

PUBLIC
ANNEX A

PROSECUTION’S “REFERENCE LIST”

N.B. Each of these groups of references will be referred to during the course of the Prosecution’s oral submissions by the alphanumeric code (e.g. “A1”, “C2”, etc). All of the authorities on this list were included on the Prosecution’s list of authorities filed on 4 January 2018.

GROUP A: “PRELIMINARY ISSUES”

(a) What level of deference should the Appeals Chamber accord to the Trial Chamber’s factual findings?

- A1 *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, App.Ch., Judgment, 17 July 2008, available at <http://www.legal-tools.org/doc/981b62/>, Separate Opinion of Judge Shahabuddeen, para. 27
- A2 *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović & Vladimir Šantić*, Case No. IT-95-16-A, App.Ch., Judgment, 23 October 2001, available at <http://www.legal-tools.org/doc/c6a5d1/>, para. 41; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, App.Ch., Judgment, 12 November 2009, available at <http://www.legal-tools.org/doc/44327f/>, para. 15; *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, App.Ch., Judgment, 16 November 2009, available at <http://www.legal-tools.org/doc/8c455f/>, para. 11; *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Case No. SCSL-04-14-A, App.Ch., Judgment, 28 May 2008, available at <http://www.legal-tools.org/doc/b31512/>, para. 33; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe*, Case No. ICTR-99-46-A, App.Ch., Judgment, 7 July 2006, available at <http://www.legal-tools.org/doc/816b44/>, para. 12; *Case 001 (Kaing Guek Eav alias “Duch”)*, Appeal Judgment, Sup.Ct.Ch., 3 February 2012, available at <http://www.legal-tools.org/doc/681bad/>, para. 17.
- A3 *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović & Vladimir Šantić*, Case No. IT-95-16-A, App.Ch., Judgment, 23 October 2001, available at <http://www.legal-tools.org/doc/c6a5d1/>, para. 22; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, App.Ch., Judgment, 12 November 2009, available at <http://www.legal-tools.org/doc/44327f/>, para. 14; *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-A, App.Ch., Judgment, 22 April 2008, available at <http://www.legal-tools.org/doc/2705b3/>, para. 11.
- A4 *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović & Vladimir Šantić*, Case No. IT-95-16-A, App.Ch., Judgment, 23 October 2001, available at <http://www.legal-tools.org/doc/c6a5d1/>, para. 30.

- A5 *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, App.Ch., Judgment, 17 September 2003, available at <http://www.legal-tools.org/doc/46d2e5/>, para. 12. See also *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, App.Ch., Judgment, 17 December 2004, available at <http://www.legal-tools.org/doc/738211/>, para. 288; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, App.Ch., Judgment, 22 March 2006, available at <http://www.legal-tools.org/doc/09f75f/>, fn. 470.
- A6 [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga AJ”), paras. 21, 24-25; [ICC-01/04-02/12-271-Corr A](#) (“Ngudjolo AJ”), para. 24.
- A7 [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga AJ”), para. 27.
- A8 [ICC-01/04-02/06-2026 OA6](#) (“Ntaganda No Case to Answer Appeal Decision”), para. 11.

(b) Can the convicted person appeal on a ground that affects the fairness of the proceedings but does not affect the reliability of the decision?

- A9 [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga AJ”), para. 155.
- A10 [ICC-01/05-01/08-3255](#) (“Bemba Abuse of Process Decision”), throughout; [ICC-01/05-01/08-3335](#) (“Bemba Stay of Proceedings Decision”), throughout.
- A11 [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga AJ”), paras. 28, 56.
- A12 R. Roth and M. Henzelin, ‘The Appeal Procedure of the ICC,’ in A. Cassese et al (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford: OUP, 2002), p. 1555; C. Staker and F. Eckelmans ‘Article 81,’ in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), p. 1941, mn. 62.
- A13 *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, App.Ch., Judgment, 30 November 2006, available at <http://www.legal-tools.org/doc/c81a32/>, para. 21; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, App.Ch., Judgment, 17 December 2004, available at <http://www.legal-tools.org/doc/738211/>, para. 119; *Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj*, Case No. IT-04-84-A, App.Ch., Judgment, 19 July 2010, available at <http://www.legal-tools.org/doc/0e6ffb/>, para. 17.
- A14 *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Case No. SCSL-04-14-A, App.Ch., Judgment, 28 May 2008, available at <http://www.legal-tools.org/doc/b31512/>, para. 35; *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Case No. SCSL-04-15-A, App.Ch., Judgment, 26 October 2009, available at <http://www.legal-tools.org/doc/133b48/>, para. 34.
- A15 [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga AJ”), paras. 147-149.

