

Appeal judgment in *Prosecutor v. Bemba Gombo*, ICC

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Author of the decision: International Criminal Court

Summary of the decision: The ICC scrutinized the shortcomings of the procedure of the inquiry or judicial process that the accused had established. The Appeals Chamber found that the Trial Chamber erred when it found that Mr Bemba had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes committed by MLC troops during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities for investigation and prosecution.

Cited international law materials: Rome Statute of the International Criminal Court

Key words: non-recognised courts, responsible command, international war crimes, functional military judicial system, *Mouvement pour la Liberation du Congo*



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Date: 8 June 2018

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Chile Eboe-Osuji
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO**

Public document

Judgment

**on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's
“Judgment pursuant to Article 74 of the Statute”**

motivated by preserving the reputation of his or her troops do not intrinsically render them any less necessary or reasonable in preventing or repressing the commission of crimes, and ensuring their prosecution after proper investigation.³⁵⁶

178. The Appeals Chamber notes that the Trial Chamber's preoccupation with Mr Bemba's motivations appears to have coloured its entire assessment of the measures that he took. Indeed, in assessing the Mondonga Inquiry, the Trial Chamber appears to have considered what it perceived to be Mr Bemba's adverse motivations in establishing the inquiry as a key factor in assessing the genuineness of that measure (namely, countering media allegations, demonstrating the taking of action, vindicating MLC leadership and generally rehabilitating its image).³⁵⁷ The Trial Chamber's consideration of Mr Bemba's motivations also significantly affected its finding regarding his correspondence with the UN Representative in the CAR (which was said to have been driven by the desire to demonstrate good faith and maintain the image of the MLC)³⁵⁸ and his withdrawal from the CAR (which was said to have been motivated by external pressure directly related to the negotiation of the Sun City agreements).³⁵⁹ Ultimately, the Trial Chamber concluded that in fact *all* of the measures that Mr Bemba had taken in response to allegations of crimes were driven by a motivation to counter public allegations and rehabilitate the public image of the MLC.³⁶⁰ Whereas the Trial Chamber stated that these motivations were a factor "aggravating" the failure to exercise his duties, in effect the Trial Chamber appears to have treated the motives as determinative, in and of themselves, of the adequacy or otherwise of the measures. From the ambiguous concept of an "aggravated omission" arises the impression that the Trial Chamber's evaluation of the adequacy of the measures taken by Mr Bemba was tainted by what it considered Mr Bemba's motivations to be.

179. Moreover, the motivations that the Trial Chamber found established, namely, the broad desire to maintain the image of the MLC and counter public allegations are not in fact intrinsically "negative" motivations, as the Trial Chamber appears to have

³⁵⁶ [Appeal Brief](#), para. 363.

³⁵⁷ [Conviction Decision](#), para. 582.

³⁵⁸ [Conviction Decision](#), para. 604.

³⁵⁹ [Conviction Decision](#), para. 555.

³⁶⁰ [Conviction Decision](#), para. 728.

considered them. Nor do they necessarily conflict with the taking of genuine and effective measures. There may be multiple motives behind the measures taken by a commander. In this respect it is conceivable that a commander may discharge his duty to take “necessary and reasonable measures” and in doing so accomplish multiple, additional or extraneous purposes, such as protecting the public image of his forces. Therefore, in considering Mr Bemba’s motivation to protect the image of the MLC, the Trial Chamber erred because it took into consideration an irrelevant factor. In any event, the Trial Chamber failed to make an assessment as to how *in concreto* such alleged motive ultimately affected the necessity or reasonableness of the measures taken by Mr Bemba.

180. Turning to the remainder of Mr Bemba’s arguments, the Appeals Chamber recalls that the Trial Chamber faulted the measures Mr Bemba took because they were limited in “mandate, execution, and/or results”.³⁶¹ The Trial Chamber appears to have lost sight of the fact that the measures taken by a commander cannot be faulted merely because of shortfalls in their execution. When a commander establishes an independent commission, inquiry or judicial process – of which he or she is not part – it must be left to freely fulfill its mandate. Whilst limitations in the results of an inquiry might be attributable to the manner of its establishment (for example, through deliberate exclusion or limitation of mandate), this is not necessarily so. It is important to establish, in this regard: (i) that the shortcomings of the inquiry were sufficiently serious; (ii) that the commander was aware of the shortcomings; (iii) that it was materially possible to correct the shortcomings; and (iv) that the shortcomings fell within his or her authority to remedy. The Trial Chamber did not make this assessment in the present case.

