

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**

Date: **6 July 2018**

TRIAL CHAMBER III

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Chang-ho Chung
Judge Kimberly Prost

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

**Prosecution's submissions on the reparations proceedings
before Trial Chamber III**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Unrepresented Victims**Unrepresented Applicants****The Office of Public Counsel for Victims**

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States Representatives**Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations Section**

Mr Phillip Ambach

Trust Fund for Victims

Mr Pieter de Baan

Introduction

1. On 8 June 2018, the Appeals Chamber, by majority, reversed Jean-Pierre Bemba Gombo’s convictions for crimes against humanity and war crimes.¹ The Majority of the Appeals Chamber found certain criminal acts to fall outside the scope of the case and discontinued proceedings in that regard.² Further, the Majority found that the Trial Chamber’s error on necessary and reasonable measures “extinguished in full” Mr Bemba’s criminal liability for the criminal acts he was convicted of and entered an acquittal in that respect.³ Two judges dissented: Judges Hofmański and Monageng would have affirmed Mr Bemba’s convictions.⁴

2. The Majority acquitted Mr Bemba because it did not find him criminally liable under article 28(a) of the Statute.⁵ Notwithstanding, the Majority—as their Judgment and Separate Opinions show—acknowledged that the MLC troops had committed crimes during the 2002-2003 CAR Operation.⁶ Judges Van den Wyngaert and Morrison recognised that many victims had suffered “at the hands of persons or

¹ ICC-01/05-01/08-3636-Red A (“[Bemba Majority AJ](#)”), paras. 195-198.

² [Bemba Majority AJ](#), para. 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 [...].”).

³ [Bemba Majority AJ](#), para. 196 (“[...] 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.”); para. 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.”)

⁴ ICC-01/05-01/08-3636-Anx1-Red A (“[Bemba Dissenting Opinion](#)”), para. 1 (“We respectfully disagree with the decision of our colleagues [...] to discontinue the proceedings with respect to a number of criminal acts and to reverse the conviction of Mr Bemba with respect to the remainder of the criminal acts. We would have confirmed the Conviction Decision.”)

⁵ [Bemba Majority AJ](#), para. 194.

⁶ [Bemba Majority AJ](#), para. 192 (“It must 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*.”); para. 194 (“[...] Mr Bemba cannot be held criminally liable under that provision for the *crimes committed by MLC troops during the 2002-2003 CAR Operation*.”) (emphasis added).

groups [related] to the accused.”⁷ Judge Eboe-Osuji noted that there was “ample evidence” that victims suffered violations in this case.⁸

3. On 13 June 2018, this Trial Chamber noted the Appeals Judgment and invited Parties and participants to file “consequential submissions” on the reparations proceedings in this case.⁹

Submissions

i. A reparations order must be issued against a convicted person.

4. A Chamber of this Court may order reparations in a case only when a person has been convicted. Conversely, when a case does not lead to a conviction, a Chamber cannot order reparations.

5. The *Lubanga* Appeals Chamber has confirmed that the Court’s legal framework clearly establishes that a reparations order must be issued in *all* circumstances *against the convicted person*.¹⁰ Reparations orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence.¹¹ Since the Court is designed to establish *individual* criminal liability for crimes under the Statute, reparations orders must

⁷ ICC-01/05-01/08-3636-Anx2 A (“[Judges Van den Wyngaert and Morrison Separate Opinion](#)”), para. 74 (“There was undeniable suffering on the part of the many victims of violence and cruelty at the hands of persons or groups that are related to the accused.”); para. 77 (noting the crimes that were committed against the population of the Central African Republic”); para. 78 (“It is not excluded [...] it would have been possible to hold Mr Bemba criminally responsible for his failure as commander in relation to *some or all of the crimes that were committed by MLC soldiers in the CAR.*”) (emphasis added).

⁸ ICC-01/05-01/08-3636-Anx3 A (“[Judge Eboe-Osuji’s Concurring Separate Opinion](#)”), para. 1 (“There is ample evidence that [victims suffered violations]”).

