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Original: **English**

No.: **ICC-01/05-01/08 A**
Date: **23/01/2017**

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public with Public Annexes A and B

Public redacted version of Appellant's Reply to "Prosecution's Response to Appellant's Document in Support of Appeal"

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Prosecution position, according to its Response, is that a commander before the International Criminal Court can (indeed should) be found guilty of crimes against humanity or war crimes, absent proof that he knew that such crimes were being committed,[1] and having made no causal contribution to them.[2]

2. In taking this position, the Prosecution has not only dragged responsibility outside the regulatory framework of the Court, but outside the criminal law. An acceptance of this position would transform this institution from an international criminal court into a court of ethical responsibility.

3. A criminal omission, like a criminal act must be causative of something or else it is inconsequential. A commander who merely has knowledge of his subordinate committing rape or murder *simpliciter* does not come within this Court's jurisdiction and may, in fact, commit no criminal offence at all.

4. In other respects the Prosecution's submissions are erroneous in law. They misrepresent the Chamber's findings, the evidence and their own arguments at trial, and are inconsistent with the Prosecution position adopted in other cases. They are, moreover, substantially non-responsive to the Appellant's arguments and often merely repetitive of the Chamber's findings.

5. The Appellant maintains his original submissions and the absence of comment on any aspect of the Response is in no way indicative of a concession on his part to the validity of any submission made by the Prosecution.

[1] Prosecution's Response to Appellant's Document in Support of Appeal, ICC-01/05-01/08-3472-Conf, 21 November 2016, ("Response"), paras. 278-295.
[2] Response, para. 220.

II. THIS WAS A MISTRIAL

A. THE DEFENCE SUBMISSIONS ARE NOT IMPROPER

6. The Defence submissions are neither "unconsidered" nor "factually unsubstantiated"[3]. The facts as now known to the Defence concerning the steps that were adopted in the course of the Article 70 investigations, and how those steps impaired the fairness of the proceedings, are set out carefully and with extensive quotation and citation to ensure maximum transparency. For all its gratuitous empty rhetoric,[4] the Prosecution Response makes no single challenge to any factual assertion in the Ground 1 of the Appellant's Brief.

B. THERE IS NO BASIS TO DISMISS THE DEFENCE SUBMISSIONS *IN LIMINE*

7. Ground 1 is not an interlocutory appeal from the abuse of process decision or any other decision. This is a final appeal from the Judgment[5] based on the unfairness of the trial viewed as a whole. It is not limited to the correctness of the abuse of process decision, but encompasses the procedure followed by the Trial Chamber in its totality and the impact on trial fairness. The Prosecution is entitled to invoke any reasoning of the Trial Chamber to explain why there was no such unfairness, and the Defence is entitled to base appellate arguments on the error in the procedure *actually followed* by the Trial Chamber, rather than errors in the abuse of process decision itself.

8. The reliance on a single pronouncement in *Lubanga* is misplaced. There, the Appeals Chamber appears to have considered that the ground of appeal in question was subsumed within the relevant interlocutory decision fully.[6] It also appears to have reasoned that the failure of the Appellant to have "challenged the approach or

[3] Response, para. 9.
[4] Response, paras. 10, 35, 43, 59-60.
[5] Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016 ("Judgment").
[6] *Lubanga* AJ, para. 149.

findings of the Trial Chamber" meant that the Appeals Chamber was required to "address these allegations *de novo*."[7]

9. In any event, any deficiency in the degree of "engagement"[8] does not justify the suggested draconian remedy. Both parties have set out arguments extensively.[9]

C. THE PROSECUTION MISREPRESENTS THE *EX PARTE* SUBMISSIONS

10. The characterization of the *ex parte* submissions as a "discrete *procedural* matter"[10] "strains credibility."[11] Court scheduling is an example of a "procedural matter" properly the object of an *ex parte* communication. Submissions about the credibility of another party's evidence are not. If this is the standard applied by the ICC Prosecution for permissible *ex parte* submissions, then this systemic procedural error requires immediate and robust correction by the Appeals Chamber.

11. The *ex parte* submissions were not limited.[12] The absence of "definitive conclusions" about criminal responsibility is irrelevant. *Ex parte* submissions went about as far as possible in alleging criminal culpability on the part of members of the Defence and Mr. Bemba.

12. If the Prosecution's argument concerning the professionalism of judges[13] is taken to its logical conclusion, no procedural error – no matter how serious – could have any impact on the trial fairness. Some procedures are so fundamental to the reality and appearance of a fair trial, from which prejudice is so insidious and irreversible, that further proof of prejudice is inappropriate. Hearing witnesses against an accused in his absence and without cross-examination, for example,

[7] *Lubanga* AJ, para. 155.
[8] Response, paras. 18, 20.
[9] Appellant's document in support of the appeal, ICC-01/05-01/08-3434-Conf, 19 September 2016 ("Brief"), paras. 51-114; Response, paras. 6-70.
[10] Response, paras. 25, 37.
[11] Response, para. 43.
[12] Brief, paras. 62-64.
[13] Response, para. 32.

would render a trial unfair regardless of the judges' professionalism.[14] The gravamen of unfairness is the deviation from accepted procedures that are intrinsic to fairness. The need to adhere to these procedures does not involve any evaluation of the judges' professionalism or require proof of any particular impact on deliberations.

13. The Prosecution's allegation of "innuendo"[15] and "insinuation"[16] misstates the basis of the Defence's arguments, trivializes the significance of these fair trial procedures, and inappropriately demands separate proof that deliberations were influenced – which would require looking into them in a way that is both evidentially and substantively prohibited. It is appropriate to examine specific indications in the trial record concerning disparate treatment of Defence witnesses,[17] how Prosecution questions referred to its *ex parte* submissions,[18] and how the Judgment addresses matters that were within the subject-matter of the *ex parte* submissions.[19]

14. The proper approach, rather than inquiring into the Judges' psychological state, is to examine the circumstances and make an objective assessment of the likelihood of prejudice. This may properly include considering the content of the submissions in relation to the subject-matter of the Trial Chamber,[20] and placing the burden on the Prosecution to show that the circumstances were not prejudicial.[21]

[14] ICC-02/11-01/11-286-Red, para. 43 ("whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist.")
[15] Response, para. 43.
[16] Response, para. 46.
[17] Brief, para. 71.
[18] Brief, para. 71.
[19] Brief, paras. 73-75.
[20] Brief, paras. 59-74.
[21] Brief, paras. 57-58.

D. IT IS FOR THE PROSECUTION TO SHOW THAT THE *EX PARTE* SUBMISSIONS COULD NOT HAVE BEEN REVEALED EARLIER

15. The Prosecution claims that the Defence's submissions that the *ex parte* submissions could have been revealed earlier are "speculative, unfounded and show[] no error."[22] The Prosecution, despite an informational advantage which permitted it to do so, failed to explain or even to discuss the circumstances that caused it not to proceed more expeditiously.

