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THE *BEMBA* APPEALS CHAMBER JUDGMENT: IMPUNITY FOR SEXUAL AND GENDER-BASED CRIMES?

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INTRODUCTION

On June 8, 2018, a majority of the Appeals Chamber of the International Criminal Court (ICC) reversed the conviction of former military commander Jean-Pierre Bemba for the crimes against humanity of rape and murder and the war crimes of rape, murder, and pillaging committed by his troops in the Central African Republic (CAR) between October 2002, and March 2003.[1] The decision was clearly a disappointment for the victims of the crimes committed by Bemba's troops, who have been waiting for more than fifteen years for a measure of justice. Significantly, the acquittal also means that sixteen years after the Rome Statute came into force,[2] and despite increasing recognition of the prevalence of sexual violence in the situations under the jurisdiction of the court, the ICC has yet to issue a single, final conviction for the crime of sexual violence.

A number of commentators have critiqued various aspects of the judgment, including the standard of review used by the Appeals Chamber.[3] However, with few

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[1] *See* Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute" (June 8, 2018) [hereinafter Bemba Appeals Judgment]. This case concerned a military campaign of atrocities, including sexual violence, murder, and pillaging, committed by the Movement for Liberation of Congo (MLC), a rebel force operating in the armed conflict in the Central African Republic (CAR) between 2002 and 2003. The Trial Chamber convicted Jean-Pierre Bemba, a former vice-president of the Democratic Republic of the Congo, who commanded the MLC, of war crimes and crimes against humanity, due to Bemba's failure to prevent or punish the criminal conduct of fighters under his effective control. *See* Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, 183 (Mar. 21, 2016) [hereinafter Bemba Trial Judgment]. Bemba appealed his conviction, arguing that he exercised reasonable and necessary means to prevent and punish his troops for their acts. Ultimately, the Appeals Chamber reversed Bemba's conviction, thereby acquitting him of all charges. *See* Bemba Appeals Judgment; *see also infra* Section II.B.

[2] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute entered into force July 1, 2002.

[3] *See, e.g.*, Diane Marie Amann, *In* Bemba *and Beyond, Crimes Adjudged to Commit*

exceptions,[4] little of this commentary has focused on the impact of the Appeals Chamber's analysis of command responsibility under Article 28 of the Rome Statute on sexual and gender-based crimes. This Article aims to fill that gap.

Article 28(a) requires three central elements be proven beyond a reasonable doubt in order to convict a military commander for the crimes of his or her subordinates, namely that: (1) the commander had effective command and control, or effective authority and control, over those subordinates; (2) he or she knew or should have known that those forces were committing or about to commit crimes within the jurisdiction of the ICC; and (3) he or she failed to take "all necessary and reasonable measures" to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.[5] The majority's decision—in particular, its analysis of the necessary and reasonable measures that a commander is required to take to avoid liability under Article 28—evinces a problematic lack of gender competence.

Indeed, the majority's approach in the *Bemba* appeal seems consistent with earlier judgments[6] in which the court similarly interpreted other modes of liability[7] in the absence of the kind of insight that a critical gender analysis would have offered.[8] As a forthcoming article we recently co-authored explains,[9] the court has adopted a rigid interpretation of direct and indirect co-perpetration under Article 25(3)(a)[10] and

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Themselves, EJIL TALK! (June 13, 2018), https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves [https://perma.cc/UW96-5EWD]; Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in* Prosecutor v. Jean-Pierre Bemba Gombo, EJIL TALK! (June 12, 2018), https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo [https://perma.cc/25D6-QLUB]; Alex Whiting, *Appeals Judges Turn the ICC on Its Head with* Bemba *Decision*, JUST SECURITY (June 14, 2018), https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision [https://perma.cc/6NAH-7WP5].

[4] *See, e.g.*, Joseph Powderly & Niamh Hayes, *The* Bemba *Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC*, PHD STUD. HUM. RTS. (June 26, 2018), http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html [https://perma.cc/RUL4-7P5Z]; Susana SáCouto, *The Impact of the Appeals Chamber Decision in* Bemba*: Impunity for Sexual and Gender-Based Crimes?*, INT'L JUST. MONITOR (June 22, 2018), https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes [https://perma.cc/57JD-8H2N].

[5] Rome Statute, *supra* note 2, art. 28(a).

[6] *See, e.g.*, Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgement Pursuant to Article 74 of the Statute (Mar. 14, 2014) (acquitting the accused of the war crimes and crimes against humanity of rape and sexual slavery despite the fact that these crimes were committed by the same militia group against members of the same ethnic group in the same village and during the same time as the other crimes of which the accused was convicted).

[7] *See* Rome Statute, *supra* note 2, art. 25(3).

[8] Susana SáCouto, Leila Nadya Sadat & Patricia Viseur Sellers, *The Gendered Jurisprudence of the ad hoc Tribunals' Joint Criminal Enterprise Theory of Liability and Article 25(3) of the Rome Statute: Two Trains Running*, LEIDEN J. INT'L L. (forthcoming 2019).

[9] *Id.*

[10] The court's restrictive interpretation of indirect perpetration under Article 25(3)(a) "is

applied common purpose liability under Article 25(3)(d) in an arguably discriminatory manner,[11] thereby resulting in the acquittal of sexual violence charges against the accused. Thus, combined with these earlier decisions, the majority's analysis of command responsibility in *Bemba*, if followed, significantly narrows the prospects for successful prosecution of sexual and gender-based crimes at the ICC.

This is hardly what drafters had in mind when adopting a statute which, for the first time in history, not only enumerated a broad range of sexual violence and gender-based (SVGB) crimes as war crimes and crimes against humanity,[12] but also included structural and procedural provisions[13] intended to ensure that these crimes would be

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likely to serve as a particularly high bar for cases involving sexual-violence charges." SáCouto, Sadat & Sellers, *supra* note 8. Indeed, it will likely be difficult to prove that individuals accused of such crimes "unquestionably . . . conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution" as required by the court's doctrinal construction of indirect interpretation, given that sexual violence, even when widespread, often occurs because it is tolerated and permitted rather than explicitly ordered or planned. SáCouto, Sadat & Sellers, *supra* note 8 (citing Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1412 (Mar. 1, 2014)).

[11] SáCouto, Sadat & Sellers, *supra* note 8 ("It is hard to avoid the conclusion that the Chamber in Katanga isolated and treated SGBV crimes differently, both factually and legally, from the other charged crimes. Rather than viewing the evidence in the record as linking the sexual violence with the broader context in which it occurred, the Chamber analyzes these crimes separately, requiring more concrete evidence than its own findings on common purpose liability suggest it is legally required to show that the sexual violence was part of the common plan.").

