

THE BEMBA APPEAL DECISION: COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

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I INTRODUCTION

Command responsibility is a mode of liability enshrined in article 28 of the Rome Statute of the International Criminal Court, which enables commanders or persons acting as such to be held criminally responsible for the crimes committed by forces under their effective command or authority, and control.¹ International criminal law cases have illustrated that few crimes are committed by members of an armed force without some involvement of superiors, sometimes on the basis of explicit orders but at other times on the basis of a lack of effective oversight.² Yet, the law of command responsibility has ‘a highly disputed jurisprudence’, not helped by the ‘extremely complicated’ and ‘unusual’ wording of article 28.³ Under article 28, to establish the liability of a military commander or person acting as such, it must be proven that: forces were under that person’s effective control, that, in the circumstances at the time, they knew or should have known that the forces were committing or about to commit crimes, and that they failed to take all necessary and reasonable measures within their power to prevent or repress the crimes’ commission, or to submit the matter to the competent authorities for investigation and prosecution.⁴ Article 28 does not specify when and how a measure is deemed ‘reasonable’ and how to determine whether a commander has failed to take ‘all’ necessary measures available to them.

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¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 (*‘Rome Statute’*).

² Otto Triffterer, ‘General Principles of Criminal Law: Article 28’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (C.H. Beck/Hart/Nomos, 2016) 1059 (*‘Rome Statute Commentary’*).

³ *Ibid* 1059, 1060.

⁴ *Rome Statute* (n 1) art 28.

Article 28 was interpreted and applied for the first time by the International Criminal Court (ICC) in the case of Congolese man Jean-Pierre Bemba Gombo ('Bemba').⁵ In the Trial Chamber's 2016 decision, Bemba became the only person ever convicted by the ICC on the basis of command responsibility.⁶ He was convicted for crimes against humanity and war crimes committed by forces of his Movement for the Liberation of the Congo between 2002-2003 in the Central African Republic.⁷ In 2018, a majority of the ICC Appeals Chamber overturned Bemba's conviction.⁸ Regarding the ground of appeal relating to Bemba's command responsibility under article 28, the majority specifically examined whether the Trial Chamber erred in its finding that Bemba did not take all necessary and reasonable measures to prevent or repress the commissions of crimes (article 28(a)(2)).⁹ This note argues that the majority's acquittal of Bemba was based on their misinterpretation of article 28, as they failed to properly consider the requirement of 'effective control' and incorrectly focused on Bemba's actions, not his failures, thus contradicting previous jurisprudence. This reasoning could have a significant impact on the application of this mode of liability by potentially creating a loophole where a commander or person in such a position can physically distance themselves from a conflict to escape their obligations under article 28.

The majority of the Appeal Chamber's decision was controversial and a strong departure from previous jurisprudence, particularly regarding the majority's findings in relation to Bemba's criminal responsibility.¹⁰ The Appeals Chamber's interpretation of command responsibility has the greatest potential impact on the application of this mode of liability in terms of how it should or can be argued by the Prosecution in the future,

⁵ *Prosecutor v Bemba (Judgment)* (ICC, Appeals Chamber, ICC-01/05-01/08 A, 8 June 2018) ('*Bemba Appeal*').

⁶ Michala Chadimová, 'Superior Responsibility in the Bemba Case – Analysis of the Court's Findings on Necessary and Reasonable Measures' (2019) 19(2) *International and Comparative Law Review* 300, 301.

⁷ *Bemba Appeal* (n 5) [12].

⁸ *Ibid* 4.

⁹ *Ibid* [32].

¹⁰ See, eg, Leila Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo', *EJIL: Talk!* (Article, 12 June 2018) <<https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>>; Sarah Hibbert, 'The Bemba Acquittal: A Blow to the ICC's Legitimacy in a Time of Crisis' 2019 34(1) *Temple International & Comparative Law Journal* 95.

and what is required to establish it. Much of the majority's judgment and the dissenting opinion were devoted to examining this specific area of the appeal. Some previous scholarship has focused generally on the majority's finding on command responsibility,¹¹ while others have examined the entirety of the Appeals Chamber's judgment.¹² Academics have also considered more specific consequences or aspects of the Appeal finding,¹³ such as the Appeals Chamber's ethics and integrity,¹⁴ their standard of review and the impact on prosecuting sexual and gender based crimes.¹⁵ This case note seeks to better understand the Appeal Chamber's findings on command responsibility specifically by examining them in detail alongside the development and jurisprudential history of this mode of liability.

This note begins in Part II by outlining the jurisprudential history of command responsibility and the development of the essential element of 'effective control' which was incorporated into the Rome Statute. It continues in Part III to detail the factual background of the Bemba Case including the specific measures Bemba took that the Trial Chamber assessed in determining that he failed to take all necessary and reasonable measures. Part IV examines the majority of the Appeals Chamber's finding that the Trial Chamber's consideration of the evidence and interpretation of the law of article 28 was erroneous. This part will also consider the

¹¹ See Matteo Colorio, 'A Commander's Motivations and Geographical Remoteness under Command Responsibility: An Analysis of Controversial Issues of the Bemba Appeal Judgment' (2021) 21(3) *International Criminal Law Review* 445; Alexandre Galand, 'Bemba and the Individualisation of War: Reconciling Command Responsibility under Article 28 Rome Statute with Individual Criminal Responsibility' (2020) 20(4) *International Criminal Law Review* 669; Chadimová (n 6) 300; Martha Bradley and Aniel de Beer, "'All Necessary and Reasonable Measures' – The Bemba Case and the Threshold for Command Responsibility' 2020 20(2) *International Criminal Law Review* 163; Ray Murphy, 'Command Responsibility After Bemba' (2019) 15 *New Zealand Yearbook of International Law* 94.

¹² See, eg, Kate Gauld, 'The Prosecutor v Jean-Pierre Gombo', Judgment of the Appeals Chamber (2018) 24 *Australian International Law Journal* 201.

¹³ See, eg, Aniel de Beer and Martha Bradley, 'Appellate Deference Versus the De Novo Analysis of Evidence: The Decision of the Appeals Chamber in Prosecutor v Jean-Pierre Bemba Gombo' (2019) 22 *Yearbook of International Humanitarian Law* 153; Hibbert (n 10); Susana SaCouto and Patricia Viseur, 'The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes' (2019) Vol 27(3) *William & Mary Bill of Rights Journal* 599.

¹⁴ See, eg, Sadat (n 10).

¹⁵ See Shannon Fyfe, 'Ethics, Integrity and the Bemba Acquittal' in Morten Bergsø and Vivian Dittrich (eds), *Integrity in International Justice* (Torkel Opsahl, 2020) 269; SaCouto and Viseur (n 13).

additional, separate opinion of Judges Van den Wyngaert and Morrison, and the dissenting opinion where Judges Monageng and Hofmanski opposingly held that the majority failed to apply the law correctly and to understand both the evidence and the Trial Chamber's decision. Part V finally assesses the majority's decision and how it may detrimentally impact the application of article 28 by enabling potential loopholes and altering the way command responsibility is argued by the Prosecution in future cases.

