

PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO

Case No. ICC-01/05-01/08 A
International Criminal Court
Appeals Chamber Judgement
June 8, 2018

Judges:

Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji
Judge Sanji Mmsenono Monageng
Judge Howard Morrison
Judge Piotr Hafmanski

Prosecution:

Ms. Fatou Bensouda
Ms. Helen Brady

Defense:

Mr. Peter Haynes
Ms. Kate Gibson

Gender Keyword: Rape

Procedural History: On May 23, 2008, the Pre-Trial Chamber issued an arrest warrant for Mr. Jean-Pierre Bemba Gombo (“Bemba”).¹ On June 10, 2008, the Pre-Trial Chamber issued a new arrest warrant following the submission of additional information by the Prosecutor.² On July 3, 2008, the Kingdom of Belgium surrendered and transferred Bemba to the International Criminal Court (ICC).³ On March 30, 2009, the Prosecution filed an amended version of the Document Containing the Charges, charging Bemba with criminal responsibility as a co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute and, in the alternative, as a military commander or person effectively acting as such under Article 28(a) or as a superior pursuant to Article 28(b).⁴ On June 15, 2009, the Pre-Trial Chamber confirmed there was sufficient evidence to believe that Bemba was responsible as a person effectively acting as a military commander under Article 28(a) of the Rome Statute for crimes against humanity and war crimes committed in his role as the Commander-in-Chief of the *Armée de Libération du Congo* (ALC), the military branch of the *Mouvement de libération du Congo* (MLC) in the Central African Republic (CAR).⁵ On November 22, 2010, the trial against Bemba officially commenced.⁶

On March 21, 2016, the Trial Chamber convicted Bemba of the crimes against humanity of rape and murder and the war crimes of rape, murder and pillaging (¶ 12). Bemba was found guilty as

¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber Judgment, March 21, 2016, ¶ 5.

² *Id.*

³ *Id.*

⁴ *Id.* ¶ 7.

⁵ *Id.* ¶¶ 1-2.

⁶ *Id.* ¶ 10.

a person effectively acting as a commander pursuant to Article 28(a) of the Statute for these crimes committed by MLC in the CAR between October 26, 2002 and March 15, 2003 (¶¶ 12-13). The Trial Chamber found that Bemba was the President of the MLC and the Commander-in-Chief of the ALC, which intervened in the CAR to support then President Mr. Ange-Félix Patassé in countering a rebellion led by General François Bozizé (¶ 13).

On April 4, 2016, Bemba filed his notice of appeal against the Conviction Decision (¶ 14). On September 19, 2016, Bemba filed his Appeal Brief (*id.*). Between January 9 and 11, 2018, the Appeals Chamber held a hearing where the parties and participants were allowed to make submissions and observations (¶ 27). Bemba appealed his conviction on six grounds (¶ 29). The six grounds of appeal include that: (i) this was a mistrial (Ground 1); (ii) the conviction exceeded the charges (Ground 2); (iii) he is not liable as a superior (Ground 3); (iv) the contextual elements of war crimes and crimes against humanity were not established (Ground 4); (v) the Trial Chamber erred in its approach in identifying evidence (Ground 5); and (vi) various other procedural errors were committed that invalidate the conviction (Ground 6) (*id.*). However, the Appeals Chamber only addresses two grounds of appeal: that the conviction exceeded the charges (Ground 2) and that Bemba is not liable as a superior (Ground 3) (¶ 32). In relation to the third ground of appeal, Bemba specifically alleged that the Trial Chamber erred in: (i) finding that he had effective control over MLC troops in the CAR; (ii) dismissing and ignoring relevant evidence; (iii) finding that he had actual knowledge of MLC crimes; (iv) finding that he did not take all necessary and reasonable measures to prevent or punish his subordinates' crimes; and (v) finding that the causation element had been met (¶ 30). On June 8, 2018, the Appeals Chamber released its decision, which is digested here with a focus on the application of the issues raised to the charges of sexual and gender-based violence.