E. THE DEFENCE SUBMISSIONS CONCERNING *EX PARTE* SUBMISSIONS HAVE BEEN MISCHARACTERISED

16. The Appellant did not argue that "there was no basis at all for the suspicion of Article 70 offences."[23]

17. The argument, instead, is that the Prosecution's *ex parte* submissions included allegations that extended to witnesses who did not subsequently form part of the Article 70 Case and cast aspersions on certain payments that have not been shown to be in any way improper.[24] The allegations were, accordingly, directed at the credibility of the Defence case as a whole. Some of those allegations have now been adjudicated as well-founded in the Article 70 Case. This does not justify the Prosecution's failure to disclose its submissions as early as possible so that the Defence could (i) take remedial measures as quickly as possible;[25] and (ii) refute allegations that went beyond the scope of legitimate suspicion.[26]

F. THE TRIAL CHAMBER'S PRONOUNCEMENTS ARE NEITHER DETERMINATIVE NOR RELEVANT

18. The Prosecution argues that there was no prejudice because the Trial Chamber said there was no prejudice.[27] This approach would reduce appellate proceedings to

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[22] Response, para. 35.
[23] Response, para. 43.
[24] Brief, para. 64.
[25] Brief, paras. 78, 88-91.
[26] Brief, paras. 64-67, 70.
[27] Response, paras. 27 ("the Chamber found that his submissions were 'without merit'"), 28 ("[i]t rejected any notion that the trial record demonstrates any impact of ex parte submissions on its

examining whether a Trial Chamber used the right formula of words while disregarding the nature of the trial procedure and circumstantial indications of prejudice. The Trial Chamber's assertion that there was no prejudice does nothing to demonstrate lack of prejudice in reality; on the contrary, its refusal to acknowledge any such danger raises concern that the Trial Chamber did not pay adequate regard to the irreducible requirements of a procedurally fair trial.

19. The Appellant did not argue that the Trial Chamber should have been unaware of the existence of an Article 70 investigation,[28] but rather, that the Prosecution offered extensive substantive submissions concerning the case *sub judice* which the Trial Chamber itself subsequently found to be procedurally improper under the Statute and Rules.[29]

G. THE PROPOSED REMEDIAL MEASURES ARE UNREALISTIC

20. The Prosecution – while conceding its disclosure violation[30] – argues that any prejudice caused could have been remedied by submissions during trial, re-opening of the case and the recall of witnesses.[31]

21. The Prosecution fails to acknowledge the impact of its piecemeal disclosure on the ability of the Defence to make assessments about the advisability of any such steps.[32] In *Ntaganda*, this information was disclosed during the Prosecution case, given its relevance to the preparation of the Defence case and "the selection of its witnesses".[33] In *Bemba*, information relevant to the validity of the Prosecution allegations was disclosed long after closing submissions. Despite the obvious relevance of this information to the very steps that the Prosecution now proposes, it

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appearance of impartiality"), 32, 34 ("nor did it countenance the possibility that the Prosecution's submissions would form part of its deliberations on Bemba's guilt or innocence"), 36 ("the Chamber clarified that it was appropriately cautious regarding these allegations"), 51 ("it stressed that it was not influenced").

[28] Response, para. 40.

[29] Brief, paras. 26, 58.

[30] Response, paras. 51, 53.

[31] Response, para. 55.

[32] Response, para. 55, second bullet point.

[33] ICC-01/04-02/06-1616, para. 3.

asks the Appeals Chamber to shut its eyes to this material on the basis that it is irrelevant.[34]

H. PREVIOUS INTERNATIONAL PRACTICE IS RELEVANT

22. The cited cases reflect an understanding that these matters must be addressed early and rapidly.[35] The Article 70 Case could have been addressed early and rapidly, and the damage could have been contained to three witnesses.[36] Had that been done, the Article 70 Case itself would have been much quicker and expeditious, and its impact on this trial substantially averted.

I. THE PROSECUTION ARGUMENTS CONCERNING ITS USE OF PRIVILEGED INFORMATION ARE MISPLACED

23. The Prosecution's complaint that the Defence has failed to "show concretely" how invasion of privilege has affected this case,[37] or to provide an exact inventory of the privileged information in the Prosecution's possession[38] reflects a misunderstanding of the requirements of procedural fairness. The Prosecution team in this case had information during this case that was, at one time or another, subsequently adjudicated not to be indicative of any crime.[39] This access should be viewed as inherently inimical to trial fairness, and prejudice presumed, precisely because it is impossible to conduct an inquiry as to how the Prosecution used the information or how that use may have directly affected, for example, the content of cross-examination or other matters.

III. THE CONVICTION EXCEEDED THE CHARGES

24. The Prosecution misstates the law in claiming that "the effects of late notice [of charges or underlying acts] may be cured".[40] Material received after trial has

[34] ICC-01/02-01/08-3471-Conf, paras. 2, 18-19, 29.
[35] Response, paras. 57-58.
[36] Brief, para. 90.
[37] Response, para. 67.
[38] Response, para. 66.
[39] Brief, paras. 94-99.
[40] Response, para. 97.

commenced can only be relevant to "whether prejudice caused by the lack of detail in the charges may have been cured".[41] Notice of the charges brought by V1 and V2 should not just have "ideally" been given to the Accused before trial,[42] it was a prerequisite to their forming a basis of his conviction, even according to the Prosecution's assessment of the ICC's jurisprudence.[43] The fact that the Appellant was convicted of a further murder, rapes and acts of pillage in a geographically novel area is demonstrable prejudice.

IV. MR BEMBA IS NOT LIABLE AS A SUPERIOR

A. MR. BEMBA DID NOT HAVE EFFECTIVE CONTROL OVER THE MLC TROOPS IN CAR

1. Mr. Bemba did not receive help from the MLC General Staff

25. The finding of General Staff involvement in the CAR operation has no evidential basis.[44] The Prosecution's attempts to find a basis are unsuccessful. It cites to a paragraph referring only to the role of the General Staff **in the DRC**, which has nothing to do with the CAR.[45] The initial deployment of troops from the DRC to the CAR was **prior** to findings of crimes, and was (in reality) within the purview of the MLC General Staff.[46] It is telling that the only credible evidence of MLC General Staff involvement is during the one period in which the MLC General Staff would have (in reality) been involved.[47]

26. The evidence of [REDACTED]'s limited and sporadic brushes with the CAR operation demonstrates nothing more than the residual command which would rightly remain with the Chief of General Staff of a sending army.[48] [REDACTED]'s evidence does not demonstrate the realtime information or monitoring essential to a

[41] *Lubanga* AJ, para. 129.
[42] Response, para. 102.
[43] Response, para. 75.
[44] Brief, para. 151.
[45] Response, para. 130, fn. 413.
[46] Response, para. 130.
[47] As to the evidence cited in Response, para. 130, fn. 417 concerning "military intelligence", *see* Brief, paras. 204-206.
[48] Response para. 131.