II JURISPRUDENTIAL HISTORY

The legal concept of superior responsibility was first developed by the international criminal trials after World War II, where military commanders and superiors were held accountable for the criminal actions of forces under their command and control.¹⁶ This concept was seen as necessary to enable prosecutions 'beyond the direct perpetrators of crimes', where superiors could otherwise avoid any liability.¹⁷ The US Supreme Court's decision in the 1946 *Yamashita* case contributed significantly to the development of this mode of liability. In *Yamashita*, the majority established the principle that the law of armed conflict bestows a duty on commanders to take measures within their power to control the forces they command, including preventing criminal actions.¹⁸ The concept of superior responsibility was also applied in the Nuremberg Trials, where those in senior positions of the German military and government were held accountable for crimes, many of which were enacted by subordinates under their control or acting under their orders.¹⁹ In the *High Command Case*, the Court held that under the 'basic principles of command authority' an officer violates international law if they stand by while subordinates carry

¹⁶ See, eg, *United Kingdom v Karl Rauer et al.*, (Military Court, Wuppertal, 18 February 1946) ('*Rauer Case*'); *United States v Wilhelm List et al.*, (United States Military Tribunal, Nuremberg, 19 February 1948) ('*Hostages Trial Case*'); *Case of the Major War Criminals* (International Military Tribunal, Nuremberg, 1 October 1946); *United States v Toyoda* (Tokyo Tribunal, Tokyo, October 1948) ('*Toyoda Case*'); *Re Yamashita No. 61*, 327 US 1 (1946) ('*Yamashita Case*'); *United States v Wilhelm von Leeb et al.*, (United States Military Tribunal, Nuremberg, 27 October 1948) ('*The High Command Case*').

¹⁷ Jamie Williamson, 'Some considerations on command responsibility and criminal liability' 2008 90(870) *International Review of the Red Cross* 303, 304.

¹⁸ *Ibid* 304; *Yamashita Case* (n 16).

¹⁹ See, eg, *The High Command Case* (n 16); *Hostages Trial Case* (n 16); *Case of the Major War Criminals* (n 16).

out criminal acts ordered by their superiors, and the officer knows those actions are illegal.²⁰ In cases such as *Hirota* and *Pohl*, superior responsibility was also applied to individuals in non-military positions.²¹

Thirty years later, the precedents from the Tokyo Tribunal and Nuremberg Trials influenced the drafting of the principle of command responsibility when it was codified into article 86 of the 1977 Additional Protocol I to the 1949 Geneva Conventions ('API').²² Article 86, read in conjunction with article 87, criminalises a person's failure to act to prevent the commission of crimes by subordinates if that person had a duty to do so.²³ This went beyond the incrimination of ordering crimes, or active responsibility, that already existed in the four Geneva Conventions.²⁴ The codification of this mode of liability in article 86 and 87 of API 'constitutes the basis of the modern concept of superior responsibility' from which subsequent decisions and development of the principle have derived.²⁵

Since then, this principle was incorporated into the Statutes of the ad hoc Tribunals, which developed the mode of liability into a concept with uniform underlying principles, a broad application with specific characteristics.²⁶ The Statutes of the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Tribunal for the Former Yugoslavia ('ICTY') provided that superiors will be held criminally responsible for the actions of their subordinates if they knew, or had reason to know, that the actions had been or were going to be committed, and they failed to take necessary and reasonable measures to prevent the acts or

²⁰ *The High Command Case* (n 16); E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Criminal Law*, (T.M.C. Asser Press, 2003) 145.

²¹ van Sliedregt (n 20) 145.

²² Including the *Yamashita Case* (n 16), where Japanese general Yamashita was charged, convicted, and sentenced to death by a United States war crimes commission for unlawfully disregarding and failing to discharge his duty as a commander to control the operations of those under his command who committed atrocities. This cases' 'value lies in its recognition that failure of duty can generate criminal responsibility', a similar standard to that in Article 28. The precedent from *Yamashita* was adopted in the *Hostages* and *High Command* cases, with a more limited knowledge standard: van Sliedregt (n 20) 120-3, 125; Williamson (n 17) 305.

²³ van Sliedregt (n 20) 137-138.

²⁴ *Ibid* 137.

²⁵ *Ibid* 142.

²⁶ *Ibid* 140, 223.

punish the perpetrators.²⁷ The ad hoc Tribunals introduced the concept of ‘effective control’ – with the test being whether a superior has the material ability to prevent or repress crimes.²⁸ These developments recognised that crimes were typically committed by military personnel in instances where their superiors did not prevent or repress those actions.²⁹

In the *Čelebići* case, the ICTY Trial Chamber found that evaluating a superior’s effective control and their material ability to take necessary and reasonable measures to prevent or repress crimes requires an ‘*in concreto* inquiry’ based on the facts of the specific case.³⁰ The ICTY Trial Chamber determined three criteria for establishing individual criminal responsibility as stipulated in article 7(1) of the ICTY Statute:³¹ the existence of a superior-subordinate relationship, that the superior knew or had reason to know that the criminal act was about to be committed, and the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator.³² These criteria were reiterated and discussed in subsequent ICTY cases.³³ The ICTR generally followed the ICTY rulings on superior responsibility and convicted defendants on this basis, but never ‘explicitly’ ruled on the concept of superior responsibility.³⁴ Command responsibility is now a ‘norm of customary

²⁷ van Sliedregt (n 20) 138; Williamson (n 17) 306; SC Res 955, UN Doc S/RES/955 (8 November 1994) annex (*ICTR Statute*) art 6; SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) (*ICTY Statute*) art 7.

²⁸ van Sliedregt (n 20) 141, 223.

²⁹ Williamson (n 17) 306.

³⁰ *Prosecutor v Čelebići et al. (Judgment)* (ICTY, Trial Chamber, IT-96-21-T, 16 November 1998) [346], [393]-[395] (*Čelebići*); van Sliedregt (n 20) 141.

³¹ van Sliedregt (n 20) 144; *Čelebići* (n 30) [356].

³² van Sliedregt (n 20) 144; *Čelebići* (n 30) [356].

³³ See, eg, *Prosecutor v Aleksovski (Judgment)* (ICTY, Trial Chamber, IT-95-141-T, 25 June 1999) (*Aleksovski*); *Prosecutor v Aleksovski (Judgment)* (ICTY, Appeal Chamber, IT-95-14/1-A, 24 March 2000) [72] (*Aleksovski Appeal*); *Prosecutor v Martić (Decision)* (ICTY, Trial Chamber, IT-95-11-R61, 8 March 1996) (*Martić*); *Prosecutor v Karadžić and Mladić (Judgment)* (ICTY, Trial Chamber, IT-95-5/18-T, 24 March 2016) [41] (*Karadžić*); *Prosecutor v Hadžihasanović (Judgment)* (ICTY, Trial Chamber, IT-01-47-T, 15 March 2006) (*Hadžihasanović*).

