International Criminal Court

Appeals Chamber

Situation: Central African Republic

In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08

Presiding Judge Christine van den Wyngaert, Judge Sanji Mmasenono Monageng, Judge Howard Morrison, Judge Chile Eboe-Osuji and Judge Piotr Hofmański

Appeals Hearing - Courtroom 1

Wednesday, 10 January 2018

(The hearing starts in open session at 9.31 a.m.)

THE COURT USHER: [9:31:36] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:31:54] Good morning to everybody in the courtroom.

Today we are continuing the submissions by the parties and participants on the issues that were raised by the Appeals Chamber. Yesterday we dealt with the first two of these five issues. Today we are going to deal with three and four, which is the command responsibility aspects. The first of those sub-grounds that we are going to deal with is knowledge, and then this afternoon we are going to deal with reasonable measures and the interpretation of Article 28.

Before giving the floor to the Defence, I wanted to raise a point. That was a request that we received from the Defence to expand their list of authorities with one case, with the Brima case of the Special Court for Sierra Leone. I just wanted to ask the parties and participants whether there are any objections to that request.

MS BRADY: [9:32:59] No, of course not, your Honour. We have no objection.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:33:02] Thank you.
The Legal Representative?
MS DOUZIMA LAWSON: [9:33:08] (Interpretation) No objection.
PRESIDING JUDGE VAN DEN WYNGAERT: [9:33:12] The Defence has the floor.
Mr Ambos, Professor Ambos.
MR AMBOS: [9:33:17] Good morning, your Honours. Good morning to everybody.
The questions under group C may be structured in two ways. The first umbrella question, how I would call it, refers to the question of the possible lowering of the standard from "knowledge" to "should have known", and the second set of questions refers to the actual mental element in Article 28 of the Rome Statute.
I will now refer to the first set of questions. Now, here my first proposition is that Regulation 55 is not applicable in these proceedings for five reasons.
First, Regulation 55 is an ultra vires provision. The States did not agree on the fundamental question how to deal with the legal re-characterisation of offences or modes of liability. The Judges then introduced Regulation 55 in the Regulations which, according to the Statute, Article 52 of the Statute shall deal with routine functions of the Court. Perhaps at the beginning of this Court people thought that this is a routine function, and the Lubanga Appeal Chamber went and said, "There is no problem with Regulation 55, thought that's a routine function." But we know now, after having litigated heavily on Regulation 55, that it's not at all routine function. It's a fundamental question on how to define this procedure. That means that Regulation 55 as it stands is an invalid provision. It could not be applied before this Appeal Chamber.
Secondly, Regulation 55 only applies at the trial stage. This follows from three plain text indicators, if analysing Regulation 55. First, Regulation 55 is listed in Section 3

of the Rules and Regulations titled "Trial". It is not repeated or referred to in Section 4 on "Appeal and Revision", starting with Regulation 57.

Second, Regulation 55(1) specifically refers to permissive use of this provision pursuant to a Chamber's power to change legal characterisation, quote, "in its decision under Article 74", end of quote; ie, to a provision exclusively applicable for the Trial Chamber. In particular, it does not extend its application to the decision power of the Appeals Chamber pursuant to Article 83 of the Statute.

Third, Regulation 55(2) refers to such re-characterisation taking place, quote, "at any time during the trial", end of quote; ie, it refers to the trial, in contrast to the appeals, proceedings.

This interpretation limiting Regulation 55 to the trial proceedings finds further support in the travaux which show that the discussion on the subsequent modification of a legal qualification always referred to the pre-trial or trial proceedings.

The case law also supports this interpretation since it calls for a notice within the meaning of Regulation 55(2), quote, "as early as possible", end of quote, and at any rate during the trial. The Ruto and Sang Trial Chamber explicitly stated, quote, that "[L]egal recharacterisations can only be made in the trial judgment ...", end of quote. Of course, this is in our list of authorities, this reference.

Concretely speaking, this refers to the period between the opening statements and the Article 74 judgment. This interpretation is in line with the purpose of Regulation 55, namely to correct incorrect or poor charging, but not to correct a wrong assessment by a Trial Chamber.

The third argument, an application of Regulation 55 at this late stage in the proceedings would be utterly unfair. The core issue in our case is the negative

impact of a subsequent legal re-characterisation at the appeals stage on the fairness of the proceedings. Indeed, it is the approach to fairness which informs the different position with regard to our question and which should also inform the Appeals Chamber setting Regulation 55 aside.

The unfairness in this case follows from two considerations. First, the notice given by the Trial Chamber followed by the non-use of Regulation 55, and, second, the impossibility of a proper defence should Regulation 55 be invoked at such a late stage in the proceedings, after almost ten years of litigation since the Pre-Trial Chamber confirmation decision.

As to the first point, the notice given by the Pre-Trial Chamber, the Pre-Trial Chamber, as we all know, has given this notice, but it has convicted Mr Bemba on the basis of knowledge, finding it, quote, "unnecessary", end of quote, to invoke the lower "should have known" standard. With this decision, the Trial Chamber has closed the matter for these proceedings. It has in fact created what some call in legal theory a Vertrauenstatbestand, a kind of situation of confiance, a situation where the parties to the proceedings could reasonably trust that the issue of a subsequent re-characterisation with regard to the mental standard of Article 28 has finally been disposed of in these proceedings.

As to the question of a proper defence under these circumstances, if the Appeals Chamber, notwithstanding this factual situation, decided to reopen the issue of the applicable mental standard, it would be impossible to mount a proper Defence. In fact, the Defence when preparing the appeal did of course focus on the trial judgment and its conviction of Mr Bemba on the basis of knowledge. It could not possibly analyse this judgment with a focus on the "should have known" standard since this standard was explicitly rejected by the Trial Chamber and thus such a defence focus

would have been a purely hypothetical one.

Fourth, even if, for the sake of argument, *the Appeals Chamber considered Regulation 55 applicable at this stage of the proceedings, it cannot apply it without further ado. The Appeals Chamber would have to give a proper notice since the Trial Chamber notice has been, so to say, burned because the Trial Chamber invoked, made a notice, but didn't use it, so they would have to been made a new notice. And the Appeals Chamber would have to hear the relevant evidence giving the parties the possibility to make submissions, including hearing witnesses, according to Regulation 55(3). That means that in fact the Appeals Chamber would have to reopen the evidentiary stage of proceedings discussing in detail the relevant evidence as to the "should have known" standard. It would entail an evaluation de novo, which is not the purpose of appeals proceedings, notwithstanding Article 83(1), which gives the Appeals Chamber all the powers of the Trial Chamber but still we are *in an appeal and we do not repeat in an appeal in no system the trial.

So even if we take Article 83(1) that would not be the sense, the meaning of the appeals proceedings. And of course sending back the case to the Trial Chamber to have a new evaluation to a new Trial Chamber would entail a very, very long delay in these proceedings.

Finally, my fifth argument against Regulation 55 application, the first time application of the "should have known" standard at this stage of the proceedings would make a factual reopening of the case against Mr Bemba necessary and thus would entail exceeding the facts and circumstances within the meaning of Article 74(2) and Regulation 55(1). This has to do with a later argument.

We have in front of us an already closed issue by the Trial Chamber having not applied the" should have known" standard. The change to the lower "should have

known" standard would affect the factual basis of the newly introduced legal standard, ie, the "should have known" standard. And that brings us back to a discussion we know from the very thoughtful considerations of Judge Fulford and Judge van den Wyngaert in the Lubanga and in the Katanga proceedings. I cannot go into details here but would love to discuss that with you.

The core issue is that one cannot neatly separate the law and the facts, and especially not if we talk about the change in the modes of liability here, Article 28. And I just want to focus on Judge van den Wyngaert's considerations in one very, very pertinent part which is absolutely applicable to our case. Judge van den Wyngaert, of course this is also on our list of authorities, talking about a change in the mode of responsibility as to Article 25(3)(a) to (d), yes, said that would entail, I quote, "a drastic change", end of quote, in the factual narrative of the case, which is no longer covered, this change, by Article 74(2), ie, it would exceed the facts and circumstances of the case.

In general terms, whether such a drastic change exists can be evaluated in the view of Judge van den Wyngaert by questioning, I quote the Judge, "whether a reasonable diligent accused would have conducted substantially the same line of defence against both the old and new charge" end of quote.

Of course in this case the answer is clearly no. As I said, we have focused our knowledge and we would not have made the same defence if we had to focus and to face "should have known."

Now, what follows from this to the specific question, the question is that the Appeals Chamber cannot apply Regulation 55. But the Appeals Chamber can under no circumstances with or without a Regulation 55 go to the lower standard and that is due to the fairness considerations. After having ten years litigated under the

knowledge standard, such a change at this late stage of the proceedings would be utterly unfair.

That means as to *"question B", the power of a change under Regulation 55 is limited to the Trial Chamber and the Trial Chamber, that is *"sub-question iii", the notice of the Trial Chamber is not relevant for our proceedings because it has been made in the trial proceedings and it would have to be renewed in the appeals proceedings.

Let me just make another argument which has to do with the fairness, and that refers to a principle which we can see in Article 83(2) in *fine at the end of the Statute, and that's the famous reformation in peius rule. If you look at this rule it clearly says if a decision, a decision cannot be amended to the detriment of the accused if the point in question has only been appealed by the accused.

That means, and that is a provision which is an expression of fairness, as you can read, for example, in Staker and Eckelmans' commentary in Triffterer, that means that it would be unfair and it would even be a violation of the Statute to apply now a lower standard which clearly goes to the detriment of the accused.

And I want to recall Judge Morrison's question from yesterday, transcript 47, column 1 following, when he made the very important point that, I quote, "The defendant should not meet a more serious case" under Regulation 52. That's the same idea. It's not possible to apply Regulation 55 to the detriment of the accused at this late stage of the proceedings.

I now come to the following question, to the two set of questions which directly refer to the mental standard in Article 28.

The first question refers to the relationship between Article 30 and Article 28, the knowledge. Article 30 is a general rule under mens rea in the Rome Statute and it refers to conduct, consequence and circumstance. And only Article 30(3),

30 paragraph 3, defines knowledge as awareness as to circumstances. And that's the only thing we can take to Article 28 since Article 28 of course is a lex specialis as to the specific knowledge requirement or mental requirement for commander or superior. And that is a very important point which informs our defence.

This mental standard is a culpability based standard. The whole command responsibility construction rests on the mental standard. We do not have command responsibility as a strict liability provision. We need a mental connection, we need a connection between the crimes of the subordinates and the commander.

And especially given the loose connection in such a liability provision, which is omission. We should never forget we are not talking about physical perpetration, we are not talking about co-perpetration. We are talking about a mere responsibility on the basis of a failure to intervene in alleged crimes by the subordinates.

So as to the relationship, it just says that knowledge means full awareness, which is quite obvious, and this full awareness, and that's the important point, refers to the crimes committed by subordinates.

Also for this reason, Mr Gallmetzer's presentation yesterday trying to loosen, to flexibilise the detail requirement is false, it's incorrect, it's flawed. Since the issue in Article 28, the very important issue is exactly this relationship between the crimes of the subordinates and the superior's knowledge. How can I have no detailed information if I want to demonstrate that a commander has the required mental requirements?

The "should have known" standard and the "had reason to know" standard, that's the next question. What's the difference? What's the distinction? We should interpret this standard in light of the mother provision, and that is Article 86(2) of Additional Protocol I.

If you recall, this provision refers to information the commander is getting and on the basis of this information the commander is able to conclude that the subordinates commit crimes.

Now, this information requirement is absolutely key in the whole interpretation of command responsibility since the AP1. In the ICTY, ICTR, we just translated this information requirement with the phrase "had reason to know". Why do I have reason to know? Because I have information. That's quite logical. And then under the ICC Statute, we converted this in "should have known".