[12] *See* Rome Statute, *supra* note 2, art. 7(1) ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."); *see also id.* art. 8(2)(b) (defining "war crimes" as including "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"); *id.* art. 8(2)(e) (defining "war crimes" as including "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts . . . (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions"); International Criminal Court, Elements of Crimes, art. 6(b)(1) & n.3, Doc. PCNICC/2000/1/Add.2 (2000) (noting that although rape was not listed as a form of genocide under Article 6 of the Rome Statute, genocide committed by acts causing "serious bodily or mental harm" may include "acts of torture, rape, sexual violence or inhuman or degrading treatment").

[13] *See, e.g.*, Rome Statute, *supra* note 2, art. 54(1)(b) (requiring that, in "ensur[ing] the effective investigation and prosecution of crimes within the jurisdiction of the Court," the prosecutor "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children"); ICC Rules of Procedure & Evidence, ICC-ASP/1/3, R.70(d) (Sept. 9, 2002) ("[C]redibility, character or predisposition to sexual availability of

adequately investigated and prosecuted by the court.[14] Absent reconsideration, the court's jurisprudence on modes of liability will remain a major obstacle to the successful prosecution of cases involving SVGB crimes, especially for high-ranking accused who either did not clearly order the crimes or were not physically present during the commission of those crimes.[15]

I. THE ROOTS OF COMMAND RESPONSIBILITY

The roots of command responsibility derive from the principle of responsible command, which requires military commanders to ensure compliance by their subordinates with the laws and customs of war.[16] The principle of responsible command first appeared in the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Fourth Hague Convention,[17] and then in a number of post–World

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a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness"); *id.* R. 71 ("[A] Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.").

[14] Cate Steains, *Gender Issues*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357, 364–65, 375–83 (Roy S. Lee ed., 1999) (noting that "[t]he experience of the [International Criminal Tribunal for the former Yugoslavia] and [International Criminal Tribunal for Rwanda], as well as the post–Second World War prosecutions under control Council Law No. 10, suggested that [the effective investigation, prosecution, and trial by the Court of sexual and gender violence crimes] would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute. A number of delegations at the [Preparatory Commission] and at the Diplomatic Conference therefore attached importance to the inclusion of such special structural mechanisms").

[15] It is worth noting that a majority of the *Bemba* Appeals Chamber concluded that Bemba could not be found liable for the crimes they found to have been established beyond reasonable doubt—the vast majority of which were rapes—in part because he was a "remote" commander. Bemba Appeals Judgment, *supra* note 1, ¶ 191. The application of this reasoning to a case involving predominantly crimes of sexual violence is disturbingly similar to a tendency in the early jurisprudence of the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in which judges tended to impose higher evidentiary thresholds in cases involving sexual and gender-based crimes compared to other types of cases. *See* Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 337, 356 (2009) (concluding upon a review of the jurisprudence of the ad hoc tribunals on various modes of liability, including command responsibility, that in cases of sexual violence, the tribunals appeared "reluctant to draw meaningful inferences from circumstantial evidence and . . . to prefer direct or more specific evidence as to knowledge or causality, even when such evidence [was] not required as a matter of law").

[16] *See* Jamie Allan Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, INT'L REV. RED CROSS 303, 303–05, 317 (June 30, 2008), https://www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf [https://perma.cc/AM52-X3EK].

[17] Convention (IV) Respecting the Laws and Customs of War on Land, Art. 1, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 71 (Dietrich Schindler & Jiří Toman eds., 1988).

War I international conventions, including the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,[18] and the Convention Relative to the Treatment of Prisoners of War.[19]

In the post–World War II trials, commanders were held *criminally* liable for failure to exercise control over subordinates and to repress or redress their crimes. In the case against Japanese General Tomoyuki Yamashita, for instance, a U.S. Military Commission in the Philippines found Yamashita guilty and sentenced him to death, stating:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[20]

The International Military Tribunal for the Far East (IMTFE, also referred to as The Tokyo Tribunal) also imposed criminal liability based upon command responsibility.[21] Regarding the infamous military operation known as the "Rape of Nanking," for

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[18] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, June 19, 1931, 118 L.N.T.S. 303, 327, Art. 26.

[19] Convention Relative to the Treatment of Prisoners of War, June 19, 1931, 118 L.N.T.S. 343, 363, Art. 18.

[20] United States v. Yamashita, Case No. 21, a Military Commission appointed by ¶ 24, Special Orders 100, Headquarters United States Army Forces, Western Pacific (Feb. 4, 1946), *reprinted in* IV LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 35 (1948).

[21] The Tokyo Tribunal judges opined that "Army or Navy commanders can, by order, secure proper treatment and prevent ill treatment of prisoners. . . . If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes." International Military Tribunal for the Far East, Judgment, at 48446, *reprinted in* 103 THE TOKYO MAJOR WAR CRIMES TRIAL (R. John Pritchard ed., 1998). *See also* Maj. W.H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 1–11, 66 (1993). For further discussion of the IMTFE sexual-violence jurisprudence, see KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTIONS AND INTERNATIONAL WAR CRIMES TRIBUNALS (1997); Kelly D. Askin, *Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward*, *in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES (Anne Marie de Brouwer et al. eds., 2013); Patricia Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 287–93 (Gabrielle Kirk McDonald & Olivia Swaak Goldman eds., 2000).

instance, the Tokyo Tribunal judges found the commander, General Iwane Matsui, guilty, noting:

> In this period of six or seven weeks, thousands of women were raped. . . . The Tribunal is satisfied that Matsui knew what was happening. He did nothing or nothing effective to abate these horrors. . . . He had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally liable for his failure to discharge his duty.[22]

Notably, the Tokyo Tribunal extended the principle to civilian superiors. Among the civilian leaders convicted by the IMTFE under superior responsibility—inclusive of crimes of sexual violence—was Koki Hirota, who served as both Foreign Minister and Prime Minister of Japan between 1933 and 1938.[23] In finding that Hirota had disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war, the IMTFE explained:

> As Foreign Minister, he received reports of . . . atrocities immediately after the entry of the Japanese forces into Nanking. [A]ccording to the Defence, . . . credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of [the] opinion that [Hirota] was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.[24]

A number of superiors, both civilian and military, were also tried pursuant to Control Council Law No. 10.[25] In these cases, superiors were individually found criminally responsible based on their failures both to prevent and to punish the crimes

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[22] International Military Tribunal for the Far East, Iwane Matsui Judgment, at 49815–16, *reprinted in* 103 THE TOKYO MAJOR WAR CRIMES TRIAL (R. John Pritchard ed., 1998).

[23] *Id.*

[24] *Id.* at 49791.