³⁴ van Sliedregt (n 20) 178; see eg, *Prosecutor v Kayishema and Ruzindana (Judgment)* (ICTR, Trial Chamber, ICTR-95-1-A, 1 June 2001); *Prosecutor v Musema (Judgment)* (ICTR, Trial Chamber, ICTR-96-13-T, 27 January 2000); *Prosecutor v Kambanda (Judgment)* (ICTR, Trial Chamber, ICTR-97-23-S, 4 September 1998); *Prosecutor v Serushago (Sentence)* (ICTR, Trial Chamber, ICTR-98-39-S, 5 February 1999).

international law applicable in both international and non-international armed conflicts.³⁵

The third element elucidated in *Čelebići* is particularly relevant to the Bemba Appeal decision, as discussed below. The ICTY found in both *Čelebići* and *Blaškić* that determination of necessary and reasonable measures is not dependent on any formal, legal ability to take measures but the ‘material ability’ to prevent or punish criminal actions.³⁶ In both *Čelebići* and *Kunarac*, the ICTY emphasised that the responsibility of superiors centres on effective control.³⁷ Forces will be under a commander’s effective control when they have a ‘material ability’ to prevent the crime or punish the individual subordinate who committed it.³⁸ Thus, effective control directly relates to the question of determining the necessary and reasonable measures available in a given situation. In *Kordić and Cerkez*, the ICTY Trial Chamber’s obiter described a superior’s duty to prevent as arising before the commission of a crime, if they gain knowledge that the crime in question is being prepared, planned, or has reasonable grounds to suspect this.³⁹ Additionally, the duty to punish was stated to arise after the commission of a crime, being ‘at least an obligation to investigate crimes to establish facts and to report them to competent authorities’ if they do not have the power to sanction subordinates

³⁵ International Committee of the Red Cross (ICRC), ‘IHL Database: Rule 153’, ICRC (Database, September 2022) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule153>; Diane Marie Amann, ‘In Bemba and Beyond: Crimes Adjudged to Commit Themselves’, *EJIL: Talk!* (Article, 13 June 2018) <<https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>>.

³⁶ *Čelebići* (n 30) [395]; *Prosecutor v Blaškić (Judgment)* (ICTY, Trial Chamber, IT-95-14-T, 3 March 2000) [335] (*‘Blaškić’*); van Sliedregt (n 20) 166.

³⁷ *Čelebići* (n 30) [378]; *Čelebići (Judgment)* (ICTY, Appeal Chamber, IT-96-21-A, 20 February 2001) [241] (*‘Čelebići Appeal’*); *Prosecutor v Kunarac (Judgment)* (ICTY, Trial Chamber, IT-96-23-T, IT-96-23/1-T, 22 February 2001) [199] (*‘Kunarac’*); van Sliedregt (n 20) 169.

³⁸ See *Prosecutor v Bemba (Decision on the Confirmation of Charges)* (ICC, Pre-Trial Chamber, ICC-01/05-01/08, 15 June 2009) [415]-[416] (*‘Bemba Confirmation of Charges’*), citing *Čelebići Appeal* (n 37) [256]; *Prosecutor v Musema (Judgment)* (ICTR, Trial Chamber, ICTR-96-13-A, 26 January 2000) [135]; *Prosecutor v Bagilishema (Judgment)* (ICTY, Appeals Chamber, ICTR-95-1A-A, 3 July 2002) [51]. See also *Prosecutor v Prlić (Judgment)* (ICTY, Trial Chamber, IT-04-74-T, 29 May 2013) [238], [240].

³⁹ *Kordić and Cerkez (Judgment)* (ICTY, Trial Chamber, IT-95-14/-T, 26 February 2001) [445] (*‘Kordić and Cerkez’*); van Sliedregt (n 20) 167.

themselves.⁴⁰ Factors which indicate a superior's position of authority and effective control have been found to include:

- the defendant's official position;
- their power to issue or give orders;
- their capacity to ensure compliance with the orders issued;
- their position within the military structure and tasks they carried out;
- their capacity to order forces under their command, whether immediate or at lower levels, to engage in hostilities;
- their capacity to re-subordinate units or make changes to command structure;
- their power to promote, replace, remove, or discipline any member forces and,
- their authority to send forces where hostilities occur and withdraw them at any time.⁴¹

Article 28 of the Rome Statute incorporated and further developed the pre-existing concept of superior responsibility. Article 28 provides two alternatives of command responsibility: for military and non-military superiors, respectively.⁴² The first, 28(a), stipulates the requirements for a military commander or person acting as such to be held criminally responsible for crimes committed by forces under their effective command or authority and control.⁴³ For this mode of liability to be made out, it must be established that the military commander failed to take all necessary and reasonable measures within their power to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.⁴⁴

According to van Sliedregt, the ICC concept of superior responsibility has detrimentally separated the mode of liability into the two standards stated above.⁴⁵ However, article 28 is 'a step forward' as it enables superior

⁴⁰ *Kordić and Cerkez* (n 39) [446]; van Sliedregt (n 20) 167.

⁴¹ *Bemba Confirmation of Charges* (n 38) [417].

⁴² *Rome Statute* (n 1) art 28; van Sliedregt (n 20) 223.

⁴³ *Rome Statute* (n 1) art 28.

⁴⁴ *Ibid.*

⁴⁵ van Sliedregt (n 20) 223.

responsibility to be applied to crimes of omission due to the ‘failure to exercise control.’⁴⁶ Article 28 includes the requirement of ‘effective control’, incorporating and endorsing the ICTY Appeals Chamber’s finding in *Čelebići*.⁴⁷ Following this jurisprudence, the point of including this element is to ‘cut right through strict hierarchical structures’ and base liability on a person’s effective control over another, rather than their specific formal position or rank.⁴⁸ However, there is little guiding jurisprudence on how article 28 is to be applied. The only ICC case to convict and sentence a person on the basis of command responsibility under article 28(a) was the Trial Chamber’s 2016 Bemba decision.⁴⁹ The Trial Chamber in their conviction decision interpreted a commander’s duty under article 28 to prevent crimes committed by subordinates as dependent on the material power of the commander to intervene in a specific situation, dependent on the circumstances at the time.⁵⁰

III BACKGROUND

In 1998, Bemba founded the Movement for the Liberation of the Congo (MLC) in the Democratic Republic of Congo (DRC).⁵¹ Originally a rebel movement which developed into a political party, Bemba was the party’s President and the Commander-in-Chief of the MLC’s military wing, the ALC.⁵² Between October 2002-March 2003, around 1500 ALC troops intervened in the Central African Republic (CAR) at the request of the its President at the time, Ange-Félix Patassé, to assist in quashing General François Bozizé’s rebellion.⁵³ After the ICC Pre-Trial Chamber issued a warrant for the arrest of Bemba in May 2008 regarding crimes of the ALC

⁴⁶ Ibid.

⁴⁷ Ibid 182.

⁴⁸ Ibid.

⁴⁹ Chadimová (n 6) 301; Sadat (n 10).

⁵⁰ MLC translated from ‘Mouvement de libération du Congo’: *Prosecutor v Bemba (Judgment)* (ICC, Trial Chamber, ICC-01/05-01/08, 21 March 2016) [1], [5] (*‘Bemba Trial Judgment’*).

⁵¹ Ibid [203].

⁵² ‘Armée de libération du Congo’: *Bemba Trial Judgment* (n 50) [1], [382], [390]; *Bemba Appeal* (n 5) 7.