- A16 [ICC-01/04-01/07-3484-tENG-Corr](#) (“Katanga Sentencing Judgment”), paras. 136-140; [ICC-01/04-01/06-2901](#) (“Lubanga Sentencing Judgment”), paras. 89-91.

GROUP C: “ISSUES RELATED TO MR BEMBA’S THIRD GROUND OF APPEAL” (MENS REA FOR ARTICLE 28)
--

- C1 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 299, 357-360, 368, 414, 417, 422, 429, 433-435, 445, 448, 457, 530, 544, 557-558, 572, 581, 583-585, 706-718.
- C2 [ICC-01/05-01/08-424](#) (“Confirmation Decision”), paras. 429, 432-434; [ICC-01/04-01/06-803-tEN](#) (“Lubanga Confirmation Decision”), para. 358; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: OUP, 2012), pp. 200-201; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), p. 101; M. E. Badar, *The Concept of Mens Rea in International Criminal Law* (Abingdon: Hart, 2013), pp. 412-413; C. Meloni, *Command Responsibility in International Criminal Law* (The Hague: T.M.C. Asser, 2010), pp. 180, 182-186; G. Boas et al, *International Criminal Law Practitioner Library, Volume I: Forms of Responsibility in International Criminal Law* (Cambridge: CUP, 2007), pp. 258-259; D. Robinson, ‘A justification of command responsibility,’ [2017] 28 *Criminal Law Forum* 633, pp. 664-667.

GROUP D: “FURTHER ISSUES RELATED TO MR BEMBA’S THIRD GROUND OF APPEAL” (NECESSARY AND REASONABLE MEASURES UNDER ARTICLE 28, AND CAUSATION)
--

(a) To what extent is a commander’s motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy?

- D1 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 727-728. *See also* K. Ambos, ‘Superior responsibility’ in A. Cassese et al (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford: OUP, 2002), p. 862.
- D2 *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 63. *See also* [ICC-01/05-01/08-3343](#) (“Judgment”), para. 198.
- D3 *Prosecutor v. Ljube Bošković & Johan Tarčulovski*, Case No. IT-04-82-T, T.Ch., Judgment, 10 July 2008, available at <http://www.legal-tools.org/doc/939486/>, paras. 534-536; *see also* para. 528.

- D4 *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, T.Ch., Judgment, 31 January 2005, available at <http://www.legal-tools.org/doc/927ba5/>, paras. 435-446.
- D5 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 719-725, 727-728.

(b) For article 28 responsibility, must the accused be given notice of the measures which the Trial Chamber finds he could have taken as a commander; if so how must such notice be given?