[25] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVI (1951).

committed by their subordinates.[26] For instance, in the *Hostage Case*,[27] high-ranking German officers were charged with criminal responsibility under the doctrine of command responsibility for the murder, deportation, and looting of thousands of civilians from Nazi-occupied Greece, Yugoslavia, Norway, and Albania between September 1939, and May 1945, by troops under their command and acting pursuant to their orders.[28] One of the defendants, General Wilhelm List, was charged with passing to subordinates illegal orders that resulted in ruthless measures against the civilian population of the Balkans.[29] Upon review of the facts, the tribunal held List's failure to terminate the unlawful killings in his zone of command and to take adequate steps to prevent their recurrence constituted a serious breach of duty, rendering him criminally responsible.[30]

The concept of superior responsibility was codified in Additional Protocol I to the Geneva Conventions of 1949.[31] According to Article 86(2), superiors are not

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[26] *See, e.g.*, United States v. Von Leeb, Case No. 12, Judgment (Oct. 27–28, 1948), *reprinted in* 10–11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 512, 558 (1951) (finding Wilhelm Ritter von Leeb, commanding General of the German Army Group North, guilty of implementing the *Barbarossa Jurisdiction Order* despite suspecting the order's illegality, and noting that "[a]ny participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part"); United States v. Flick, Case No. 5, Judgment (Dec. 22, 1947) *reprinted in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1187, 1202 (1952) (finding Flick and Weiss, two leading civilian industrialists, guilty for their participation in the use of slave labor, and in particular finding that Flick was criminally responsible for his "knowledge and approval" of the steps taken by Weiss to procure slave laborers); United States v. Brandt (The Medical Case), Case No. 1, Judgment (Aug. 17, 1947), *reprinted in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 171, 207 (1951) (reaffirming the principle that "[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war"); Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechlin, Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, *reprinted in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1061, 1088 (1951) (convicting the civilian superior Herman Roechling, head of Roechling Iron and Steel Works in Voelklingen, for the mistreatment of forced laborers, and noting that the basis of Roechling's liability did not stem from having ordered the horrific treatment, but from "having tolerated it and [from] not having done anything in order to have [the treatment] modified").

[27] United States v. List, Case No. 7 (Feb. 19, 1948), *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 759 (William S. Hein & Co. 1950).

[28] *Id.*

[29] *Id.* at 1263–64.

[30] *Id.* at 1274.

[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

absolved of responsibility for breaches by their subordinates if the superiors knew, or had information enabling them to conclude, that the breaches were being committed or were about to be committed, and they did not take reasonable measures to prevent them.[32] Article 87 adds a requirement that superiors report breaches by their subordinates to competent authorities and take disciplinary or penal action against violators.[33]

Additionally Protocol II does not directly express the requirements of command responsibility within the context of non-international armed conflict.[34] Nonetheless, the ICTY appeals decision in the *Hadžihasanović*[35] case made clear that organized military forces operate on the basis of responsible command, irrespective of the characterization of the conflict.[36] Specifically, the decision held that the command responsibility doctrine applied under international customary law to internal armed conflict, notwithstanding the absence of reference to the doctrine in Additional Protocol II.[37] Accordingly, command responsibility had been interpreted to cover armed conflicts governed by Common Article 3 to the Geneva Conventions and by Additional Protocol II, having a basis in customary international law that dates from, at least, the early 1990s.

II. COMMAND RESPONSIBILITY UNDER ARTICLE 28 OF THE ROME STATUTE

Under Article 28(a) of the Rome Statute, "a military commander or person effectively acting as a military commander" may be held criminally responsible for crimes within the jurisdiction of the court committed by forces under his or her effective command and control, or effective authority and control, where:

1. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

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Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (1979).

[32] *Id.* art. 86(2).

[33] *Id.* art. 87.

[34] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (1979).

[35] Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 14 (Int'l Crim. Trib. For the Former Yugoslavia July 16, 2003).

[36] *Id.* ¶ 16.

[37] *Id.* ¶¶ 28–31. The *Hadžihasanović* case concerned events occurring in the former Yugoslavia between January 1993 and March 1994. Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Third Amended Indictment, ¶ 7 (Int'l Crim. Trib. For the Former Yugoslavia Sept. 26, 2003).

2. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[38]

A. The Trial Chamber's Approach

Bemba was the first verdict in which the Trial Chamber had an opportunity to lay out its interpretation of the elements of command responsibility.[39] While the court addressed all of these elements, our discussion here is focused on the two elements relevant to our analysis of the Appeals Chamber decision—namely effective control and failure to take all reasonable and necessary measures to prevent or repress the crimes.[40]

In its judgment, the Trial Chamber explained that "effective control" requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities, and that any lower degree of control, such as the ability to exercise influence—even substantial influence—over the forces who committed the crimes, would be insufficient to establish command responsibility.[41] Furthermore, whether or not there are intermediary subordinates between the commander and the forces which committed the crimes is immaterial; the question is simply whether or not the commander had effective control over the relevant forces.[42] There is no requirement that a commander have sole or exclusive authority and control over the forces who committed the crimes; it is possible for multiple individuals to have effective authority and control.[43]

With respect to "all reasonable and necessary measures," the Trial Chamber made clear that Article 28(a)(ii) imposes three distinct duties upon commanders: "(i) preventing the commission of crimes; (ii) repressing the commission of crimes; and (iii) submitting the matter to the competent authorities for investigation and prosecution."[44] Failure to discharge *any* of these responsibilities may entail liability.[45] The scope of the duty to prevent depends on the material power of the commander to intervene in a specific situation, which in turn "is dependent on the circumstances at the relevant time."[46] These measures can include "issuing orders specifically meant to prevent the crimes, as opposed to merely issuing routine orders;" "suspending, excluding, or redeploying violent subordinates;" and "taking disciplinary measures to prevent the

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[38] Rome Statute, *supra* note 2, art. 28(a).
[39] Bemba Trial Judgment, *supra* note 1, ¶ 183.
[40] *Id.*
[41] *Id.* ¶¶ 170, 183.
[42] *Id.* ¶ 184.
[43] *Id.* ¶ 185.
[44] *Id.* ¶ 201.
[45] *Id.*
[46] *Id.* ¶ 203.

commission of atrocities by the forces under the commander's command."[47] The duty to repress, while related to the duty to prevent, is intended "to ensure that military commanders fulfil their obligation to search for the perpetrators and either bring them before the courts or hand them over to another state for trial."[48] Further, "[i]f the commander has no power to sanction those who committed the crimes, he has an obligation to submit the matter to the competent authorities."[49] The duty to punish or to submit the matter to competent authorities "aims at ensuring that offenders are brought to justice, in order to avoid impunity and to prevent future crimes."[50] At a minimum, the duty to punish includes "the obligation to investigate possible crimes in order to establish the facts."[51] Significantly:

> [A] commander cannot be considered to have discharged his duty to submit the matter if he does not submit the matter to an authority competent to investigate and prosecute the alleged perpetrator. Further, referral to a non-functioning authority or an authority likely to conduct an inadequate investigation or prosecution may not be sufficient to fulfil the commander's obligations.[52]

The Trial Chamber spent nearly four years hearing the case,[53] taking testimony from seventy-seven witnesses, including seven expert witnesses, and reviewing 733 items of documentary evidence.[54] In a unanimous decision, the Trial Chamber concluded that Bemba had effective control over the Movement for the Liberation of the Congo (MLC) forces operating in the Central African Republic (CAR) based not only on his role as President of the MLC and Commander-in-Chief of its armed forces, which gave him "broad formal powers, ultimate decision-making authority, and powers of appointment, promotion, and dismissal,"[55] but also based on evidence that he "controlled the MLC's funding, had direct lines of communication to commanders in the field, had well-established reporting systems, received operational and technical advice from the MLC General Staff, and both could, and did, issue operational orders."[56] In determining that Bemba had effective control over the MLC forces in the CAR, the Trial Chamber also took into account the fact that Bemba had represented

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[47] *Id.* ¶¶ 203–04. *See also* Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 172 (June 9, 2014).

