the evidential analysis in the confirmation decision. Thus, the "facts and

14 circumstances" were described, in relation to the crimes, at the level of individual

15 criminal acts.

16 The Appeals Chamber considered, by majority, Judge Monageng and

17 Judge Hofmański dissenting, that the criminal acts that the Prosecutor added after the

18 confirmation decision, by means of disclosure and inclusion in auxiliary documents,

19 cannot be said to have been part of the "facts and circumstances described in the

20 charges" in terms of Article 74(2) of the Statute. This is because, as set out, the

21 Prosecutor had formulated the charges at a level of detail sufficient for the purposes

22 of that provision only in respect of the criminal acts. For that reason, adding any

23 additional criminal acts of murder, rape and pillage would have required an

24 amendment to the charges, according to Article 61(9) of the Statute. This, however,

25 did not occur in the case at hand. The Appeals Chamber finds, by majority, that the

1 criminal acts that were added after the confirmation decision had been issued and
2 that were not listed in the Amended Document Containing the Charges did not form
3 part of the "facts and circumstances described in the charges" and Mr Bemba could
4 therefore not be convicted for them. The same applies to the criminal acts put
5 forward by the victims.

6 The Appeals Chamber therefore grants this ground of appeal and finds, by majority,
7 Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber erred
8 when it convicted Mr Bemba of such acts, which did not fall within the "facts and
9 circumstances described in the charges" in terms of Article 74(2) of the Statute. This
10 means that the number of criminal acts of which Mr Bemba was convicted
11 was 1 murder, rapes of 20 persons and 5 acts of pillaging.

12 I am now turning to the third ground of appeal.

13 Under the third ground of appeal, Mr Bemba argues that the Trial Chamber erred in
14 finding that he failed to take all measures that were necessary and reasonable to
15 prevent or repress the crimes committed by MLC forces, or to submit the matter to the
16 competent authorities. On this point, Mr Bemba makes five submissions: One, the
17 Trial Chamber failed to apply the correct legal standard; two, it misappreciated the
18 limitations of the MLC's jurisdiction and competence to investigate; three, it ignored
19 that Mr Bemba had asked the CAR prime minister to investigate the allegations; four,
20 it erred by taking into account irrelevant considerations; and five, its findings on the
21 measures taken were unreasonable, misstated the evidence and ignored relevant
22 evidence.

23 The Appeals Chamber, by majority, Judge Monageng and Judge Hofmański
24 dissenting, have identified serious errors in the Trial Chamber's assessment of
25 whether Mr Bemba took all necessary and reasonable measures to prevent, repress or

1 punish the commission of crimes by his subordinates.

2 First, the Appeals Chamber finds that the Trial Chamber erred by failing to properly
3 appreciate the limitations that Mr Bemba faced in investigating and prosecuting
4 crimes as a remote commander sending troops to a foreign country. Whilst the
5 Trial Chamber had some regard to such difficulties, it ignored significant testimonial
6 evidence indicating that Mr Bemba's power to investigate crimes committed in the
7 CAR was limited and that he faced logistical difficulties in conducting investigations.
8 It also ignored the fact that throughout the 2002-2003 CAR operation the MLC relied
9 upon cooperation with the CAR authorities.

10 Second, the Appeals Chamber finds that the Trial Chamber erred by failing to address
11 Mr Bemba's argument that he sent a letter to the CAR authorities. While failing to
12 address this argument, it nevertheless concluded that Mr Bemba had not referred
13 allegations of crimes to the CAR authorities for investigation. The Trial Chamber's
14 finding that Mr Bemba had not taken necessary and reasonable measures was in part
15 based on a finding that Mr Bemba had made no effort to refer allegations of crimes to
16 the CAR authorities. The Trial Chamber was wrong to make this finding without
17 expressly considering Mr Bemba's argument that he did indeed do so.

18 Third, the Trial Chamber erred in determining that the motivations that it attributed
19 to Mr Bemba precluded him from taking the required necessary and reasonable
20 measures in good faith. However, the motive to preserve the reputation of troops
21 does not intrinsically render the measures any less reasonable or necessary in
22 preventing or repressing crime.