- D6 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgment, 29 July 2004, available at <http://www.legal-tools.org/doc/88d8e6/>, para. 218; *Prosecutor v. Jadranko Prlić et al*, Case No. IT-04-74-A, App.Ch., Judgment, 29 November 2017, Vol. III, available at <http://www.legal-tools.org/doc/9379b6/>, para. 3138; *Prosecutor v. Théoneste Bagosora & Anatole Nsengiyumva*, Case No. ICTR-98-41-A, App.Ch., Judgment, 14 December 2011, available at <http://www.legal-tools.org/doc/52d501/>, para. 191; *Aloys Ntabakuze v. Prosecutor*, Case No. ICTR-98-41A-A, App.Ch., Judgment, 8 May 2012, available at <http://www.legal-tools.org/doc/281406/>, para. 100; *Tharcisse Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, App.Ch., Judgment, 1 April 2011, available at <http://www.legal-tools.org/doc/0abb32/>, para. 54; *Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, App.Ch., Judgment, 28 November 2007, available at <http://www.legal-tools.org/doc/04e4f9/>, para. 323.
- D7 *Prosecutor v. Jadranko Prlić et al*, Case No. IT-04-74-A, App.Ch., Judgment, 29 November 2017, Vol. III, available at <http://www.legal-tools.org/doc/9379b6/>, para. 3140. See also *Aloys Ntabakuze v. Prosecutor*, Case No. ICTR-98-41A-A, App.Ch., Judgment, 8 May 2012, available at <http://www.legal-tools.org/doc/281406/>, para. 123; *Tharcisse Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, App.Ch., Judgment, 1 April 2011, available at <http://www.legal-tools.org/doc/0abb32/>, paras. 54, 118; *Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, App.Ch., Judgment, 28 November 2007, available at <http://www.legal-tools.org/doc/04e4f9/>, paras. 323, 366-368.
- D8 *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 63; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgment, 29 July 2004, available at <http://www.legal-tools.org/doc/88d8e6/>, para. 72.
- D9 [ICC-01/05-01/08-1386 OA5 OA6](#) (“Bemba Evidence Appeal Decision”), paras. 63-64.
- D10 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 729-730.

- D11 [ICC-01/05-01/08-424](#) (“Confirmation Decision”), paras. 438-442, 458-477, 491-501; [ICC-01/05-01/08-950-Red-AnxA](#) (“Post-Confirmation DCC”¹), paras. 23-31, 58-75, 91-100, 72-75.
- D12 *Prosecutor v. Vujadin Popović, Lubiša Beara, Drago Nikolić, Radivoje Miletić & Vinko Pandurević*, Case No. IT-05-88-A, App.Ch., Judgment, 30 January 2015, available at <http://www.legal-tools.org/doc/4c28fb/>, para. 68; *Prosecutor v. Jadranko Prlić et al*, Case No. IT-04-74-A, App.Ch., Judgment, 29 November 2017, Vol. III, available at <http://www.legal-tools.org/doc/9379b6/>, para. 3140. For relevant assertions in this case, see [ICC-01/05-01/08-424](#) (“Confirmation Decision”), paras. 437-442, 449-477, 490-501; [ICC-01/05-01/08-950-Red-AnxA](#) (“Post-Confirmation DCC”²), paras. 23-31, 58-75, 91-100.

(d) Does an assessment of causation overlap with an assessment of whether a commander has taken necessary and reasonable measures or is an additional element required?

- D13 see e.g. *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-A, App.Ch., Judgment, 22 April 2008, available at <http://www.legal-tools.org/doc/2705b3/>, para. 38; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, App.Ch., Judgment, 17 December 2004, available at <http://www.legal-tools.org/doc/738211/>, para. 832; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. “Pavo”, Hazim Delić & Esad Landžo, a.k.a. “Zenga”*, Case No. IT-96-21-T, T.Ch., Judgment, 16 November 1998, available at <http://www.legal-tools.org/doc/6b4a33/>, para. 399.
- D14 [ICC-01/05-01/08-3343-AnxI](#) (“Judge Steiner Separate Opinion”), para. 13; [ICC-01/05-01/08-3343-AnxII](#) (“Judge Ozaki Separate Opinion”), para. 17.
- D15 [ICC-01/05-01/08-424](#) (“Confirmation Decision”), para. 424; [ICC-01/05-01/08-3343-AnxI](#) (“Judge Steiner Separate Opinion”), para. 14; [ICC-01/05-01/08-3343-AnxII](#) (“Judge Ozaki Separate Opinion”), para. 17.
- D16 [ICC-01/05-01/08-3343](#) (“Judgment”), para. 738.
- D17 [ICC-01/05-01/08-424](#) (“Confirmation Decision”), para. 424.
- D18 [ICC-01/05-01/08-3343-AnxII](#) (“Judge Ozaki Separate Opinion”), para. 17; [ICC-01/05-01/08-3343-AnxI](#) (“Judge Steiner Separate Opinion”), para. 12; [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 736-739.
- D19 *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 64.