General Staff assisting in the formulating of operational orders. [REDACTED] lacked even basic knowledge about the operation.[49] Ten weeks in, [REDACTED] a message to the MLC troops in the CAR asking for basic information about the strength and position of the enemy.[50]

27. More fundamentally, if the MLC General Staff was not "significantly involved in planning operations, issuing orders, or intelligence",[51] then who was? There are holes in the Trial Chamber's theory, which the Prosecution cannot fill.

2. The MLC troops did not act independently

28. The Prosecution does not engage with identified errors,[52] or address the Trial Chamber's **reliance** on a wealth of evidence demonstrating the mixing of MLC and loyalist troops.[53]

29. The Prosecution characterises the evidence as showing that "Patassé's forces may sometimes have advanced alongside the MLC".[54] The evidence has the MLC and FACA troops "launching an assault",[55] "recaptur[ing] the towns",[56] and "fighting together to repulse the rebels".[57] The value of *Hadžihasanović* is limited to whether cooperation, in the absence of any other indicators, can constitute effective control.[58] It does not assist in the present case when many other indicators of re-subordination were present.

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[49] Judgment, fn. 1242, citing T-218, 21:15-22:13.
[50] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702. *See also* T-274-CONF-ENG, 63:5-13.
[51] Response, para. 130, citing Judgment, para. 446.
[52] Brief, paras. 155-162.
[53] Brief, para. 161.
[54] Response, para. 136.
[55] EVD-T-CHM-00060/CAR-D04-0002-1380.
[56] Judgment, para. 612, citing EVD-T-OTP-00580/CAR-OTP-0031-0120, track 1, from 00:01:19 to 00:01:50, track 2, from 00:00:00 to 00:00:39, and from 00:02:05 to 00:02:34; and EVD-T-OTP-00582/CAR-OTP-0031-0124, track 1, from 00:14:00 to 00:14:17.
[57] Judgment, para. 411, fns. 1110-1111, citing T-353, 48:8-20, T-354, 42:16-17, T-290, 64:8-65:19, and T-261, 37:25-38:5, 65:25-66:10. *See also* Judgment, para. 524, citing EVD-T-CHM-00060/CAR-D04-0002-1380 and T-117, 16:25-17:7, 31:9-14; EVD-T-D04-00008/CAR-DEF-0001-0832 at 38.20-42.18; T-302-CONF-ENG, 40:19-24.
[58] Response, para. 136.

3. Mr. Bemba "sometimes" issued orders directly to units in the field

30. The Prosecution explains the finding that Mr. Bemba "sometimes" issued orders, on the basis that the Trial Chamber meant that "he could give orders directly *or* through the MLC chain of command."[59] There is no evidence of the latter. Many of the paragraphs cited concern **only the DRC**, and none of them point to any evidence or findings that Mr. Bemba issued operation orders in the CAR through the (unspecified) "MLC chain of command".[60]

31. If the Prosecution means that Mr. Bemba issued orders through the MLC General Staff, the orders would have been recorded in the MLC logs. The Prosecution discounts the logs on the basis that Mr. Bemba could have given the orders directly over the phone.[61] It cannot have it both ways.

32. Mr. Bemba was as removed from the troops as is factually possible.[62] Understandably, therefore, central to the Prosecution's case,[63] and conviction, was the giving of operational orders. The cases cited are so factually removed as to be inapposite.[64] Bagosora gave operational orders,[65] while Renzaho was held liable for the rapes of subordinates on the basis of the direct instructions he issued to them.[66]

B. MR. BEMBA DID NOT HAVE ACTUAL KNOWLEDGE OF THE ALLEGED CRIMES

33. The Prosecution draws an erroneous distinction between "certainty" and "awareness".[67] "Knowledge" means awareness, as follows from plain legal

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[59] Response, para. 138.
[60] Response, fn. 454.
[61] Response, para. 145.
[62] Brief, paras. 173-174. Contra Response, para. 139.
[63] Brief, fn. 334.
[64] Response, fn. 485.
[65] *Bagosora* AJ, para. 472.
[66] *Renzaho* AJ, fn. 1281, *Renzaho* TJ, para. 777.
[67] Response, para. 183: "[…] not require the superior to be *convinced* to a degree of certainty […] but to be *aware* that this was so".

terminology,[68] and from Article 30(3) of the Statute which (contrary to the Prosecution's assertion) is applicable to Article 28.[69] Knowledge is "a state of mind in which a person has **no substantial doubt** about the existence of a fact."[70] Thus, a person who knows or is aware of certain circumstances (for example, that crimes have been committed by subordinates) can be certain of these circumstances. Or, in other words, he is "convinced" that these circumstances have occurred. Terminology aside, this is a high threshold which should not be confused with anything less than actual knowledge or "virtual certainty".[71] Otherwise, the delimitation between the knowledge and lower reckless/negligence standard ("should have known" or "consciously disregarded information") becomes blurred.

34. The Prosecution also confuses the abstract standard of knowledge and its proof. The Prosecution erroneously attempts to define the knowledge standard by references to drawing inferences from "reliable and concrete information",[72] "through objective factors",[73] and urging the Court to have regard to "the nature and extent of the information".[74] Drawing an inference on this basis is perfectly legitimate in determining whether a superior has acted with a certain state of mind, but does not assist in defining the standard of "actual knowledge".

35. The Prosecution never grapples with the central Defence argument.[75] Repeating the Chamber's findings[76] does not respond to the Chamber's failure to

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[68] Black's Law Dictionary, pp. 950-951: 'Knowing: Having or showing awareness'; 'Knowledge: An **awareness** or understanding of a fact or circumstance' (emphasis added); Oxford Dictionaries, knowledge: […] 2. **Awareness** or familiarity gained by experience of a fact or situation' (emphasis added); Merriam-Webster, legal definition of knowledge: 'awareness or understanding especially of an act, a fact, or the truth'.

[69] Response, para. 183, fn. 639. The Prosecution misreads Werle and Jessberger (2005), at p. 47: "[u]nless otherwise provided …"; and Nerlich, at pp. 671, 675, as these authors do not exclude Article 30(3) in definitional terms but only refer to the "unless otherwise provided" formula which allows for a lower mental standard for superiors.

[70] Black's Law Dictionary, p. 950 (emphasis added). *See also* Merriam-Webster, definition of certain: '[…] known or proved to be true'.

[71] *See Lubanga* AJ, para. 447 ("virtual certainty" with regard to future events).

[72] Response, para. 180.

[73] Response, para. 184.

[74] Response, para. 183.