181. In finding that there were “indications that all [the] measures were limited in mandate, execution, and/or results”, the Trial Chamber implies that this was attributed to Mr Bemba.³⁶² However, without undertaking the necessary assessment set out in the preceding paragraph, this could not be made out without a finding that Mr Bemba purposively limited the mandates of the commissions and inquiries. Yet, the Trial Chamber made no such finding as to the sham nature of the measures.

³⁶¹ [Conviction Decision](#), para. 720.

³⁶² [Conviction Decision](#), para. 720.

182. The Trial Chamber also faulted Mr Bemba for having failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes as a result of which he could not be said to have submitted the matter to the competent authorities for investigation and prosecution.³⁶³ However, the Trial Chamber cited no evidence in support of this finding. In addition, this finding appears to be in contradiction with the Trial Chamber's finding that "Colonel Moustapha and the other MLC Commanders also had some disciplinary authority in the field".³⁶⁴ The Trial Chamber failed to explain this apparent contradiction and its finding as to the lack of empowerment of other MLC officials, hence it appears unreasonable. Moreover, given that finding, the Trial Chamber failed to explain what more Mr Bemba should have done to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes and how he fell short in that regard.

183. Furthermore, it is evident that the assessment of a trial chamber of the measures taken by a commander also depends on the number of crimes that were committed. The Appeals Chamber recalls that the actual number of crimes established beyond reasonable doubt in the instant case was comparatively low.³⁶⁵ While the Trial Chamber noted, in relation to the specific locations where crimes had been committed, that there was "reliable evidence" more generally that the MLC committed crimes at these locations,³⁶⁶ the evidence in question, on its face, appears for the most part very weak, often consisting of media reports including anonymous hearsay.³⁶⁷ Importantly, the Trial Chamber failed to properly analyse this evidence and address its potentially extremely low probative value. The Trial Chamber also failed to give even an indication of the approximate number of crimes that were committed at these locations. Thus, beyond the low number of individual instances of crimes found to have been established beyond reasonable doubt, it is unclear how

³⁶³ [Conviction Decision](#), para. 733.

³⁶⁴ [Conviction Decision](#), para. 449.

³⁶⁵ See *supra* paras 116-119.

³⁶⁶ See [Conviction Decision](#), para. 461, fn. 1304 regarding Bangui; para. 486, fn. 1408 regarding Bangui; para. 520, fn. 1567 in relation to PK22; para. 525, fn. 1585 regarding Damara; para. 527, fn. 1591 regarding the Bossembélé-Bozoum axis; para. 531, fn. 1607 regarding Sibut; para. 534, fn. 1619 regarding the Bossembélé-Bossangoa axis.

³⁶⁷ See e.g. [Conviction Decision](#), para. 461, fn. 1304 regarding Bangui (EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0048-0053; EVD-T-OTP-00411/CAR-OTP-0004-1096 at 1102-1103, 1109, 1121, 1124; EVD-T-OTP-00399/CAR-OTP-0004-0343 at 0344; EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0415, 0419-0423, 0425; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0667, 0669-0670, 0672-0674, 0678, 0681-0684, 0690).

widespread the criminal behaviour of the MLC troops in the 2002-2003 CAR Operation was; and, as a corollary, it is difficult to assess the proportionality of the measures taken. Furthermore, the Appeals Chamber notes the apparent discrepancy between the limited number of crimes for which Mr Bemba was held responsible under article 28 and the Trial Chamber's assessment of the measures Mr Bemba should have taken, which appears to have been based on the much broader and more general 'finding' by the Trial Chamber concerning widespread MLC criminality in the CAR. Indeed, a finding that the measures deployed by a commander were insufficient to prevent or repress an extended crime wave, for example five hundred crimes, does not mean that these measures were also insufficient to prevent or repress the limited number of specific crimes, for example 20 crimes, for which the commander is ultimately convicted.

184. The Appeals Chamber also notes that the majority of the criminal incidents in relation to which the Prosecutor presented evidence occurred at the beginning of the 2002-2003 CAR Operation, whereas little evidence was presented regarding specific criminal acts towards the end of the operation; a factor which must be taken into account when assessing whether Mr Bemba took all necessary and reasonable measures. Whereas it may have been difficult to make a determination as to the actual extent of criminal behaviour, both in terms of number of crimes and duration, the Trial Chamber should at least have acknowledged this challenge and determined its impact on the assessment of the question of whether Mr Bemba took all necessary and reasonable measures. By failing to do so, the Trial Chamber erred.