[48] Bemba Trial Judgment, *supra* note 1, ¶ 206.

[49] *Id.* ¶¶ 207–08.

[50] *Id.* ¶ 209.

[51] *Id.* ¶ 207.

[52] *Id.* ¶ 208.

[53] *Id.* ¶¶ 10–16.

[54] *Id.* ¶ 221.

[55] *Id.* ¶ 697.

[56] *Id.*

the MLC forces in external matters, such as responding to the media or in discussions with the UN,[57] had disciplinary powers over MLC members, "including the power to initiate inquiries and establish courts-martial," and had the ability to send or withdraw troops from the CAR.[58]

After hearing all the evidence, the Trial Chamber concluded that although the accused took some measures to address alleged crimes committed by his forces in the CAR, including creating two commissions to investigate those crimes and conducting a trial of some soldiers,[59] those measures were insufficient, meaning the accused had failed in his duties to prevent, repress, and punish the crimes.[60] In reaching this conclusion, the court noted, *inter alia*, that:

- Although Bemba set up a commission—known as the Mondonga Inquiry—in response to allegations that crimes were being committed in the CAR by MLC soldiers, investigators did not pursue various relevant leads—in particular, reports of rape and the responsibility of commanders—and no explanation or justification was given for those omissions. As a result, only seven low-ranking soldiers were tried, and solely on charges of pillaging minor goods and "small sums of money."[61]
- Although Bemba established a second commission of inquiry—known as the Zongo Commission—in response to "public allegations of murder, rape, and pillaging by MLC soldiers"—the mandate of that Commission was limited to addressing allegations of pillaging. Moreover, "[i]t was . . . comprised solely of MLC officials, and based its . . . interviews on eight Zongo inhabitants who . . . worked for the MLC" rather than soldiers.[62]
- During a visit to the CAR, Bemba did not take "any concrete measures in response to allegations of crimes by MLC soldiers."[63]
- Finally, there was "no evidence that [ ] Bemba followed up on or enforced general warnings he publicly made to his troops against abuse of the civilian population."[64]

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[57] *Id.* ¶ 702.

[58] *Id.* ¶ 697.

[59] *Id.* ¶ 719. In particular, the measures included:

> [T]he Mondonga Inquiry; a November 2002 visit to the CAR, during which Mr Bemba met with the UN representative in the CAR, General Cissé, and President Patassé; a speech given at PK12 in November 2002; the trial of Lieutenant Willy Bomengo and others at the Gbadolite court-martial; the Zongo Commission; correspondence with General Cissé; correspondence in response to the FIDH Report; and the Sibut Mission.

Id.

[60] *Id.* ¶ 727.

[61] *Id.* ¶¶ 589, 720.

[62] *Id.* ¶ 722.

[63] *Id.* ¶ 721.

[64] *Id.* The Trial Chamber went on to note that:

After considering all the evidence, the Trial Chamber ultimately determined that the measures Bemba took were "a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR."[65]

B. The Appeals Chamber Approach

On review of the Trial Chamber's judgment, a majority of the Appeals Chamber decided that rather than adopt the standard of review for factual errors used by the Appeals Chamber in an earlier case[66]—and consistently used by the ICTY and ICTR[67]—it would use a new standard. Instead of determining "whether a reasonable trial chamber could have been satisfied beyond a reasonable doubt as to the finding in question,"[68] which would mean giving the Trial Chamber a "margin of deference" with respect to its evaluation of the evidence,[69] the Appeals Chamber in *Bemba* decided it

> In addition to or instead of the insufficient measures Mr Bemba did take, and in light of his extensive material ability to prevent and repress the crimes, Mr Bemba could have, *inter alia*, (i) ensured that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervised during the 2002–2003 CAR Operation; (ii) initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes; (iii) issued further and clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altered the deployment of the troops, for example, to minimise contact with civilian populations; (v) removed, replaced, or dismissed officers and soldiers found to have committed or condoned any crimes in the CAR; and/or (vi) shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.

Id. ¶ 729.

[65] *Id.* ¶ 727.

[66] *See* Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, ¶ 21 (Dec. 1, 2014) [hereinafter Lubanga Appeals Judgment].

[67] Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeals Judgement, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgement, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

[68] Bemba Appeals Judgment, *supra* note 1, ¶ 38.

[69] Lubanga Appeals Judgment, *supra* note 66, ¶ 24 (explaining that deference is given to the Trial Chamber on matters of fact because "[t]he Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness'[s] testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion" (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-A,

could "interfere with the factual findings of the first-instance chamber whenever the failure to interfere *may* occasion a miscarriage of justice,"[70] and that it would do so when it is "able to identify findings that can reasonably be called into doubt."[71] At the same time, a majority of the Appeals Chamber declined to "assess the evidence *de novo*,"[72] meaning that even though it granted less deference to the Trial Chamber's assessment of the evidence, it did not assess anew all the evidence in the record. Relying, therefore, on its own limited review of the evidence, a majority of the Appeals Chamber disagreed with the Trial Chamber's analysis of the evidence, acquitting Bemba of all charges.[73] It first found that the Trial Chamber had erred in convicting Bemba for various criminal acts—including several acts of rape, murder, and pillaging[74]—because these acts did not fall within the "facts and circumstances described in the charges."[75] It then found that the Trial Chamber had erred in convicting Bemba for those acts which were adequately described in the charges and proven beyond a reasonable doubt because the Trial Chamber made a number of errors that "resulted in an unreasonable assessment of whether [ ] Bemba failed to take all [the] necessary and reasonable measures" required to avoid liability under Article 28 of the Rome Statute.[76] Ironically, perhaps, although the vast majority of the acts adequately described in the charges and proven beyond a reasonable doubt were acts of sexual violence,[77] little of the majority's discussion is dedicated to whether any of the measures Bemba took were intended to address sexual violence allegations.[78] Indeed, as discussed below, the majority's reasoning reveals a problematic tendency—discernible in earlier cases as well[79]—to assess questions of liability through an arguably gendered lens, increasing the risk of impunity for SGBV crimes.

Appeals Judgement, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001) (alteration in original))).

[70] Bemba Appeals Judgment, *supra* note 1, ¶ 40 (emphasis added).

[71] *Id.* ¶ 46.

[72] *Id.* ¶ 42 (citing Lubanga Appeals Judgment, *supra* note 66, ¶ 27). *Lubanga* clarified that:

> [A]n appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.