[75] Brief, paras. 292-308.

consider the effect that corroborated information that crimes **were not** occurring would have had on Mr. Bemba's level of knowledge.[77]

36. The Bomengo file contained no **findings** of rape.[78] The criminal proceedings being referenced[79] resulted in convictions for pillage only. RFI's report about cannibalism **was not** dated 18 February 2003.[80] The entries in the cahier about false allegations of cannibalism are dated 12 January and 25 January 2003,[81] and other evidence places RFI false reporting about cannibalism as **prior** to its allegations of crimes in the CAR.[82] Moreover, the RFI had retracted false allegations about the MLC intervention in 2001.[83]

37. It was not that "some of Bemba's sources of information did not specifically mention murder".[84] Mr. Bemba **was positively told** that murder **was not** occurring. [REDACTED] relayed this.[85] Mr. Bemba watched a video of CAR civilians in which the RFI reports are called "lies".[86] [REDACTED] nothing of the sort had happened.[87] President Patassé said it was "all lies yet again".[88] The Prosecution says these sources "do not detract" from the sources of information detailing that murder occurred.[89] Of course, they do. If an accused has 10 people whom he trusts telling him that murders did not happen, while a radio report says the opposite, no reasonable assessment of his knowledge could fail to even acknowledge the former information as being relevant.

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[76] Response, para. 185.
[77] Brief, paras. 302-308.
[78] Response, para. 187.
[79] Brief, para. 303, citing Judgment, para. 589.
[80] Response, para. 190, citing a report which does not concern cannibalism accusations.
[81] EVD-T-OTP-00703/CAR-D04-0002-1641 at 1702 and 1736.
[82] T-267-CONF-ENG, 71:6-13.
[83] T-319-CONF-ENG, 28:5-12.
[84] Response, para. 194.
[85] T-302-CONF-ENG, 41:3-13. *See also* T-208-CONF-ENG, 31:8-14.
[86] Judgment, para. 616; EVD-T-D04-00008/CAR-DEF-0001-0832 from 39.20 to 42.18.
[87] T-292-CONF-ENG, 53:8-54:2.
[88] EVD-T-OTP-00576/CAR-OTP-0031-0099 at 03:12-04:00. French transcript, EVD-T-CHM-00040/CAR-OTP-0036-0041 at 0044 (English translation can be found at CAR-OTP-0056-0287 at 0290-0291); EVD-T-OTP-00448/CAR-OTP-0013-0161 at 0162-0163. *See also* T-96-CONF-ENG, 4:10-14.
[89] Response, para. 194.

C. MR. BEMBA TOOK NECESSARY AND REASONABLE MEASURES

38. Again, the Prosecution Response does not address the primary identified error; that a trier of fact must have regard to what was feasible in the circumstances prevailing at the time.[90] No excuse is provided for the Trial Chamber's legal error.

39. "Minimising contact with the civilian population" is a specific idea, not encompassed by Mr. Bemba's alleged control over the troops.[91] He could not reasonably have known to defend against this.[92]

40. The Trial Chamber impugns Mr. Bemba on the basis that he "made no effort to refer the matter to the CAR authorities".[93] The Prosecution now says a letter (ignored by the Chamber) referring the matter to the CAR authorities is irrelevant, because it was not their role to investigate.[94] If that were the case, why is Mr. Bemba criticised by the Trial Chamber for making no effort to refer the matter to them? In any event, Mr. Bemba's letter (i) asked for assistance from the CAR authorities in investigating;[95] and (ii) requested "an **international commission of inquiry**".[96] He can refute both contradictory criticisms. This letter should not have been ignored. Mr. Bemba was not "content to rely on assurances which he knew were not being implemented",[97] he continuously sought new ways of finding the truth, including an international inquiry.

41. There is no requirement under international law to "follow-up" on measures taken.[98] How many times should Mr. Bemba have asked the CAR Prime Minister, the UN, or FIDH for assistance? Twice each? Eight times each? The genuineness of a

[90] Brief, paras. 338-341.
[91] Response, fn. 745.
[92] Brief, paras. 343-344.
[93] Judgment, para. 733.
[94] Response, paras. 208-209.
[95] T-267-CONF-ENG, 55:7-10.
[96] T-267-CONF-ENG, 51:5-8 (emphasis added).
[97] *Hirota*, p. 49,791.
[98] Response, para. 211.

commander's measures cannot be dependent on the reaction of those whom he asks for help.

D. THE FINDING ON CAUSATION IS INVALID

1. The alleged errors materially affect the Judgment

42. Mr. Bemba challenged the Trial Chamber's failure to identify the causal standard between the superior's failures and the resultant crimes.[99] On appeal, "arguments made in response must be limited to those raised".[100] The Prosecution was entitled to argue (as it attempted) that the Trial Chamber **did** identify the causal standard.[101] However, alleging that Mr. Bemba "challenge[d] the causal standard applied in the Judgment"[102] is an error. He merely pointed out that there wasn't one. The Prosecution's entire hook for its treatise on causation is based on a flawed premise. That a matter comes to the attention of a party only in connection with an opponent's appeal, does not relieve it from following the correct appellate procedures.[103]

43. The cases relied upon do not support the Prosecution's approach.[104] Each is limited to the Appeals Chamber's ability to revise a Trial Chamber judgment with respect to alternate modes of liability based on the initial factual findings. They do not stand for the broader proposition.

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[99] Brief, paras. 381-388.
[100] *Prlić*, Decision on Ćorić and Stojić's motions, p. 2.
[101] Response, para. 256. Incredibly, the Prosecution asserts that the standard applied by the Chamber was "stated with clarity", by citing selectively to the phrase "the crimes would not have been committed, in the circumstances they were, had the commander exercised control properly". It removes the first clause of this sentence, being "[a] nexus requirement **would** clearly be satisfied when it is established that". The Trial Chamber is not saying that it applied this standard. It explicitly excused itself from this task.
[102] Response, para. 225.
[103] *Orić* AJ, para. 65.
[104] Response, fn. 820.

2. This was never the Prosecution's "position at trial"

44. The Prosecution's statement that its "position at trial" was that Article 28(a) **did not** require a causal link between the superior's failures and the crimes, borders on unethical.[105]

- DCC (2009): Article 28 requires that "**crimes were committed as a result of** Mr. Bemba's failures."[106]
- Subsequent DCCs: same interpretation.[107]
- Confirmation Decision: Article 28(a) "**includes an element of causality** between a superior's dereliction of duty **and the underlying crimes.**"[108] (No Prosecution appeal).
- Prosecution In-Depth Analysis Chart of Incriminatory Evidence: Article 28 requires that "**[t]he crime was committed as a result of** the military commander's failure to exercise control properly over his forces".[109]
- Prosecution Response to Defence Objection to DCC:[110] No Prosecution challenge to the existence of causal contribution.[111]
- Decision ordering the amendment of the causal contribution in DCC:[112] No Prosecution appeal. No suggestion of an alternative interpretation.
- Prosecution Opening Statement: Evidence would establish that **crimes were committed "as a result of**" Mr. Bemba's failures.[113]
- Prosecution Closing Brief: Causal contribution a "constituent element" of Article 28.[114] "The legal element requires the Prosecutor to establish a link