23 Fourth, the Trial Chamber erred in faulting Mr Bemba for the fact that the measures
24 that he ordered were poorly executed or achieved limited results. It failed to
25 appreciate that the measures taken by a commander cannot necessarily be faulted

1 merely because of shortfalls in their execution. In this case, the Trial Chamber
2 appeared to attribute to Mr Bemba the alleged limited results of the independent
3 inquiries, simply because the inquiries were initiated by him.

4 Fifth, the Trial Chamber erred in finding that Mr Bemba failed to empower other
5 MLC officials to fully and adequately investigate and prosecute crimes: It arrived at
6 this conclusion in apparent contradiction to an earlier finding that other MLC
7 commanders exercised some disciplinary authority in the field. Moreover, the
8 Trial Chamber failed to explain what more Mr Bemba should have done to empower
9 other MLC officials to fully and adequately investigate and prosecute allegations of
10 crimes and how he fell short in that regard.

11 Sixth, the Trial Chamber erred by basing its assessment of the necessary and
12 reasonable measures on the totality of crimes allegedly committed by the MLC,
13 whereas only a limited number of these crimes were proved beyond reasonable doubt.
14 A finding that the measures deployed by a commander were insufficient to prevent or
15 repress an extended crime wave does not mean that these measures were also
16 insufficient to prevent or repress the limited number of specific crimes for which the
17 commander is ultimately convicted.

18 Seventh, the Trial Chamber erred by taking into account the redeployment of MLC
19 troops as a measure available to Mr Bemba. The Appeals Chamber considers it
20 axiomatic that an accused person be informed promptly and in detail of the nature,
21 cause and content of a charge. However, in no document designed to give
22 Mr Bemba notice of the charges was the redeployment of troops to minimise contact
23 with the civilian population specifically identified as a necessary and reasonable
24 measure that Mr Bemba should have taken. The deployment of troops was
25 mentioned in the Amended Document Containing the Charges, but only in the

1 context of establishing Mr Bemba's effective control over the MLC forces. As a result
2 of the lack of proper notice Mr Bemba suffered prejudice.

3 The Appeals Chamber finds that these errors had a material impact on the
4 Trial Chamber's finding that Mr Bemba failed to take all necessary and reasonable
5 measures.

6 The Appeals Chamber thus find, by majority, Judge Monageng and Judge Hofmański
7 dissenting, that the Trial Chamber's conclusion that Mr Bemba failed to take all
8 necessary and reasonable measures in response to MLC crimes in the CAR, was
9 materially affected by errors and Mr Bemba cannot be held criminally responsible
10 under Article 28 for the crimes committed by MLC troops during the CAR operation.

11 I now come to the appropriate relief.

12 In these circumstances, the Appeals Chamber, by majority, reverses the conviction of
13 Mr Bemba. It discontinues the proceedings with respect to those criminal acts in
14 relation to which the Trial Chamber entered a conviction even though they were
15 outside the scope of the facts and circumstances of the case. In relation to the
16 remaining criminal acts, it enters an acquittal because the errors found with respect to
17 necessary and reasonable measures extinguish his responsibility in full.

18 May I ask the Registry to restore the calm in the public gallery.

19 May I ask the Registry to restore the order in the public gallery, failing which we will
20 have to adjourn.

21 THE COURT OFFICER: [16:30:20] Your Honour, we are working on it.

22 PRESIDING JUDGE VAN DEN WYNGAERT: [16:30:22] I am not finished with
23 reading the judgment.

24 Can you please sit down. Can you please sit down. May I ask you to sit down.

25 I shall now proceed to summarise the reasons for Judge Monageng and

1 Judge Hofmański's dissent from the majority decision. I will focus on the three main
2 contentious issues which are, first, the standard of review on appeal; second, the
3 question of whether Mr Bemba failed to take all necessary and reasonable measures to
4 prevent, repress or punish the crimes; and third, the question of whether the
5 conviction exceeded the scope of the charges. The dissenting judges address the
6 other grounds of appeal in their dissenting opinion, which is the authoritative
7 document. Based on their consideration of all arguments raised, they would have
8 confirmed the impugned decision.