Now, in my view this does not mean that there is a distinction between "had reason to know" and "should have known" because in both cases the basis of this knowledge must be information. If this information does not exist and then we can discuss what kind of information, how specific this information has to be, there can be no knowledge or should have known.

And that also brings me to the constructive knowledge. That's a very ambivalent and ambiguous term which I would reject because it's a very dangerous term. It does not mean in any case that you can infer knowledge from objective facts in the sense of a strict liability provision, but it always means as "had reason to know" or "should have known" that the inference of the knowledge must be based on informations, informations available to the superior.

And again, this highlights the culpability interpretation which most recently has been very well explained by Darryl Robinson last paper in the Criminal Law Forum which we also sent around and we put in our list of authorities.

Now, if the information requirement is a common denominator of any mental standard in Article 28, again, I repeat, no strict liability but information required, then the "consciously disregarded" standard, which is the next question, that's for the

civilian superior, is of course a higher standard in the sense of requiring more concrete reliable information. That has to do of course with a difference of a civilian superior and the military superior.

But let me make a point here which is striking to me, having come very late to this case. It's not so clear that Mr Bemba is a military superior at all. If we look at the case law of Nuremberg, I can give you a list of names of military superiors, clear-cut military superiors. But here we have a kind of hybrid case, a politician turned perhaps military superior or being in a position where he commands certain military troops, but that's not a clear-cut case. And if that is so, the actual requirements which are stricter for military commander under subparagraph (a) of Article 28 should be, should be different here in this case where we have a civilian superior which by definition does not have the same command. Of course, this has been litigated and always paragraph (a) has been applied, but certainly it's not a clear-cut case.

What is the time? Can I ask how much time do I have? Someone is controlling this?

THE COURT OFFICER: [9:53:08] You have 10 minutes left.

MR AMBOS: [9:53:13] How many?

THE COURT OFFICER: [9:53:14] Ten.

MR AMBOS: [9:53:16] Ten? So much. Actually, I wouldn't like to use these 10 minutes. I hope we can come back to some of the questions in the discussion. But just let me maybe make one point, which certainly my colleague Mike Newton will come back to.

Our interpretation of command responsibility is not the kind of fragmented interpretation. Command responsibility is a very complex mode of liability, and if

we change one element, for example, the mental element, then we change other elements, the countermeasures.

You cannot have the same requirement as to the countermeasures if we have not knowledge but "should have known". So the point here is as to a possible lowering of the standard, we cannot just take the evidence we have from the confirmation proceedings or the trial and apply it without further ado to a new standard.

We have to have a new evidentiary assessment of this situation if we apply a different standard, and that would, as I said, would mean that we cannot draw the line to the facts and circumstances of the case in the sense of Article 74(2). And I think that this is one of the tricky issues in this case. That's really the first ever case where an Appeals Chamber, not only of this Court but of any court, has to deal with this specific situation which is brought about by Regulation 55 and which makes it, in my view, impossible to just change the standard without affecting the factual basis. And, therefore, it is out of the question that this can be applied.

And then there is another point, a general point I want to make using this one minute, and that is the constituency of this decision. This decision is very, very important. You are writing legal history here. You are here defining for the first time the command responsibility contours in a way which may be in line with the culpability requirements, which many of us demand for a long time and which are very, very necessary not to discredit this form of command responsibility. We should remember that command responsibility cases affect NATO States, affect peacekeeping missions, affect military commanders of all kinds of ranges, and we should not lightly apply this provision almost like a kind of strict liability provision.

So that is my submissions, and I hope that we can go into more details in the discussions. Thank you very much.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:56:03] Thank you, Professor Ambos.

Ms Brady.

MS BRADY: [9:56:07] Yes, Mr Matthew Cross, appeals counsel, will be answering on behalf of the Prosecution. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:56:12] Thank you.

MR CROSS: [9:56:13] Good morning, your Honours. Just as a housekeeping matter, I will be making use of a visual aid which will be shown on your Honours' screens during the course of the submission, I think on the evidence 2 channel. I also have a copy of that visual aid, which, if it is of assistance to your Honours or to my colleagues, we can also distribute by email after the submissions, if that's useful.

Your Honours, given the interlinked nature of some of these issues, I shall also address the questions in reverse order, first addressing the mens rea standards, questions C and D from your Honours' order, and then the powers of the Appeals Chamber, question B, and, finally, applying these principles to this case.

In answering your questions, however, we continue to emphasise that, in the Prosecution's view, the Trial Chamber reasonably determined that Mr Bemba actually knew of MLC crimes, based on its multi-factored analysis in paragraphs 706 to 718 of the judgment. In its reply the Defence has suggested that Mr Bemba was positively told that crimes such as murder were not occurring. That's in the reply at paragraph 37.

But the Trial Chamber doubted the credibility of the witnesses cited by the Defence, and they expressly rejected the possibility that Mr Bemba might have had any reason to disbelieve the RFI reports, for example. And your Honours can see the various references to the judgment in that respect at note C1 of our reference list. That's

filing 3593 filed on Monday.

In general, therefore, in our submission, the claim that Mr Bemba was confronted with conflicting information depends on evidence which the Chamber reasonably rejected.

Now to turn your Honours' questions on the mens rea under Article 28, in summary, we submit that the knowledge standard in Article 28 is a subjective test which includes, but is not limited to, the concept of knowledge in Article 30(3), as it has so far been interpreted by the Appeals Chamber.

The essence of the "should have known" standard, on the other hand, is an objective test based on the negligent failure of the superior in appropriate circumstances to acquire information of subordinates' crimes.

And, for this reason, we consider the "should have known" standard to be different from the "had reason to know" standard in customary international law and to be broader than the "consciously disregarded" standard in Article 28(b), which is also an objective test with regard to knowledge of the subordinates' crimes, but it is an elevated test.

In this context, therefore, we consider that a subjective awareness of the fact of criminal allegations, even if the superior may be unconvinced by those allegations, falls more properly within the concept of "knowledge" for the purpose of Article 28.

I'll now explain the basis for these views in a bit more detail. But before we get into the meat of Article 28, there are two things to recall about Article 30. First, as my colleague previously mentioned, Article 30 only comes into play if Article 28, as correctly interpreted, does not "otherwise provide", and this means interpreting Article 28 through the lens of the Vienna Convention on the law of treaties.

Second, whether Article 28 does "otherwise provide" also depends on what

Article 30(3) actually means. We assume that the Appeals Chamber in this case won't depart from its view in Lubanga at paragraph 447 that "awareness that a consequence will occur in the ordinary course of events" means a requirement for, quotes, "virtual certainty". In other words, a very high level of confidence indeed, and a standard in fact with which the Prosecution disagrees in principle, although we respect it as a ruling of this Court. But if we are wrong, and Lubanga is more nuanced that it might appear, then there may be no difference between Article 28 and Article 30(3) after all when it comes to "knowledge".

Interpreting Article 28 itself, we begin with its plain terms and their ordinary meaning. And, your Honours should now see the relevant passages from Article 28(a)(i) and (b)(i) on the screen.

On its face, as Professor Ambos said, the term "knowledge" in Article 28 can be read consistently with Article 30(3). By contrast, however, "consciously disregarded" suggests the availability of information, but not subjective awareness of its contents, and "should have known" again suggests a lack of subjective awareness and some greater degree of recklessness or negligence.

The object and purpose of Article 28 is also generally significant, and indeed undisputed between the parties, and can briefly be addressed. Whereas Article 25 addresses the various ways in which the drafters wish to punish participation in a crime, Article 28 reflects a separate intention, to punish a superior's failure to properly control their subordinates, in the sense of preventing or punishing their crimes. Not only is this intention expressly stated in the chapeau of Article 28, as we understand it, but it also follows from IHL itself, in provisions such as Articles 86 and 87 of the First Additional Protocol.

Because Article 28 therefore has a special function in encouraging the superior to take

their duties to prevent and punish seriously, it is crucial that the trigger for those duties, the mens rea, does not defeat the object and purpose. Otherwise, it deprives Article 28 of its entire point, and, as we noted in our response at paragraph 252, States regarded this provision as critical to the Rome Statute.

In this respect, therefore, an appropriate definition of the "knowledge" standard is key. Otherwise, perversely, a superior would escape liability if they went through the motions of informing themselves but then took an unreasonably sceptical approach to the information that they found. A reasonable commander who nonetheless believes -- sorry. A reasonably diligent commander who nonetheless believes, however credulously, "my men would never do that", escapes liability. Only the commander who on the Lubanga test more or less intends their subordinates' crimes, as I shall explain, is guilty. Hinging liability on such a degree of certainty is moreover especially bizarre in the context of armed conflict where, again as we pointed out in our response at paragraphs 181 to 183, a superior will rarely be "certain" of anything, yet they will carry out their functions just the same.

Why should a core IHL duty, to prevent and punish subordinates' crimes, be any different?

Now, this brings us to an assessment of the context of the different knowledge standards in Article 28. And a systematic interpretation of these different standards is key in understanding them, and, for that reason, it's helpful to consider these standards in relation to one another. And this is what we've tried to do with the visual aid, which I'll now take your Honours through on the screen. Two things are immediately clear.

First, at the top of the screen, the term "knowledge" necessarily includes, even if it may not be limited to, knowledge where the superior is convinced of their

subordinates' crimes, in the sense that he or she is virtually certain of them. Indeed, so high is this degree of confidence that it amounts to dolus directus, in the second degree, which in other contexts is regarded as demonstrating volition, an intent standard that neither Article 28 nor customary law has ever required for a superior.

Second, at the other end of the scale, "should have known" is obviously a lesser test. But what does it actually mean?

We understand it to mean, as now shown on the screen, a three-part test that, first, when the situation required, the accused, second, fails to take the steps that a reasonable superior would have taken to inform themselves of the situation, and, third, that those steps would have alerted a reasonable superior in that position to the subordinate's crimes.

There is no requirement in this test that the superior has any subjective awareness of the subordinates' crimes, and that obviously is where we depart from the Defence in this respect.

As the next slide shows, this interpretation is based not only on the text of Article 28 but is also supported by a range of sources.

I'm sorry, your Honours. I'm told that the slide is not keeping up. It shows on my screen, and at the moment you should see a red -- yes. Thank you.

Now, as this next slide shows, our interpretation is based not only on the text of Article 28 but on a range of sources. Time, sadly, doesn't allow us to go into a full discussion of the history of the "should have known" provision. We might touch on some of this later. But your Honours can see some key authorities for its nature as a negligence standard on the screen.

And your Honours can also find *those authorities at note C2 of our reference list. Again, that's filing 3593. For now I shall just highlight one or two things.

The first is that, obviously, the "should have known" test is only in Article 28(a), and thus it applies only to military and paramilitary superiors. This is consistent with the notion that such persons have both a practical need to remain informed of their troops' activities, and indeed a duty to do so.

Second, the "should have known" test is different in nature from the "had reason to know" test in customary law, because it does not require that information about subordinates' crimes was already "available" to the superior.

More broadly, the "should have known" test simply requires that the circumstances as a whole, and not any particular information, triggered the superior's duty of inquiry, and that if they had done so, they would have found out about their subordinates' crimes. The greater reach of the "should have known" test can be explained by the fact that it applies only to military and paramilitary superiors, unlike the "had reason to know" test in customary international law, which applies also to civilian superiors.

Turning to the question of civilian superiors, we can also see, again on the slide, how the alternate standard from Article 28(b) fits into the system of mens rea for the superior responsibility. That is now the standard, at the second bottom on your screen. The "consciously disregarded" standard is more demanding than "should have known" in the sense sufficient information of the subordinates' crimes must actually have been made available to the superior, who then knowingly failed to consider that information.

But the "consciously disregarded" test is still not a knowledge standard, however, because the superior prevented themselves from subjectively appreciating the relevant information. The only element of subjectivity in this standard is the superior's knowledge that there is some information which is available to them, unlike the "should have known" standard where the superior need not even be aware

of that.