[105] Response, para. 225, fn. 821.
[106] ICC-01/05-01/08-395-Anx3, p. 4 (emphasis added). *See also* paras. 57, 86, 100-104.
[107] ICC-01/05-01/08-593-Anx-Red, p. 4 (emphasis added). *See also* paras. 60, 74-78; ICC-01/05-01/08-950-Conf-AnxA, para. 76.
[108] ICC-01/05-01/08-424, paras. 423-426 (emphasis added).
[109] ICC-01/05-01/08-710-Conf-AnxA, p. 387 (emphasis added).
[110] ICC-01/05-01/08-694, para. 108 and ICC-01/05-01/08-694-Conf-Exp-AnxA, para. 78.
[111] ICC-01/05-01/08-731.
[112] ICC-01/05-01/08-836, para. 168. *See also* T-32-ENG, 12:10-19.
[113] T-32-ENG, 31:17-32:1 (emphasis added).
[114] ICC-01/05-01/08-3079-Conf-Corr, para. 509.

between **the crimes committed by the ALC troops and Bemba's failure to exercise control properly […]**."[115]

- Closing Oral Arguments: "[A]rticle 28(a) has five elements", including that "Bemba's failure to properly exercise control over his forces **resulted in the commission of the charged crimes**."[116]
- Judgment: "**[t]he crimes committed by the forces must have resulted from** the failure of the accused to exercise control properly over them."[117] (No Prosecution appeal)
- Prosecution Sentencing Submissions: Mr. Bemba bears "the highest degree of military culpability as a commander under Article 28 of the Statute" on the basis that **the crimes were committed "as a result** of Bemba's failure to discharge his duties".[118]
- Prosecution Oral Sentencing Submissions: "the Chamber's factual findings **on the nexus between Bemba's omissions and the crimes committed** by the MLC greatly impact on Bemba's degree of participation and intent." **"The established nexus** increases Jean-Pierre Bemba's degree of culpability".[119]
- Sentencing Judgment: "Article 28 requires that **the crimes be committed as a result of"** the commander's failure".[120] The "nexus requirement" is of "particular relevance" to the sentence,[121] and "considerably elevates the significance of the commanders' role."[122] (Prosecution appeal on the basis of other errors. No error alleged in interpreting Article 28).[123]

45. Had the Prosecution's "position at trial" been that Article 28 required no causal contribution then, quite simply, this position would have been advanced. The arguments presented on appeal would have been presented to the Trial

[115] ICC-01/05-01/08-3079-Conf-Corr, para. 765 (emphasis added).
[116] T-364-CONF-ENG, 46:20-47:4 (emphasis added).
[117] ICC-01/05-01/08-3343, para. 210 (heading directly above) (emphasis added).
[118] ICC-01/05-01/08-3363-Conf, para. 125 (emphasis added).
[119] T-370-ENG, 14:9-11, 15-17 (emphasis added).
[120] ICC-01/05-01/08-3399, para. 60 (emphasis added).
[121] ICC-01/05-01/08-3399, para. 59.
[122] ICC-01/05-01/08-3399, para. 60.
[123] ICC-01/05-01/08-3451.

Chamber. At least, the Prosecution would have argued in the alternative.[124] An ambiguous remark in oral submissions on "measures", which directly contradicts an earlier statement on the requisite elements of Article 28, cannot be considered as representing the Prosecution's "primary view",[125] particularly in the face of seven years of representations to the contrary, and in view of the opposite position it continues to advance on sentence.[126]

46. So desperate is the Prosecution to create the impression of a "primary view" which never existed, that it cites its Closing Brief in the following terms:[127]

> The Prosecution had argued that ***if*** **it must be proved** "that the Accused's subordinate forces committed crimes as a result…"

The phrase "*if* it must be proved" was not in its brief.

47. The disingenuous nature of the Prosecution's position underlines its importance. The Prosecution is implicitly conceding that for this argument to succeed on appeal, it must first have been raised at trial. This is, in fact, correct. A party is "under an obligation to formally raise with the Trial Chamber (either during the trial or pre-trial) any issue that requires resolution. It cannot remain silent on a matter only to return on appeal to seek a trial *de novo*."[128] To "withhold" arguments for a second instance review, flies in the face of the restrictive

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[124] *See, for example*, ICC-02/11-01/15-192-Anx2, para. 522.

[125] ICC-01/05-01/08-3472-Conf, fn. 821. Judge Steiner noted: "The Prosecution supported a different approach only late in the proceedings, during its closing oral statement […] I am of the view that the oral closing statements were not the appropriate procedural opportunity to endorse such an interpretation of the *chapeau* elements in Article 28(a). Therefore, given in particular that the interpretation provided by the Pre-Trial Chamber has not been properly challenged by the parties, […] it is unnecessary to discuss the issue any further." ICC-01/05-01/08-3343-AnxI, para. 9.

[126] ICC-01/05-01/08-3363-Conf, para. 125; T-370-ENG, 14:7-18.

[127] Response, para. 225, fn. 821 (emphasis added).

[128] *Akayesu* AJ, para. 361. See also *Tadić* AJ, para. 55; *Kambanda* AJ, para. 25; *Blaškić* AJ, para. 222; *Kupreškić* AJ, para. 408; *Čelebići* AJ, para. 724; *Blagojević*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, para. 10. *See also* Ambos (2013), p. 552.

interpretation of the scope of appeal.[129] The Appeals Chamber has refused to entertain arguments in similar circumstances.[130]

48. This limitation is a pragmatic one. If a Trial Chamber has been apprised of all arguments, it can satisfactorily address the issue of the accused's criminal responsibility and there will be no need to appeal against its ruling – expediting a process which becomes less burdensome and costly.

49. Should the Appeals Chamber come to the view that this was not the Prosecution's position at trial then this ground of appeal must succeed.

3. The Chamber interpreted Article 28(a) correctly

50. It follows from the above that the Appellant's "primary position" is that this ground of appeal succeeds by reason of the absence of effective response.

51. The comments below must be read in that context. They are offered to correct the moribund inaccuracy in the Prosecution Response, and are not intended as any concession that the question of whether Article 28 has a causal link is a live appellate issue. It is not.

52. The causality requirement follows from the plain **wording** of Article 28.[131] It is the dominant position in academic literature.[132] It is the unanimous view of the ICC judiciary.[133] It is also supported by a historical and teleological reading of Article 28.