Disposition: The Appeals Chamber, by majority, grants Grounds 2 and 3 of Bemba's appeal and reverses the Trial Chamber's judgment (¶¶ 196-98). The Majority finds that the Trial Chamber erred in convicting Bemba for various criminal acts—including several acts of rape, murder, and pillaging—because these acts did not fall within the “facts and circumstances described in the charges” (¶ 196). Furthermore, the Majority finds that the Trial Chamber erred in finding that Bemba was liable under command responsibility because he failed to take all necessary and reasonable measures within his power to prevent or repress the criminal acts adequately described in the charges—including acts of rape, murder, and pillaging—committed by MLC troops or to submit the matter to the competent authorities (*id.*). The Appeals Chamber, therefore, reverses Bemba's conviction for these remaining crimes and acquits Bemba of all charges (¶ 198).⁷

Key Gender Based Holding:

RAPE:

⁷ Two of the judges who voted with the majority filed a separate opinion. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber Judgement Separate Opinion of Judges Wyngaert and Morrison (June 8, 2018). The third judge on the majority filed a separate concurring opinion. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber Judgement Concurring Separate Opinion of Judge Eboe-Osuji (June 14, 2018). Two of the Appeals Chamber judges filed a dissenting opinion. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber Judgement Dissenting Opinion of Judges Monageng and Hofmannski, (June 8, 2018).

- The Trial Chamber convicted Bemba of rape as a war crime and a crime against humanity under command responsibility for his role as the Commander-in-Chief of the MLC forces that committed the crimes in CAR between October 2002 and March 2003 (¶¶ 12-13). Bemba appealed the conviction, alleging that (i) some of the crimes he was convicted of—including acts of rape—exceeded the charges against him and that (ii) he was not responsible as a commander under Article 28(a) of the Rome Statute for the criminal acts adequately described in the charges, including acts of rape (¶ 29).
 - i. Bemba argued that the Trial Chamber erred in convicting him on the basis of criminal acts upon which the Pre-Trial Chamber declined to rely when confirming the charges against him, including the rape of unidentified victims 1 to 35 (¶ 88). Bemba also argued that the Prosecutor’s allegation of rape by MLC soldiers during the relevant time period was not sufficiently specific and that “without the inclusion of any other factual details, it would be a rape charge with a 141-day time frame covering a geographic area of approximately 623,000 square kilometers” (¶ 90). Bemba argued that this vague description allowed the Prosecutor to “expand the factual parameters of the trial after confirmation” of charges, which Bemba submitted should not have been permitted (*id.*). Bemba pointed to the language “include” or “include but not limited to” in the [Amended Document Containing Decision on the Confirmation of Charges](#), arguing that various criminal acts for which he was convicted exceeded the “facts and circumstances described in the charges” because they were not expressly listed (¶¶ 75, 99). In Bemba’s view, “the scope of the trial against him was limited to the criminal acts that were specifically confirmed by the Pre-Trial Chamber in the Confirmation Decision” because acts not included in confirmed charges cannot be used as the basis of a conviction (¶ 99). The Appeals Chamber, by majority, finds that “the formulation in the operative part of the Confirmation Decision as well as that in the first paragraphs of the passages in relation to each category of crimes in the Amended Document Containing the Charges are too broad to amount to a meaningful ‘description’ of the charges” (¶ 110). The Majority finds that while other parts of the Confirmation Decision and the Amended Document Containing the Charges did provide the necessary [specificity-detail](#) where [individual-specific](#) criminal acts were alleged, the criminal acts that the Prosecutor added after the Confirmation Decision was issued were not sufficiently detailed and cannot be said to have been part of the “facts and circumstances described in the charges;” thus, these additional charges of [individual](#) criminal acts required an amendment to the charges, which was not done in this case (¶ 115). Therefore, the Appeals Chamber reverses Bemba’s conviction for specific criminal acts— including several acts of murder and pillaging as well as the conviction for the rapes of P79 and her daughter, two unidentified girls, a woman in a bush, P69 and his wife, and V1—finding these acts exceeded the scope of the charges (¶ 116). The Appeals Chamber confirms that the other crimes of which Bemba was convicted—including the rape of 20 [womenpeople](#)—did not exceed the scope of the confirmed charges (¶ 119).