What is clear, therefore, is that both the alternate standards in Article 28(a) and 28(b), the should have known and "consciously disregarded" standards, are objective tests.

Again, your Honours can see this marked on the screen.

For neither of these objective standards does the superior actually know, in the sense of having any subjective awareness, of the subordinates' crimes at all.

By contrast, if the superior has Article 30 knowledge, now marked in red at the top of the screen, he or she is not only aware of the subordinates' crimes but is convinced of them. This is a very high standard and a subjective standard.

But your Honours can see that there is a logical gap. There must also be a lesser form of knowledge for the purpose of superior responsibility, but which is still a subjective standard. And our understanding of this final form is now shown on the screen, second from the top.

In this form of knowledge, the superior knows perfectly well of the fact of the allegations of crimes by their subordinates, but for some reason declines to believe those allegations or otherwise is not virtually certain of those allegations. This is still knowledge in the ordinary meaning of the word. If you walked into the superior's office and you mentioned that allegation, he or she would know what it is that you are talking about.

And we're not proposing that any old rumour would meet this test. As a safeguard, we suggest that the Court should still assess the sufficiency of the information known to the accused from the point of view of a reasonable superior.

But it would not be true in this scenario to say that this superior does not know of the crimes, even if they are not entirely convinced by the allegations. This should still suffice to trigger their core IHL duty to prevent or punish.

Indeed, such a mental state is clearly different from the alternate standards in Article 28 as we understand them. As we have seen, they are objective. Their existence is premised on the assumption that the superior does not know of the subordinates' crimes. By contrast, the unconvinced form of knowledge is still knowledge. Less than virtual certainty of a thing, a lack of absolute conviction does not mean ignorance, yet the objective stance in Article 28 presumes that the superior does not actually know. And to import subjective awareness of those crimes into those objective standards would be to turn them on their head.

Finally, to answer your Honours' last question on this topic, this next slide shows the relationship between the Article 28 mens rea and Article 7(1) of the ICTY Statute which relies on customary law. As you can see, both forms of the knowledge standard as we see it and the "consciously disregarded" standard also apply in customary international law.

Notably, customary international law does not require subjective awareness of the subordinates' crimes, provided the information is available to the superior. And that's taken from the Celebici appeals judgment at paragraph 239, the Blaškić appeals judgment at paragraph 62, and also in the article by Professor Robinson that Professor Ambos mentioned at page 643 to 644.

And this is consistent with the fact that all of these standards in customary international law apply equally to military and civilian superiors. Where Article 28 is unique is in introducing the "should have known" standard for military and paramilitary superiors only, a basis for liability which does not exist in customary international law, at least in the time periods relevant to the ICTY and the ICTR.

And for this reason also, therefore, it would be erroneous to take an established aspect of the subjective standard from customary international law, the "lesser knowledge"

standard, and then to shoehorn it into the "should have known" standard when the "should have known" standard was created by States to be a more far-reaching, objective aspect to the law adopted specifically for this Court.

Now, *if I may, I'll turn to your Honours' questions on Regulation 55 and the second question posed by the Appeals Chamber concerns the power to legally re-characterise the facts. And our answer is unsurprisingly yes, your Honours do have that power. And this follows not only from a proper interpretation of Regulation 55, in our view, but also from the core powers and functions of the Appeals Chamber itself. Given the focus of your Honours' question, however, we will approach this issue from the point of view of Regulation 55, but your Honours might well take a different approach in your own thinking.

And I'll now put that provision up on the screen. I'll start just very briefly responding to Professor Ambos with our view that Regulation 55 cannot be or should not be understood to be ultra vires. In particular, Regulation 55 has been acknowledged and accepted by the Appeals Chamber both in the Lubanga appeals decision, which is in the list of authorities, and the Katanga appeals decision, also in those lists, and there are no cogent reasons to depart from the Appeals Chamber's previous rulings in that respect.

Regulation 55, the plain text, of course refers to the Trial Chamber's decision under Article 74, the trial judgment, and notice being given at any time during the trial. It's true that no other phase of judicial proceedings is mentioned. It's also true that the Appeals Chamber in Katanga, decision 3363, paragraph 17, did not directly rule upon this question, merely finding that the trial still continues during the Trial Chamber's deliberations.

However, if we read Regulation 55(1) in context, the term "trial" must be read to

encompass the appeal. And this is required by two provisions of the Statute itself, again, now shown on the screen.

First, Article 83(1) of the Statute expressly confers upon the Appeals Chamber for the purpose of proceedings under Articles 81 and 83 all the powers of the Trial Chamber. And since this is an appeal under Article 81, the Appeals Chamber has all the powers of the Trial Chamber in this case, including under Regulation 55. Nothing in Regulation 55 itself would exclude this possibility, nor could it; indeed, Article 52(1) of the Statute requires that the regulations are in accordance with the Statute.

Second, Article 83(2) of the Statute provides that the Appeals Chamber may grant remedies, including amending the decision of the Trial Chamber. Now, if it was understood that the Appeals Chamber could not exercise the power under Regulation 55(2), this would deprive this particular aspect of the Appeals Chamber's specific powers of much of its meaning. The Appeals Chamber would be substantially unable to apply the correct law to the factual findings of the Trial Chamber.

Furthermore, the object and purpose of Regulation 55(2) confirms that it must have been intended to be available on appeal. As the Katanga Appeals Chamber said, and this quotation is now shown on the screen, the purpose of this provision is to, quote, "close accountability gaps", unquote, and avoid the situation where only an acquittal can ensue if initial legal qualifications turn out to be incorrect.

How much more important is this principle in the context of an appeal where the key focus, especially given the importance of deference to the Trial Chamber's factual findings as discussed yesterday by Ms Brady, is likely to be the Appeals Chamber's own legal expertise?

For this reason we submit that the Appeals Chamber must have the power to legally re-characterise the facts under Regulation 55. This leads to the practical question

merely of when it may do so.

JUDGE EBOE-OSUJI: [10:18:30] Before you proceed, you removed 83, 83, yes, from the screen.

MR CROSS: [10:18:41] Yes.

JUDGE EBOE-OSUJI: [10:18:42] Would you be dealing with the last sentence of 83(2)?

MR CROSS: [10:18:46] I take Professor Ambos's point. I probably wasn't intending to deal with it directly in these submissions, but I would be very happy to do so in your Honours' questions later, if that's okay with you? I'm much obliged.

For these reasons - yes, this leads us to perhaps the question really of when the Appeals Chamber may act under Regulation 55. In this case the Appeals Chamber may undoubtedly re-characterise the facts, if need be, from "knowledge" to "should have known". And this is because notice of this possibility has already been given and the trial was conducted on the basis of the possible change which may now be contemplated.

With respect to my learned friends opposite, it's hard to see why the Trial Chamber's notice would not suffice. The distinction between notice of the possible change which is now being considered no longer being valid seems like a rather formalistic one. Nonetheless, the Defence had the notice at the relevant time.

And as a matter of principle, going beyond this, even though it's not required in this case, we would also say that the Appeals Chamber itself may properly give notice of the possibility of re-characterisation. And this follows again from a correct interpretation of Regulation 55(2) consistent with Articles 52(1), 81 and 83(1) and (2) of the Statute.

Moreover, as the Appeals Chamber has repeatedly stressed, Regulation 55 may only

be used with safeguards to ensure the fairness of the proceedings. And your Honours can see again the Katanga decision 3363 at paragraphs 87 to 88.

Even when judicial deliberations by the Trial Chamber have already started, the Katanga Appeals Chamber confirmed, and again this is on the screen, "... there is no reason, in principle, why notice of a proposed re-characterisation cannot be given ...". What is important instead, as they said just before in paragraph 91, is how the Trial Chamber conducts the further proceedings, and especially the measures taken to protect the rights of the accused.

Indeed, as the Appeals Chamber recognised in the paragraph on the screen, it's possible that, and I quote, "... changes to the legal characterisation of the facts may be addressed at late stages of the proceedings, including at the appeals stage, or [indeed even] in review proceedings without necessarily causing unfairness."

Accordingly, in our submission, the Appeals Chamber may not only re-characterise the facts when notice has been given at trial, as in this case, but may also itself give notice of the possible re-characterisation. And if it does that it can then avail itself of all of its powers under Articles 83(1) and 83(2) of the Statute to ensure that no unfairness is caused, including by allowing time for the Defence to present new submissions, or even call additional evidence if that's required.

But fundamentally, consistent with the logic of Regulation 55, the charges remain the same as they always did; they are defined by the facts and circumstances which were pleaded and not their legal character. And that comes in the Katanga decision 3363 at paragraph 49.

Now turning very briefly to the final question, your Honours. I'm aware I'm close to the time limit. The final question is whether it would constitute a legal re-characterisation of the facts if it was determined that Mr Bemba, charged with

knowing of his subordinates' crimes, instead should have known of the subordinates' crimes. Our answer again is yes. On the basis described by the Trial Chamber in this case in decision 2324 at paragraph 5, Mr Bemba would remain subject to the same mode of liability, but that would be superior responsibility, but the form of knowledge would be different from that specified in the confirmation decision in this case. Re-characterisation, however, would not exceed the facts and circumstances charged, and that is because the only basis for reconsideration of -- I beg your pardon, re-characterisation in this case would be your Honours' conclusion that Mr Bemba was not virtually certain of his subordinates' crimes but, nonetheless, was subjectively on sufficient notice of them.

Now, as I've just argued, in our submission, this too is knowledge in the meaning of Article 28(a).

But in any event, even if your Honours are not with us on that, the history of this trial shows that such a state of affairs was consistently part of the case confirmed against Mr Bemba.

And if your Honours again look on the screen, the Pre-Trial Chamber in the confirmation decision expressly stated that the same factors relevant to its finding of actual knowledge would also be relevant to assessing any question whether Mr Bemba should have known. That's paragraph 424.

At trial, the Prosecution's position reflected the same approach. Therefore, once the Trial Chamber gave Regulation 55 notice in 2012, the Prosecution affirmed, again on the screen, that it would rely on the same allegations and evidence to satisfy the lesser standard. Your Honours can see three quotes at paragraphs 13, 16 and 18 from filing 2334 on the screen.

Moreover, the Trial Chamber agreed with this approach. Again, if your Honours

look at the screen, the Trial Chamber reaffirmed in decision 2480 that, and I quote, "the facts and circumstances, as well as the evidence submitted in order to prove them, are exactly the same".

Now, this approach is entirely consistent with the general view taken by the Katanga Appeals Chamber, which rejected in decision 3363, at paragraphs 50, 57 and 58, many of the same arguments which Mr Bemba also adopted at trial; for example, filing 2451, paragraphs 19 to 21.

And finally, your Honours, any conceivable procedural prejudice to Mr Bemba was in any event cured by the Trial Chamber's order to suspend the trial in order to allow Mr Bemba "adequate time for the effective preparation of his defence". And there I quote from decision 2480 at paragraphs 13 to 15.

The trial only resumed when the Defence elected, in the Trial Chamber's words, to, and I quote, "renounce", unquote, the opportunity that had been provided to them. And that's in decision 2492 at paragraph 10 and again at decision 2500 at paragraph 21. But they did have that opportunity, your Honours. Final sentence. And the Defence's submission, their informed tactical choice at trial not to pursue that option does not now entitle them to hold the Court and this Appeals Chamber hostage over the correct legal characterisation of the confirmed facts.

Unless your Honours have any further questions, that concludes my submissions.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:26:18] Thank you, Mr Cross. We may have further questions after the break, but the floor is now to the Legal Representative. Thank you.

MR N'ZALA: [10:27:14] (Interpretation) Thank you, your Honour.

The team representing the victims shall respond in relation to the issues that deal with command responsibility. I will respond to the issue of "knew" versus

"should have known" and I will also make a few remarks about modification of the legal characterisation of the facts, in particular in relation to Regulation 55, after which Ms Douzima Lawson will have a few words to say.

