



**Original: English**

**No. ICC-01/05-01/08 A A2 A3**

**Date: 27 November 2017**

**THE APPEALS CHAMBER**

**Before:**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

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

**Public document**

**Order in relation to the conduct of the hearing before the Appeals Chamber**

**Order to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**  
Mr Peter Haynes  
Ms Kate Gibson

**Legal Representatives of Victims**  
Ms Marie-Edith Douzima Lawson

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Judgment pursuant to Article 74 of the Statute” of 21 March 2016 (ICC-01/05-01/08-3343), and

In the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 21 June 2016 (ICC-01/05-01/08-3399),

Noting the “Scheduling order for a hearing before the Appeals Chamber” of 7 November 2017 (ICC-01/05-01/08-3568), in which the Appeals Chamber informed the parties and participants that a hearing would be held from Tuesday, 9 January 2018 to Friday, 12 January 2018 and on Tuesday, 16 January 2018 in order to hear submissions and observations on the above-mentioned appeals,

*Issues* the following

## ORDER

1. The Appeals Chamber informs the parties and participants that they will be invited during the hearing to address the following issues in particular:
  - i. Group A - Preliminary issues:
    - a. What level of deference should the Appeals Chamber accord to the Trial Chamber’s factual findings?
    - b. Article 81 (1) (b) of the Statute reads in its relevant part:
 

“The convicted person, or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds:

[...]

(iv) Any other ground that affects the fairness **or** reliability of the proceedings **or** decision”. [emphasis added]

Can the convicted person appeal on a ground that affects the fairness of the proceedings, but does not affect the reliability of the decision?

- ii. Group B - Issues relating to the Second Ground of the appeal of Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) against the decision of Trial Chamber III entitled “Judgment pursuant to Article 74 of the Statute” of 21 March 2016 (“Conviction Decision”):
- a. What are “the facts and circumstances described in the charges”, within the meaning of article 74 (2) of the Statute? In particular, which of the following examples is a “fact”:
    - (i) the rape of P22 in PK12 on or around 6 or 7 November 2002, or
    - (ii) rape committed by the MLC soldiers in the Central African Republic between on or about 26 October 2002 and 15 March 2003?
  - b. What is the minimum level of detail required for “[a] statement of the facts” to be included in the document containing the charges pursuant to regulation 52 (b) of the Regulations of the Court, especially regarding “the time and place of the alleged crimes”? Does the required detail depend on the form of individual criminal responsibility charged in the case? In particular, would the required detail in a case of criminal responsibility as a co-perpetrator under article 25 (3) (a) differ from the required detail in a case of command responsibility under article 28 (a) of the Statute?
  - c. Must acts underlying the crimes charged be exhaustively listed in the document containing the charges?
  - d. Must the Pre-Trial Chamber determine whether there is sufficient evidence to support, to the requisite standard, each underlying act (a criminal act underlying one of the crimes charged) included in the document containing the charges and enter a finding on each such act in the confirmation decision?
  - e. Can the Prosecutor notify the accused person of other underlying acts in auxiliary documents provided after the confirmation

decision was rendered, without seeking to add additional charges under article 61 (9) of the Statute? Can the accused person be notified of other underlying acts through the provision of statements of victims? If the Prosecutor or the legal representative of victims notifies the accused person of other underlying acts after the confirmation decision, do they exceed “the facts and circumstances described in the charges”?

iii. Group C - Issues relating to the Third Ground of Mr Bemba’s appeal against the Conviction Decision:

a. Would a change from the “knew” standard to the “should have known” standard in article 28 (a) (i) of the Statute amount to a modification of the legal characterisation of the facts, which would need to comply with the requirements of regulation 55 of the Regulations of the Court (including that it not exceed the facts and circumstances of the charges)?

b. Does the Appeals Chamber have the power to change the legal characterisation of the facts itself?

(i) If it does not have such power, why is this the case?

(ii) If it does have the power to re-characterise, on what legal basis may it do so?

(iii) To what extent is it relevant that the Trial Chamber gave notice under regulation 55 (2) in the course of the trial?

c. How must the “knew” standard be interpreted? To what extent is the definition of knowledge in article 30 (3) of the Statute relevant to article 28 (a) (i) of the Statute?

d. How must the “should have known” standard be interpreted? Does the “should have known” standard differ materially from the “had reason to know” standard in article 7 (3) of the ICTY Statute and in its jurisprudence? How does this standard relate to

the “consciously disregarded” standard in article 28 (b) (i) of the Statute?