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[129] ICC-01/05-01/08-83-Red, para. 29.
[130] ICC-01/09-01/11-2024, para. 87.
[131] Even more explicitly in French ("*lorsqu'il ou elle n'a pas exercé le contrôle*") and Spanish ("*en razón de no haber ejercido un control*"); and equally clear in Russian ("*в результате неосуществления им контроля надлежащим образом над такими силами*") and Arabic (the relevant word for "result" being "*natija*": "نتيجة").
[132] Triffterer (2002), pp. 189, 197 (quasi causality), 202 ("causal connection"), 203-204; Greenwood, p. 599, 603-605 (extending the causality requirement of Article 28 to Article 86(2) of Additional Protocol I and Article 7(3) and Article 6(3) of ICTY and ICTR Statutes); Weltz, p. 263 (hypothetical causality); Boas *et al.*, pp. 260-262 (explicitly p. 262 speaking of "Article 28's causation requirement"); Nerlich, pp. 673 ("(quasi-) causal link"), 677-678 (regarding the superior "after the fact"); Mettraux, p. 33 (p. 82 ff. generally arguing in favour of causality as part of customary law); Ambos, *in* Cassesse *et al.*, pp. 850, 860-861; Weigend, p. 76 ("hypothetical causation"); Meloni (2010), pp. 173-178 (at least regarding preventive countermeasures); Robinson (2012), pp. 5

53. In teleological terms, the need for a causality requirement follows from the fundamental function of causality in criminal law. From the perspective of general **criminal law theory**, causation is a minimum requirement of criminal responsibility.[134] Responsibility is based on causation; he who does not cause a criminal result, cannot be held responsible for it.[135] The Trial Chamber speaks of a "personal nexus" in this context.[136] If acts and omissions are treated as equivalent in terms of criminal liability,[137] that is, the person who acts is as equally responsible as

("[…] Rome Statute expressly requires causal contribution […]"), 12, 53 ("properly requiring causal contribution"); Karsten, pp. 83-85 (regarding duty to prevent); Van Sliedregt (2012), p. 199 ("express recognition of a causal link"); Cryer (2014), p. 393 ("form of causation"); Kiss, pp. 622, 636-637; O'Keefe, pp. 204, 205 (distinguishing it from the Ad Hoc Tribunals's law and accepting causality, referring to the Bemba PTC decision, with regard to the failure to prevent); Garrocho Salcedo, pp. 244-245 (referring to the Bemba PTC decision); Triffterer and Ambos, mn. 109-110, 121 (following Bemba PTC decision regarding the duty to prevent, hypothetical causation); Ambos (2013), p. 215; Judge Moloto, p. 21; Triffterer (2004), pp. 251-252; Van Sliedregt (2003), p. 175; Meloni (2007), p. 173; Ambos (2007), pp. 177-198; Burghardt, p. 219 with n.714, acknowledging the causality requirement but critical of Article 28. Some authors leave the question open, *for example* Cryer (2005), p. 323; Schabas, pp. 461-462 (only referring to academic writings and the Bemba PTC decision); Satzger, p. 242; Werle and Jessberger (2014), mn. 614. Some authors mix the requirement of causality as such and the definition of the requirement, *for example* Gaeta *et al.*, p. 187 (no direct causal link but risk increase); others ignore the question altogether, *for example* Bantekas and Nash, pp. 37 ff.

[133] ICC-01/05-01/08-424, paras. 423-426; ICC-01/05-01/08-836, para.168; ICC-01/05-01/08-3343, paras. 6, 210-213; ICC-01/05-/01/08-3399, paras. 59-60; ICC-01/04-02/06-309, para. 164; ICC-01/04-02/06-309, para. 174.

[134] *See* Fletcher, p. 61; Jescheck and Weigend, p. 277; Roxin, p. 349; Simester *et al.*, pp. 88-90; Herring, p. 123; Desportes and Le Gunehec, mn. 445; Dreyer, mn. 698; Renout, p. 135; Mir-Puig, p. 247; Cury, p. 294; Muñoz-Conde and García Arán, p. 226; Velásquez Velásquez, p. 360. The position of Ashworth, p. 135, quoted by the Prosecution in Response, para. 230, fn. 837, is no longer taken in the most recent edition, *see* Horder, p. 118 ff ("causation can be one of the most basic requirements of criminal liability", p. 120, stressing the "dimension of moral autonomy").

[135] *See* Hart and Honoré, pp. 62 ff. (importance of causation in the assessment of responsibility), 325 ff. (causing harm in criminal law); Moore, pp. 3 ff. (general importance of causation for legal liability), 20 ff. (causation matters to moral fault); Dressler, p. 103 (causation as "instrument […] to ensure that responsibility is personal"); Gardner, p. 127 (participation in wrong of others "by making a causal contribution"); Engisch, p. 5 ("Kausalzusammenhang zwischen Verhalten und tatbestandsmäßigem Erfolg" as "hochbedeutsame Haftungsvoraussetzung": "highly relevant requirement of liability" [own translation]); from an ICL perspective Robinson (2012), p. 12 ff. (culpability requires a personal, causal connection).

[136] Judgment, para. 211.

[137] For an equation of actions with omissions with regard to the war crimes of murder, torture, wilfully causing great suffering, inhuman treatment and cruel treatment, *see Delalić et al.* TJ, paras. 424, 494, 511; *Blaškić* TJ, paras. 154, 186; *Kordić & Čerkez* TJ, para. 236. *See also* Olásolo, pp. 82 ff.

the person who fails to act, the conditions for responsibility for omission must not fall behind those for a positive act.[138]

54. As to the historical perspective, the assertion that "[n]either the ILC's 1994 Draft Statute nor the 1996 Draft Code of Crimes referred to causation for superior responsibility"[139] is misleading. The ILC's 1994 Draft Statute did not address modes of liability. The 1996 Draft Code of Crimes commentary emphasises that "[a] military commander may be held criminally responsible for the unlawful conduct of his subordinates **if he contributes directly or indirectly** to their commission of a crime."[140] Thus, a causal link.[141]

55. Ultimately, the 1996 text imposed accountability for crimes committed "**as a result of** the [commander's][superior's] **failure to exercise proper control**".[142] The Preparatory Committee amended the 1996 language at its session between 11 and 21 February 1997 in a manner that indicates conscious consideration of the causation requirement, and its appropriate wording in the Statute. The 1997 text revised the earlier text to say that criminal responsibility lay for offenses committed by forces within the effective control "**as a result of** the [commander's][superior's] **failure to exercise properly this control**". As such, the focus shifted textually towards personal criminal liability on the part of the commander that was caused by a failure to comport to the established professional standards. "Proper control" in the 1996 text is different from the 1997 text "failure to exercise properly this control" while the "as a result" language remained constant. The inference that this was accidental and uninformed[143] is at best guesswork and at worst misleading, and is unsupported in the diplomatic records.[144] Rather, the

[138] *See* Wilson, p. 85 ("[…] criminal liability for omitting to act can be incurred if […] the offence definition is consistent with such liability and if the defendant is placed under a duty to act").
[139] Response, para. 251.
[140] ILC Draft Code of Crimes, p. 25 (emphasis added).
[141] Bantekas, p. 81.
[142] Preparatory Committee Draft (1996), p. 86 (emphasis added). Decision of Preparatory Committee, 1997, p. 23 (emphasis added).
[143] Response, para. 251.
[144] Report of Zutphen meeting, p. 55.

drafting history reveals consistent efforts to sharpen the language and to remove ambiguity in a manner that the causation requirement became more focused on the causal linkage between the actions of the commander and the actual crimes committed by the forces or personnel subject to his effective control. Causation is not some hidden feature of Article 28; rather it embeds the very core of the criminality.[145]

56. The Prosecution's alternative approach is unpersuasive, merely positing a distinction without a difference and confirming a causality requirement, whether "hortatory" or not.[146] In any event, if there is ambiguity, the interpretation more favourable to the accused is to be used (*lex mitior principle*).[147]

57. The Prosecution's "context" argument, (that "the casual (sic) contribution requirement is almost impossible to reconcile with responsibility for breach of the **duties to punish** or refer")[148] is misleading. It is not clear what is meant by "*almost* impossible".[149] Regardless, the argument overlooks the twofold structure of Article 28 distinguishing between the (basic) requirements of the superior's responsibility (crimes committed by subordinates as a result of a failure to properly control them, effective control, and the mental element) and the necessary countermeasures (prevent, repress or submit).[150]

58. This twofold structure means that the superior must take these countermeasures only if the basic requirements of his responsibility are fulfilled.