Now, that being said, the two standards, "knew" and "should have known", are set out in subparagraph 28(a)(i) of the Statute with a view to determining the criminal responsibility of a military commander or a person effectively acting as a military commander for crimes under his or her effective command and control, or effective authority and control, as the case may be, when this person has failed to exercise control properly.

The Pre-Trial Chamber made a distinction between these two standards as an element of the fault of the person responsible. The Pre-Trial Chamber -- well, "knew" requires effective knowledge and "should have known" refers to a form of negligence. And this point is made in the decision regarding the confirmation of charges, paragraph 429. According to the Pre-Trial Chamber, the "knew" standard requires direct or indirect evidence for such characterisation. That was the case in the Kordić decision, paragraph 427.

As for the "should have known" standard, this requires mere negligence on the part of the commander; that is to say the commander has neglected to look into illegal behaviour by his subordinates, and I refer you to the decision on the confirmation of charges, paragraph 432.

Going from the "knew" standard to the "should have known" standard, which is set out in subparagraph 28(a)(i), falls fully within the authority, the framework of authority of the Trial Chamber to change the legal characterisation of the facts, as set out in Regulation 55(2) of the Regulations of the Court. It says that the view -- if I can now move on to Article 83(1), which reads, "For the purposes of proceedings

under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber." And consequently the Appeals Chamber can itself re-characterise the facts and the jurisprudence in -- the Lubanga case is quite clear on this point, in actual fact.

The Appeals Chamber shall come to its own conclusions about the appropriate law and shall decide whether the Trial Chamber misinterpreted the law. And if the Trial Chamber made such a mistake, the Appeal Chamber acts only if the error materially affected the impugned decision. If no error was made, the Appeals Chamber can correct mistakes found within a certain parameter; that is to say the parameter set in the decision confirming the charges.

Your Honour, these were the points that I wished to make, and my learned colleague shall elaborate.

MS DOUZIMA LAWSON: [10:32:29] (Interpretation) Regarding group C, we looked to the analysis of the Pre-Trial Chamber particularly regarding knowledge required under Article 30(3) and furthermore further provisions that come out of the decision relating to confirmation of the charges.

However, we do wish to point out that there are commonalities between the two, as the case might be, and also in terms of consequences. The definition of "know", that is to say knowledge that is relevant to 83(a)(i). The three provisions have one common denominator: Circumstances and consequences.

As for point D, the Pre-Trial Chamber reminded us of the background of the actual drafting of the provision having to do with the "should have known" standard. The drafters of the Statute, the legislators, so to speak, wished to adopt a stricter position in relation to military commanders and people fulfilling similar roles. And to respond to the Defence, a commander is indeed amongst the various leaders or

related people.

As for the parameters that are set out in 28(b), we also wish to remind the Chamber of the Pre-Trial Chamber's position, which pointed out that the criteria, and I quote, "had reasons to know". And this is something that we find in the ICTY legislation, the ICTR legislation, and the Special Court for Sierra Leone.

Nonetheless, the Chamber was of the view that the criterion "should have known" set out in these texts, the standard was quite clear within these ad hoc tribunals, and "had reason to know" can also be a useful standard when the time comes to apply the "should have known" standard, be it merely to determine whether a commander may have, or should have, known, rather, that crimes had been committed or could very well be committed.

The Pre-Trial Chamber also pointed out that in accordance with Article 16 of the MLSC, and as was pointed out by one particular witness, the MLC came under the control of the president. Which president? Well, the person who has been convicted.

The Chamber also pointed out that a system of information using means of communication available was to be found with the MLC, and this system made it possible for Jean-Pierre Bemba to receive intelligence on a daily basis, either oral reports or written reports, as a number of witnesses testified. And I refer you to paragraph 459 of the confirmation of charges hearing.

The Chamber was of the view that throughout the entire exercise in 2002 and 2003 within the CAR, Mr Bemba had effective control over the MLC troops deployed to the CAR during the five months in question. I reiterate: During the five months during which the troops were active in that country, during that entire period, he had the material ability to keep crimes from being committed. What is even more, the

Defence constantly says that he was so far away from the place of the crimes, but all the same, the troops remained under the control of the MLC headquarters in Gbadolite. Thus the criminal responsibility of Mr Bemba is clear cut.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:38:25] Prosecutor, you have the time to respond.

MR CROSS: [10:38:29] Your Honours, we have nothing to add to our previous submissions.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:38:33] Thank you very much. Defence, Mr Ambos.

MR AMBOS: [10:38:36] Could I also respond to the Prosecution at this stage? Well, then I have three points to make.

First, I was a little bit puzzled by the use of the word "objective" by Mr Cross. If we're talking about the mental standard, I think that's inconsistent as such. I mean, if we talk about mental standards, we talk about, by definition, subjective standards. I think that we maybe are not getting confused in this. What I think Mr Cross wants to say is, the measure we use to apply the subjective standard -- I give you an example. If I cause an accident with my car because I'm driving carelessly, I run over a child. If we take the reasonable-man standard, so the standard of the careless driver, I would be responsible for negligent homicide in any domestic system. But it is still a subjective standard because reproach imputed to me is that I acted negligently.

And that brings me to the second point. Of course, it is a respectable position to distinguish between "had reason to know" and "should have known" in terms of the wording. But both are standards below knowledge. I think that is agreeable. And we could call them negligence standards. I myself take this view. Now, if we take

the position that the "had reason to know" standard is a stricter standard -- but the standard demanded by customary international law is, for example, Guénaël Mettraux also in his famous book on command responsibility -- then how can this Chamber not interpret the "should have known" standard in light of customary international law in a restrictive fashion? So if we really take this view that customary international law goes for the "had reason to know" standard, then Article 28 must be interpreted in light of this customary international law standard, and not in light of a looser interpretation of the "should have known" standard.

And then there is another point I really -- I'm struck by this. I negotiated this Statute, and I think Mike Newton also was in Rome. If Mr Cross says the State wanted to introduce lower standard consciously to get more commanders prosecuted, that's more like paraphrasing the argument. I mean, what is really the objective of Article 28? Do *we want to prosecute and convict as many people as possible or do we want to convict the right people according to standards of fairness and culpability? States did not think about how many people will be prosecuted. They used this standard and they introduced it, but it was not in this, let's say, in this way.

We should be very careful if we say what is *the objective or provision. That's not our task anyway. We can look at the travaux perhaps but we should interpret the provision as it stands. Also, we should be careful to draw an inference from the core IHL norm, as Mr Cross makes this point. I mean, I quoted Article 86. We all know the Additional Protocol I. But that's the primary norm. We are talking about the criminal law provision here. That's a secondary norm. We are actually convicting people. We are stigmatising people. We say that Mr Bemba or anybody else is to *blame for the conduct. So that's a much harsher reproach than just having prohibitive norm in international material. So that's a qualitative, actually, thing,

which needs a specific justification. And that's why we argue for a liberal culpability-based restrictive interpretation of command responsibility.

Actually, I remember Bill Ferencz, when he worked at the ICTY, making a very valid point in these cases; that is, that we are not competent to judge this thing actually as civilians, because in the ex ante situation of military or commander where he has to take a decision -- take the Kunduz case, a German case, where I was involved in Afghanistan, where the commander is in a position to take ex ante a quick decision, only people who have been in this situation, military people, can have the competence to take, actually, to judge this decision.

Of course, we have to take a judgment, but we have to be very modest and careful in ex post facto judging a conduct which was taken in the heat of battle and which was taken under circumstances which are not the circumstances of a courtroom.

So I think I would be very, very cautious, also in terms of the message we send around from this courtroom to military, to NATO States, to other forces. If we have very loose and wide and broad interpretation of command responsibility, in the end, that does not serve the purpose. We will destroy command responsibility. So that's why our position is a very restrictive culpability-based provision.

And, again, the linkage between the crimes and the superior is the mental element. So how can a superior take counter measures without having information? I mean, the clearer the information is, if we have a kind of university academic case, if I have clear information that my subordinates rape and kill, of course I have to intervene. But this, this, this linkage, this is the essence of the provision. So we cannot really compromise on the mental state and mental element, and we have really, really to be very careful to make this point and say, "okay, there have been crimes, and you are responsible because you knew or you should have known, and you did not

intervene." So I think this linkage cannot be overstated.

Thank you very much.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:44:59] Thank you, Professor Ambos.

It is now time for the Bench to retire. We are going to have a deliberation of 30 minutes, so we come back to the courtroom at quarter past 11.

THE COURT USHER: [10:45:12] All rise.

(Recess taken at 10.45 a.m.)

(Upon resuming in open session at 11.25 a.m.)

THE COURT USHER: [11:25:49] All rise.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:26:05] We have a number of questions to be asked from the parties and participants.

My first question is about Regulation 55. So the question being whether if you move from "knew" to "should have known", both parties seem to be in agreement that in order to make that move you need to trigger Regulation 55.

My question is: Is that really so? Is there not a difference with Article 25(3) where, for example, in the Katanga case the move was made from subparagraph (a) to subparagraph (d), so you were going over different paragraphs, whereas here you stay inside one and the same sentence. So is this something different or does it require the triggering of Regulation 55?

I have this question for all parties and participants. So who wants to start?

I think Mr Cross being eager to answer?

MR CROSS: [11:27:20] Happily, your Honour. In short, our view is that for Regulation 55, certainly as the Trial Chamber considered it, a change to the mental

standard as they found it, it was appropriate to proceed on the basis of Regulation 55 because that way it ensured fairness to the accused.

As I said in my submissions, we wouldn't rule out the possibility that if the Appeals Chamber on appeal considered that Regulation 55 in fact was not the appropriate vehicle for the Appeals Chamber's functions, it may be possible that there is another means, for example, under Article 83 and just directly under the Statute, although obviously Regulation 55 has some safeguards built into it, which might mean you would think it appropriate to go through Regulation 55.

In terms of whether or not it would necessarily be a change to the legal characterisation of facts to move within a mode of responsibility, so if you take Article 28 as a unitary mode, which then, as it were, encompasses two kinds of mens rea within that mode, in the abstract I can see your Honour's implication that Regulation 55 might not be necessary. That said, on the facts of this case because of the somewhat checkered history with this allegation first at the Pre-Trial Chamber and then with the Regulation 55 notice of the Trial Chamber we took a somewhat conservative view for this case because we do think it's possible and we want to maximise fairness for the accused. But we wouldn't rule out other possibilities if that was feasible.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:28:57] Thank you, Mr Cross. I have a follow-up question, but I first want to hear the Defence.

*Professor Ambos.

MR AMBOS: [11:29:05] Well, of course we think that Regulation 55 is not applicable for the *principal reason I stated. But if I go for your argument and would apply it, then I wouldn't see a difference because para 1 speaks of 25 and 28 without making a distinction in terms of the paragraphs. So if you go for Regulation 55, it is always a

change if you change one legal element, yes, of 25 or 28, so that would not make the difference. But I want to emphasise that we have serious concerns about fairness. So if you don't use Regulation 55 and do it directly via the Statute, as suggested, then you still have the fairness issue, and for us, that's really the core.

On the other hand, if you don't use Regulation 55, then it's even worse for the Defence because then you have not the safeguards of 55 in para 2 and 3, you see? That's a problem because Regulation 55 on the one hand of course allows for a change in the legal characterisation. In our view, not to the detriment. That's another restriction. But it also has safeguards and that's a notice, yes? And para 3, the whole evidentiary provision. So to take away the whole Regulation 55 makes the fairness issue even worse in our view.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:30:38] (Microphone not activated) first. So I take the point that you just make that it would still be open to the Appeals Chamber should we be so minded. But then I didn't hear an answer to the argument that Professor Ambos made on the reformation in peius. Would that not be to the detriment of the accused and would it be possible for that reason?

MR CROSS: [11:31:01] Your Honour, I'm grateful for that question and also for Judge Eboe-Osuji in letting me wait until this point to answer his question.

