

SUMMARY OF MR. JEAN-PIERRE BEMBA'S APPEAL AGAINST CONVICTION

On 19 September 2016, Mr. Bemba filed an appeal against his conviction. Whilst no two trials are ever exactly alike, it is no exaggeration to say that there has never been a trial quite like the *Bemba* case. In straightforward historical terms, of course, it will always be the first command responsibility case at the ICC, as well as the Court's first case involving allegations of sexual violence. For a time, Mr. Bemba was (and arguably, still is) the highest profile accused held in custody at the Detention Unit. It is objectively an important case.

The novelty of the *Bemba* case, however, does not end with the accused's status, the mode of liability with which he was charged, nor the substance of his charges. It was also the first case in international criminal law in which the accused's Counsel was arrested and imprisoned during the course of the trial, in which the President of any international tribunal lifted the immunities and privileges of defence lawyers, permitting their arrests and their offices to be searched, and in which the Prosecution was permitted to intercept and listen to telephone conversations between the accused and his lawyers, between the lawyers themselves, and between the lawyers and Defence witnesses. It is also unique in the amount of *ex parte* access to the Trial Chamber enjoyed by the Prosecution to discuss matters directly relevant to the Judgment itself, namely, the credibility of the Defence case.

The effect of these unprecedented incursions into an accused's rights meant that the Bemba trial, in fact, was a mistrial.

A quarter of the document filed in support of appeal details how Mr. Bemba's right to a fair trial was violated by the manner in which the Trial Chamber and the Prosecution dealt with suspicions of offences against the administration of justice. The Prosecution, instead of prioritising and preserving the fairness of the trial by concluding its investigations as rapidly as possible so that they could be revealed to

the Defence for a response and/or remedial action, used these suspicions to offer substantial *ex parte* submissions to the Trial Chamber, followed by an extended period of surveillance of Mr. Bemba and members of his Defence team. Recordings of telephone calls between Mr. Bemba and his Defence, and amongst members of his Defence team, were revealed to the Prosecution Senior Trial Attorney in the trial against Mr. Bemba while the trial was ongoing. These (and other) measures destroyed the substance and appearance of the fairness of the trial. No adversarial system of justice would countenance such serious violations of its most basic principles.

The majority of the appeal, however, is dedicated to the flaws which undermine command. The Trial Chamber's findings on effective control fall far outside established military doctrine and practice. Left undisturbed, these findings will isolate the Judgment from the main body of international scholarship and, critically, deprive it of precedential value in shaping the future actions of commanders.

The Trial Chamber, having disregarded the evidence of both the Prosecution and Defence military experts, invented a theory of command responsibility which is a military impossibility. The Trial Chamber conflated basic military principles, misunderstood and misapplied established legal doctrine and, most alarmingly, made key factual findings on the basis of no evidence.

In reality, Mr. Bemba is the commander that international law would have him be. He trained his army, he gave them a Code of Conduct, he actively pursued rumours of crimes, he punished those identified to him. Rather than going out of its way in this its first command responsibility case to reinforce the principles of responsible command, the ICC created a flawed and self-fulfilling construct of criminality.

Other fatal flaws undermine the conviction. Significantly, nearly two thirds of the underlying acts for which Mr. Bemba was convicted were not included or improperly included in the Amended Document Containing the Charges and fall

outside the scope of the charges. Reliance on these acts to convict Mr. Bemba was a legal error.

The Trial Chamber also failed to make critical findings. To convict a person of a crime against humanity, as opposed to the “ordinary” underlying criminal act, a Trial Chamber must find that he knew that his conduct was part of a widespread attack on a civilian population. No such finding was made in this case. This failure invalidates Mr. Bemba’s convictions for the crimes against humanity of rape and murder and, thus, materially affects the Judgment. The findings on other contextual elements were similarly flawed. Most notably, the Trial Chamber misapplied the law of pillage.

Mr. Bemba also challenged the extraordinary scope of Legal Representatives of Victims (LRVs) participation in his trial. Unlike any other case at the ICC, LRVs were permitted to act as parties, performing lengthy and aggressive cross-examinations of each and every Defence witness, with no limits as to the subject-matter of their questions, for which they required no prior approval from the Trial Chamber. The trial was accordingly unbalanced and unfair.

The Prosecution has two months within which to file a response.