185. Finally, the Appeals Chamber recalls that the Trial Chamber found that Mr Bemba had failed to take all necessary and reasonable measures, noting *inter alia* that Mr Bemba should have modified MLC troop deployment so as to, for example, minimise contact with the civilian population, whereas Mr Bemba argues that he did not have sufficient notice of this potential measure.

186. The Appeals Chamber considers it axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge.³⁶⁸ In principle, notice containing the details of the charges must be given prior to the start

³⁶⁸ See article 67 (1) (a) of the Statute; [Lubanga Appeal Judgment](#), paras 118-130.

of the trial.³⁶⁹ One of the elements of command responsibility under article 28 (a) of the Statute is that the commander must have failed to take “all necessary and reasonable measures within his or her power to prevent or repress [the crimes’] commission or to submit the matter to the competent authorities for investigation and prosecution”. It follows that the accused person must be informed of the factual allegations on the basis of which the Prosecutor seeks to establish this element.

187. The Appeals Chamber notes that the Corrected Revised Second Amended Document Containing the Charges did not specifically identify the redeployment of troops as a necessary and reasonable measure that Mr Bemba should have taken. Nor was redeployment of the MLC troops, for example, to minimise contact with the civilian population mentioned in any other document designed to give Mr Bemba notice of the charges as a measure that he should have taken. The deployment of troops to the CAR from the DRC was mentioned in the above document only in the context of establishing Mr Bemba’s effective control over the MLC forces,³⁷⁰ and therefore did not provide adequate notice of redeployment within the CAR and within the particular context of the necessary and reasonable measures taken. Thus, he was not sufficiently notified of this factual allegation as a necessary and reasonable measure.

188. The Appeals Chamber is of the view that Mr Bemba suffered prejudice as a result of the lack of proper notice. The Appeals Chamber notes in this regard Mr Bemba’s submission on appeal that, had he known that troop redeployment was considered a necessary and reasonable measure that he should have taken, he would have argued that this would not have been feasible or would have put lives at risk from “friendly fire”.³⁷¹ Thus, the Trial Chamber should not have relied on this measure when finding that Mr Bemba had failed to take all necessary and reasonable measures and by doing so the Trial Chamber erred.

³⁶⁹ [Lubanga Appeal Judgment](#), para. 129. The Appeals Chamber also found that: “[t]o the extent that further information [about the charges] is provided in the course of the trial, this can only go towards assessing whether prejudice caused by the lack of detail of the charges may have been cured”.

³⁷⁰ [Second Amended Document Containing the Charges](#), para. 27 (2).

³⁷¹ [Appeal Brief](#), para. 343.

189. In sum, the Appeals Chamber has identified the following serious errors in the Trial Chamber's assessment of whether Mr Bemba took all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution: (i) the Trial Chamber erred by failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country;³⁷² (ii) the Trial Chamber erred by failing to address Mr Bemba's argument that he sent a letter to the CAR authorities before concluding that Mr Bemba had not referred allegations of crimes to the CAR authorities for investigation;³⁷³ (iii) the Trial Chamber erred in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes;³⁷⁴ (iv) the Trial Chamber erred in attributing to Mr Bemba any limitations it found in the mandate, execution and/or results of the measures taken;³⁷⁵ (v) the Trial Chamber erred in finding that Mr Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes;³⁷⁶ (vi) the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures;³⁷⁷ and (vii) the Trial Chamber erred by taking into account the redeployment of MLC troops, for example to avoid contact with the civilian population as a measure available to Mr Bemba.³⁷⁸ The Appeals Chamber shall now assess the cumulative material impact of these errors.

190. In assessing the measures that Mr Bemba took, the Trial Chamber focused on the Mondonga Inquiry (which resulted in the Bomengo case file), the meeting with General Cissé, the UN representative in the CAR, and President Patassé in November 2002, the speech he gave to his troops in November 2002, the Gbadolite court-martial,

³⁷² See *supra* paras 171-173.

³⁷³ See *supra* paras 174-175.

³⁷⁴ See *supra* paras 176-179.

³⁷⁵ See *supra* paras 180-181.

³⁷⁶ See *supra* para. 182.

³⁷⁷ See *supra* paras 183-184.

³⁷⁸ See *supra* paras 185-188.

the Zongo Commission, correspondence with General Cissé, correspondence with the President of the FIDH, and the Sibut Mission.³⁷⁹

191. The Appeals Chamber finds that the errors that it has identified have a material impact on the Trial Chamber's finding that Mr Bemba failed to take all necessary and reasonable measures. In particular, it is apparent that the Trial Chamber's error in considering Mr Bemba's motivation had a material impact on the *entirety* of its findings on necessary and reasonable measures because it permeated the Trial Chamber's assessment of the measures that Mr Bemba had taken. Furthermore, the Trial Chamber's failure to fully appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country had an important impact on the overall assessment of the measures taken by Mr Bemba.