First, our primary position is obviously that no re-characterisation is necessary because in our view the facts meet the actual knowledge standard.

Second, although we agree that the judgment cannot be amended to the detriment of the accused without a Prosecution appeal in the sense, for example, of adding a conviction for a new crime which wasn't in the trial judgment, in our submission the possible re-characterisation in this case is not in legal terms to Mr Bemba's detriment, and that's primarily first because notice of this possibility was given at trial and the

Defence had the procedural option to adjust its case accordingly and they took the decisions that they took on that basis, and therefore, the Defence remains in the same position today as they were in before the trial judgment was ever rendered.

Moreover, that the scenario in this case, which is perhaps a somewhat unusual one to do with the evolution between the Pre-Trial Chamber's approach and then the Trial Chamber's approach, but that this case can't fall within the notion of detriment in Article 83(2) also might be reinforced by the fact that the Prosecution wasn't in a position to appeal the Trial Chamber's finding that Mr Bemba had actual knowledge of the subordinates' crimes because that appeal would not have had any impact on the judgment under Article 83(2).

This is the same problem the Prosecution encountered with regard to causation where again because in fact the Trial Chamber convicted Mr Bemba, perhaps arguably on a less than sound basis in this legal respect; nonetheless, it foreclosed the possibility of the Prosecution appeal and therefore it would be a very strange situation indeed, your Honours, if the Trial Chamber's error could not now be corrected because of detriment to the accused because the Prosecution hadn't taken the procedural step of appealing when the Prosecution has no ability to appeal this particular finding.

So that would be our answer to that question.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:33:16] Do you want to follow up?

JUDGE EBOE-OSUJI: [11:33:18] Yes, actually two questions I had for Mr Ambos when he spoke last.

You submitted that, in response to the Presiding Judge's question, that any change in the element is precluded under Regulation 55. And what I wanted to do is can we look at Regulation 55? Can you look at, do you have it, (1), Regulation 55(1).

And it says, "In its decision under Article 74, the Chamber may change the legal

characterisation of facts to accord with the crimes" skipping "or to accord with the form of participation of the accused under Articles 25 and 28".

Now, my interest here is participation of the accused, to accord with the participation of the accused. What does that mean in the context of this debate? Does the participation of an accused in the mode of a commander depend on whether the facts reveal "knew" or "should have known"? That would be my first question.

The second question, maybe I should put it on as well now, is what is the legislative intent really of Article 28 in that *binary formulation of knowledge in the terms of "knew" or "should have known", is the intent to prescribe something in the nature of a positive element of crime, so to speak, that anchors liability, criminal liability, or was it merely to preclude a defence on the part of a defendant who may say "I did not know"? But the legislators say it doesn't matter if you did not know, it's enough that there is information that you should have known. What is it? Thank you.

MR AMBOS: [11:36:03] Well, thank you very much for these very important and difficult questions.

As to the first, the word "participation" Regulation 55(1), I would interpret it in the broad sense, including all the elements of 25 and 28. I mean, I see your point that you say, well, participation could be in a more objective sense and then you say in the sense of 25(3)(a) to (d) and only 28 as one provision. But I think you cannot read "participation" in command responsibility without looking at the mental element. I mean, our view is that command responsibility is one structure. You cannot take out something without changing it. So we have command responsibility on the base of knowledge and we have command responsibility on the base of should have known. These are two forms of command responsibility participation.

And for this reason I think the answer would be that participation includes a mental

element.

As to the second question, of course, the legislative intent is always difficult to know if we do not have access to the travaux, and actually sometimes there was no intent, I must say, we must admit in some of these provisions. But certainly the general position is that what States think is still a punishable blame-worthy conduct, yes, that's the underlying rationale of 28. So of course States have decided in Rome, if a commander which should have known does not intervene, he is punishable. That is the position of States. States could have decided only knowledge would make him punishable. That is a policy decision States have taken.

In this sense, it's not so much a question of defence, it's just a question what would be a mental element which still is in line with fairness and culpability? Because certainly States would not want to have a provision which is unfair to commanders. I mean, imagine how many States have negotiated this who have commanders in the field or which would be a strict liability provision, to bring me back to my previous point.

So States just took the decision that a "should have known" standard is still a standard in abstracto, in abstracto, which is compatible with the culpability and fairness requirements, because what is clear and what sometimes people from certain constituency overlook, if States wanted to make a fair and liberal-minded statute, you know. They didn't want to make provisions which at any cost convict commanders. And that's the thing I think we have to take into account. I hope that is satisfactory for this very complicated question, your Honour. Thanks.

MR CROSS: [11:39:14] Your Honours, before the next question, perhaps you'd allow me to make a comment on Professor Ambos's comment to that question.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:39:23] Go ahead.

MR CROSS: [11:39:24] Thank you. First of all, we in the Prosecution would absolutely agree that of course the purpose of the Statute, in Article 28 in particular, is to create a fair and liberal and appropriate criminal law regime.

But there are a couple of ambiguities in that context. The first of is that we are not suggesting, as Professor Ambos suggested in his reply earlier, that the drafter's intention was to just convict everyone or convict as many people as possible. But in our view, the drafter's intention was to make Article 28 fit for its purpose, and its purpose is, by its unique nature being different from Article 25 in a participatory mode, very closely related to the IHL duty, to prevent and to punish crimes.

And in terms of the question as to whether or not your Honours should try and delve into the States' intention in creating Article 28, for all that it might sometimes be difficult, as Professor Ambos mentions, we would respectfully submit that it is essential. As the Appeals Chamber has consistently ruled in various decisions, the means of interpreting the Rome Statute are by the Vienna Convention *of the Law of Treaties, and an integral part of that process is looking at the object and purpose of the treaty itself.

Now, that's not necessarily second guessing what a particular State may or may not have had in mind during the Rome negotiations, but it does mean looking globally at what the provision is, what this Court considers its object and purpose was, what the travaux say, and then coming to some sense of that accordingly.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:41:03] May I interrupt you on this.

MR CROSS: [11:41:06] Of course.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:41:07] Doesn't a purposeful interpretation include Additional Protocol I bases of Article 86 and 87?

MR CROSS: [11:41:14] Of course. So we would absolutely agree. I think it's Article 32 of the Vienna Convention, which also says that you can look more broadly at other relevant aspects of the international law as part of that process. So, absolutely, we would look at Articles 86 and 87 of AP1 as well.

Just in terms also, if this is a convenient moment, when I said "objective" earlier -- just to pick up Professor Ambos's point -- we're not again suggesting that the accused has absolutely no mental state. We're not suggesting that Article 28 is a form of strict liability. What we're suggesting is that there is a distinction between actual knowledge, which is where the superior has subjective awareness of the subordinates' crimes, and then the alternate standards in Article 28(a) and (b), where in our view the superior does not have subjective awareness of the subordinates' crimes, but they do have a different subjective state. So the focus is just on a different object than it is with regard to actual knowledge.

And for that means we're not talking about strict liability; we're just talking about a difference between different parts of the mode.

And as the final point, your Honours, in terms of relationship between the Rome Statute and customary law, and Professor Ambos invited you, if the Rome Statute is different from customary law, then to follow customary law. But in our respectful position, that misstates the nature of public international law itself, whereby the content of treaties need not be identical to customary international law and the Rome Statute is obviously itself a treaty which the States freely ratified.

And in that regard, although the ICC and this Court may look to customary law when expressly required by the Rome Statute, and your Honours are aware of the recent decision in Ntaganda on jurisdiction *where for the purpose of Article 8 the Appeals Chamber considered it appropriate to look to the content of customary

international law when the Statute gave that *cue. That doesn't mean it's required all the time. Indeed, Article 21 makes very clear that there is a hierarchy of sources and the Rome Statute is supreme over them all.

Thank you very much for the additional time.

MR AMBOS: [11:43:28] Can I, just on this point.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:43:30] Yes.

MR AMBOS: [11:43:30] That was a misinterpretation of my position. I didn't say that you have to follow customary law. What I say, and that is in line with the sources, Article 21 of the Statute, if you interpret the provision of a Statute which is informed by convention, Additional Protocol I, but also by customary law, you have to take into account customary law. There is no hierarchy in terms of the sources, in terms of Article 38 of the ICJ Statute here. I mean, Article 21, of course, says the treaty is first. But if the treaty is not clear, the Rome Statute, Rules of Procedure and Evidence, elements of crimes, you come to custom and especially IHL, international humanitarian law.

So my point is just interpret -- if you consider that "had reason to know" is stricter than "should have known", interpret "should have known" in line with "had reason to know" customary standard.

MR CROSS: [11:44:27] If I can just apologise, Professor Ambos. Thank you for the clarification. Our only comment would be that in that context then, obviously, the content of customary international law that would be relevant would be the content as it existed in 1998 at the Rome negotiations, which is before the ICTY and the ICTR took a perhaps more conservative view of the "had reason to know" test and would be informed by the post-World War II jurisprudence. We may, of course, disagree about what the content of that jurisprudence means. Thank you.

MR AMBOS: [11:45:00] I wouldn't agree.
PRESIDING JUDGE VAN DEN WYNGAERT: [11:45:01] One last --
MR AMBOS: [11:45:02] I wouldn't agree because that is not correct either, because if we go for the customary law standard, of course, we have to take the updated standard. Why should we go to the '98 standard when we draft the Rome Statute, especially if it's not to the detriment of the accused? If it's a stricter standard, we can, of course, take updated standards of 2018.
PRESIDING JUDGE VAN DEN WYNGAERT: [11:45:23] Judge Eboe-Osuji.
JUDGE EBOE-OSUJI: [11:45:26] Back to Defence. During your submissions, Mr Ambos, you said that one of the reasons why you take issue with the possibility of -- assuming Regulation 55 is the way to go -- why you say it is not available at this stage, is it because you say it would entail trial de novo, possibly Defence being precluded from calling evidence? I believe that was the submission. If that is the case, my question to you would be, what is it that Article 55 really requires to be done upon notice of possibility of variation of characterisation? Was it to give the parties an opportunity to make submissions on the evidence on the record at that stage, in which case there is no need to call fresh evidence, and there is no question of anyone being precluded from calling evidence? Is that a wrong understanding of Article -- or Regulation 55? If you say it is, can you tell us, with reference specifically to the words of the provision, why that is so.
MR AMBOS: [11:47:06] Well, let's look at Regulation 55(2), where the requirement of the notice is actually codified. So "the Chamber shall give notice to the participants of such a possibility" -- "possibility" meaning the change of legal characterisation -- "and having heard the evidence, shall at any and at an appropriate stage of such proceedings give the participants the opportunity to make oral or

written submissions."

So the first thing I would say is that the interpretation, the notice requirement, is a high standard; is a very sufficiently detailed notice which is required. You must give a notice where you exactly say, "Well, this, it is possible to change this standard X for standard Y."

The second point is that, I say that if you go for the road of Regulation 55(2), of course, you always have to look at 74(2) of the Statute, and you have to draw the line between law and facts, and not exceed the facts, of course. I think that we are in agreement on this point.

And so if you say, especially in command responsibility case, that instead of "knowledge", "should have known" is a sufficient standard. I don't think that you can use the same evidence, the evidence you have on the record. You have to have a new assessment of the evidence, and perhaps look, take a fresh look at the evidence with this new legal standard, the "should have known" standard.

And that is also important. That's my third point. Mike Newton will come back to this. Again, our unity argument. If I know something, I have a stricter obligation to act as if I just could know something, yes, or should know something. Take a very simple case, an ordinary case. If I know that my son is buying drugs, I have to act as a father in a different way if only I should know or could know negligence that he is taking drugs. In the first case, I would maybe lock him up and tell him, "Don't go to this place to buy drugs." In the second case, I say, "May I suspend your pocket money." So the obligation to act hinges or depends on the degree of knowledge, yes?

And that also means that the knowledge requirement informs or influences the circumstances, the counter measures, to be taken.