- iv. Group D - Further issues relating to the Third Ground of Mr Bemba’s appeal against the Conviction Decision:
- a. To what extent is a commander’s motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy?
  - b. Must the accused be given notice of the measures which the Trial Chamber finds he could have taken as a commander? If so, how must such notice be given – must it be given specifically with respect to measures or may it be given in the course of pleadings on the commander’s material ability?
  - c. Mr Bemba argues that causation is required in the context of article 28 (a) of the Statute, whilst the Prosecutor argues that causation is not required. If causation is required pursuant to article 28 (a) of the Statute, what degree of nexus is required - “but-for”, “high probability”, “reasonable foreseeability” or other?
  - d. Does an assessment of causation overlap with an assessment of whether a commander has taken necessary and reasonable measures or is an additional element required?
  - e. Is a commander under a legal duty to withdraw his troops in the event that he becomes aware that they are committing crimes? If so:
    - (i) What is the legal basis for this duty?
    - (ii) When does this duty arise?
    - (iii) Would it extend to all troops or only to those alleged to have committed crimes?

- (iv) Is it of any import that withdrawal, either full or partial, would, in all likelihood, lead to military defeat?
- v. Group E - Issues relating to the Fourth Ground of Mr Bemba's appeal against the Conviction Decision:
- a. The elements of crimes against humanity include the requirement that "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population". In cases of individual criminal responsibility under article 28 of the Statute, does this requirement apply to the direct perpetrator of the crime or to the accused person or both?
  - b. Can a Trial Chamber rely on the war crime of pillaging to establish that there was an organizational policy?
  - c. Responses to and/or replies to responses to the questions listed in the Appeals Chamber's "Order for submissions on the contextual elements of crimes against humanity" of 30 October 2017 (ICC-01/05-01/08-3564).
2. The parties and participants will be invited to address the Appeals Chamber on the five groups of issues set out above as follows:

In relation to Group A:

- 1) Counsel for Mr Bemba (maximum 15 minutes);
- 2) The Prosecutor (maximum 15 minutes);
- 3) The Legal Representative of Victims (maximum 10 minutes);
- 4) The Prosecutor in response to the Legal Representative of Victims (maximum 5 minutes);
- 5) Counsel for Mr Bemba in reply to the Prosecutor and the Legal Representative of Victims (maximum 10 minutes).

In relation to Groups B to E:

- 1) Counsel for Mr Bemba (maximum 30 minutes);
- 2) The Prosecutor (maximum 30 minutes);

- 3) The Legal Representative of Victims (maximum 15 minutes);
  - 4) The Prosecutor in response to the Legal Representative of Victims (maximum 5 minutes);
  - 5) Counsel for Mr Bemba in reply to the Prosecutor and the Legal Representative of Victims (maximum 10 minutes).
3. At the hearing, the parties and participants will also be invited to address the Appeals Chamber on any relevant issues arising in the appeals of the Prosecutor and Mr Bemba against the decision of Trial Chamber III entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 21 June 2016 (ICC-01/05-01/08-3399), as follows:
- 1) Counsel for Mr Bemba (maximum 25 minutes);
  - 2) The Prosecutor (maximum 25 minutes);
  - 3) The Legal Representative of Victims (maximum 10 minutes);
  - 4) The Prosecutor in response to the Legal Representative of Victims (maximum 5 minutes);
  - 5) Counsel for Mr Bemba in reply to the Prosecutor and the Legal Representative of Victims (maximum 10 minutes).
4. Questions may be put to the parties and participants from the bench in these or any other relevant respects.
5. Should he wish, Mr Bemba may address the Appeals Chamber for 15 minutes at the close of the hearing.
6. The parties and participants are directed to provide the Appeals Chamber by Thursday, 4 January 2018 with (i) a list of all the relevant decisions, orders and transcripts of the Court, and (ii) electronic copies of authorities, with the relevant sections indicated, to which they intend to refer during the hearing.
7. The Registrar is directed to make the necessary arrangements to ensure Mr Bemba’s presence at the hearing.



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



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**Judge Christine Van den Wyngaert**  
**Presiding Judge**

Dated this 27th day of November 2017

At The Hague, The Netherlands