9 I address first the standard of review.

10 Regarding the standard of review on appeal, the Dissenting Judges disagree with the
11 majority's view that the Appeals Chamber must overturn factual findings of the
12 Trial Chamber if they can reasonably be called into doubt. They view this as a
13 significant and unexplained departure from the conventional standard of review for
14 factual errors applied to date by the Appeals Chamber of this Court, as well as other
15 international and internationalised courts and tribunals. The Dissenting Judges
16 consider that it is not sufficient that there are "serious doubts" about a factual finding
17 entered by the Trial Chamber. In case of doubt, they consider it necessary for the
18 Appeals Chamber to review the evidence supporting the factual findings in question
19 to itself determine the issue or to remand the matter to a Trial Chamber for that
20 purpose. Therefore, in assessing Mr Bemba's ground of appeal, the Dissenting
21 Judges have applied the conventional standard of appeal, which accords some
22 deference to the Trial Chamber's findings of fact.

23 I am now addressing ground 3, the necessary and reasonable measures.

24 The Dissenting Judges consider that the application of this modified standard of
25 review in practice has led the majority of the Appeals Chamber to an erroneous

1 conclusion regarding Mr Bemba's failure to take all necessary and reasonable
2 measures to prevent, repress or punish crimes committed by MLC troops.
3 In the view of the Dissenting Judges, three core aspects of the Trial Chamber's
4 reasoning supported the conclusion that "Mr Bemba failed to take all necessary and
5 reasonable measures within his power to prevent or repress the commission of crimes
6 or to refer the matter to the competent authorities". First, the Trial Chamber
7 acknowledged that "Mr Bemba took a few measures over the course of the 2002-2003
8 CAR operation", but found that all "were limited in mandate, execution and/or
9 results". Second, the Trial Chamber found that the MLC troops continued
10 committing crimes throughout the 2002-2003 CAR operation, and that consistent
11 information regarding these crimes was brought to Mr Bemba's attention. Third, the
12 Trial Chamber considered the limited and deficient measures Mr Bemba had taken "in
13 light of his extensive material ability to prevent and repress the crimes". Based on
14 this assessment, the Trial Chamber concluded that the measures taken "patently fell
15 short of 'all necessary and reasonable measures' to prevent and repress the
16 commission of crimes within his material ability" and that Mr Bemba could not be
17 said to have referred the matter to the competent authorities.

18 As further explained in their dissenting opinion, the Dissenting Judges have reviewed
19 the Trial Chamber's findings in light of the arguments raised by Mr Bemba on appeal
20 and are unable to identify any error in the Trial Chamber's findings or any
21 unreasonableness in the overall conclusions. The Dissenting Judges would therefore
22 have rejected Mr Bemba's arguments and confirmed the findings and conclusions of
23 the Trial Chamber.

24 The majority reaches an alternative conclusion based on an analysis that the
25 Dissenting Judges are unable to accept and find to be deeply flawed for the reasons

1 that I shall now summarise.

2 Regarding the measures actually taken by Mr Bemba, the majority identifies three
3 errors in the Trial Chamber's analysis.

4 First, it finds that the Trial Chamber paid insufficient attention to the fact that MLC
5 troops were operating in a foreign country with the attendant difficulties on Mr
6 Bemba's ability to take measures. In the Dissenting Judges' view, the majority's
7 conclusion that Mr Bemba was limited in his ability to take measures in the Central
8 African Republic is based on an uncritical acceptance of Mr Bemba's arguments and
9 an erroneous assessment of a fraction of the evidentiary record to which the Trial
10 Chamber had regard. The Dissenting Judges find this approach to be untenable,
11 especially in the circumstances where Mr Bemba does not point to any attempts to
12 investigate that were in fact made and proved impossible. They would have found
13 that the Trial Chamber properly considered Mr Bemba's ability to take measures
14 based on the evidence in this case.

15 The second error identified by the majority is that the Trial Chamber appears to have
16 treated Mr Bemba's motivations as determinative of the adequacy or otherwise of the
17 measures he took. The Dissenting Judges consider that the majority's view of the
18 Trial Chamber's reasoning does not accurately reflect the approach of the Trial
19 Chamber and is not supported by any proper reading of the Conviction Decision.
20 The Dissenting Judges consider inappropriate the majority's use of speculative
21 language to impute reasoning to the Trial Chamber that is not apparent from the
22 wording of the decision. The Dissenting Judges would not have found any error in
23 the Trial Chamber's consideration of Mr Bemba's motivations.