You can have in this theoretical case the situation where you say, I just made this

theoretical (indiscernible). The commander knew that crimes have been committed, and on the basis of the knowledge, the counter measures have been insufficient. Now, if the commander should have known, so only "should have known", the counter measures were sufficient, you see, because if he doesn't know exactly, so he only has a suspicion, that something happens, the counter measures cannot be the same counter measures. You cannot require from him or her the same countermeasures as under the "should have known" standard.

JUDGE EBOE-OSUJI: [11:50:18] But leaving aside now the matter of counter measures, and concentrating on the evidence, let's assume that you are right that Regulation 55 -- let's assume for purposes of argument that you are right that Regulation 55 requires evidence, new evidence, or evaluation of evidence, fresh evaluation of evidence, what about this scenario? Let's say that in a case -- it need not be this case, but let's be hypothetical -- the Trial Chamber may have looked at a particular evidence and said this evidence communicates actual knowledge, and but the Appeals Chamber says no, we do not see that this evidence communicates actual knowledge; this evidence only communicates "should have known", would you say that Regulation 55 is precluded in those circumstances?

MR AMBOS: [11:51:16] I mean, first of all, I would say that case is not a realistic scenario because we have to look at the totality of the evidence. But anyway, I take just for the sake of this discussion, if you paint it that way, your Honour, then of course you could apply. But that's very theoretical. I don't think that's how it works in a practical case, because we have to look at the totality of the evidence to make the assessment if the "should have knowledge" or knowledge standard is actually complied with.

MR CROSS: [11:51:54] Your Honour, I don't think I have very much to add to your

question except that your question from this side of the Court doesn't look quite so theoretical. It looks, you know, reasonably on point for these scenarios whereby the question is, the very question before us is whether the factual findings made by the Trial Chamber add up to the level of knowledge required for actual knowledge, if that's very high and means virtual certainty, and in the event that that's in some way incorrect, and then the question is, well, do those factual findings add up to the "should have known" standard. And we disagree about what "should have known" means, and that will be for your Honours to decide.

But in this context, the evidence is the same. We're not, just to be clear, suggesting that this case would go into the broader universe of what the "should have known" standard could mean because this case was not run on that basis. So it's a more limited inquiry for these purposes.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:52:52] But isn't it, Mr Cross, the case of the Prosecution that because of the measures that Mr Bemba took, that that proves his knowledge? And isn't that then a sort of a catch 22?

MR CROSS: [11:53:05] It's certainly the case that to some extent that the measures taken by Mr Bemba form part of the Trial Chamber's findings on his knowledge. I wouldn't agree necessarily that it forms the entirety of its findings on his knowledge. And I think that's clear from the multi-factored analysis in the judgment.

On the point also of whether or not the relationship between the mens rea and the measures that he's required to take is, if you like, a new aspect of superior responsibility, my point would only be to go back, I think, to the line that Ms Brady will take later in talking about what the legal definition of necessary and reasonable measures is, and there is already a test for that purpose. You know, it's necessary measures appropriate for the crime, reasonable measures within the material

possibility of the superior.

Mens rea, it's less clear to me whether that forms part of that question. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:54:01] Thank you very much.

Yes, Maître.

MS DOUZIMA LAWSON: [11:54:04] (Interpretation) Thank you, your Honour.

A number of arguments have been brought forward on the other side of the courtroom that require me to respond as the representative of the victims, particularly in light of what was said regarding the drafters of the Rome Statute. What is more in addition to the preparatory travaux, the point made by the Pre-Trial Chamber that I spoke to earlier today, I wish to remind all of the preamble to the Rome Statute, in particular, the part which reads as follows: "Bearing in mind that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

And another provision found within the preamble: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

Why do I mention these provisions found within the preamble? Well, because people are saying that there has been a misinterpretation of what led States to adopt the Rome Statute.

The Statute provides for the future. I tell you, it is so easy to send troops out into the field and then they commit crimes and atrocities and then you turn around and say as a military leader "Oh, well, I wasn't there. I was so far away from the actual theatre of operations."

So when you read the preamble, you see that it was subsequent to findings that, such findings that the Rome Statute arose. And if today the drafters of the Rome Statute

considered 55 and the "should have known" standard, it is because in the current case the accused said that "Oh, I didn't know." If you didn't know, you should have known.

So this is the point that I wanted to make and I thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:57:00] Judge Morrison has the floor.

JUDGE MORRISON: [11:57:04] Mr Cross, if there is an importation of any *species of an objective test into "should have known", are we not moving towards the position in which General Yamashita found himself? That being a position that caused considerable disquiet at the time. I think of the writings of the Dutch Judge Röling and frankly frequently Sims.

MR CROSS: [11:57:38] Your Honour, I take the point. Obviously in Yamashita the way, if I recall correctly, the charge was framed was more specifically about dereliction of duty. And obviously on the one level that was a case which very much inspired what happened in a number of future developments, including at the ICTY, but also was seen as being overly harsh, in particular because on the facts of the case, if I recall correctly, General Yamashita was convicted of some things which neither he knew about nor really was it very clear that anyone in his position could have found out about.

In our submission today we have tried to explain how the way in which the "should have known" test in Article 28 is formulated avoids the Yamashita problem. It has some safeguards in it. The first safeguard obviously is the prefix owing to the circumstances at the time.

So the first question is: It's not that there is a general ongoing permanent unfocused duty for the superior always to remain on top of what their subordinates are doing as

a matter of Article 28, although of course a number of national jurisdictions will impose an active duty on superiors to remain informed of their subordinates, but that's a different question. So first safeguard is owing to circumstances at the time. Second safeguard is that it's not just owing to the circumstances at the time you should have known of these set of facts, but that in some way a person in your position could not have known of those set of facts. If it was impossible for a reasonable superior in your position to know of those facts, to know of the subordinates' criminal conduct, then again we would agree that would fall outside Article 28's alternative standard, and again for that reason we think there is that extra link of culpability there.

We would agree, Yamashita was too far, although it was reasoned by the *lights of its time. But in Article 28 we see evidence that the drafters specifically intended to try and eliminate the gap that might be left by going all the way to, if you like, the customary law position while at the same time eliminating some of the concerns that Yamashita might have raised.

Does that answer your Honour's question sufficiently? Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:00:07] Thank you.

Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [12:00:09] Thank you.

Now, Mr Cross, in your submissions, and that links squarely with Judge Morrison's line of inquiry as well, there is a lot of both sides use submissions on the word "know" - forget about the "should have known" part, but "know" or "knew" - in a way that assumes the definition of it, which I don't see in the written submissions, and I haven't heard any definition given here. What does it mean? And that question comes in particularly in light of your efforts in trying to distance Article 30 from the

exercise we're trying to do here.

What does "know" mean in terms? In some national jurisdictions it has been defined to mean "true belief", quote and unquote, "true belief". And some others have even gone as far as to say that where the information available to the accused will only lead to suspicion, that's not enough, that there needs to be true belief on the part of the accused person.

So when we start talking about true belief, we're now talking about subjective state of mind; isn't that the case? Does it have anything to do with what we are saying, Article 28 is saying?

MR CROSS: [12:02:12] Thank you for the question, your Honour.

I will try and give a relatively brief answer, although obviously as we're getting into rather epistemological questions, it's a big field.

JUDGE EBOE-OSUJI: [12:02:26] It is a necessary epistemological exercise to be done --

MR CROSS: [12:02:31] Absolutely.

JUDGE EBOE-OSUJI: [12:02:33] -- for purposes of criminal liability of the accused in this case.

MR CROSS: [12:02:34] Yes. So as briefly as I can, I will try and answer the question.

The dilemma the Prosecution finds itself in with Article 28 obviously is that we start from the Lubanga jurisprudence at paragraph 447 of the appeals judgment that generally they've said awareness that a consequence will occur in the ordinary course of events, which is the test from Article 30(3) of our Statute, that's 30 subparagraph 3, means virtual certainty of that consequence.

So obviously that is one test which is in the universe of possible tests. Our view is

that if that test were to apply to Article 28, it would lead to the kind of lacuna I described in my primary submissions. And because we have to interpret the word "knowledge" in Article 28 itself, according to the Vienna Convention object context -- sorry, ordinary meaning context objects and purpose, you then have to consider whether if indeed the virtual certainty test is the correct understanding of Article 30(3), whether that fits in the context of Article 28 as it's framed.

In terms of actually whether or not understanding knowledge in the sense of Article 30(3) as meaning awareness of a virtual certainty that a consequence will occur, the Prosecution I think would, I was going to say agree with you, but actually I don't know your Honour's position, but the Prosecution would take the view that that is too high a standard.

And if I may very briefly --

JUDGE EBOE-OSUJI: [12:04:13] And you ask: Why should that be?

MR CROSS: [12:04:16] And if I may, I'll explain why we think it might be too high a standard.

The first is that the phrase "virtual certainty" does not to us seem to adhere very closely to the phrase "ordinary course of events."

In both the Lubanga appeals judgment and also in the Katanga trial judgment the analysis of Article 30 focuses on the verb "will" and because of the emphasis on the verb "will", it tends to then back off slightly from an analysis of really what the phrase "ordinary course of events" might mean.

And if I can give an example of that dilemma, your Honours, if I were to stand on the top of a tall building and throw a rock off the top of that tall building and it were to land on the road below, I would know that in the ordinary course of events I'm likely to cause an accident. In our view, it would not be true to say that I was virtually

certain that I would cause an accident because there are many other possible intervening acts which might avert the risk that I've created. But nonetheless, I have a pretty good knowledge that in the ordinary course of events I am likely to cause that accident.

JUDGE EBOE-OSUJI: [12:05:31] Now getting to zone of causation then --

MR CROSS: [12:05:33] Well, causation, yes, but also because Article 30 is framed in terms of consequence, that there is sort of a causal element, but nonetheless that's how Article 30 works.

Another reason why we have some doubts about Article 30(3) is that the way in which it's framed - now I'm going to be careful because I've thought a little bit about this before your Honour's question - we don't take any position today for the purpose of this case as to whether or not Article 30(2)(b), the intent provision, whether or not the drafters intended to include a dolus eventualis standard in that provision.

But the origins of the virtual certainty test are in any event particularly problematic when it comes to pure knowledge because virtual certainty is, if you like, one formulation of what's known as dolus directus second degree, which is where you have an elevated cognitive requirement and you have that elevated cognitive requirement because it's standing in place of and being evidence of volition in order to prove the intent of a person.

JUDGE EBOE-OSUJI: [12:06:45] Can you hold on to that.

MR CROSS: [12:06:46] Yes.

JUDGE EBOE-OSUJI: [12:06:47] Could it be, and you asked the question during your primary submission as to why would that be, and you're now in that zone, virtual certainty replacing cognition, could it be because 28 is holding somebody responsible for a crime that they did not actually put their hands on?

MR CROSS: [12:07:15] In our position that wouldn't be a correct understanding of Article 28 because Article 28 is not intended to be a participatory mode of liability. It's a, it's not a great phrase, but it's a sui generis mode of liability which is standing in a slightly special place in order to give effect to the IHL duty to prevent and punish. So we wouldn't necessarily take your Honour's suggestion in that respect.

But just going very briefly *back to finish the thought about Article 30(3) and virtual certainty and dolus directus second degree, even if that is one way of viewing the necessary elevated cognitive requirement for the purposes of intent, it makes no sense particularly to make that elevated cognitive requirement apply to pure knowledge, because pure knowledge, 30(3), it's a separate part of the Statute, (2)(b) and (3) are separated, and why for the purposes of awareness of a fact or a circumstance do you need to have such a high level of cognitive conviction that that would stand in the place of intent?

So for those reasons we have some serious doubts about the position in Lubanga on this particular question. I apologise for the rather lengthy answer to your question, but probably I should stop it there.

JUDGE EBOE-OSUJI: Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:08:32] Thank you very much, Mr Cross.

Does Mr Ambos want to react to this?