⁹ ICC-01/05-01/08-3639 (“[13 June 2018 Order](#)”), para. 2 (noting *inter alia* rule 86: “The Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, [...] victims of sexual or gender violence”). See ICC-01/05-01/08-3644 (“[Extension of Time Decision](#)”), para. 9 (“[T]he purpose of the Order was to provide the parties and participants with a final opportunity to place matters on the record, if they so wished. [...]”).

¹⁰ ICC-01/04-01/06-3129 A A2 A3 (“[Lubanga Reparations AD](#)”), para. 76.

¹¹ [Lubanga Reparations AD](#), para. 65.

equally reflect this context¹²—they must reflect the “principle of accountability” and “ensure that offenders account for their acts”.¹³

6. As the Appeals Chamber has noted, the Statute’s drafting history reflects this principle.¹⁴ So do commentary¹⁵ and other decisions of this Court.¹⁶

7. Accordingly, since Mr Bemba’s convictions have been reversed on appeal, Trial Chamber III cannot order reparations against him. These reparations proceedings must be discontinued.

ii. Notwithstanding, the Trust Fund for Victims (TFV) can still assist the victims.

8. Although the specific reparations proceedings *vis-à-vis* Mr Bemba must be discontinued by law, the Statute’s regime and purpose can and must continue to assist the victims of the Central African Republic, beyond the confines of the Court’s judicial processes. Notwithstanding differing opinions on the contours of the Court’s

¹² [Lubanga Reparations AD](#), para. 65.

¹³ [Lubanga Reparations AD](#), paras. 65, 69-70.

¹⁴ [Lubanga Reparations AD](#), para. 66 (noting references in the drafting history to the statement in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power that “[o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants”). See also [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (A/RES/40/34, General Assembly resolution 40/34 of 29 November 1985, annex), para. 8.

¹⁵ Donat-Cattin, “Article 75”, p. 1857, mn. 10 (“The Court is obliged to establish principles relating to reparations in each case before it that results in a conviction.”); Brady, “Appeal and Revision”, p. 582 (noting “the strong view that a reparations order should be classed as a ‘fundamental’ decision, and consequently treated in a similar manner to a decision of conviction, acquittal or sentence.”). See also [Lubanga Reparations AD](#), paras. 67-68.

¹⁶ ICC-01/09-01/11-2038 (“[Ruto and Sang Reparations Decision](#)”), paras. 6-7 (noting that the case against Mr Ruto and Sang was terminated and that there were no pending proceedings, and stating “[...] a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.”). *But see* ICC-01/09-01/11-2038-Anx (“[Judge Eboe-Osuji’s Dissenting Opinion Ruto and Sang Reparations Decision](#)”), para. 12. See also Judge Fremr’s Reasons in ICC-01/09-01/11-2027-Red-Corr (“[Ruto and Sang Judgment of Acquittal](#)”), para. 149 (“As a result of the case ending without a conviction, no reparations order can be made by this Court pursuant to article 75 for the benefit of the post-election violence. While I recognise that this must be dissatisfactory to the victims, a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.”). *But see* Judge Eboe-Osuji’s Reasons, paras. 195-210.

mandate,¹⁷ the Prosecution remains of the respectful view that the Rome Statute's regime and purpose is broader than any one single issue. Just as the fair trial of an accused must be guaranteed in criminal proceedings, so too is the harm suffered by victims of the grave crimes before this Court an important consideration. Even if the specific judicial outcome in this case precludes the Trial Chamber from ordering reparations, the harm suffered by the victims in a situation remains significant and should neither be forgotten nor dismissed.

9. Moreover, the Statute's history shows, in no small measure, that a "victim-friendly" Court was always anticipated and welcomed.¹⁸ To quote Philippe Kirsch, the President of the Preparatory Commission for the Court, and the first President of the Court (as attributed by one commentator):

"[...] As we embark on the future work to make the Court as fair as effective as possible, it will be essential to recall that the fundamental objective of the creation of an independent Court was the protection of the victims. [...] In the context of the ICC, the victims themselves should remain the absolute priority of the international community, and this should be never forgotten."¹⁹

10. As the Court marks the Rome Statute's twenty year anniversary, these words remain as relevant today. They resonate with the remarks of Judge Eboe-Osuji, the current President of this Court, albeit in a different case, that judging must be

¹⁷ See e.g., [Judges Van den Wyngaert and Morrison Separate Opinion](#), para. 75 ("[...] It is emphatically not the responsibility of the International Criminal Court to ensure compensation for all those who suffer harm as a result of the international crimes. We do not have the mandate, let alone the capacity or the resources [...]").