Lubanga Appeals Judgment, *supra* note 66, ¶¶ 26–27 (citations omitted). It is worth noting, however, that unlike in *Bemba*, the Lubanga Chamber applied the more deferential standard of review, thus obviating a need for it to conduct a *de novo* review.

[73] Bemba Appeals Judgment, *supra* note 1, ¶¶ 196–98.

[74] Bemba Trial Judgment, *supra* note 1, ¶ 742.

[75] Bemba Appeals Judgment, *supra* note 1, ¶ 196 (quoting Rome Statute, *supra* note 2, art. 74(2)).

[76] *Id.* ¶ 193.

[77] *Id.* ¶ 119.

[78] *See id.*

[79] *See supra* note 6 and accompanying text.

1. The Trial Chamber's Failure to Assess the Measures Bemba Should Have Taken by Reference to the Specific Crimes That Were Actually Committed

Among the errors identified by the majority was the Trial Chamber's failure to assess the measures Bemba should have taken by reference to the specific crimes that were actually committed.[80] The majority found that because the number of crimes adequately described in the charges and proven at trial beyond a reasonable doubt were "comparatively low," it was hard to assess how widespread the criminal acts were, making it "difficult to assess the proportionality of the measures taken."[81] It suggested that if the Trial Chamber had confined its assessment of the measures Bemba took by comparing those measures to the limited number of crimes for which he was convicted—rather than the "much broader and more general 'finding' by the Trial Chamber concerning widespread MLC criminality in the CAR"—it might have found those measures sufficient.[82]

There are several problems with this analysis. The *first* relates to the majority's position on the crime base against which the measures Bemba took should be assessed. Although the majority did not find Bemba guilty for the crimes that were not, in their view, adequately described in the charges, this finding does not mean those crimes did not occur, or that they should have been taken into consideration when assessing the sufficiency of the measures Bemba took to prevent or repress crimes about which he knew or should have known. As the dissenting judges point out, those "individual criminal acts were presented by the Prosecutor as *examples* of the criminality alleged to have been committed by the MLC troops during the 2002–2003 CAR Operation."[83] Thus, "the adequacy of the measures taken by [ ] Bemba to prevent and repress the commission of crimes within the jurisdiction of the Court must be assessed in light of the scale and duration of the criminal activity alleged as a whole."[84]

This relates to a *second* issue, namely the majority's critique of the Trial Chamber's reliance on "reliable evidence" that MLC crimes committed in the CAR were widespread. The majority notes that "the evidence in question, on its face, appears for the most part very weak, often consisting of media reports including anonymous hearsay[,]" adding that "the Trial Chamber failed to . . . address its potentially extremely low probative value."[85] However, the majority failed to mention that among the evidence relied on by the Trial Chamber was the testimony of various

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[80] Bemba Appeals Judgment, *supra* note 1, ¶ 183.

[81] *Id.*

[82] *Id.*

[83] Prosecutor v. Bemba, ICC-01/05-01/08, Dissenting Opinion of Judge Monageng and Hofmański, ¶ 94 (June 8, 2018) [hereinafter Bemba Appeals Dissenting Opinion] (emphasis added).

[84] *Id.*

[85] Bemba Appeals Judgment, *supra* note 1, ¶ 183.

witnesses,[86] which in turn was corroborated by media articles, NGO reports, and oral recordings of victims' statements submitted to the Bangui Court of Appeals.[87] Moreover, the majority did not have an opportunity, as did the Trial Chamber, to hear that testimony first hand, or to evaluate its reliability and credibility in light of *all* the other evidence submitted to the Court, given that it did not conduct a *de novo* review of the entire trial. Indeed, given these limitations, it is difficult to see why the majority felt better suited to assess the reliability and credibility of this evidence than the Trial Chamber.

Third, the majority recognized that "[t]he scope of the duty to take 'all necessary and reasonable measures' is *intrinsically connected* to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution."[88] The material ability of a commander to take measures, in turn, is "directly connected to his or her level of authority . . . and what he or she might reasonably have been expected to do."[89] As discussed above, the Trial Chamber found that Bemba had "disciplinary powers over MLC members, including the power to initiate inquiries and establish courts-martial."[90] Thus, one way to assess whether the measures Bemba took were sufficient would be to evaluate the Trial Chamber's findings on whether Bemba adequately exercised this authority. In other words, the more authority Bemba had over MLC troops in the CAR, the more he could have been expected to prevent or repress crimes committed by those troops and vice versa. However, the majority did not address this.[91] Rather, it turned to an assessment of "all necessary and reasonable measures" and introduced—without citing to any authority—a novel interpretation of that phrase.[92] Indeed, despite the plain language of Article 28, which states that a commander is liable if he or she fails to take *all* necessary and reasonable measures within his or her power to prevent or repress the crimes or to submit them to the competent authorities, the majority states:

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[86] *See, e.g.*, Bemba Trial Judgment, *supra* note 1, ¶ 461 (citing witness P6); *id.* ¶ 486 (citing witnesses P73, P42, P119, P38, P112, P178, P69, and P23); *id.* ¶ 520 (citing witnesses P119 and P69); *id.* ¶ 525 (citing witnesses P209, P63, P6, P178, and P9); *id.* ¶ 527 (citing witnesses P173, P6, and P9); *id.* ¶ 531 (citing witnesses P69, P173, P38, P119, and victim participant V2); *id.* ¶ 534 (citing witnesses P178, P169, P173, P6, and P9).

[87] *Id.* ¶¶ 461, 486, 520, 525, 527, 531, 534.

[88] Bemba Appeals Judgment, *supra* note 1, ¶ 167 (emphasis added).

[89] *Id.* ¶ 169.

[90] *Id.*

[91] In fact, although the Appeals Chamber expressed "concerns regarding the Trial Chamber's findings relevant to Mr Bemba's effective control"—which included an assessment of Bemba's level and exercise of authority over his troops, Bemba Trial Judgment, *supra* note 1, ¶ 697—it did not address these in any detail, having chosen to focus instead on the Trial Chamber's errors regarding its analysis of "Mr Bemba's purported failure to take all necessary and reasonable measures." Bemba Appeals Judgment, *supra* note 1, ¶ 32.

[92] Bemba Appeals Judgment, *supra* note 1, ¶ 32.

> [I]t is not the case that a commander must take each and every possible measure at his or her disposal. Despite the link between the material ability of a commander to take measures (which is directly connected to his or her level of authority) and what he or she might reasonably have been expected to do, it is not the case that a commander is required to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility.[93]

Thus, rather than grapple with Bemba's level of authority and whether the measures he took were consistent with an adequate exercise of that authority, the majority introduces a new standard by which the reasonableness of his measures are to be assessed: proportionality.[94] The focus, therefore, turns to numbers, which leads to the *fourth* and perhaps most significant problem with the majority's analysis, namely the gendered means by which it analyzes reasonableness.

