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## Preventing and punishing sexual violence in war post-Bemba

0 comments

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*Following the acquittal of Jean-Pierre Bemba Gombo by the International Criminal Court, [Louise Arimatsu](#) reflects on what steps might be taken to more effectively address sexual violence in conflict.*

*The International Criminal Court (iStock.com/LIVINUS)*

Preventing sexual violence in conflict has been a high priority for the international community for at least the last two decades exemplified by the myriad of policy, legal and institutional measures adopted by

states at domestic and international levels. While we might debate the extent to which prosecutions can deter sexual violence in armed conflict, they remain one, among many, preventative strategies and mechanisms that are at the disposal of states. Yet, given the prevalence of sexual violence in war and, notwithstanding significant advances in the field of international criminal law, the number of perpetrators who have been prosecuted for rape by courts and tribunals remains woefully low.

In a bid to remedy the poor record of [the ICC](#) the current Prosecutor, Fatou Bensouda, has taken important [strategic steps](#) to surmount social, cultural and historical impediments and regularly [reaffirms her commitment](#) to addressing sexual and gender-based offences through her investigative and prosecutorial powers. The conviction in 2016 of Jean-Pierre Bemba Gombo for rape as a war crime and crime against humanity was seen as [a milestone](#) for the Court, albeit [a limited one](#) given the scale of the problem in most, if not all, conflicts. For the survivors of the atrocities the decision represented a long-awaited *acknowledgement by the law* of what they had individually and collectively endured during a four month period in 2002-2003 when Bemba's forces had been deployed to the Central African Republic (CAR).

The fact that Bemba was held responsible *as a commander* for failing to take all necessary and reasonable measures to prevent and punish the Movement for the Liberation of Congo (MLC) troops under his effective control for the sexual violence perpetrated against the civilian population was to recognise the locus of power and authority and the responsibilities that attach to positions of privilege. As the Military Commission in the Yamashita case noted over seven decades ago, "clearly assignment to command military troops is accompanied by broad authority and heavy responsibility... [W]here murder and rape and vicious, revengeful actions are widespread offences, and there is no

effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.”

The decision in June 2018 by the Majority of the Appeals Chamber (3-2) to acquit Bemba has generated a significant amount of commentary among the legal community. Concerns have rightly been expressed about the [lack of clarity that comes with the release of multiple opinions](#) while other criticisms have been directed at the [standard of appellate review](#) and the inter-related broader question as to the [scope of judicial authority to depart from previous jurisprudence](#) since it was only by doing so that the Majority was able to find that the conviction had exceeded the facts described in the charges, the first of the two grounds upon which Bemba was acquitted. The disturbing consequence of the Majority’s reasoning is that prosecutions of sexual violence crimes will be that much more difficult as [elaborated by Susana SaCouto](#).

If preventing sexual violence in conflict is a priority of states, it is the second ground upon which Bemba was acquitted that demands further reflection: namely, that Bemba had *not failed* to take all necessary and reasonable measures to prevent and punish crimes committed by MLC troops under his effective control. As with their judicial predecessors, each of the appellate judges reflected, albeit to different degrees and with varying levels of comfort, on the doctrine of command responsibility. Despite being re-formulated in multiple texts, finessed by courts and dissected by academics over many decades, the underlying principles of the doctrine first set out in Yamashita remain unchanged and have subsequently been incorporated into military manuals across the world. In other words, although international criminal law has elaborated on the scope and content of command responsibility (most notably on the element of *mens rea*) the doctrine is one that is firmly

grounded in the logic of the law of armed conflict, operational effectiveness, military ethos and the value of reciprocity. Importantly it is a doctrine that recognises the unique structure, distribution of power and chain of command system upon which military institutions rest and to that extent functions to set the *minimum* baseline expected of all commanders to maintain rule compliance.

While the Trial Chamber found that, all things considered, the measures taken by Bemba had been “grossly inadequate”, the Majority disagreed. This opens up the question as to what *specific* measures a commander must take to satisfy their legal obligation to prevent the commission of sexual violence whether as a war crime, crime against humanity or genocide and to punish those who have engaged in such criminality. Is the geographical distance of the commander from the site of the alleged offence (especially if perpetrated in a foreign country) relevant to assessing the reasonableness of the measure taken, as suggested by the Majority? Should the commander’s actions be assessed against the gravity of the offences alleged or is the number of offences alleged determinate? Is a commander entitled to apply “a cost/benefit analysis” when deciding the measures to take in cases of sexual violence? Where the offence constitutes rape, has a commander discharged his responsibility simply by authorising an investigation without specifically insisting that the investigation should include an enquiry into the allegations of sexual violence?

Legal arguments aside, Bemba’s acquittal is nothing short of a failure on the part of the international community towards the victims and survivors of the atrocities perpetrated by MLC troops. What steps can be taken to ensure against similar failings in the future? One option is for states to agree to a set of guidelines including concrete measures that all commanders would be expected to take where sexual violence is alleged. A far more radical and survivor centric measure would be for states to de-link reparations from convictions in a more comprehensive

manner than is currently the case. After all, if there was one issue upon which all the judges, appellate and trial, agreed, it was that sexual violence offences were perpetrated against women, children and men during the conflict in the CAR.

Image credit: [Oxfam East Africa \(CC BY 4.0\)](#)

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