¹⁸ See e.g., Donat-Cattin, "Article 75", pp. 1869-1870, mns. 31-32 ("A 'victims' friendly Court' has been advocated and welcomed by all the most active players in the creation of the Court, including the Secretary General of the United Nations and the Chairperson of the Committee of the Whole of the Rome Conference").

¹⁹ See Donat-Cattin, "Article 75", p. 1869, fn. 72. See also Preamble to the [Statute](#) (noting that the States Parties to the Statute were "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity").

compassionate.²⁰ In that vein, in this very case, Judge Eboe-Osuji has underscored that victims deserve “every rehabilitative assistance” that individuals, national governments and the international community can offer.²¹

11. In recognition of the central role of the victims and the harm they may suffer, the Statute recognises a specific role for the TFV (although it is separate from the Court). Article 79 states that the TFV was specifically established “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims”.²² Following the reversal of Mr Bemba’s convictions, the TFV’s *assistance mandate* can be invoked to assist the victims of the situation. The TFV’s support to the victims under their assistance mandate is not part of the judicial process, and therefore, the TFV remains solely responsible for it.

12. To this end, the Prosecution notes with appreciation that the TFV, promptly on 13 June 2018, informed the President of the Assembly of States Parties of its decision to accelerate the launch of a programme under its assistance mandate.²³ This

²⁰ [Judge Eboe-Osuji’s Dissenting Opinion Ruto and Sang Reparations Decision](#), paras. 2-3 (noting Judge Blackmun (US Supreme Court)’s comment “Today, the Court purports to be the dispassionate oracle of the law, unmoved by ‘natural sympathy’...But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognising either the facts of the case before it or the legal norms that should apply to those facts [...] Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”, and stating, *inter alia*, “To be clear, I firmly share the view that compassion must not be banished from the province of judging [...]”).

²¹ [Judge Eboe-Osuji’s Concurring Separate Opinion](#), para. 1. *See also* p. 1, second footnote (“Such individuals would include Mr Bemba himself. Indeed, in light of the outcome of the appeal, I must hope that Mr Bemba will use his new lease on freedom to do the following: assist victims of violations (including victims of rape) that occurred during the period of his involvement in the CAR war, regardless of the question of his own legal responsibility to do so [...]”). The Prosecution respectfully notes that any such potential assistance by Mr Bemba should be encouraged *only* if it is in the best interests of the victims, their families and their communities.

²² Article 79(1), [Statute](#). *See* Khan, “Article 79”, p. 1901, mn. 1 (“[...] Aimed at addressing the harm resulting from the crimes under the jurisdiction of the Court and to assist the victims of such crimes, the Trust Fund for Victims has two mandates: (a) to implement Court-ordered reparations; and (b) to provide physical and psychological rehabilitation or material support to victims.”). *See also* [Lubanga Reparations AD](#), paras. 107-108 (“[...] The Appeals Chamber recalls that the Trust Fund has a dual mandate: 1) to provide assistance to victims within the Court’s jurisdiction and (2) to implement Court ordered reparations. [...] This first mandate is not contingent on a Court order and is not funded by Court-ordered reparations [...]”).

²³ *See* TFV Press Release, 13 June 2018. *See also* Letter from Chair, Board of Directors of the TFV to the President, Assembly of States Parties, 13 June 2018.

programme is intended to include physical and psychological rehabilitation, as well as material support, for the benefit of victims and their families in the situation of the Central African Republic.²⁴ In its assessment, the Board will specifically consider the harms suffered by the victims in the *Bemba* case (who are, by definition, victims of the situation in CAR I) and the harms from sexual and gender based violence arising out of the situation.²⁵

iii. Other possibilities for redress

13. Notwithstanding the acquittal of Mr Bemba, the Trial Judgment remains a critical recognition of the crimes of rape, murder and pillage suffered by victims in CAR at the hands of MLC troops.²⁶ The Majority acknowledged that the MLC troops had committed crimes in the 2002-2003 CAR Operation.²⁷ Mr Bemba’s Counsel—Mr Peter Haynes—has also noted that there are victims of the crimes committed in this case.²⁸

14. Although proceedings against Mr Bemba have concluded at this Court, the victims may have several other possibilities for redress.