24 The third error identified by the majority is that the Trial Chamber failed to establish
25 that Mr Bemba purposively limited the mandates of the commissions and inquiries

1 set up. The Dissenting Judges consider the majority's position to misconstrue the
2 nature of criminal liability under Article 28 of the Statute. In their view, this mode of
3 responsibility, the issue is not whether Mr Bemba was responsible for any deficiencies
4 or limitations in the measures that he took. Rather, the question is whether, also in
5 light of the measures that Mr Bemba did take, it can be said that he took all necessary
6 and reasonable measures to prevent, repress or punish the commission of crimes.
7 The Dissenting Judges would have found that the Trial Chamber did not err in its
8 consideration of the issue.

9 Regarding the continuation of the crimes in spite of the measures taken, the
10 Dissenting Judges note that the majority expresses doubt about the Trial Chamber's
11 findings regarding the scale and duration of the crimes. Similarly, although it
12 expresses "concerns" regarding the Trial Chamber's findings as to Mr Bemba's
13 effective control and knowledge of the crimes, the majority does not resolve either of
14 the questions it raises. This, in the Dissenting Judges' view, has the unfortunate
15 result that the issues essential to the determination of whether Mr Bemba took all
16 necessary and reasonable measures are left unresolved for the purposes of this appeal.
17 The Dissenting Judges consider that the majority should have resolved any concerns
18 regarding the Trial Chamber's findings based on its own review of the evidentiary
19 record of the present case. In the absence of such review and a positive
20 determination of the issues, it is unclear to the Dissenting Judges how the majority
21 could proceed to overturn the findings of the Trial Chamber and enter an acquittal.
22 For their part, the Dissenting Judges have carried out a full review of the factual
23 findings and evidence relied upon by the Trial Chamber, and are satisfied that there
24 was no error in the Trial Chamber's finding that many crimes continued to be
25 committed throughout the 2002-2003 CAR Operation, that Mr Bemba knew of these

1 crimes and that he had effective control over his troops.

2 The Dissenting Judges consider that the majority's skewed consideration of this case

3 is the result of the implementation of the modified standard of appellate review in

4 practice. It led the majority to overturn the Trial Chamber's factual findings

5 without engaging in any meaningful way with the factual findings entered by the

6 Trial Chamber or demonstrating any awareness of the evidence on which these

7 findings were based. The Dissenting Judges consider it unsurprising that the

8 majority had doubts about the Trial Chamber's factual findings and overall

9 conclusion given its limited assessment of the evidence. The Dissenting Judges

10 reiterate their view that doubts are not a sufficient basis to reverse factual findings of

11 the Trial Chamber, in particular in the absence of consideration of all relevant

12 evidence. What is required is a determination of whether a reasonable trier of fact

13 could have reached the finding in question based on the evidence that was before the

14 Trial Chamber.

15 For the Dissenting Judges, the key question, both during the trial and on appeal, is

16 whether the measures that Mr Bemba took were commensurate with all the necessary

17 and reasonable measures that were within his power. The inquiry in the present

18 case was twofold, whether Mr Bemba failed to take all necessary and reasonable

19 measures within his power to: One, prevent or repress the commission of crimes;

20 and two, submit the matter to the competent authorities for investigation or

21 prosecution. The Dissenting Judges consider that these questions could only be

22 properly answered with due regard to the scale and duration of the crimes committed,

23 Mr Bemba's knowledge thereof and the full range of measures available to him in the

24 circumstances based on the extent of his control over the troops. The

25 Dissenting Judges regret that the majority limited its analysis to the measures that

1 Mr Bemba took and they consider that its confined examination of an isolated aspect
2 of the case led it to an erroneous conclusion.

3 For all these reasons, the Dissenting Judges would have confirmed the
4 Trial Chamber's finding that Mr Bemba failed to take all necessary and reasonable
5 measures.

6 I shall now turn to the Dissenting Judges' view on the second ground of appeal
7 concerning the scope of the charges.

8 The Dissenting Judges regret that they are unable to agree with the majority's
9 conclusion that some of the criminal acts that the Trial Chamber found established
10 beyond reasonable doubt were outside the scope of the charges.