- ii. With regard to the remaining charges, the Appeals Chamber considers Bemba's submission that the Trial Chamber erred when it found Bemba guilty under command responsibility because he did not fulfill his obligation to take "all necessary and reasonable measures" to prevent or repress the crimes from being committed or to investigate and punish the subordinates that committed the crimes, which included rape as a war crime and a crime against humanity (¶¶ 12, 122-23). The Trial Chamber found that Bemba did take "somea few" measures⁸ but they were all "limited in mandate, execution, and/or results" (¶¶ 122-23). One such measure cited by the Trial Chamber as limited in mandate was an investigation into crimes committed by MLC soldiers known as the "Mondonga Inquiry" (*id.*). In its assessment of the Mondonga Inquiry, the Trial Chamber held found that investigators did not investigate reports of rape and "only seven soldiers [were] ever ... arrested and tried, and only in relation to pillaging minor items and small sums of money" (¶ 128). The Trial Chamber found that this was one example of Bemba's measures falling short of the "necessary and reasonable" standard due to the limited mandate of the Inquiry (¶¶ 123, 131, 136). The Trial Chamber also assessed another investigative measure Bemba took known as the Zongo Commission (¶ 129). Bemba argued on appeal that the Trial Chamber ignored evidence presented by witness D48 that the Zongo Commission's mandate was limited due to the impossibility of investigating rape allegations in CAR.⁸ D48 testified that "[t]he [Zongo] [C]ommission was not able to investigate cases of rape, because it had no mandate whatsoever to go into the CAR, and it seems to me that it would be going out on a limb to say that such a commission could investigate rapes committed on the soil of a foreign nation. That wouldn't be possible."⁹ The Majority grants this ground of appeal, finding that the Trial Chamber erred in its assessment of several of Bemba's investigative measures, including both the Mondonga Inquiry and the Zongo Commission, and concluding that these and other errors materially affected the Trial Chamber's conviction of Bemba for rape and other crimes committed by his subordinates (¶¶ 190-94). The Majority's findings with regard to command responsibility is discussed further below under "Other Issues: MODES OF LIABILITY."

Other Issues:

STANDARD OF REVIEW FOR FACTUAL ERRORS:

- The Majority starts by citing the commonly accepted standard of review for factual errors, which requires the Appeals Chamber to determine "whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question, thereby applying a margin of deference to the factual findings of the trial chamber" (¶ 38). However, the Majority adds that "the idea of a margin of deference to the factual

⁸ See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Public Redacted Version of Appellant's Document in Support of the Appeal (September 28, 2016), ¶ 350.

⁹ The dissenting judges find that the Trial Chamber did not ignore this evidence but rather found D48's evidence to be inconsistent, causing substantial doubt as to the D48's credibility. *Prosecutor v. Bemba*, ICC-01/05-01/08, Appeals Chamber Judgement Dissenting Opinion of Judges Monageng and Hofmański (June 8, 2018), ¶ 58.

findings of the trial chamber must be approached with extreme caution” (*id.*). Indeed, the Majority is of the opinion that it can interfere with factual findings whenever the “failure to interfere may occasion a miscarriage of justice” (¶ 40). This finding departs from the traditional standard of review in which an appeals chamber will only interfere in the case where it cannot discern how the Chamber could have reasonably reached its conclusion from the evidence (¶¶ 39-40). The Majority of the Appeals Chamber finds that it will determine “whether a reasonable trial chamber properly directing itself could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it” and if the Chamber is unsatisfied, it will overturn the decision (¶ 42).¹⁰ The standard of review applied by the Majority of the Appeals Chamber underlies many of its findings leading to the reversal of Bemba’s convictions for all charges, including the Chamber’s findings with regard to mode of liability¹¹ and its application to rape as a crime against humanity and a war crime, which is discussed in more detail below under “Mode of Liability.”

MODE OF LIABILITY:

- The Trial Chamber convicted Bemba as a superior pursuant to Article 28(a) of the Statute for his role as the Commander-in-Chief over the MLC forces, who committed crimes in the CAR between October 2002 and March 2003 (¶¶ 12-13). The Trial Chamber found that in order to establish liability pursuant to Article 28(a) of the Statute, the following elements must be met:
 - a. crimes within the jurisdiction of the Court must have been committed by the **relevant** forces;
 - b. the accused must have been either a military commander or a person effectively acting as a military commander;
 - c. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;
 - d. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;
 - e. the accused **must have** failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