²⁴ See TFV Press Release, 13 June 2018.

²⁵ See TFV Press Release, 13 June 2018. See also [Lubanga Reparations AD](#), para. 199 (noting that it was appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including victims of sexual violence in the assistance activities undertaken under its mandate under regulation 50(a) of the Regulations of the Trust Fund).

²⁶ See e.g., ICC-01/05-01/08-3343 (“[Bemba TJ](#)”), para. 671 (“There is consistent and corroborated evidence that MLC soldiers committed many acts of rape and murder against civilians during the 2002-2003 CAR Operation. Moreover, such acts were consistent with evidence of a *modus operandi* on the part of MLC soldiers throughout the 2002-2003 CAR Operation and throughout the areas of the CAR in which they were present. The Chamber underlines that the specific acts addressed in Sections VI(A), VI(B), and VI(C) constitute only a portion of the total number of acts of murder and rape MLC soldiers committed, as also addressed below in Section VI(E)(2).”); para. 694 (“The Chamber has found beyond reasonable doubt that MLC soldiers committed crimes within the jurisdiction of the Court—namely, the war crime and crime against humanity of murder, the war crime and crime against humanity of rape, and the war crime of pillaging—between on or about 26 October 2002 and 15 March 2003 on the territory of the CAR” [citing Sections VI(A), VI(B), and VI(C)]).

²⁷ See e.g., [Bemba Majority AJ](#), paras. 192, 194; [Judges Van den Wyngaert and Morrison Separate Opinion](#), paras. 74, 77, 78.

²⁸ See Haynes, Justice Hub Interview, 13 June 2018 (noting *inter alia* “in order to negate the fact that [Mr Bemba had] taken steps to prevent and punish crimes” and “[t]here are still victims, we don’t deny that.”) (<https://justicehub.org/article/bembas-lawyer-fact-there-are-victims-doesnt-mean-man-dock-guilty>, accessed on 5 July 2018).

15. *First*, the Majority’s Judgment does not preclude criminal proceedings against other alleged perpetrators for MLC-related crimes in the CAR.

16. *Second*, while fully respecting Mr Bemba’s presumption of innocence following the conclusion of this case, the Prosecution notes that the question of whether domestic criminal proceedings can be brought against Mr Bemba for the “discontinued crimes” outlined in the Majority’s Judgment remains an open one in law.²⁹ Apart from stating that such crimes are “discontinued” (an undefined term), the Majority’s Judgment—and the associated Separate Opinions—is ambiguous as to its meaning.³⁰

17. On its face, article 20(2) of the Statute only prohibits further proceedings for “a crime referred to in article 5”,³¹ in other words, crimes within the Court’s jurisdiction. As a result, as some commentators suggest, even if further proceedings for international crimes (article 5 crimes) are disallowed, a person convicted or acquitted by the ICC may consequently also be tried for *crimes under national law* for the *same conduct*.³² Moreover, article 20(2) applies the principle of *ne bis in idem* only to

²⁹ See [Bemba Majority AJ](#), paras. 116, 196 and 197.

³⁰ For instance, both Separate Opinions only address the possibility of retrial at this Court, not in other courts. See [Judges Van den Wyngaert and Morrison Separate Opinion](#), para. 73 and [Judge Eboe-Osuji’s Concurring Separate Opinion](#), para. 22.

³¹ Article 20(2), [Statute](#): “No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court”; article 5 lists the crimes within the Court’s jurisdiction, *i.e.*, genocide, crimes against humanity, war crimes and aggression.