⁵³ *Bemba Appeal* (n 5) 7; *Bemba Trial Judgment* (n 50) [410].

in the CAR,⁵⁴ Bemba was surrendered and transferred to the seat of the Court in July 2008.⁵⁵

In the 2016 trial, the Prosecution argued that Bemba was liable under article 28(a) of the Rome Statute. The Prosecution successfully showed that Bemba had effective control and failed to take ‘all necessary and reasonable measures’ within his power to prevent or repress the commission of crimes or submit the matter to competent authorities. In March 2016, Bemba was unanimously convicted by the Trial Chamber of crimes against humanity of murder and rape, and war crimes of murder, rape and pillaging, committed by his troops during the course of their operation in the CAR.⁵⁶

A Trial Chamber’s Finding on Effective Control

The Trial Chamber found that Bemba had effective control over his troops as the President of the MLC and Commander-in-Chief of the ALC.⁵⁷ He had ‘broad formal powers, ultimate-decision making authority and powers of appointment, promotion and dismissal’.⁵⁸ Bemba controlled the MLC’s funding, had direct lines of communication to commanders in the field, with whom he communicated regularly, had established reporting systems, issued operational orders and received operation and technical advice from the MLC General Staff.⁵⁹ The Trial Chamber also found that Bemba had disciplinary powers including to initiate inquiries, establish court-martials and to send or withdraw troops from the CAR.⁶⁰ Amongst other facts that showed Bemba’s control extended over the specific forces operating in the CAR, once Bemba eventually ordered the withdrawal of troops, this was complied with.⁶¹

⁵⁴ A new, updated warrant was also issued on 10 June 2008: *Bemba Trial Judgment* (n 50) [5].

⁵⁵ *Ibid.*

⁵⁶ *Bemba Appeal* (n 5) [12].

⁵⁷ *Bemba Trial Judgment* (n 50) [697]-[705].

⁵⁸ *Ibid* [697].

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid* [698]-[702].

B Measures Taken by Bemba

Given his effective control, the Trial Chamber considered several measures taken by Bemba in coming to their determination that he had failed to take all necessary and reasonable measures within his power.⁶²

1 Mondonga Inquiry

The Mondonga Inquiry was established by Bemba who had authority over the commission of inquiry, headed by Colonel Mondonga.⁶³ The commission was sent to Bangui to investigate allegations in the media of ALC troops committing crimes in the CAR since the initial days of the operation.⁶⁴ Bemba received and reviewed information from the inquiry including a case file on soldiers arrested for pillaging.⁶⁵

The Trial Chamber held that the findings of the Mondonga Inquiry did not result in investigators pursuing ‘various relevant leads’, most particularly the responsibility of commanders, alleged perpetrators from a specific battalion led by Colonel Moustapha, including Moustapha himself, and reports of rape.⁶⁶ Lieutenant Bomengo, who was tried for pillaging, gave evidence that it was Colonel Moustapha who instructed him to pillage items.⁶⁷ They found that the defendant had given no explanation for the above omissions, nor for apparent ‘procedural irregularities’ including minimal guidelines, and that interviews of suspects were carried out in the middle of the night.⁶⁸ The Trial Chamber held that despite the Inquiry being established, it had a limited effect, only leading to seven low-ranking soldiers being tried before a court-martial in the DCR, in Gbadolite for charges of pillaging ‘minor goods’, and small amounts of money.⁶⁹

⁶² *Bemba Appeal* (n 5) [122]; *Bemba Trial Judgment* (n 50) [574].

⁶³ *Bemba Trial Judgment* (n 50) [582].

⁶⁴ *Ibid.*

⁶⁵ *Ibid* [586].

⁶⁶ *Ibid* [720].

⁶⁷ *Ibid* [587].

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

2 *Visit to the CAR*

Bemba visited the CAR in November 2002 to meet with General Cissé, the UN representative in the CAR, and President Patassé, where allegations of crimes by ALC troops were discussed.⁷⁰ Although he met with General Cissé and President Patassé, the Court found that there was no evidence Bemba took any concrete measures in response to allegations of crimes by MLC troops during or because of those meetings.⁷¹

3 *PK12 Speech*

Bemba gave a speech at PK12 in November 2002, where he made a general, public warning to his forces against abuse of the civilian population, specifically referring to troops' 'misbehaviour', 'stealing' and 'brutalising' of civilians.⁷² He also gave a similar public, general warning to troops at other points during the operation, as reported in the media.⁷³ There was no evidence that these warnings were enforced or pursued further.⁷⁴

4 *Trial at Gbadolite Court-Martial*

As a result of the Mondonga Inquiry, Lieutenant Willy Bomengo and six others in the DRC were tried at the Gbadolite court-martial on charges of pillaging.⁷⁵ Bemba appointed both the presiding judge over the trial and the prosecutor, and members of the court-martial reported on what was happening to Bemba during the trial.⁷⁶ All seven defendants were convicted and sentenced to between three and 24 months imprisonment on the basis of their own statements, as no other witnesses or victims were interviewed and no physical evidence adduced.⁷⁷ The report of the court-martial was then sent to Bemba in December 2002 who forwarded it to

⁷⁰ *Bemba Appeal* (n 5) [22]; *Bemba Trial Judgment* (n 50) [591]-[592].

⁷¹ *Bemba Trial Judgment* (n 50) [721].

⁷² *Bemba Appeal* (n 5) [22]; *Bemba Trial Judgment* (n 50) [594], [721].

⁷³ *Bemba Trial Judgment* (n 50) [721], [723].

⁷⁴ *Ibid.*

⁷⁵ *Ibid* [719].

⁷⁶ *Ibid* [597].

⁷⁷ *Ibid.*

General Cissé in January 2003.⁷⁸ The Trial Chamber found that the trial was extremely limited in effect, only relating to charges of pillaging minor goods and small sums of money despite allegations of crimes of more serious crimes such as rape.⁷⁹

5 *Zongo Commission*

The Zongo Commission was established by Bemba after public allegations were made that ALC soldiers had committed murder, rape and pillaging in Zongo in the CAR.⁸⁰ The Commission questioned witnesses in Zongo and was mandated only to address whether pillaged goods from the CAR were entering the DRC through Zongo, rather than to investigate the crimes that were being publicly alleged.⁸¹ The Commission was made up of MLC officials, and its report was founded on interviews with only eight Zongo residents, all of whom worked for the MLC directly or performed public functions for the MLC.⁸² The Commission had the power to call soldiers before it, but their report had no reference to doing so, nor to any interviews conducted with soldiers.⁸³ The definition of pillaging used by the Commission was also limited as it did not account for the stealing of animals or mattresses, despite the fact that these were often pillaged by the MLC troops in the region.⁸⁴ The Trial Chamber concluded that, ultimately, there was no evidence that any further action was taken by anyone, including Bemba, to follow leads resulting from the investigations of the Commission, particularly in relation to pillaging in the CAR and those items being transferred into the DRC close to the Imese and Dongo areas.⁸⁵

6 *Correspondence*

In a letter to General Cissé dated 4 January 2003, Bemba stated that ‘appropriate remedial and preventative measures’ had been taken and asked for assistance to investigate the allegations of crimes committed by

⁷⁸ Ibid [597]-[600].