11 In the view of the Dissenting Judges, the Prosecutor's case against Mr Bemba was
12 brought by geographical, temporal and other substantive parameters. The
13 Pre-Trial Chamber confirmed the charges as such. The Trial Chamber therefore
14 could consider any criminal acts that fell within these parameters, subject to the
15 requirement of proper notice to the accused.

16 This conclusion of the Dissenting Judges is based on the following considerations.

17 The Dissenting Judges consider that the Statute vests the Prosecutor with the power
18 to formulate the charges and to set the factual parameters of the case. In their view,
19 Article 74(2) of the Statute ensures that the Trial Chamber does not exceed the factual
20 scope of the case brought by the Prosecutor. Its purpose is to delineate the
21 jurisdiction of the Trial Chamber.

22 The Dissenting Judges consider that the Prosecutor may set broad parameters for the
23 charges depending on the circumstances of the case she intends to bring. For
24 instance, in the case of mass crimes that the accused did not directly participate in, the
25 Prosecutor may decide to describe the crimes alleged broadly for the purposes of

1 limiting the Trial Chamber's jurisdiction under Article 74(2) of the Statute.

2 Regarding the Pre-Trial Chamber's role, the Dissenting Judges consider that its aim is

3 to determine whether there is a case to be tried and not to engage in a lengthy

4 fact-finding process to a lower standard of proof. Where specific criminal acts are

5 alleged to support a more broadly described charge, they are primarily vehicles to

6 prove a broader charge and the Pre-Trial Chamber must consider these acts only

7 insofar as it may serve its inquiry into whether the person committed the crimes

8 charged. The Pre-Trial Chamber does not confirm or crystallise all factual

9 allegations for the purposes of the trial.

10 Therefore, according to the Dissenting Judges, if the Prosecutor formulates the

11 charges broadly, this means that additional individual criminal acts may be alleged

12 for the purposes of the trial, provided that they fall within the scope of the crimes

13 confirmed and provided that the accused's rights to notice and time for the

14 preparation of his or her defence are respected.

15 The Dissenting Judges are of the view that the charges in the present case were

16 formulated broadly by way of temporal, geographical and other factual parameters.

17 These charges encompassed acts of murder, rape and pillaging committed by the

18 MLC troops in the CAR from on or about 26 October 2002 to 15 March 2003. They

19 were not limited to the specific individual criminal acts mentioned in the document

20 containing the charges and in the confirmation decision. The Dissenting Judges

21 consider this description of the facts and circumstances described in the charges to be

22 adequate from the perspective of Article 74(2) of the Statute in the circumstances of

23 this case.

24 For these reasons, the Dissenting Judges would have found that Mr Bemba's

25 conviction did not exceed the facts and circumstances described in the charges that

1 were brought against him. The Dissenting Judges would therefore have concluded
2 that Mr Bemba failed to show that the Trial Chamber committed a legal error and
3 would have rejected the second ground of appeal. Consequently, the
4 Dissenting Judges would not have discontinued the proceedings with respect to the
5 criminal acts which the majority finds to exceed "the facts and circumstances
6 described in the charges".

7 I now turn to the appeals against the sentence.

8 As a result of this judgment on Mr Bemba's appeal, the Appeals Chamber
9 unanimously considers the appeals lodged by Mr Bemba and the Prosecutor against
10 the sentencing decision to be moot and dismisses them as such.

11 This concludes the summary of judgments in this case. The Appeals Chamber notes
12 that in the case of an acquittal, the acquitted person is to be released from detention
13 immediately. However, Mr Bemba was convicted by this Court in another case of
14 offences against the administration of justice and his sentence in relation to this
15 conviction is still currently before Trial Chamber VII. Thus, while the
16 Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on
17 the basis of the present case, it rests with the Trial Chamber VII to decide, as a matter
18 of urgency, whether Mr Bemba's continued detention in relation to the case pending
19 before that Chamber is warranted. Therefore, Mr Bemba will not be released
20 immediately.

21 I wish now to thank the interpreters, the court reporters, the technical supporting staff,
22 security, the legal officers of Chamber and all the staff of Chambers, the parties and
23 participants in the proceedings. The hearing is now adjourned.

24 THE COURT USHER: [16:49:25] All rise.

25 (The hearing ends in open session at 4.49 p.m.)