MR AMBOS: [12:08:38] Not to this, but to the victims representative. I think we should not scapegoat Mr Bemba for the crimes committed in the world. I mean, the preamble is not the base of a conviction of someone and the preamble is not even part of the Statute. There is another discussion we could have now on the way of the preamble for the interpretation of the Statute, in particular Article 28. And that's a

little bit the concern we have, that if we apply command responsibility in a very broad fashion, then it's more scapegoating a defendant than having the real, the real person to be blamed for crimes committed on the ground, which have been committed. But we are here in a criminal trial and we have a specific case to answer against a specific person. And so it's not helpful to invoke impunity and the preamble in this very specific endeavour. And as we have seen in our very high-level exchange here with your Honours and between us, I think it's a very, very difficult endeavour and we should not go on the level of kind of impunity discourse, I would call it that way. Thanks.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:09:52] Thank you.

Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [12:10:03] Finally, Mr Ambos, a question. During your primary submission, you gingerly made a point, although you did not press it, but it may be of interest to me in particular to understand what we are doing with Article 28. You said -- the point that you made, you said that you're not sure that Mr Bemba really fits into the category of a military commander. Again, we get into the problem of definition and whether you can assist us with what a military commander, what that means. Does it include a person who necessarily belongs in the chain of command of a military set-up? One, if that is the case, would it include or not a head of state who is the commander-in-chief of the armed forces of his or her country and who is in a position to tell the soldiers or the field marshal, "Go" or "Stop"?

MR AMBOS: [12:11:23] A military commander is a person which is formally military commander. Take, for example, the high command case, the Nuremberg case. The high command of the German army, these have been military commanders. A

military commander was also the person, the German commander in Kunduz, Afghanistan. So he's part of the Bundeswehr. And this is a formal definition of a military commander.

Of course, para (a) refers to de facto commanders and one could argue that a boss or commander of a paramilitary group in the DRC or in Colombia would be covered by para (a) as a de facto military commander. That's why actually the Article 28 was framed to include de facto military commanders.

But my concern in this case was what do we do with persons who are actually politicians and, like the president of the United States, who is not a military commander, he is formally, of course, the head of the armed forces, but would fall under - I talk under the protection of Mike, he will later correct me - fall under (b) as a civilian superior, as a head of state. But it comes closer to a person who is actually a politician and then may use military force in a certain armed conflict situation and exercise military power in a way.

So that was a little bit my position as to the concrete categorisation, classification of our defendant, because he's really in between para (a) and (b) in a way. And if he were in para (b), if I had, were involved in this case at the pre-trial stage, I had made this argument to put him in para (b), because then we would have a much higher mental standard, of course.

MR CROSS: [12:13:18] Your Honours, if I can also just jump in on that point.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:13:22] Mr Cross.

MR CROSS: [12:13:24] I think that the easiest way of looking at this is, of course, there is a question of fact as to whether in any particular case a particular superior falls under 28(a) or 28(b). We would stress, as Professor Ambos acknowledged, that of course 28(a) includes both persons who are military commanders and persons

effectively acting as military commanders, and that is itself a question of fact essentially. The legal test is clear. The question is whether or not this person is. This case has proceeded on the basis until now, and indeed including until now, that Mr Bemba is in 28(a), and therefore for those reasons, for the purpose of this case, we treat him as a military commander or a person effectively acting as military commander. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:14:15] If there are no more questions from our side, we're going to close this session. We're going to resume when? It's quarter past 12. So would 1 o'clock be agreeable? Because we would want to finish -- well, quarter past 1, quarter past 1, is that possible for the interpreters and the stenographers? We really want to have the time for our discussion this afternoon and we have to stop just before 5 o'clock. That's why I'm asking if there is no objection.

Ms Brady.

MS BRADY: [12:15:00] Yes, your Honour, if I could just raise a preliminary matter relating to this afternoon's proceedings. I've raised this matter with my friends from the Defence as well as the Legal Representative for Victims. May I be so bold as to ask for 10 extra minutes for the questions in group D. They cover a diverse range of issues, four different topics in five questions. I'll be dealing with all of them.

As you yourself yesterday said -- I mean, you've posed some very interesting legal questions. And as you've said, they raise very novel issues, especially for the International Criminal Court, many of them being heard for the first time and will affect future cases.

I don't want to -- the interpreters are doing such a great job, I don't want to be so hurried that we travel and stress out the interpreters by very quick submissions.

And because they're in different areas, it may be best to just have a bit of a slightly slower pace. I don't think it will affect the schedule, and so I am asking for an extra 10 minutes.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:16:04] (Microphone not activated)

MR HAYNES: [12:16:12] Well, I'll say to you, your Honour, exactly what I said to Ms Brady. Let's see where we go.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:16:20] Maybe you need an extra 10 minutes as well?

MR HAYNES: [12:16:24] More likely in response.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:16:26] (Microphone not activated)

THE COURT USHER: [12:16:37] All rise.

(Recess taken at 12.16 p.m.)

(Upon resuming in open session at 1.30 p.m.)

THE COURT USHER: [13:30:54] All rise.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [13:31:28] Good afternoon. We will now hear the submissions on group D of the questions that the Trial Chamber has put to the parties and participants. So we will start with the Defence. And the Prosecution has asked for the 10 extra minutes, which we grant, and in case the Defence would also ask for 10 minutes more, they would also be entitled to that extra.

(Appeals Chamber confers)

PRESIDING JUDGE VAN DEN WYNGAERT: Of course, I must read the questions. Thank you for drawing my attention to this very important part of my role.

So we are now looking at group D, further questions relating to the third ground of

appeal against the Conviction Decision. And here we again have five sub-questions. First question: To what extent is a commander's motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy?

Second question is about notice: 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? Must it be given specifically with respect to measures or may it be given in the course of the pleadings on the commander's material ability?

Third question, this is about causation: Mr Bemba argues that causation is required in the context of Article 28(a) of the Statute, while the Prosecution argues that such causation is not required. If causation is required pursuant to article 28(a), what degree of nexus is required? Is it "but for", is it "high probability", is it "reasonable foreseeability", or is it anything else?

Does the assessment of causation overlap with the assessment of whether a commander has taken necessary and reasonable measures or is it an additional requirement?

Last question with a number of sub-questions is about the legal duty to withdraw. Is a commander under such a duty to withdraw his troops in the event that he becomes aware that the troops are committing crimes? If so, one: What is the legal basis for this duty? Two: When does it arise? Three: Would it extend to all troops or only to those alleged to have committed crimes? Four: Is it of any impact that withdrawal, either full or partial, would, in all likelihood, lead to military defeat?

So these are the questions.

And now I'm giving the floor to the Defence.

MS GIBSON: [13:35:00] Thank you, Madam President, your Honours. I will be addressing the first four questions in group D, following which, with your leave, I

will pass the floor to Professor Newton who will address you on the fifth.

Turning then to your first question concerning the motivation of commanders.

The reason why a commander in the field decides to take measures to prevent and punish crimes is irrelevant to an assessment of the adequacy. Adequacy is assessed objectively; motivation is necessarily subjective.

In this case the Trial Chamber's assessment of the adequacy of the measures taken by Mr Bemba included consideration of his motivation in taking them. The Trial Chamber found, yes, Mr Bemba took these measures, but he didn't take them because he cared about preventing and punishing crime, he took them because he wanted the MLC to look good.

This was an error. Why Mr Bemba did what he did, why he travelled to the Central African Republic to remind his troops to comply with the code of conduct is irrelevant. There are no examples of command cases where an ICTY Trial Chamber for example said: Well, General Krstić, he took some measures to prevent and punish crimes, but he didn't really mean them and so he is criminally liable on that basis.

There aren't any cases like that. And certainly none that would have survived the scrutiny of the ICTY Appeals Chamber because since its first case, since the Tadić judgment the Appeals Chamber of the ICTY has stressed the irrelevance and inscrutability of motives in criminal law.

And it's not a passing comment by our Trial Chamber. It's not mentioned only once. The language of the judgment shows that the Trial Chamber viewed all of the evidence on measures through this lens of Mr Bemba's motivation. Mr Bemba's motives are used to discredit his letter to the UN in which he said the MLC wouldn't ignore violations of the codes of conduct, it's used to discredit the joint MLC/CAR

enquiry led by Colonel Mondonga, it's used to discredit the Zongo investigation, and then finally, in paragraph 728 of the judgment, it's one of the factors explicitly relied upon to discredit all of the measures that he took.

It was a key factor in the Trial Chamber's reasoning and the Judges should never have turned their minds to it. And in doing so they have introduced this level of subjectivity into an assessment of the adequacy of the measures that doesn't belong there and has no place in the law. And they have undermined their finding that Mr Bemba failed to take necessary and reasonable measures. Because of course he did.

Turning then to the notice that must be provided to an accused.

It's unfair to convict an accused on the basis that he failed to take particular and specific measures without first telling him that he should have. Without having given him the opportunity to say "Actually, I did take those measures", or "In fact, that's a *wildly unrealistic measure to expect a commander to have taken and has no place in the laws of war".

At the ICC notice of the measures that a commander failed to take has been provided in the DCC. If you look at the DCC in the Bemba case, at paragraphs 93 to 100 under the heading "Bemba failed to take necessary and reasonable measures",

the Prosecution lists the measures that it alleged Mr Bemba could have taken but didn't: That he failed to issue appropriate orders; that he failed to discipline battalion commanders; that he failed to prosecute because the Gbadolite trials were a sham.

And by listing these measures in the DCC the Prosecution was rightly acknowledging that Mr Bemba needed notice of them in order to be able to properly prepare his defence. And so he was able to confront these allegations. Mr Bemba knew that he

should bring evidence to say "No, the Gbadolite trials weren't a sham and here are the reasons why". And he did. Mr Bemba brought evidence to confront each of the allegations of failures that were listed in these paragraphs of the DCC.

What did the Trial Chamber do? It said: Well, these measures, you took them but you were motivated by the wrong things and they didn't go far enough and in fact here is a new list of measures that we think you should have taken and you didn't. You could have altered the deployment of troops to avoid contact with civilians, you could have shared relevant information with the CAR authorities, for example.

So Mr Bemba was convicted on the basis of measures that he heard about for the first time in his judgment. Had Mr Bemba known that he was going to be held criminally liable for a failure to redeploy the MLC troops to avoid civilian areas he could have asked witnesses about this. He could have asked any of the 31 soldiers who testified in this case "Is that a reasonable measure? Is that even a realistic response to crimes?" Or he could have brought evidence to show that the troops were redeployed in that manner. None of this was open to him.

So how does the Prosecution respond to this? Importantly, significantly, the Prosecution did not argue in response that Mr Bemba didn't need notice of these measures, the Prosecution argued that he had it. And in support the Prosecution cites in paragraph 212 of its response brief to paragraphs of the confirmation decision, of the DCC, of the evidence summary, of the in-depth analysis chart, and not one of the paragraphs that it cites is listed in relation to measures. Instead the Prosecution cites to hundreds of pages of general pleadings on Mr Bemba's general material abilities as a commander and says: There, he had specific notice of these specific measures.

So in reality what the Prosecution is saying is if you are an accused at the ICC, the

Trial Chamber is entitled to convict you for failing to take specific measures on the basis of any fact listed anywhere in your indictment or any of the hundreds of other pages of pleadings in your case regardless of whether they are pleaded as facts relevant to measures or not. Essentially: Here is the case file, the facts are all in there, you figure out what elements of the charge they are relevant to.

That's not real notice because it doesn't, it doesn't help an accused know how to defend himself. Charges are not a loose collection of names, places and events that can be ordered and reordered at will. There is a discrete set of facts which supports each of the elements of the charge.

To leave this as the position would be to say to Mr Ntaganda, for example: "Here is the list of measures in your indictment that the Prosecution says you failed to take. You can defend the case on that basis, but just know you could end up being convicted on the basis of a completely different list of measures drawn from any fact anywhere in the pleadings in your case and you will find out in the judgment".