¹ Also described in the Prosecution’s Response (filing ICC-01/05-01/08-3472-Corr-Red) as “DCC” or “Amended DCC”.

² Also described in the Prosecution’s Response (filing ICC-01/05-01/08-3472-Corr-Red) as “DCC” or “Amended DCC”.

(c) If causation is required for article 28(a), what degree of nexus is required—but-for, high probability, reasonable foreseeability or other?

- D20 [ICC-01/05-01/08-424](#) (“Confirmation Decision”), paras. 423, 425-426.
- D21 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 213, 741.
- D22 [ICC-01/05-01/08-3343-AnxI](#) (“Judge Steiner Separate Opinion”), para. 18; [ICC-01/05-01/08-3343-AnxII](#) (“Judge Ozaki Separate Opinion”), para. 21; [ICC-01/05-01/08-424](#) (“Confirmation Decision”), para. 425.
- D23 [ICC-01/05-01/08-3343-AnxI](#) (“Judge Steiner Separate Opinion”), para. 24; [ICC-01/05-01/08-3343-AnxII](#) (“Judge Ozaki Separate Opinion”), para. 23, and fn. 33.

(e) Is a commander under a legal duty to withdraw his troops in the event that he becomes aware that they are committing crimes, and associated questions

- D24 [ICC-01/05-01/08-3343](#) (“Judgment”), paras. 197-198; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 63; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgment, 29 July 2004, available at <http://www.legal-tools.org/doc/88d8e6/>, para. 417; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, App.Ch., Judgment, 3 July 2008, available at <http://www.legal-tools.org/doc/e053a4/>, para. 177; *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-A, App.Ch., Judgment, 22 April 2008, available at <http://www.legal-tools.org/doc/2705b3/>, para. 151; *Prosecutor v. Théoneste Bagosora & Anatole Nsengiyumva*, Case No. ICTR-98-41-A, App.Ch., Judgment, 14 December 2011, available at <http://www.legal-tools.org/doc/52d501/>, para. 672.
- D25 *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-A, App.Ch., Judgment, 22 April 2008, available at <http://www.legal-tools.org/doc/2705b3/>, para. 33. See also *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 63; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgment, 29 July 2004, available at <http://www.legal-tools.org/doc/88d8e6/>, para. 72; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, App.Ch., Judgment, 3 July 2008, available at <http://www.legal-tools.org/doc/e053a4/>, para. 177; *Prosecutor v. Théoneste Bagosora & Anatole Nsengiyumva*, Case No. ICTR-98-41-A, App.Ch., Judgment, 14 December 2011, available at <http://www.legal-tools.org/doc/52d501/>, para. 672.
- D26 *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, App.Ch., Judgment, 3 July 2008, available at <http://www.legal-tools.org/doc/e053a4/>, para. 177; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, App.Ch., Judgment, 16 October 2007, available at <http://www.legal-tools.org/doc/d97ef6/>, para. 63; *Prosecutor v. Vujadin Popović, Lubiša Beara, Drago Nikolić, Radivoje Miletić & Vinko*

Pandurević, Case No. IT-05-88-A, App.Ch., Judgment, 30 January 2015, available at <http://www.legal-tools.org/doc/4c28fb/>, paras. 1928-1929.

D27 *Prosecutor v. Théoneste Bagosora & Anatole Nsengiyumva*, Case No. ICTR-98-41-A, App.Ch., Judgment, 14 December 2011, available at <http://www.legal-tools.org/doc/52d501/>, paras. 663, 672; *Prosecutor v. Vujadin Popović, Lubiša Beara, Drago Nikolić, Radivoje Milić & Vinko Pandurević*, Case No. IT-05-88-A, App.Ch., Judgment, 30 January 2015, available at <http://www.legal-tools.org/doc/4c28fb/>, para. 1931.