¹⁰ The dissenting judges disagree, stating that they are “not aware of any appellate chamber of an international or internationalised court or tribunal in the field of international criminal law that would apply [the] different standard of review” that the majority is adopting. *Id.* ¶ 3. While the Appeals Chamber is not obligated to follow its previous interpretations of the rule of law, the Appeals Chamber has previously held that “absent convincing reasons” it will not deviate from previous jurisprudence. *Id.* ¶ 5. The dissenting judges note that this notion of “predictability of the law is essential for any court, especially for the ICC,” and submit that the majority does not provide any reason for departing from the previous standard of review for factual findings, which has been applied to all final appeals before the Court. *Id.* Furthermore, the dissenting judges state that the majority fails to cite to any authority in support of its change in the appellate review standard. *Id.* Finally, they note that while the Appeals Chamber has access to the trial record, they lack the specific familiarity that a trial chamber has with the evidence, including “hearing of all witnesses and seeing the case unfold,” which is why it is “natural for the Appeals Chamber to give a margin of deference to the findings of the trial chamber.” *Id.* ¶ 7.

¹¹ *Id.* ¶ 54.

f. the crimes committed by the forces ~~must have been~~were a direct result of the failure of the accused to exercise control properly over them.¹²

- Bemba appealed the Trial Chamber’s finding that he was liable under command responsibility for the crimes committed by his subordinates on four different grounds related to the elements of command responsibility above (¶ 30). The Majority of the Appeals Chamber addresses only Bemba’s argument that the Trial Chamber erred in finding that he did not take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes (¶ 32). The Trial Chamber found that in order for a commander or person effectively acting as such to fulfill his or her obligations, he or she must take all necessary and reasonable measures within his or her material ability to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.¹³ The Majority notes that the Trial Chamber found that Bemba took a “few measures” in response to the crimes being committed by MLC forces, including: an investigation known as the Mondonga Inquiry; a visit to the CAR to meet with the UN representative and President Patassé; a speech given at PK12 in November 2002; the trial of Lieutenant Bomengo and others at Gbadolite, with the report of the trial transmitted to Bemba; an investigation known as the Zongo Commission; a letter written to General Cissé; a letter to the President of the International Federation for Human Rights (FIDH) in February 2003; and the establishment of the Sibut Mission at the end of February 2003 (¶ 122). The Trial Chamber ruled, however, that these measures were all “limited in mandate, execution, and/or results”¹⁴ and therefore did not meet the threshold of “all necessary and reasonable measures.” The Trial Chamber ~~held~~ also found that Bemba’s key intention when taking those limited measures was to protect the image of his troops, and therefore “[h]is primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty.”¹⁵ The Trial Chamber found that Bemba had “extensive material ability to prevent and repress the crimes” by taking a range of measures, finding that he could have: “(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 troops, for example, to minimize 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.”¹⁶ The Trial Chamber also found that Bemba could

¹² *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber Judgement, March 21, 2016, ¶ 170.

¹³ *Id.* ¶¶ 197-98.

¹⁴ *Id.* ¶ 720.

¹⁵ *Id.* ¶ 728.

¹⁶ *Id.* ¶ 729.

have withdrawn his troops from CAR altogether prior to March 2003, when the Trial Chamber stated they were withdrawn for political reasons.¹⁷

- The Majority holds that the Trial Chamber’s finding that Bemba failed to take the necessary and reasonable measures to prevent or repress the crimes was “unreasonable because it was tainted by serious errors” detailed below (¶ 166).
 - *The Trial Chamber erred in defining reasonableness in a way that disregards proportionality and feasibility.* The Appeals Chamber finds that the overall scope of a commander’s duty to take “all necessary and reasonable measures” is connected to his or her material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution, “because “a commander cannot be blamed for not doing something he or she has no ability to do” (¶ 167). When assessing whether “all necessary and reasonable measures” were taken, the Appeals Chamber finds that the Court must consider the measures that were at the commander’s disposal in the circumstances at the time (¶ 168). The Appeals Chamber finds that “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”; rather, “Article 28 only requires commanders to do what is necessary and *reasonable* under the circumstances” (¶ 169, emphasis in original). The Appeals Chamber finds that when a court assesses reasonableness, other parameters must be considered, such as the operational realities on the ground (¶ 170). The Appeals Chamber notes that Article 28 is “not a form of strict liability” and that commanders “are allowed to make a cost/benefit analysis when deciding which measures to take, bearing in mind their overall responsibility to prevent and repress crimes committed by their subordinates” (*id.*). A commander is allowed to consider the impact of any measures on ongoing or planned operations (*id.*).
 - *The Trial Chamber erred in failing to identify concrete measures a reasonable commander should have taken.* The Majority “cautions against the “risk ... of evaluating what a commander should have done with the benefit of hindsight,” and finds that in making this assessment, a trial chamber must “specifically identify what a commander should have done *in concreto*” (*id.*). A trial chamber must demonstrate in its reasoning “that the commander did not take specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken” (*id.*). The Appeals Chamber finds that a list of measures that a commander could have hypothetically taken, juxtaposed with crimes committed by the commander’s subordinates, does not prove that the commander “acted unreasonably at the time” (*id.*).¹⁸