⁷⁹ Ibid [720].

⁸⁰ *Bemba Appeal* (n 5) [122]; *Bemba Trial Judgment* (n 50) [722].

⁸¹ *Bemba Trial Judgment* (n 50) [722].

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

ALC soldiers in the CAR.⁸⁶ General Cissé replied that he would assist in any measure relating to an investigation.⁸⁷ Bemba also corresponded with the International Federation for Human Rights (FIDH) President in response to a FIDH Report.⁸⁸ The report detailed allegations of murder, rape and pillaging committed by ALC soldiers in the CAR and analysed Bemba's criminal responsibility for such crimes.⁸⁹

The Trial Chamber found that there was no evidence that Bemba accepted and pursued further action after receiving General Cissé's response and offer of participation in any investigation initiatives.⁹⁰ There was also no evidence that Bemba took any concrete measures relating to the alleged crimes as a result of or in connection to his corresponding with General Cissé.⁹¹ The same was found by the Trial Chamber in relation to Bemba's correspondence with the FIDH President, which 'mirrored the content and tone of the letter sent to General Cissé', but from which no related, concrete measures were then taken by Bemba.⁹²

7 *Sibut Mission*

Bemba established the Sibut Mission at the end of February in 2003 in response to media allegations of crimes by ALC soldiers in Bozoum and Sibut.⁹³ It consisted of a delegation of reporters, ALC soldiers and officials who travelled to Sibut in response to media reports of large-scale abuse there by the ALC.⁹⁴ The Sibut Mission was also found by the Trial Chamber to be a limited 'measure', as it was not an investigation.⁹⁵ It was a planned media delegation where reporters were taken directly upon landing to a home of one of the interviewees in a non-central location in

⁸⁶ Ibid [723].

⁸⁷ Ibid.

⁸⁸ Ibid [724].

⁸⁹ Ibid.

⁹⁰ Ibid [723].

⁹¹ Ibid.

⁹² Ibid [724].

⁹³ Ibid [725].

⁹⁴ Ibid [614].

⁹⁵ Ibid [726].

the town of Sibut.⁹⁶ Reporters were only able to speak to a few, selected interviewees, some of whom exercised public roles and were connected to President Patassé, in a coercive atmosphere where ALC soldiers were present.⁹⁷

C Trial Chamber's Assessment

The above actions were considered probative to determining whether Bemba took all necessary and reasonable measures available to him as per his duty under Article 28(a). The Trial Chamber found that in the context of allegations of crimes committed by ALC soldiers in the CAR, Bemba did take some measures during the 2002-2003 Operation, but these were limited in 'mandate, execution and/or results'.⁹⁸ They found that although Bemba had consistent information given and available to him of ALC crimes of murder, rape and pillaging in the CAR, his responsive actions were limited.⁹⁹ For example, the two investigations that Bemba created had narrow mandates to only investigate pillaging in the initial days of the CAR operation in Bangui and goods being transported via Zongo.¹⁰⁰ The measures Bemba took were viewed as a 'grossly inadequate response' to the consistent information before him and not sincerely executed.¹⁰¹ Importantly, there was no evidence that Bemba took any action to actually repress and prevent the crimes in relation to or as a result of the above measures.¹⁰² The Trial Chamber found that these actions were instead taken to counter public allegations and restore the MLC's public image, not to genuinely stop the crimes occurring.¹⁰³ Particularly, despite Bemba having the power and authority to withdraw his troops from the CAR, at any point, he did not do so until March 2003.¹⁰⁴

⁹⁶ Ibid [725].

⁹⁷ Ibid.

⁹⁸ Ibid [720].

⁹⁹ Ibid [720], [726], [727].

¹⁰⁰ Ibid [726].

¹⁰¹ Ibid [727].

¹⁰² Ibid [726]-[734].

¹⁰³ Ibid.

¹⁰⁴ Ibid [704].

IV THE APPEAL CHAMBER'S DECISION

Bemba appealed the Trial Chamber's decision in April 2016 and was acquitted of all charges by a 3:2 majority of the ICC Appeals Chamber in June 2018.¹⁰⁵

The majority of the Appeals Chamber, consisting of Presiding Judge Eboe-Osuji, Judge Van den Wyngaert and Judge Morrison, considered only part of the third ground of appeal regarding Bemba's liability as a commander. Judge Van den Wyngaert and Judge Morrison gave further, separate reasoning to complement the majority decision and to address additional points.¹⁰⁶ Primarily addressing the grounds of appeal focused on by the majority, Judge Monageng and Judge Hofmański's dissenting opinion also addressed in detail this part of the third ground of appeal.

A Majority Opinion delivered by Presiding Judge Eboe-Osuji

The majority determined the Trial Chamber's finding that Bemba failed to take all necessary and reasonable measures was 'unreasonable because it was tainted by serious errors'.¹⁰⁷ The majority specified that the scope of a commander's duty to take all necessary and reasonable measures under article 28 is context dependent and not a form of strict liability.¹⁰⁸ The majority focused on the word 'reasonable', stating that a commander is only required to do what is 'reasonable under the circumstances', not every possible measure available regardless of proportionality and feasibility.¹⁰⁹ Thus, the Court must consider 'other parameters' to assess the reasonableness of measures, including, for example, 'the operational realities on the ground at the time'.¹¹⁰ Further, the Trial Chamber must 'specifically identify what a commander should have done *in concreto*'.¹¹¹ Thus, the findings must not abstractly suggest or list what a commander could theoretically have done, but show the specific, concrete measures

¹⁰⁵ Ibid 4.

¹⁰⁶ *Prosecutor v Bemba (Separate Opinion)* (ICC, Appeals Chamber, ICC-01/05-01/08, 8 June 2018) (Judge van den Wyngaert and Judge Morrison) ('*Separate Opinion*') [1].

¹⁰⁷ *Bemba Appeal* (n 5) [166].

¹⁰⁸ Ibid [168], [170].

¹⁰⁹ Ibid [169].

¹¹⁰ Ibid [170].

¹¹¹ Ibid.

that were available but not taken by the commander in question and which a ‘reasonably diligent commander’ in similar circumstances would take.¹¹²

The majority found that the Trial Chamber was in error because it failed to properly consider the circumstances at the time that affected the reasonableness of measures available to Bemba.¹¹³ They held that evaluating what a commander should have done with the benefit of hindsight is a ‘risk’ to be ‘avoided in adjudication’.¹¹⁴ The majority determined that the Trial Chamber did not identify what Bemba should have done ‘*in concreto*’ because they gave a list of measures that Bemba could hypothetically have taken.¹¹⁵ This juxtaposed with the fact crimes were committed, was not sufficient to show he acted unreasonably at the time.¹¹⁶ Further, the majority stated that the Trial Chamber’s findings would have been ‘necessarily different’ if they had fully appreciated how Bemba’s geographical distance from his troops limited his material ability to take reasonable measures.¹¹⁷ The majority recognised that the Trial Chamber had acknowledged that a regular feature of the CAR Operation was the ALC troop’s cooperation with CAR authorities, and that this was logical given they were foreign forces unfamiliar with the terrain and territory.¹¹⁸ However, the Trial Chamber erred by disregarding this aspect of the operation in their assessment of the measures taken.¹¹⁹ The majority found that commanders can make a cost/benefit analysis when deciding to take certain measures, may consider the impact of measures on ‘ongoing or planned operations’ and choose the ‘least disruptive measure’ as long as it can ‘reasonably’ be expected to prevent or repress crimes.¹²⁰ This interpretation appears to allow commanders a lot of discretion in deciding what measures to take, rather than requiring them to take ‘*all* necessary and reasonable measures’ as article 28 states.¹²¹ The majority therefore adopted

¹¹² Ibid.