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[145] Conference of Plenipotentiaries, p. 17.
[146] Response, para. 245.
[147] Article 22(2) of the Rome Statute; Judge Ozaki, Separate Opinion, ICC-01/05-01/08-3343-AnxII, para. 11.
[148] Response, para. 247 (emphasis added).
[149] Emphasis added.
[150] *See* Brief, para. 390 (distinguishing between causality and the duty to carry out countermeasures as "two materially legal distinct elements"); Kiss, p. 623 (distinguishing between the duty to properly supervise and the duty to take countermeasures). This twofold structure entails a two phase responsibility with a "double" causal link and a second chance to take countermeasures, *see* Triffterer (2002), p. 191 ff. Also rejecting this argument but focusing on a strict separation between the "failure to prevent" and the "failure to punish" and, in addition, arguing that the latter "elevates the risk of subsequent crimes", Robinson (2012), pp. 28, 56.

Thus, the countermeasures are predicated on these requirements,[151] particularly on the fact that the subordinates' crimes result from the superior's failure to supervise properly.[152] Accordingly, while the repression/submit obligations refer to crimes already committed, these crimes have been committed in the first place as a result of the superior's lack of proper control. This understanding of Article 28 – highlighting its internal twofold structure – makes it perfectly possible to interpret the provision in line with the correct Prosecution assessment,[153] "as a unitary basis of responsibility" with obligations of countermeasures of equal legal status.

59. The Prosecution itself accepts that a "**personal nexus** is required"[154] but nowhere explains what this "personal nexus" should mean if not causality. Instead it refers to customary international law[155] which does not, in fact, preclude the imposition of the causal contribution. The Prosecution's submissions have no regard to the wealth of post-World War II cases which required a causal link between a commanders' failings and the crimes.[156] The ICC Prosecution is currently prosecuting Bosco Ntaganda on the basis that Article 28 requires a causal link, despite its submissions on appeal in *Bemba*.[157] The STL has incorporated the same causal requirement into its Statute.[158] The ICTY and ICTR recognised the causal link

[151] As acknowledged by the Prosecution, para. 248, "a superior need not prevent and punish" if he has not contributed to the respective crimes. Yet, this "would not alter the 'message' sent to the world at large" but is only a consequence of the fact that nobody can be held, fairly and in line with the culpability principle, responsible for criminal results he/she did not cause. *See also* Robinson (2012), pp. 18-20 (no sufficient, culpable contribution if proper supervision); Kiss, p. 623 (superior who "sufficiently discharged his general duty to exercise control properly […] not be held responsible […]").

[152] *See also* Kiss, p. 638 ("[…] crimes need to be the result of the superior's failure to exercise control properly and not the result of his failure to repress.").

[153] Response, para. 240.

[154] Response, para. 230 (emphasis added).

[155] Response, para. 233.

[156] *See, for example* , *Hostage case*, p. 1261; *Tokyo case*, Separate Opinion of Judge Bernard, pp. 482, 492; *Schonfeld et al.*, pp. 70-71; *Baba Masao case*, p. 207; *Medina case*, in K. Howard, pp. 10-12. *See also*, *The Medical Case*, Karl Brandt, p. 198 and Giegfried Hanloser, pp. 206-207.

[157] ICC-01/04-02/06-503-AnxA-Red2, para. 635.

[158] STL Statute, Article 3(2).

as an inherent aspect of the doctrine (even if not a legal requirement),[159] and convicted in those cases where the relevant causal link existed on the facts.[160]

60. In fact, the Prosecution wants to **argue away the causality requirement** to broaden Article 28 since it feels a "pressing social need" to hold superiors criminally responsible, is concerned about the "effectiveness of superior responsibility" and a "significant liability gap" and the enforcement of IHL in general. Apart from the fact that this position is premised on the unproven assumption that a broadening of Article 28 entails a better performance of superiors and thus fewer crimes by the subordinates (what else should "effectiveness" in this context mean?), it is incompatible with the *nullum crimen* principle in Article 22(2). The strict construction requirement (*leges certa* and *stricta*) is not limited to the crimes but also refers to modes of responsibility for these must also be reasonably foreseeable for any person investigated to guarantee a fair warning.

61. Nor would the causal connection in Article 28 "confirm that, as a matter of international criminal law, a superior need not prevent and punish crimes if they have not in some way contributed to them."[161] A superior will always need to prevent and punish crimes.[162] International humanitarian law does not rely exclusively on criminal sanctions for its enforcement.[163] By contrast, a commander incurs **criminal** liability for those crimes to which he contributed.

62. Consider the case of a faultless commander, whose fulfilment of his duties is beyond reproach. Amongst his ranks is a rapist, who continues to rape civilians and

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[159] *Hadžihasanović* TJ, para. 192.
[160] *See, inter alia*, *Hadžihasanović* TJ, paras. 1240, 1483, 1784; *Čelebići* AJ, para. 739; *Strugar* TJ, para. 421; *Krnojelac* TJ, para. 190; *Blaškić* TJ, para. 754; *Delić* TJ, para. 550; *Cyangugu* TJ, para. 656; *Bagosora* TJ, para. 2067; *Rugambarara* Indictment, para. 16.
[161] Response, para. 248.
[162] CIHL Rule 153; Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 86(2) and 87. *See also, for example* in ICRC: Customary IHL: UK Manual of Military Law, Part III; UK LOAC Manual, Sections 16.36- 16.38.1; US Manual for Military Commissions, Section IV-2; US Naval Handbook, para. 6.1.3; Military Manual of the Netherlands, paras. 1136, 1149; *See also* Australian Defence Force Publication 37, para. 1304.
[163] Greenwood, p. 604.

would continue to do so regardless of the actions of his commander. The commander has an ongoing and overarching duty to prevent and punish these crimes. He is only **criminally** liable if there is a link between his omissions and the criminal conduct. This does not "alter" any message "sent to the world at large". By contrast, the Prosecution's position would risk imposing strict liability on all commanders for any crimes of subordinates. It would certainly make it easier to secure convictions. It is wildly out of step with the realities of conflict, the practice of states, and the state of international criminal law.