¹⁷ *Id.* ¶ 730.

¹⁸ The dissenting judges disagree with the majority’s finding, and state that the Trial Chamber did identify measures in *concreto* that Bemba did not take, assess what the impact of those measures would have been, and find that, under the circumstances, Bemba was obligated to take those measures ~~they~~ *it* identified. *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber Judgement Dissenting Opinion of Judges Monageng and Hofmański (June 8, 2018), ¶ 52.

- *The Trial Chamber erred in failing to adequately consider the difficulties Bemba faced under the circumstances.* Bemba argued that the Trial Chamber failed to adequately appreciate the difficulties he faced in controlling troops located in a foreign country (¶ 171). The Majority finds that the Trial Chamber “had some regard” for Bemba’s difficulties implementing relevant investigatory measures, but ultimately found his argument to be unpersuasive (*id.*). The Majority finds that the Trial Chamber “paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba’s ability, as a remote commander, to take measures” (*id.*).
- *The Trial Chamber erred in its consideration of testimony by witness P36:* Bemba also argued that the Trial Chamber ignored the relevant testimony of witness P36 which detailed the ways in which MLC investigative efforts were dependent on CAR authorities, including “for access, movement, and contact with civilians” (¶ 172). The Majority finds that P36’s testimony demonstrated the logistical difficulties involved in investigating soldiers’ crimes, which were significant and directly relevant evidence that the Trial Chamber should have considered (*id.*).¹⁹
- *The Trial Chamber erred because it made an “unrealistic assessment” of Bemba’s material ability to take to take measures given the limitations on his authority in CAR* (¶ 173). The Majority finds that the Trial Chamber did not properly assess whether the measures Bemba did take “could be regarded as the extent of the necessary and reasonable measures that he could have taken, given the limitations upon his material abilities” (*id.*). The Majority finds that even if Bemba “had ultimate disciplinary authority in the CAR, this does not mean that this disciplinary authority was not in any way subject to limitations or impeded to a degree – a reality which the Trial Chamber ought to have given weight in its assessment of the measures” that Bemba did take (*id.*).²⁰
- *The Trial Chamber erred in failing to consider evidence that Bemba wrote a letter to the CAR Prime Minister requesting that an international commission of inquiry be set up to investigate MLC soldiers’ crimes* (¶¶ 174-75). The Majority finds that it was imperative for the Trial Chamber to consider the letter Bemba wrote to CAR’s Prime Minister, especially considering the fact that the Trial Chamber found that Bemba “made no effort to refer the matter to the CAR authorities, or cooperate with international efforts to investigate the crimes” (¶ 175). Despite the Trial Chamber’s doubts as to whether Bemba actually sent the letter, the Majority

¹⁹ The dissenting judges disagree with the majority and believe that P36’s testimony actually identified ways in which to overcome the logistical difficulties Bemba faced in ordering investigations in the CAR, thereby supporting the Trial Chamber’s finding. *Id.* ¶ 57. Additionally, they state that they find it troubling that the Majority makes this factual finding “without considering the findings, reasoning and evidence relied upon by the Trial Chamber” and find further that the majority fails to appreciate that the Trial Chamber “found P36 to be a witness whose evidence should be analyzed with ‘particular caution.’” *Id.* ¶ 63.