192. Indeed, in faulting the results of measures taken by Mr Bemba, the Trial Chamber failed to appreciate that, as a remote commander, Mr Bemba was not part of the investigations and was not responsible for the results generated. Had it done so, the Trial Chamber's assessment of the measures Mr Bemba had taken would have been necessarily different. It must also be noted that the 2002-2003 CAR Operation was conducted within the short space of a few months, which notwithstanding, Mr Bemba took numerous measures in response to crimes committed by MLC troops. In this regard, the Appeals Chamber recalls that the Trial Chamber failed to properly establish how many crimes had been committed.

193. Had the Trial Chamber properly assessed the measures that Mr Bemba took and had the Trial Chamber properly considered the list of measures that it stated that Mr Bemba could have taken in light of the limitations that he faced in the specific circumstances in which he was operating, it would not have been open to it to reach the same conclusion. The errors the Trial Chamber made resulted in an unreasonable assessment of whether Mr Bemba failed to take all necessary and reasonable measures in the circumstances existing at the time.

³⁷⁹ [Conviction Decision](#), para. 719.

194. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber’s conclusion that Mr Bemba failed to take all necessary and reasonable measures in response to MLC crimes in the CAR, was materially affected by the errors identified above. Thus, one of the elements of command responsibility under article 28 (a) of the Statute was not properly established and Mr Bemba cannot be held criminally liable under that provision for the crimes committed by MLC troops during the 2002-2003 CAR Operation.

VI. APPROPRIATE RELIEF

195. In an appeal pursuant to article 81 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed or order a new trial before a different trial chamber (article 83 (2) of the Statute).

196. In the present case, the Appeals Chamber has found, by majority, that the Trial Chamber erred when convicting Mr Bemba for the criminal acts listed above at paragraph 116, as these criminal acts did not fall within the “facts and circumstances described in the charges” in terms of article 74 (2) of the Statute; further, in relation to the remaining criminal acts, the Trial Chamber erred when it found that Mr Bemba had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes committed by MLC troops during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities for investigation and prosecution.

197. In these circumstances, the Appeals Chamber considers it appropriate to reverse the conviction of Mr Bemba and to declare that the criminal acts listed above at paragraph 116 are outside the scope of this case and that the proceedings in that regard are discontinued.

198. In relation to the remainder of the criminal acts of which Mr Bemba was convicted (see above, paragraph 118), it is appropriate to reverse Mr Bemba’s conviction and enter an acquittal as the error identified in the Trial Chamber’s finding on necessary and reasonable measures extinguishes in full his criminal liability for these crimes.

199. The Appeals Chamber notes that in the case of an acquittal, the acquitted person is to be released from detention immediately.³⁸⁰ However, the Appeals Chamber is cognisant of the fact that Mr Bemba was convicted of offences against the administration of justice under article 70 (1) (a) and (c) of the Statute³⁸¹ by this Court in another case. His sentence in relation to that conviction is currently before Trial Chamber VII for a new determination, following the reversal of the original sentence imposed, upon the Prosecutor's successful appeal.³⁸²

200. Thus, while the Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on the basis of the present case, it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted.³⁸³

Judge Monageng and Judge Hofmański append a dissenting opinion to this judgment as to the outcome and the reasons therefor. Judge Van den Wyngaert and Judge Morrison append a joint separate opinion to this judgment. Judge Eboe-Osuji will append a separate opinion to this judgment, which will be filed in due course.

Done in both English and French, the English version being authoritative.



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 8th day of June 2018

At The Hague, The Netherlands

³⁸⁰ This is reflected, *inter alia*, in article 81 (3) (c) of the Statute.

³⁸¹ [Bemba et al. Conviction Decision](#), p. 455; [Bemba et al. Appeal Judgment](#), para. 1631.

³⁸² [Bemba et al. Sentencing Appeal Judgment](#), paras 359, 361-362.

³⁸³ Trial Chamber VII, in the *Bemba et al. Sentencing Decision*, found that the maximum sentence of imprisonment that it could impose in relation to the offences under article 70 (1) of the Statute of which *inter alia* Mr Bemba was convicted was five years. The sentence of imprisonment initially imposed by Trial Chamber VII – though reversed by the Appeals Chamber – was one year of imprisonment ([Bemba et al. Sentencing Decision](#), paras 30, p. 99).