As noted earlier, the majority held that the scope of the duty to take measures to prevent or repress crimes depends on the *scale and duration* of the crimes that were committed.[95] However, these are not the only factors the majority found relevant to evaluating the adequacy of Bemba's measures. Earlier in the judgment, the majority found that only one murder, twenty acts of rape, and five acts of pillaging had been established beyond a reasonable doubt.[96] Its opinion suggests that the specific character of these crimes also factors into the examination of whether a commander adequately executed his responsibilities. Indeed, in its critique of the Trial Chamber, the majority noted that "the Trial Chamber did not link Mr Bemba's putative failure to take adequate measures to any of the *specific criminal acts* . . . which he was ultimately convicted of."[97] Thus, it appears that its corrective approach would have considered not only scale and duration, but also the specific type of criminal conduct of which the accused was convicted. As the majority emphasized:

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[93] *Id.* ¶ 169. The majority went on to add—again, without citing any authority—that:

> In assessing reasonableness, the Court is required to consider other parameters, such as the operational realities on the ground at the time faced by the commander. . . . Commanders are allowed to make a cost/benefit analysis when deciding which measures to take, . . . This means that a commander may take into consideration the impact of measures to prevent or repress criminal behaviour on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes.

Id. ¶ 170.

[94] *See id.*

[95] *Id.* ¶ 183.

[96] *Id.* ¶ 119.

[97] *Id.* ¶ 136 (emphasis added).

> [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.[98]

Addressing the particularly high incidence of rape—as compared to other types of crimes of which Bemba was convicted—would appear to be a significant indicator that Bemba had fulfilled his duties. Conversely, failure to address the specific nature of these crimes would appear to indicate a dereliction of his responsibilities as a commander.

Therefore, notwithstanding the judges' varying views about the scope of the appropriate criminal conduct against which Bemba's measures should be assessed, even using the majority's calculation of crimes as a base line, it seems clear that what had to be punished, repressed, prevented or reported up the chain of command were overwhelmingly acts of sexual assault. Indeed, the conservative or limited number of crimes does not modify, but rather amplifies, the characterization of the criminal conduct as predominantly sexual in nature. Therefore, what should have been scrutinized when determining how to rule upon Article 28's "necessary and reasonable measures" requirement is the capacity of those measures to address that particular crime base.

Ultimately, however, the majority said nothing about the sufficiency of Bemba's efforts with respect to the particular *nature* of the crimes of which he was convicted. Despite the distinct standard it appears to have fashioned, the Appeals Chamber majority did not evaluate the adequacy of Bemba's measures in light of the 20:1 ratio of rapes to murders or the 4:1 ratio of rapes to acts of pillaging. Indeed, the majority's detailed identification of the crimes finds no corollary in its evaluation of Bemba's actions. To the contrary, although two of the chief mechanisms set up to investigate allegations of crimes committed by Bemba's troops in the CAR either failed to adequately pursue reports of rape (the Mondonga Inquiry)[99] or were limited to allegations of pillaging (Zongo Commission),[100] the majority made no observations about the quality—or lack thereof—of these investigations with respect to sexual-violence allegations.[101]

The manner in which the majority handled Bemba's claims about the Mondonga Inquiry illustrates this point. In relation to the scope of the Mondonga Inquiry, Bemba challenged as "'inaccurate and unreasonable' the Trial Chamber's conclusion that the Mondonga Inquiry was limited to allegations of pillaging, contending that the Trial Chamber ignored directly relevant evidence from D19 who testified that Colonel

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[98] *Id.* ¶ 193 (emphasis added).
[99] *Id.* ¶¶ 589, 720.
[100] *Id.* ¶ 722.
[101] *Id.* ¶¶ 589, 720, 722.

Moustapha was questioned as to rape and killing during the course of the inquiry."[102] The transcript of the trial proceedings reveals that the question posed to the Colonel about rape was whether he had "seen" any rapes.[103] In other words, the Colonel was asked whether he had been a direct eyewitness to rape, to which he responded in the negative.[104] There is no indication that Colonel Moustapha was asked about whether he had read or heard about a report by the Federation International de Droits d'Hommes (FIDH) alleging that Bemba's troops had committed rapes or whether he knew of or could have become aware of the rapes through inquiry notice,[105] particularly the specific rapes committed in late 2002 that the majority found had been committed.[106]

Significantly, although the majority questioned the credibility of the evidence relied upon by the Trial Chamber of widespread criminality by MLC troops,[107] it did not question the evidence demonstrating that Bemba had been alerted to the FIDH report.[108] In other words, Bemba had knowledge of the allegation of rapes. In fact, though he reacted to the rape accusations against members of the MLC as a defamatory political attack,[109] he communicated with the President of FIDH[110] and initiated the Mondongo inquiry.[111] Thus, his knowledge of the types of crimes allegedly committed by troops was undeniable even if he personally disputed the contents of the FIDH report, meaning he remained under an obligation to act on them.[112] Given that his knowledge of the potential for rapes or the possibility that they already occurred was an uncontested fact, it stands to reason that the design of the means

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[102] Bemba Appeals Judgment, *supra* note 1, ¶ 161 (citing Bemba's Appeals Brief, which in turn referred to the Trial Chamber Transcript of 26 February 2013, ICC-01/05-01/08-T-285-Red2-Eng, p. 42, lines 6–11).

[103] Prosecutor v. Bemba, Trial Chamber Transcript of 26 February 2013, ICC-01/05-01/08-T-285-Red2-Eng, p. 42, lines 6–11.

[104] *Id.*

[105] *See* Prosecutor v. Celebici, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 241 (Feb. 20, 2001) (affirming command responsibility "had reason to known" standard as including "inquiry notice," meaning the duty to inquire further when put on notice that crimes were committed by subordinates).

[106] *Id.* ¶ 116 ("The rape of two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002"; "The rape of a woman in the bush outside of PK22 in November 2002"; and "The rape of P69 and his wife in PK12 at the end of November 2002."). Although the majority found these rapes had not been adequately described in the charges against the accused and that the Trial Chamber had erred in convicting Bemba of these criminal acts, it made clear that it did not dispute the rapes had been committed, finding that they "could [for instance] be taken into account for the finding regarding the contextual element of crimes against humanity." *Id.* ¶ 117.

[107] Bemba Appeals Judgment, *supra* note 1, ¶ 183.

[108] *Id.*

[109] Bemba Trial Judgment, *supra* note 1, ¶¶ 574, 577 n.1780, 578 (citing witness P-15).

[110] *Id.* ¶¶ 600, 610–11.

[111] *Id.* ¶ 178.

[112] *See* Celebici, Appeals Chamber Judgement, ¶ 241 (Feb. 20, 2001) (affirming commanders have a duty to inquire further when put on notice that crimes were committed by subordinates).

and types of measures Bemba selected should have taken into account these particular types of crimes.