²⁰ The dissenting judges disagree, finding that the Majority’s opinion, which “uncritically accepts Mr. Bemba’s submissions on the facts and the evidence, pays scant regard to the findings and analysis of the Trial Chamber and is the result of an erroneous application of the accepted standard of appellate review.” *Id.* ¶ 54.

believes this was not sufficient grounds to disregard the “uncontested factual allegation” that the letter was written (*id.*).²¹

- *The Trial Chamber erred in considering Bemba’s motives in taking measures to prevent or repress crimes.* The Majority finds that the Trial Chamber inappropriately considered Bemba’s motives when determining that the measures he took were not necessary and reasonable (¶ 176). The Majority finds that while a commander is required to act in good faith and genuinely carry out his duty to prevent or repress the crimes or refer the matter to competent authorities, other motivations do not automatically render the measures taken inadequate (¶¶ 176-77). The Majority finds that although the Trial Chamber cited Bemba’s adverse motivations as an “aggravating” factor in his failure to exercise his duties, the Trial Chamber in effect actually treated this factor as determinative that the factors taken were inadequate (¶ 178). The Majority finds that Bemba’s motivation for rehabilitating the public image of the MLC troops does 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” (¶ 179). Therefore, the Majority finds that the Trial Chamber erred in assessing Bemba’s motivation because it considered an irrelevant factor and failed to show how such a motivation would affect the necessity or reasonableness of the measures taken (*id.*).²²
- *The Trial Chamber erred in assessing Bemba’s measures based on shortcomings in their execution.* The Majority recalls that the Trial Chamber found the measures Bemba did take to be inadequate because they were limited in “mandate, execution, and/or results” (¶ 180). The Majority finds that the measures taken by a commander cannot be faulted merely because of shortfalls in their execution (*id.*). The Majority finds that “when a commander establishes an independent commission, inquiry or judicial process – of which he or she is not part – it must be left to freely fulfill its mandate” (*id.*). When considering the shortfalls of a measure taken by a commander, the Majority finds that 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” (*id.*). The Majority finds that the Trial Chamber failed to assess Bemba’s measures using these factors when it determined that some of the measures were limited in mandate/execution (*id.*). The Majority finds that unless the Trial Chamber had found that Bemba “purposely limited the

²¹ The dissenting judges note that the witness who testified about the letter testified merely that “it was decided that a letter should be sent to the CAR Prime Minister requesting an international commission of inquiry to be established” but that he never saw the letter. *Id.* ¶ 67. The dissenting judges also note the reasons why the Trial Chamber had concerns about the witness’s credibility and the fact that no letter was entered into evidence. *Id.*

²² The dissenting judges believe that this error was not in fact raised by Bemba on appeal and “appears to reflect the Majority’s subjective view of the Trial Chamber’s reasoning, which has no basis in the Conviction Decision.” *Id.* ¶ 45.

mandates of the commissions and inquiries” to investigate crimes, which it did not find, than the Trial Chamber could not have attributed the failure of the measures’ “mandate, execution, and/or results” to Bemba (¶ 181*id.*).²³

- *The Trial Chamber erred in faulting Bemba for failing to empower other MLC leaders to investigate and prosecute soldiers’ crimes.* The Majority finds that the Trial Chamber “cited no evidence in support of this finding” and contradicted itself by elsewhere acknowledging that “Colonel Moustapha and the other MLC Commanders also had some disciplinary authority in the field” (¶ 182). The Majority finds that the Trial Chamber also “failed to explain what more Mr Bemba should have done to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes and how he fell short in that regard” (*id.*).²⁴
- *The Trial Chamber erred by not determining the approximate number of crimes committed in order to assess whether the measures Bemba took to suppress the crimes were reasonable.* The Majority finds that an assessment of the measures taken by a commander are wholly-dependent on the number of crimes committed (¶ 183). The Majority finds that the number of crimes proved at trial beyond a reasonable doubt were-was comparatively small, and given this low number of individual crimes proven, it is difficult to assess how widespread the criminal acts were in the CAR (*id.*). Therefore, the Majority finds that the Trial Chamber could not accurately assess the proportionality of the measures taken by Bemba to repress those crimes (*id.*).²⁵

²³ The dissenting judges believe the majority loses “sight of the focus of article 28 of the Statute, namely holding a commander responsible for his failures and not for his actions.” *Id.* The dissenting judges disagree with the majority and believe the four-part assessment is unnecessary because if “the results of measures taken are unsatisfactory and a commander does not follow up with other measures that are available in the circumstances, it cannot be said that he or she has discharged his or her duty to prevent, repress, or punish crimes committed by his or her subordinates.” *Id.* ¶ 80.