¹¹³ Ibid [173], [175].

¹¹⁴ Ibid [170].

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid [171], [191], [192].

¹¹⁸ Ibid [173].

¹¹⁹ Ibid [171], [173].

¹²⁰ Ibid [170].

¹²¹ *Rome Statute* (n 1) art 28 (emphasis added).

a more lenient test regarding establishing effective control and the measures a commander must take to fulfil their duty under Article 28 than that applied in previous jurisprudence.¹²²

Furthermore, the majority found that the Trial Chamber's 'preoccupation' with Bemba's motivations for taking certain measures meant they failed to properly assess their reasonableness.¹²³ For instance, they found that the Trial Chamber erred in determining Bemba's motivation to protect the image of the MLC and counter public allegations as indicative of a 'lack of genuineness' in adopting measures to actually prevent and repress crimes.¹²⁴ Relatedly, they held that the measures taken by a commander cannot be faulted 'merely because of shortfalls in their execution.'¹²⁵ They stated that measures taken by a commander with the motivation to preserve their troops' reputation does 'not intrinsically make them any less necessary or reasonable in preventing or repressing the commission of crimes'.¹²⁶

The majority's interpretation that determining 'necessary and reasonable measures' under article 28 depends on the circumstances at the time is consistent with previous jurisprudence.¹²⁷ However, the argument that this should include a consideration of the limiting effect of a commander's distance from a foreign operation is hard to comprehend, given the requirement for a commander to have 'effective' control over troops.¹²⁸ Findings such as *Čelebići*, which was incorporated into article 28 through the phrasing 'effective control', specifically found, and emphasised, that it is a person's effective control which is essential to determining superior responsibility, meaning their material ability to prevent or repress crimes.¹²⁹ Remoteness could have an impact on a commander's effective control, but this fact alone is not determinative of the reasonableness of measures or the material ability to take them. Despite the novelty of their

¹²² See eg, *Čelebići* (n 30).

¹²³ *Bemba Appeal* (n 5) [178].

¹²⁴ *Ibid* [179], [189].

¹²⁵ *Ibid* [180].

¹²⁶ *Ibid* [177].

¹²⁷ See the above section on jurisprudential history.

¹²⁸ *Rome Statute* (n 1) art 28(a).

¹²⁹ See, eg, *Čelebići* (n 30); *Blškić* (n 36); *Kunarac* (n 37).

approach, the majority provided limited explanation of their reasoning. Notably, the majority's decision totalled 80 pages, with only 22 dedicated to the third ground of appeal, while the dissenting opinion consisted of 289 pages, with 141 pages regarding the third ground of appeal.¹³⁰

*B Separate Opinion of Judge Van den Wyngaert and
Judge Morrison*

In addition to the reasons given in the majority judgment, in their separate opinion, Judges Van den Wyngaert and Judge Morrison expanded on the application of article 28. Contrary to previous jurisprudence's interpretation of 'effective control' incorporated in article 28,¹³¹ Judges Van den Wyngaert and Morrison reasoned that a senior commander cannot be held responsible for the actions of an individual soldier at 'the bottom of the chain of command.'¹³² This is because a high-level commander cannot 'micro-manage' all people below them, and their duty is not to control everyone, but only those directly below themselves.¹³³ Judges Van den Wyngaert and Morrison stated that the primary obligation stipulated in article 28(a) belongs to immediate commanders of the individual soldier.¹³⁴ Correspondingly, the primary obligation of a senior commander is to ensure lower-level superiors can control and manage the troops further below them.¹³⁵ While article 28 requires a commander to have 'effective' control or authority over subordinates, a high level commander essentially cannot achieve this because it is 'simply impossible' for them to have effective control over individual troops which may be in their thousands.¹³⁶

¹³⁰ *Bemba Appeal* (n 5); *Prosecutor v Bemba (Dissenting Opinion)* (ICC, Appeals Chamber, ICC-01/05-01/08, 8 June 2018) (Judge Monageng and Judge Hofmański) ('Dissent').

¹³¹ *Bemba Confirmation of Charges* (n 38) [417] citing *Kordić and Čerkez* (n 38) [421], [438]; *Čelebići* (n 30) [767]; *Čelebići Appeal* (n 36) [767]; *Hadžihasanović and Kubura* (n 32) [21], [199]; *Prosecutor v Blaškić* (n 35) [69]; *Prosecutor v Orić (Judgment)* (ICTY, Appeals Chamber, IT-03-68-A, 3 July 2008) [91-92]; *Prosecutor v Halilović (Judgment)* (ICTY, Appeals Chamber, IT-01-48-A, 16 October 2007) [66]; *Prosecutor v Štrugar (Judgment)* (ICTY, Trial Chamber, IT-01-42-T, 31 January 2005) [394]-[396], [397], [406], [408]; *Prosecutor v Delić (Judgment)* (ICTY, Trial Chamber, IT-04-83-T, 15 September 2008) (Declaration of Judge Shahabuddeen and Partially Dissenting Opinion and Declaration of Judge Liu) 65-85.

¹³² *Separate Opinion* (n 106) [34].

¹³³ *Ibid.*

¹³⁴ *Ibid* [33].

¹³⁵ *Ibid* [34].

¹³⁶ *Ibid* [33].

Judges Van den Wyngaert and Morrison stated that a chain of command functions to delegate authority, and senior commanders entrust and rely on those lower in command to monitor the behaviour of soldiers. Thus, they concluded that the Court should ‘resist the reflex...of holding the most senior commander criminally responsible’, regardless of the proximity of the superior-subordinate relationship in question.¹³⁷ They held that the Court should not ‘get into a mind-set that gives priority to the desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability’.¹³⁸

Yet, article 28 was created to apply to hierarchical military organisations so that superiors could be held liable for the actions of those below them. Belonging to a chain of command in and of itself is insufficient to render a person criminally responsible for another’s acts, and this is why article 28 requires a commander to have effective control, which previous jurisprudence has emphasised as the foundation of superior responsibility.¹³⁹ Judges Van den Wyngaert and Morrison appear to misconstrue the very function of this mode of liability by suggesting it has either been designed as having a blanket application to any relationship within the chain of command, or that it cannot apply to relationships within the chain of command between high-level superiors and those on the ground simply because of practical differences between these positions. Holding a high rank does not automatically mean a person has effective control and can be held criminally responsible for the actions of lower troops,¹⁴⁰ but it does not automatically exclude such control. To suggest otherwise contradicts the foundation of command responsibility as a mode of liability.

*C Dissenting Opinion of Judge Monageng and Judge
 Hofmański*

In their dissent, Judge Monageng and Judge Hofmański were ‘unable to accept’ the majority’s ‘deeply flawed’ conclusion regarding Bemba’s

¹³⁷ Ibid [36].