³² See Tallgren and Coracini, “Article 20”, p. 917, mn. 28 (“After elaborate discussions, the compromise ‘for a crime referred to in article 5’ was accepted. The idea is that since the ICC does not have jurisdiction over crimes under *national law*, there is a need to ensure that a person who commits a crime does not escape responsibility simply because in the ICC trial it is not proven beyond reasonable doubt that the acts amounted to a crime under the jurisdiction of the ICC. [...] The wording even allows for retrials for ‘a crime referred to in article 5’ that was not subject to the final judgment of the ICC”). See also ICC-01/04-01/07-3679 (“[Katanga article 108 Decision](#)”), para. 23 (“[article 20(2)] only prohibits trial for a *crime* referred to in article 5 for which that person has already been convicted or acquitted by the Court and does not prohibit trials for conduct within the ambit of the ICC’s investigations. The Presidency notes that the interpretation [...] advanced by Mr. Katanga, which considers the entire ambit of the investigation, [...] would shield individuals subject to investigation from domestic prosecution for other crimes, including crimes of potentially equal gravity. Such outcome would be inconsistent with the notion of complementarity and the objective of ensuring accountability for crimes. This objective is explicitly espoused in the preamble of the Statute which declares that ‘the most serious crimes of concern to the

situations when a person has been “convicted or acquitted” by the Court, *i.e.*, when there has been a final decision on the merits of the case.³³ Since the Majority found that the “discontinued crimes” were “outside the scope of this case”,³⁴ it is debatable whether any such final decision *on the merits vis-à-vis* those crimes was ever taken. That said, the Prosecution takes no position on this matter, and defers to the specificities of the national law that may govern such situations. In such situations, if assistance is sought, the Court may cooperate in terms of rule 194.

18. *Third*, the outcome of this case does not exclude the possibility of appropriate civil remedies for victims under national law. In such a situation, resort may be had to the findings on the *Bemba* case record that have not been overturned on appeal and information in the public record.

iv. Conclusion

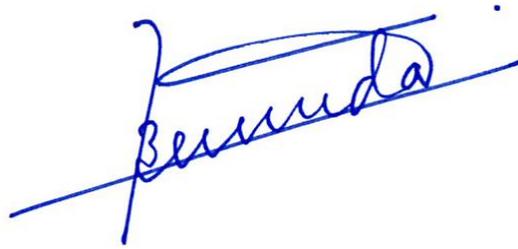
19. By finding that the Trial Chamber had erred with respect to the ‘necessary and reasonable measures’ element of article 28, the Majority’s Judgment extinguished Mr Bemba’s criminal liability for those specific crimes with which it found he had been charged. This leaves the victims with the means of redress such as those that are outlined above.

international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level”).

³³ Tallgren and Coracini, “Article 20”, p. 918, mn. 29 (“An interpretation proposed by the U.S. Delegation suggested that ‘convicted or acquitted’ in the context of paragraph 2 means that national criminal systems can act also when the case has been withdrawn or stayed at the ICC. This would mean that in addition to the general right of States to always try the same conduct as crimes not falling under the jurisdiction of the ICC, they could also try a crime referred to in article 5, unless a conviction or acquittal was issued by the Court.”); p. 928, mn. 51 (“Paragraph 2 implements a downward *ne bis in idem* protection from subsequent national prosecution also upon the convictions and acquittals of the ICC. This protection is absolute in terms of opening no exceptions, but its application is narrowly confined by ‘crimes referred to in article 5’. Relying on the same legal qualification seems understandable, since an ICC judgment cannot establish *ne bis in idem* for crimes over which the Court does not have jurisdiction. However, as a consequence, an individual may face—even multiple—trials in third States as well as in States parties for the same conduct after having been finally judged by the ICC.”)

³⁴ [Bemba Majority AJ](#), para. 197. *But see* ICC-01/09-01/11-2027-Red-Corr (“[Ruto and Sang Judgment of Acquittal](#)”), p. 1 (where the charges against the accused were vacated and the accused discharged without prejudice to their prosecution afresh in future).

20. Whatever the reasons for the outcome of the *Bemba* appeal, the Prosecution recognises that it may be difficult for the victims to understand and accept the acquittal of Mr Bemba, given the mass victimisation that they suffered. In these circumstances, it is hoped that the TFV's timely and active assistance to the victims will reassure them that the harm they suffered was recognised and addressed.



Fatou Bensouda, Prosecutor

Dated this 6th day of July 2018

At The Hague, The Netherlands