Simply put, facts concerning sexual violence were insufficiently elicited in the Mondongo inquiry and Bemba's establishment of that inquiry should have been regarded as insufficient in light of his knowledge that the alleged crimes committed by his troops included rapes. Yet, the majority did not interrogate these deficiencies. Indeed, the incompetent manner of taking rape evidence was not only not questioned by Bemba, but also readily accepted by the majority, which found the inquiry evidence of the reasonableness of his efforts.[113]

The majority took a similar approach to the subsequent investigation in Zongo, which concerned only allegations of pillaging.[114] The limited mandate raised no doubts for Bemba or for the majority, which accepted the outcome of the investigation as evidence of a reasonable measure. Likewise, the Appeals Chamber majority failed to scrutinize why the court-martial that resulted from the *Bomengo* case investigation,[115] which contained detailed information about acts of pillaging and rape allegedly committed by his troops in the CAR,[116] was limited to pillaging charges.[117] There was no indication that Bemba ordered any commanders subordinate to him to speak to survivors or civilian witnesses on the ground such as humanitarian workers, or to interview MLC foot soldiers or their immediate superiors concerning whether they took any action to address SVGB crimes.[118] Indeed, there was no indication that Bemba questioned the limitations of the investigation commissions or the court-martial or did anything further to ensure that allegations of sexual violence would be investigated.[119] Despite these inadequacies, the majority made no effort to assess the competence or quality of the measures Bemba took with respect to preventing or repressing sexual violence.[120] It never questioned, for instance, the absence of physical, digital, or other forensic evidence of sexual violence. Significantly, the

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[113] After Bemba conveyed the inquiry's result to FIDH, understandably, its president turned the largely ignored FIDH findings over to the ICC.

[114] Bemba Trial Judgment, *supra* note 1, ¶ 602 n.1877.

[115] The "*Bomengo* case" came out of the Mondonga inquiry and refers to the proceedings against Lieutenant Willy Bomengo and other soldiers of the 28th Battalion arrested in Bangui on October 30, 2002, on charges of pillaging. *Id.* ¶ 586. *See also id.* ¶ 298.

[116] *Id.* ¶ 712.

[117] *Id.* ¶ 720.

[118] Given the concurring opinion's emphasis that responsibility might not lie with the highest level of command, but instead with line commanders, the absence of an investigation or inquiry of the actions of the latter is a glaring omission. *See* Prosecutor v. Bemba, ICC-01/05-01/08, Appeals Chamber Judgement Separate Opinion of Judge Wyngaert and Judge Morrison, ¶¶ 33–35 (June 8, 2018). If geographically—or higher—positioned commanders have effective control over these intermediate commanders or even unit commanders, then surely Bemba, as the higher-positioned commander, should have conducted a competent review of the means by which his subordinates carried out their Article 28 duties.

[119] Bemba Trial Judgment, *supra* note 1, ¶¶ 589, 720, 722.

[120] *Id.*

majority's focus on the number of crimes, to the exclusion of the nature of those crimes, as the relevant means by which to assess the measures Bemba took to prevent or repress crimes was particularly troubling, as war-crimes investigations, even when adequate as to other crimes, have historically suffered from insufficiencies when it comes to sexual-violence allegations.[121] Given that none of the measures Bemba took appear intended to prevent or punish these crimes, it is difficult to see how the measures he took met the standard of "all necessary and reasonable measures within his . . . power."[122]

2. The Trial Chamber's Error in Assessing Bemba's Measures Based on Shortcomings in Their Execution

A second error highlighted by the majority of the Appeals Chamber was that the Trial Chamber erred in assessing Bemba's measures based on shortcomings in their execution.[123] The Trial Chamber had found the measures Bemba took to be inadequate, in part because they were "limited in mandate, execution, and/or results."[124] The Appeals Chamber majority found that "the measures taken by a commander cannot be faulted merely because of shortfalls in their execution."[125] Rather, when assessing whether the shortfalls of measures taken by a commander should be taken into account in determining their sufficiency, a court must establish, "(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."[126] The majority found that the Trial Chamber failed to use these factors,[127] adding that absent such an analysis, the failure of the measures' "mandate, execution, and/or results" could not be attributed to Bemba unless the Trial Chamber found that "Bemba purposively limited the mandates of the commissions and inquiries" to investigate crimes.[128]

This finding is curious for a couple of reasons. Earlier in its decision, the majority found that the Trial Chamber inappropriately considered Bemba's motives—in particular, his desire to rehabilitate the public image of the MLC—when determining that the measures he took were inadequate.[129] However, here, the majority appeared

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[121] *See* Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 66 (1999); Steains, *supra* note 14, at 364–65, 375–83.

[122] Rome Statute, *supra* note 2, art. 28(a)(b).

[123] Bemba Appeals Judgment, *supra* note 1, ¶¶ 180–81.

[124] Bemba Trial Judgment, *supra* note 1, ¶ 720.

[125] Bemba Appeals Judgment, *supra* note 1, ¶ 180.

[126] *Id.*

[127] *Id.* ¶¶ 180–81.

[128] *Id.* ¶ 181.

[129] *Id.* ¶¶ 176–77, 179 (finding that Bemba's motivation for rehabilitating the public image

to indicate that the Trial Chamber should not have attributed the shortcomings of those measures to Bemba without assessing whether he purposely limited the measures he took in response to allegations that his troops committed crimes.[130] As an initial matter, Bemba's motives would seem highly relevant to an understanding of whether he purposely limited the measures he took. Indeed, absent an express admission to this by Bemba—which of course would be highly unlikely—evidence that Bemba was motived by something other than a genuine desire to prevent or repress crimes would be quite pertinent to whether the specific measures he adopted were limited by design. Second, the majority cited no authority for the test it set out for a court to attribute to the accused the limitations of the results of the measures he undertook. Adding requirements not supported by the text of the Rome Statute (or other sources) unnecessarily restricts the interpretation of theories of liability that can be used to hold an accused criminally liable, which in turn negatively affects the prospects for accountability for SVGB crimes, as was the case here.[131]

3. The Trial Chamber's Failure to Appreciate Fully the Limitations Bemba Faced in Investigating and Prosecuting Crimes as a Remote Commander

A third error highlighted by the majority was that the Trial Chamber failed to appreciate fully "the limitations that [ ] Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country."[132] Significantly, it noted that this error "had an important impact on the overall assessment of measures taken by [ ] Bemba."[133]

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of the MLC troops did not necessarily conflict with the taking of genuine and effective measures as "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").

[130] *Id.* ¶¶ 176–77.

[131] SáCouto, Sadat & Sellers, *supra* note 8.

[132] Bemba Appeals Judgment, *supra* note 1, ¶ 191. *See also id.* ¶¶ 171–73. It is worth noting that in his separate opinion, President Eboe-Osuji clarifies:

> [He does not] subscribe to any interpretation of the Majority Opinion as suggesting that the geographic remoteness of a commander is a factor all of its own, which would necessarily insulate him from criminal responsibility. Geographic remoteness is only a factor to be considered among other circumstances or peculiarities of a given case.