¹³⁸ Ibid [35].

¹³⁹ Roberta Arnold, ‘Article 28: Analysis and Interpretation of Elements’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (C.H. Beck/Hart/Nomos, 2016) 824. See, eg, *Čelebići* (n 30).

¹⁴⁰ Arnold (n 139) 826.

liability as a commander.¹⁴¹ Overall, Judges Monageng and Hofmański found that the Appeals Chamber majority both misinterpreted the legal test and the evidence necessary to establish criminal responsibility under article 28(a). They found that the majority ‘misconstrued the nature of criminal liability under article 28’ by applying it to hold Bemba responsible only for his actions, but not his failures (the latter being the very ‘focus’ of the provision).¹⁴² The dissenting judges did agree with the interpretation that assessing what measures are reasonable and necessary must be based on a ‘full consideration of the circumstances’ of the commander at the time and this is intrinsically connected to a commander’s ability to prevent, repress or punish crimes.¹⁴³

However, they held that a commander’s remoteness is only one of numerous facts that can be considered to determine material ability.¹⁴⁴ Further, the dissenting judges found that the majority misinterpreted the Trial Chamber’s findings based on a subjective view of the Trial Chamber’s reasoning with no basis in the Conviction Decision.¹⁴⁵ Judges Monageng and Hofmański therefore held that the majority’s finding regarding Bemba’s remoteness was based on an ‘erroneous assessment of a limited part of the evidentiary record and an uncritical acceptance of [Bemba’s] unsubstantiated arguments’.¹⁴⁶ They noted that Bemba’s submissions did not point to any attempts to investigate crimes that were made but proved impossible as a result of his remoteness from the CAR.¹⁴⁷ Both Judges Monageng and Hofmański concurred that factors of cost/benefit analysis may be relevant to determining the reasonableness of measures that a commander should have taken.¹⁴⁸ However, rather than the additional, specific parameters inserted by the majority, the dissenting judges held that the qualifiers of ‘necessary’ and ‘reasonable’ included in the wording of article 28 itself were alone sufficient to understand the scope of a commander’s duty based on the specific circumstances of the

¹⁴¹ *Dissent* (n 130) [44].

¹⁴² *Ibid* [45].

¹⁴³ *Ibid* [50], [51].

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* [45].

¹⁴⁸ *Ibid* [50].

case.¹⁴⁹ As such, the dissenting judges found that the Trial Chamber's findings were reasonable, and they had clearly and sufficiently considered Bemba's arguments before rejecting them.¹⁵⁰ Unlike the majority, in assessing the validity of the Trial Chamber's decision, the dissenting judges repeatedly referenced the relevant evidence which supported the Trial Chamber's findings, and referred to the Conviction Decision in detail.

Additionally, while the majority took issue with the Trial Chamber's list and assessment of possible measures available to Bemba, the dissenting judges found that this was a necessary component of the applying law under article 28. They pointedly noted that the very 'focus' of article 28 is in fact to hold a commander responsible for their failures, not their actions, which the majority had 'lost sight' of.¹⁵¹ Further, the dissenting judges stated that application of article 28 is not a matter of substantive law but the evidence of the case, and thus the Trial Chamber's decision was correctly based on this.¹⁵² Judges Monageng and Hofmański noted that while the majority held that the Trial Chamber failed to assess *in concreto* what Bemba should have done in the circumstances, the majority themselves did not do so.¹⁵³

Additionally, the dissenting judges stated the majority's finding that the Trial Chamber incorrectly considered Bemba's motives as determinative of the adequacy of measures and a lack of genuineness had 'no basis in the Conviction decision'.¹⁵⁴ Judges Monageng and Hofmański found that the Trial Chamber's decision showed a thorough assessment of each of the measures taken by Bemba.¹⁵⁵ His motives were considered as a factor which exacerbated the 'gross inadequacy' of the measures he took.¹⁵⁶ Likewise, the Trial Chamber did not fault Bemba's actions merely 'based

¹⁴⁹ Ibid.

¹⁵⁰ Ibid [6], [55].

¹⁵¹ Ibid [45].

¹⁵² Ibid [50].

¹⁵³ Ibid [52], [53].

¹⁵⁴ Ibid 45.

¹⁵⁵ Ibid [70]-[77].

¹⁵⁶ Ibid.

on their shortfalls', but considered their minimal and insufficient effect as part of determining whether Bemba fulfilled his duty under article 28(a).¹⁵⁷

VI IMPACT ON THE APPLICATION OF ARTICLE 28.

The majority's decision was received with criticism and controversy.¹⁵⁸ Bemba's acquittal may diminish the perception of ICC as a functional institution existing to uphold justice,¹⁵⁹ and potentially impact the future application of article 28.

The majority lost sight of the focus of article 28 by focusing on Bemba's actions rather than his failures to act.¹⁶⁰ As Chadimová explains, the only 'unity' between the Appeals Chamber majority's and the dissenting judges' opinions is that concluding what is a 'necessary and reasonable measure' is a matter of evidence, not of substantive law.¹⁶¹ The test under article 28 is whether a military commander has 'effective' command and control over their subordinates, not where they were physically located at the time of the criminal acts.¹⁶² If this requirement is established, it is then *because* the person has effective control that they can take measures to prevent and repress the crimes or refer them to competent authorities. Physical location would only become relevant as one fact that may affect material ability, considered amongst others in assessing a commander's effective control. The majority therefore did not correctly apply the test of article 28.¹⁶³ They instead essentially hinged their finding that Bemba was not liable as a commander on the fact that he was geographically remote from the CAR.¹⁶⁴ Rather than using this as a fact to then determine Bemba's effective control, the majority only briefly mentions his

¹⁵⁷ Ibid [79].

¹⁵⁸ See, eg, Hibbert (n 10); Sadat (n 10); Miles Jackson, 'Commanders' Motivations in Bemba', *EJIL! Talk!* (Article, 15 June 2018) < <https://www.ejiltalk.org/commanders-motivations-in-bemba/>>.

¹⁵⁹ See, eg, Hibbert (n 10); Sadat (n 10).

¹⁶⁰ *Dissent* (n 130) [45].

¹⁶¹ Chadimová (n 6) 311.

¹⁶² *Rome Statute* (n 1) art 28.

¹⁶³ See *Dissent* (n 130) [45].