63. In fact, the absence of a causal connection tends to provide a disincentive for commanders to take steps to prevent and punish crimes, given that failed attempts to do so might incur liability. There is no safety net of liability only arising when the commander played some part in the crimes.

V. THE CONTEXTUAL ELEMENTS WERE NOT ESTABLISHED

64. A commander who receives a report alleging that his subordinate has raped a civilian, and who does not take sufficient measures, is not thereby guilty of a crime against humanity. The commander must have knowledge that his conduct is part of a widespread attack on the civilian population. It is not enough simply to prove that crimes against humanity occurred. The Prosecution's approach divorces the mental element from the crime itself.

65. In defence of its position, the Prosecution proposes a separation between the mode of responsibility (Article 28) and the respective crime (Article 7)[164] which is neither supported by the Statute nor considerations of general criminal law.

66. It follows from Article 30(1) that "a person" is criminally responsible for a crime within the jurisdiction of the Court "if the material elements are committed with intent and knowledge". This provision applies, as a matter of principle, to any person brought before the ICC, including any superior, independent of the mode of

[164] Response, paras. 278-280.

responsibility – individual, criminal or superior – invoked. The "unless otherwise provided" formula of Article 30(1) does not exclude the application of this general *mens rea* provision *tout court*, but allows for different mental standards within the specific context of specific provisions as provided by these provisions.

67. For Article 28, this means that a lower cognitive standard ("should have known", "consciously disregarded […]") is perfectly compatible with Article 30 and does not eliminate the requisite mental nexus with regard to the contextual elements of the subordinates' crimes. This follows from a combined reading of Articles 30(1) and (3) of the Statute. The "material elements" referred to in the former refer to the *actus reus* of the respective offence including, in the terminology of Article 30, "conduct", "consequence" and "circumstance".[165] As to the latter, which include contextual elements such as the "attack" in Article 7, Article 30(3) comes into play, establishing a knowledge standard.[166] Thus, any person, including a superior, must be aware of the contextual elements (circumstance) of the respective crime.[167] *In casu*, this means that Mr. Bemba must have been aware of the attack by forces under his effective control and intentionally directed against the civilian population as part of the crimes against humanity allegedly committed by his subordinates.[168]

68. This is consistent with the general principle of culpability in ICL,[169] acknowledged by the Prosecution.[170] Given that the superior is not only responsible because of a dereliction of duty but because of the subordinates' crimes,[171] the principle of culpability requires his knowledge regarding all the elements of these crimes. The Prosecution is wrong to suggest that any person, including a superior,

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[165] *See* Clark, pp. 291 ff. *See also* Triffterer and Ambos, mn. 5 ff.
[166] On the Prosecution's misreading of Article 30(3), *see* above, para. 33.
[167] *See* Triffterer and Ambos, mn. 26.
[168] Triffterer and Ambos, mn. 14 ("*some* degree of awareness of the context was considered necessary for the perpetrator to be held responsible for an international crime").
[169] *See* Damaška, p. 455; Robinson (2008), pp. 949 ff.; Robinson (2012), p. 12; *also* Ambos (2013), pp. 93 ff.
[170] *See* Response, para. 230 and passim.
[171] Robinson (2008), pp. 951 ff.; Damaška, pp. 479-481; *also* Ambos (2013), pp. 198, 206.

can be considered culpable for crimes against humanity, without having known of the respective context element, that is, the attack against the civilian population.[172]

VI. OTHER PROCEDURAL ERRORS INVALIDATE THE CONVICTION

69. Rule 91(3) **does not** give the Chamber a "broad discretion" to permit questions for which prior authorization has not been sought and no judicial authorization has been granted.[173] The Rule reads:[174]

> (a) When a legal representative […] wishes to question a witness […] the legal representative **must** make an application to the Chamber […]
> (b) The Chamber **shall** then issue a ruling on the request […]

70. A transcript review demonstrates that the assertion that the Chamber "required the LRV's to show that the victims personal interests were affected by **each question**"[175] or "carefully scrutinised"[176] follow-up questions is entirely false.

71. The Defence filed objections to applications to request to examine witnesses on the basis that they were outside the victims' personal interests, or otherwise impermissible.[177] These were routinely rejected in decisions invariably delivered during the relevant witness' testimony.[178] The Defence took oral objection from the outset to follow-up questions.[179] (The Prosecution cites to just one example of such an objection being upheld.)[180] The Defence filed an omnibus motion asking the Chamber to restrain LRV participation.[181] The Chamber delivered no reasoned

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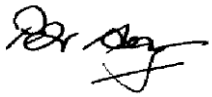
[172] Response, para. 285.
[173] Response, para. 426.
[174] Emphasis added.
[175] Response, para. 428 (emphasis added).
[176] Response, para. 421.
[177] *See, for example* ICC-01/05-01/08-2259-Conf; ICC-01/05-01/08-2288-Conf; ICC-01/05-01/08-2303-Conf; ICC-01/05-01/08-2305-Conf.
[178] *See, for example* T-230-ENG, 44:11-45:19; T-238-CONF-ENG, 1:18-2:12; T-243-CONF-ENG, 1:24-3:18; T-246-CONF-ENG, 29:5-30:20.
[179] *See, for example* T-269-CONF-ENG, 20:16-21:4; T-327-CONF-ENG, 52:16-25; T-334-CONF-ENG, 47:3-49:5; T-342-CONF-ENG, 18:14-19:7.
[180] Response, fn. 1504.
[181] ICC-01/05-01/08-2733-Conf.

judgment[182] and refused leave to appeal.[183] The suggestion that the Appellant made no "general" objection[184] or "conceded"[185] the practice endorsed by the Chamber is a caricature of the situation.

72. That the LRVs regarded themselves as "parties" to the process has been evident throughout. Maître Douzima-Lawson's closing statement could have been that of a Prosecutor.[186] Her response to the Defence Final Brief contained a series of personal attacks against Defence Counsel.[187] Her sentencing submissions suggested the death penalty as an appropriate sentence.[188] Self-evidently, such matters can neither be the subject of properly taken instructions, nor borne of victims' personal interests.

The whole respectfully submitted.



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Done at The Hague, The Netherlands, 23 January 2017

It is hereby certified that this document contains a total of 8,996 words and complies in all respects with the requirements of Regulation 36.

[182] ICC-01/05-01/08-2751-Conf.
[183] ICC-01/05-01/08-2800-Conf.
[184] Response, para. 427.
[185] Response, para. 423.
[186] See, for example, T-365-CONF-ENG, 15:2-17.
[187] ICC-01/05-01/08-3140-Conf, *see*, especially para. 10, but also paras. 11-12, 19, 21, 35-36.
[188] ICC-01/05-01/08-3371-Conf, para. 63.