Prosecutor v. Bemba, ICC-01/05-01/08, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 258 (June 14, 2018). Nevertheless, President Eboe-Osuji finds that the concept of remoteness is relevant and, in fact, "serves its greatest value in the assessment of what is *reasonable* as a measure to prevent or repress violations [or] to submit them to competent authorities for investigation and prosecution." *Id.*

[133] Bemba Appeals Judgment, *supra* note 1, ¶ 191.

This finding, too, is problematic for several reasons. As the previous section on the roots of command responsibility indicates, command responsibility has historically been used to hold commanders criminally liable for the crimes committed by their subordinates, even when the commander is physically distant from the scene of the crimes.[134] As the dissent pointed out, this finding appears to be based on a select and limited review of the record.[135] After hearing and considering all the evidence, the Trial Chamber found that while geographically remote from Bemba, MLC forces had not been re-subordinated to the CAR's military hierarchy, but rather remained under the effective control of Bemba since their original deployment.[136] Nevertheless, the majority found that the Trial Chamber failed to address the testimony of one witness, P36, who suggested that "MLC's investigative efforts were dependent on the Central African authorities," and that, therefore, Bemba's power to investigate crimes committed in the CAR was limited.[137] Again, as the dissent pointed out, the majority's reliance on such a limited part of the record to reach this conclusion was "troubling, particularly in circumstances where the Trial Chamber found P36 to be a witness whose evidence should be analysed with 'particular caution[,]' a finding which the Majority chose to ignore."[138] Finally, and most importantly, questions about what additional measures Bemba could have taken in the CAR have little to do with the fact that the measures he actually took were, as we discuss previously, inadequate to respond to the crimes of sexual violence that were found to have been established beyond a reasonable doubt.[139] Indeed, given that none of the measures Bemba actually took focused on adequately investigating those crimes, it is clear that he fell considerably short of taking "all necessary and reasonable measures within his . . . power" to prevent or repress those crimes.[140]

CONCLUSION

The majority decision fell short in its examination of the facts of sexual violence and the importance of such evidence in assessing Bemba's criminal liability as a

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[134] *See supra* notes 27–30 and accompanying text (discussing the *Hostage Case*, in which high-ranking German officers were charged with criminal responsibility under the doctrine of command responsibility for the murder, deportation, and looting of thousands of civilians from Nazi-occupied Greece, Yugoslavia, Norway, and Albania by troops under their command). *See also supra* note 22 and accompanying text (discussing the Tokyo Tribunal judgment, which found General Matsui, who was present in Nanking only after the initial invasion, responsible for subordinates' crimes prior to his arrival there because he "knew what was happening" and "did nothing, or nothing effective to abate these horrors").

[135] Bemba Appeals Dissenting Opinion, *supra* note 83, ¶¶ 54–64.

[136] Bemba Trial Judgment, *supra* note 1, ¶¶ 698–700.

[137] Bemba Appeals Judgment, *supra* note 1, ¶ 172.

[138] Bemba Appeals Dissenting Opinion, *supra* note 83, ¶ 63 (noting that the Trial Chamber had found P36 "at times, evasive or contradictory").

[139] Bemba Trial Judgment, *supra* note 1, ¶¶ 589, 720, 722.

[140] Rome Statute, *supra* note 2, art. 28(a)–(b).

commander under Article 28. The failure to assess the measures Bemba took with respect to the sexual violence allegations should have raised significant doubts about whether Bemba complied with his duties as a commander. The majority's failure to do this reflects an absence of the kind of insight that a critical gender-competent (or feminist international law) analysis of command responsibility would have offered.

Granted, the majority recognized that Bemba's liability, if established, would have been overwhelmingly in regard to the crime of rape. However, it refrained from properly interrogating and contextualizing the evidence of those specific rapes and other evidence of sexual violence.[141] In fact, the sexual violence allegations were virtually ignored when constructing the mandates of the inquiries, and questions that would have flowed from a commission clearly mandated to investigate such crimes were never asked. For instance, although responsibility can lie at various levels of command, no questions were asked about whether line commanders were informed of the FIDH report or whether they fulfilled their duties to exercise command responsibility by reporting misconduct such as rape up the chain of command. Indeed, Bemba's actions with respect to his line commanders were never thoroughly contemplated by the majority or concurring opinions. Nowhere does there exist an evidentiary review of Bemba vetting subordinates concerning the efficiency of the means that they deployed to competently prevent, punish, redress or report allegations of rape.

What could be the way forward? An appeals decision, even when the bench is split three ways, is a formidable statement of the law and facts, not departed from lightly. Jurisprudence of the ad hoc tribunals makes clear that, subsequent to an appellate decision, trial chambers are generally bound to adhere to that decision.[142] This practice acts as a due process safeguard, providing assurances of certainty, predictability, as well as coherence or harmonization of the law.[143] Whether an appeals chamber can depart from previous appeals decisions is generally answered in the negative in support of the identical values of legal certainty, predictability, and consistency.[144] Nonetheless, gradual, and even abrupt departure from previous holdings are conceivable where "cogent reasons in the interest of justice" so require.[145] As the *Aleksovski* appeals judgment elaborated:

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[141] *See, e.g.*, M. Jarvis, *Prosecuting Conflict-Related Sexual Violence Crimes: How Far We Have Progressed and Where Do We Go From Here: Some Thoughts Based on ICTY Experience*, *in* IMAGINING LAW: ESSAYS IN CONVERSATION WITH JUDITH GARDAM 121 (D. Stephens & P. Babie eds., 2016) (noting that in *Prosecutor v. Stakic*, for instance, the focus of the ICTY regarding sexual violence allegations was not on scale or patterns, but on context, in particular the objective of the JCE members and the role sexual violence played in achieving that objective).

[142] Prosecutor v. Zlato Aleksovski*,* Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 113 (Mar. 24, 2000).

[143] *Id.*

[144] *Id.* ¶ 107.

[145] *Id.*

> Instances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of the wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been wrongly decided, usually because the judge or judges were ill-informed about the applicable law.[146]

In light of the new standard of review used by the Appeals Chamber in *Bemba*, critiqued at length by other commentators,[147] and the majority's clear failure to analyze sexual violence evidence through a gender-competent lens, we believe future appeals chambers faced with adjudicating questions of command responsibility can and should depart from the reasoning and evidentiary interpretation of the *Bemba* majority. Often, rape is not explicitly planned or orchestrated from the outset of a conflict. Yet once it occurs and it becomes clear that superiors do not disapprove of it, rape often becomes more frequent and more violent and contributes to the broader violent acts committed against the targeted group. Command responsibility is one of the few ways courts can hold commanders accountable who can—but clearly fail in their duty to—put a stop to this violence. The Rome Statute's call for justice and particular emphasis on provisions designed to ensure that sexual violence crimes are adequately investigated and prosecuted demands that future appeals chambers revisit this decision using the kind of analysis that a critical gender-competent lens would offer.

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[146] *Id.* ¶ 108.

[147] *See supra* note 3 and accompanying text.