¹⁶⁴ See *Bemba Appeal* (n 5) [171], [191], [192].

remoteness as a limiting factor that the Trial Chamber failed to consider, without assessing his material ability to take measures themselves.¹⁶⁵

It is unclear why Bemba's geographical remoteness was found to affect his ability to take measures to prevent, repress or submit matters to competent authorities. As Sadat states, the majority's statement that he was owed a 'certain defence' because of the 'limitations that [Bemba] would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country' is 'extraordinary'.¹⁶⁶ Sadat explains that this was made 'without a single case, treaty or treatise to support it and 'appears not only to shelter [Bemba] but serves the interest of any state, regional organisation or even rebel group whose forces cross borders, an increasingly frequent occurrence in today's world'.¹⁶⁷ Rather, it is arguable that a commander is obliged to exercise a greater level of due-diligence and supervision 'exactly because of the risks involved and the fact that most modern commanders have almost immediate access to their forces through...modern communications methods'.¹⁶⁸ The majority's finding on geographical remoteness could become an easy loophole to escape liability where a commander could avoid their obligations by simply being physically distant from conflict. The brief majority decision gave no thorough explanation of their conclusions. Instead, their 'laconic discussion of difficult legal issues and *de novo* review of the facts of the case provide little guidance for future cases'.¹⁶⁹

The majority's criticism of the Trial Chamber's 'preoccupation' with whether Bemba took certain measures in attempt to safeguard the MLC's reputation is also questionable.¹⁷⁰ Chadimová states that the motivation behind a commander's decisions can be a part of assessing whether they have fulfilled their duty under article 28, but it is not determinative.¹⁷¹ To determine if measures were actually taken to prevent and repress crimes, it is important to consider whether any measures were merely a façade.

¹⁶⁵ *Dissent* (n 130) 52], [53].

¹⁶⁶ Sadat (n 10).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Bemba Appeal* (n 5) [178].

¹⁷¹ Chadimová (n 6) 311.

Otherwise, another potential loophole could result where a commander could take an insincere measure so they could simply point to certain actions they took, even if those measures had no effect and were not intended to. As Jackson argues, if a commander takes measures with a motive to gain positive media coverage but they are still rigorous and lead to proper results, this motivation would not 'vitate the objective adequacy of the measure'.¹⁷² Yet, if the measure was possibly 'a sham' with limited effectiveness, then motivation may be relevant to determining if all necessary and reasonable measures were taken.¹⁷³ In the Trial Chamber's decision, Bemba's motivations were one factor considered in determining the adequacy of measures taken. Evoking the sentiment of the dissenting judges, as Jackson states, the majority's assessment that motivation 'coloured' the Trial Chamber's 'entire assessment' of their findings on necessary and reasonable measures is 'not convincing'.¹⁷⁴

Additionally, the separate opinion of Judges Van den Wyngaert and Morrison suggests that a military commander's responsibility for subordinates is diluted through the chain of command due to the nature of their superior role. This seems contrary to the purpose of the command responsibility mode of liability, which exists to ensure that commanders can be held responsible for the actions of individual troops.¹⁷⁵ As Sadat argues, 'this broad – and unfooted – statement turns much of international criminal law theory on its head' and its 'profound potential implications' meant it required 'more analysis and elaboration of the judges' meaning'.¹⁷⁶ As explained, the inclusion of 'effective' command in article 28 accounts for the differing superiority of commanders by assessing their liability based on the level of control they have. The potential implication of applying this in the future would completely alter the function of this mode of liability to do the very opposite of what Judges Van den Wyngaert and Morrison state, to hold those in high leadership position responsible and ascribe to them high levels of legal culpability.

Further, the majority incorrectly held that it was erroneous for the Trial Chamber to have considered the possible actions that Bemba *could* have

¹⁷² Jackson (n 158).

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Triffterer (n 2) 1059-1060.

¹⁷⁶ Sadat (n 10).

taken.¹⁷⁷ The majority found that the Trial Chamber's list of what Bemba could have done in the situation was 'hypothetical' and a cost/benefit analysis is permissible.¹⁷⁸ However, the wording of article 28 requires a consideration of 'all necessary and reasonable' measures within the commander's power, which is a prerequisite to determining if the person in question failed to take those measures.¹⁷⁹ The concept of superior responsibility, as developed after WWII and then codified in Article 86 of API, specifically criminalises a person's *failure* to act to prevent the commission of crimes by subordinates when they have a duty to.¹⁸⁰ The jurisprudence of the ICTY in particular, which was incorporated in the drafting of article 28, involved determinations of whether a superior *failed* to fulfil their duty to prevent and repress crimes committed by subordinates based on their effective control, being their material ability to take necessary and reasonable measures.¹⁸¹ As the dissenting opinion outlined, the majority instead focused on the actions Bemba took, and did not consider what actions he *failed* to take.¹⁸² Chadimová argues that the majority have misunderstood the Trial Chamber's findings, rather than providing any new legal interpretations or precedent.¹⁸³ However, by looking only at an isolated aspect of the facts, the majority have thus also distorted the test and focus of article 28.¹⁸⁴

V CONCLUSION

The confusion surrounding the mode of liability of command responsibility under article 28 has been exacerbated by the majority's finding that consideration of a commander's geographical remoteness from conflict can

¹⁷⁷ *Bemba Appeal* (n 5) [169]-[170].

¹⁷⁸ *Ibid.*

¹⁷⁹ *Rome Statute* (n 1) art 28 (emphasis added).

¹⁸⁰ See van Sliedregt (n 20) 136-8; 140-2, 223; Williamson (n 17) 304-5; *Rauer Case* (n 16); *Hostages Trial Case* (n 16); *Case of the Major War Criminals* (n 16); *Toyoda Case* (n 16); *Yamashita Case* (n 16); *The High Command Case* (n 16).

¹⁸¹ See van Sliedregt (n 20) 138, 141-4; Williamson (n 17) 306. See eg, *Čelebići* (n 30); *Aleksovski* (n 33); *Aleksovski Appeal* (n 33); *Martić* (n 33); *Karadžić* (n 33); *Hadžihasanović* (n 33); *Blaškić* (n 36); *Kunarac* (n 37); *Kordić and Cerkez* (n 39).

¹⁸² *Dissent* (n 130) [49].

¹⁸³ Chadimová (n 6) 311.

¹⁸⁴ *Ibid.*

limit the reasonable measures available to them. Likewise, the majority misinterpreted the Trial Chamber's findings by concluding that the Trial Chamber made an improper assessment of the motives behind the measures Bemba took. Bemba's motives were only considered by the Trial Chamber as one factor that contributed to the inadequacy of the measures taken. Additionally, the separate opinion of Judges Van den Wyngaert and Morrison, which suggests a superior's obligations and control are diluted through the chain of command, seems contrary to the purpose and function of the command responsibility mode of liability. The Bemba Appeal decision may have a significant impact on the command responsibility mode of liability, and thus the ability to hold commanders accountable for the actions of troops under their control. If it is followed, the Prosecution may need to create new arguments regarding 'effective control' and material ability, and focus on facts in isolation or a different (currently unclear) standard of responsibility if a commander is remote from the conflict in question.¹⁸⁵ Yet, as the ICC is not bound by its previous decisions,¹⁸⁶ and Bemba's acquittal has been met with extensive criticism, there is hope that command responsibility will come before the Court again and be interpreted differently by an Appeals Chamber constituted by different judges.¹⁸⁷

¹⁸⁵ See, eg, Hibbert (n 10); Sadat (n 10); Gauld (n 12) 207-8.

¹⁸⁶ *Rome Statute* (n 1) art 21.

¹⁸⁷ See, eg, Colorio (n 11); Galand (n 11); Chadimová (n 6); Bradley (n 11); Murphy (n 11); de Beer and Bradley (n 11); Hibbert (n 10); SaCouto and Viseur (n 13); Fyfe (n 15); Sadat (n 10); Gauld (n 12).