²⁴ The dissenting judges disagree, finding that “there is no contradiction between the Trial Chamber’s finding concerning Mr Bemba’s failure ‘to empower other MLC officials to *fully and adequately investigate and prosecute* allegations of crimes’ and its finding that “Colonel Moustapha and the other MLC commanders also had *some* disciplinary authority in the field” *Id.* ¶ 83. Emphasis in original.

²⁵ While the dissenting judges agree that the duration and scale of the crimes committed are important factors in evaluating the adequacy of measures taken, they disagree with the majority’s finding that the Trial Chamber failed to determine the widespread nature of the crimes committed in the CAR. *Id.* ¶ 88. The dissenting judges opine further that the majority itself failed to carry out a proper assessment of the evidence in order to determine the widespread nature of the crimes, instead limiting itself “to the observations that the evidence on its face, appears for the most part very weak and is of potentially extremely low probative value.” *Id.* ¶ 92. The dissenting Judges note that given “the Majority’s conviction that an assessment of the measures taken by a commander *depends* on the number of crimes that were committed,” it is unclear how the majority itself was able to make this assessment and find that Bemba’s measures were sufficient.²⁵ *Id.* Emphasis in original. The dissenting judges also disagree more broadly with the majority’s suggestion that “only the specific individual criminal acts for which the commander was ultimately convicted are relevant to an assessment of whether a commander fulfilled his or her duty to take all necessary and reasonable measures.”²⁵ *Id.* ¶ 94. In their view, the adequacy of Bemba’s measures must be “assessed in light of the scale and duration of the criminal activity alleged as a whole.”²⁵ *Id.*

- *The Trial Chamber erred in finding that the redeployment of troops was a necessary and reasonable measure he should have taken despite the lack of notice to Bemba of this measure.* The Majority finds that Bemba was not adequately notified of the redeployment of troops as a necessary and reasonable measure that he should have taken and that Bemba suffered prejudice as a result of the lack of proper notice because he could not defend himself against this suggested measure (¶¶ 187-88). The Majority notes that the “Corrected Revised Second Amended Document Containing the Charges did not specifically identify the redeployment of troops as a necessary and reasonable measure that Bemba should have taken,” for example, to minimize contact with the civilian population (¶ 187). Because Bemba was not sufficiently notified of this factual allegation as a necessary and reasonable measure he should have taken, he could not defend against this allegation at trial by, for example, arguing that redeployment would not have been feasible and would have increased the risk to his troops from “friendly fire” (¶ 188).
- Based on all of the above findings, the Majority holds that the errors the Trial Chamber made “resulted in an unreasonable assessment of whether Mr Bemba failed to take all necessary and reasonable measures in the circumstances existing at the time” (¶ 193). The Majority concludes therefore that “one of the elements of command responsibility under article 28 (a) of the Statute was not properly established” and therefore “Bemba cannot be held criminally liable under that provision for the crimes committed by MLC troops during the 2002-2003 CAR Operation” (¶ 194). The Majority reverses Bemba’s conviction on those charges which were not already reversed due to the other ground discussed above (¶ 198).²⁶

²⁶ The dissenting judges state that they disagree with the Majority’s conclusion that it was unreasonable for the Trial Chamber to find that Bemba “failed to take all necessary and reasonable measures to prevent, repress or punish the commission of crimes” and opine that the Majority failed to assess all of the measures at Bemba’s disposal and the reasonableness of the Trial Chamber’s conclusions in light of all the evidence it relied upon. They find it problematic that the Majority questions the Trial Chamber’s conclusions based on a limited number of doubts the Majority identifies in relation to the Trial Chamber’s discrete factual findings *Id.* ¶ 110. The dissenting judges find that the Majority’s approach reflects a misapplication of the accepted standard of appellate review and conclude that they would have rejected Bemba’s grounds of appeal regarding his superior responsibility and would have confirmed the Trial Chamber’s conclusion on this issue. *Id.*