It would be impossible to defend cases on that basis. You're not giving the accused a fair chance. What happened in this case shouldn't remain as the standard for pleading command at the ICC.

Turning then from measures to causation and the question of what is the degree of causal nexus required under Article 28(a) of the Statute.

The nature of command responsibility demands a strict causality standard.

Command responsibility is exceptional in law. It allows for someone to be convicted of a crime even though he took no part in its commission and didn't intend for it to occur. Someone else commits the crime and a commander's liability arises from his failure to act, from his omissions.

Omissions are different from acts. There is a difference between killing someone by

shooting them, an action, and failing to intervene to stop a shooting, a non-action. But as Judge Steiner noted in her separate opinion, the assessment of causality for acts and omissions shouldn't differ from one another beyond that which is inevitable. And that's right. If actions and omissions are to be treated as equivalent in terms of criminal culpability, if we find someone who acts as equally culpable as someone who fails to act when they had a duty to do so, then the circumstances giving rise to criminal responsibility should also be equivalent, there should also be symmetry. So what does this mean in terms of causation? For an act, liability arises because the accused's shooting caused the death of the victim. For an omission, liability arises because the victim would not have been shot and killed but for the failure to intervene of the accused. Treating acts and omissions as equivalent requires the application of a "but for" standard in order for the omission to become criminal. A fair imputation of the subordinates' crimes to the commander requires that but for the failures of the commander, the crimes would not have occurred. And yes, that's a high standard and it's higher than the standard being advocated by the Prosecution. The Prosecution argued at trial that it was only required to establish that Mr Bemba's failures increased the risk of crimes. But there are several problems with setting the standard so low. Firstly, from the perspective of general criminal law theory causation is a minimum requirement of criminal responsibility. And here in the context of command when a commander isn't the person committing the crimes, when he is already arm's length from the crimes, you need something more than an increased risk to trigger criminal culpability. We are talking here under the Statute for criminal responsibility for genocide, for crimes against humanity, for war crimes through a failure to act. The

threshold should be high. And setting the standard at this level won't undermine the goals of criminal justice or allow for commanders to slip through the gap, it will just mean that convictions are appropriately restricted to those commanders whose derelictions caused the crimes.

Secondly, the "increased risk" standard is much lower than the standard of causation for omissions in domestic law. Judge Steiner in footnote 49 of her separate opinion conducted a mini survey of domestic standards of causal nexus between omissions and crimes and she cited Swiss and German decisions which talk about probability bordering on certainty, and the French Cour de Cassation which required a risk of particular gravity, and Italian courts requiring logic probability. And this makes sense. How could it be right that an action by an accused is required to be the cause in fact of the crime but that an omission only needs to increase the risk of a crime? That's the disparity that should be avoided.

And the other problem with the Prosecution's proposed standard is this: If the commander's failures are only required to increase the risk of crimes, that means there is a real possibility that the crimes would have occurred regardless. Even if the commander had complied with his duties, the crimes could have occurred anyway. So the causation requirement means nothing. It's rendered almost meaningless. It's not sufficient to trigger criminal responsibility on the part of a commander. The nature of command responsibility demands, requires a strict causality standard. If despite these arguments a risk approach is adopted, then the degree of risk must be strictly defined, not any risk or any probability could suffice.

In line with these domestic authorities and basic principles of personal culpability this would only allow for convictions in the cases of commanders where there was a high probability bordering on certainty that the commanders' omissions caused the crimes,

which leads to my last question, being the overlap, if any, between the measures and causation.

Whether a commander took necessary and reasonable measures and whether there is a causal link between those omissions and the crimes are two different things.

A Trial Chamber can't resolve both with the same analysis. A Trial Chamber isn't entitled to say, "Well, we found that this accused didn't take necessary and reasonable measures, so automatically we find that he caused the crimes."

In our case when assessing causation, our Trial Chamber looked at the same evidence that it looked at when it was assessing measures and then incorporated by reference its findings on measures and then concluded, had Mr Bemba taken these measures, the crimes would not have occurred.

There is nothing new, there was nothing extra in its causation analysis, and we say that was an error, because a Trial Chamber needs to approach these two elements separately. So how should this be done?

To assess a commander's measures, a finder of fact is entitled to look at what the accused did. The commander took measures A, B and C. Were they adequate? Were they reasonable given the prevailing circumstances?

Causation is something different. Causation involves a judge looking at the relationship between the omissions and the crimes, whether there is a trigger, whether there is a cause, whether one is as a result of another.

And that makes sense because, as Judge Ozaki said in her separate opinion, and I quote, "The very nature of command responsibility presupposes the existence of multiple causes of crimes, including the conduct of direct perpetrators." Causation requires a Trial Chamber to think about this, to grapple with this issue, to consider what was the cause of the crime. Can they safely be attributed to the accused's

failings or were there other factors at play? Is there a sufficient link or trigger between the dereliction and the resultant crimes? That's the extra step.

So why didn't the judges of our Trial Chamber do this? Why is this reasoning absent from our judgment? Because they couldn't. Because they hadn't defined the degree of causal nexus that was necessary. They had no standard, no basis against which to assess the extent to which Mr Bemba's alleged failings caused the crimes. You can't determine causation when you don't have a threshold for causation against which to assess the measures. That's why this reasoning is missing.

To say, for example, our Trial Chamber had defined the causal nexus and had found for argument's sake that a but-for standard was required, it could have firstly assessed whether Mr Bemba took the necessary and reasonable measures. Then it could have considered whether in the circumstances of this case, taking into account all the relevant factors, the conduct of the perpetrators, whether the crimes, whether the specific crimes, whether pillage, whether rape, and whether murder would have occurred but for the failures of Mr Bemba. That is the second step. That's the something extra. And our Trial Chamber completely skipped it because it couldn't take it because it hadn't defined the degree of causal nexus, and for this reason the causation finding is invalid.

With your leave, Madam President, I will now pass the floor to Professor Newton to address you on the question of withdrawal of troops.

PRESIDING JUDGE VAN DEN WYNGAERT: [13:53:33] Thank you, Ms Gibson. Mr Newton.

MR NEWTON: [13:53:42] Madam President, may it please the Court. I rise with respect for the time limits that you've set in these complex issues.

My colleague spoke yesterday of the poor reasoning that is rife that infects this

decision in various ways, and this issue is one of those key issues. In the Defence position, the imposition of a per se duty on commanders to withdraw forces is a serious legal error that we urge this Bench to rectify. It is a big mistake in this opinion that is unprecedented.

Let me be clear in answer to your first three questions. We could spend a lot of hypothetical time on these questions. On the first three sub-questions that you have asked, there is no precedent in any form or any forum for imposing a per se legal duty on a commander at any level to withdraw forces from an ongoing operation, and that is true of both command responsibility and superior responsibility.

The language of the Blaškić appeal keeps bouncing in my head like a pebble in a Coke can. The Blaškić Appeals Chamber said that these issues are not a matter of substantive law, but a matter of evidence, a matter of specific contextual evidence, and therefore declined, as so many other courts have, to impose a blanket per se legal bright-line rule.

In this case the duty to withdraw is a fiction imposed by the Trial Chamber that really risks undermining the entire fabric of the law, or it risks undermining NATO operations. It risks undermining every military combined coalition in the world to include United Nations peacekeeping operations, because this is a common practice all around the world in all professional military contexts.

With respect to the substance here, the reading of the Trial Chamber essentially undermines Article 28 in violation of the Vienna Convention on the Law of Treaties, because it fundamentally torques the meaning of that language.

The meaning of language of Article 28 is to exercise command properly.

In addition, it violates Article 21 of the Rome Statute, because this brand-new subjective standard is injected just by this Trial Chamber in the absence of any

evidence. Go to paragraph 740, look at it, you will see no legal citations, no citations to State practice, no reference of any reality in the real world. What you will see is an internal cross-reference to witnesses which I shall address in a minute.

I want to digress for just a second to revert back to an issue that we danced around this morning, but I want to say it with great particularity. In this case the imposition of a duty to withdraw on a commander violates Article 21 of the Rome Statute as well. The language in Article 28 says that the commander must exercise control properly. Yes, of course in accordance with Article 21 there is reference to the statute and the elements of the Rules of Procedure. But the word "properly" is nowhere defined in the Rome Statute as a textual matter. Of course this Chamber must resort to the practices of States under Article 86 and 87 of Protocol I. Of course they must make reference to the broader. Do that. You will see no hint anywhere of a per se legal duty to withdraw forces.

Now, we all know that the very presence of warfare by its very nature imposes the absence of order and morality. That's why the role of the commander is so important.

The problem in this case is as a substantive matter that the Trial Chamber simply ignored the reality that the very fabric of the law of war is decided from the ground up. Throughout its essence, woven into its fabric is a blend of military efficacy along with the humanitarian imperatives. There is no precedence. There is no dominance. They both must work in the same time in the same place to achieve protections for civilians.

We expect deployed forces to encounter incredibly difficult situations. We don't expect them to give up. We expect them to comply with the law to protect civilians. But we also expect them to comply with the orders of their commanders to do

everything possible to balance both the accomplishment of the mission and compliance with the law.

That's what this Trial Chamber got wrong. They simply wrote out the military efficacy that is embedded in the law of war and said: Ah, at the first hint of trouble, they have a duty to withdraw, and that's a valid, necessary and reasonable measure. We disagree with that.

As my colleague has said, the causality requirement of Article 28 is an element that must be proven beyond a reasonable doubt by the Prosecutor. And this said on these facts, rather than demonstrating any professional malfeasance on the part of Mr Bemba, and the acts that occurred in another country under another operational chain of command in another language, the Trial Chamber simply leapt to the conclusion that all those things could have been avoided had you simply not gone in the first place or withdrawn.

Any commander, and I want to say this carefully, any commander that simply set loose forces to commit crimes and abdicated any umbilical cord of support, who sent forces and said, "Oh, don't tell me what's happening. Don't report to me. I don't want to know", any commander who did that with no oversighting or reporting channels or accountability would justifiably be subject to censure because he would be violating the professional ethos.

At the same time I would submit that that same commander would not deserve the title "commander". To command is an active verb.

Earlier today Mr Cross referenced that the meaning of Article 28 is to impose a superior's failure to properly control. The problem is he left out the verb. The verb is "exercise". It is an ongoing, active verb. You must exercise, you must do both, you must achieve the mission to the very best of your ability and at the very

same time maintain command authority to comply with the law.

We spoke yesterday of the discrepancies in this decision. Let the Bench remember that the non-negotiable tenet of the military ethos requires us to be active.

Now I want to digress for just a second to the key paragraph in this opinion that focuses on the duty to withdraw, paragraph 740. The Trial Chamber phrases an attack on Mongoumba, as they say, part of a modus operandi, part of a pattern of deliberately attacking civilian areas where there were only civilians.

As I said earlier, no cross-references to legal citations or any authority or any State practice.

But there is a much more egregious error, and it's subtle. You have to go back to paragraph 543, footnote 1654, to see the source of it and see why that is such an egregious error. In fact, the Trial Chamber conveniently forgot to mention that members of the MLC armed force had been captured and held in that location.

One might just as easily have imagined a Trial Chamber opinion that said war crimes against civilians would be avoided if people never held military forces in an area inhabited by civilians or used civilians as human shields. They don't focus on that. They simply ignore the fact that there were military forces in that area.

You have to look at the footnote carefully. You see from Witness P-29 the only reason there were only civilians there is because the forces fled.

Mr Bemba should not be held criminally responsible for the unanticipated fortuity that the enemy fled upon the approach of his forces, MLC forces.

Article 28 has to be interpreted in a manner that strives for consistency between its plain text and the overarching purpose. In this case, the Trial Chamber has warped Article 28 into a cudgel that would compel commanders to do one of two things, either of which, either one of which is irresponsible. On the one hand -- and I would

add would represent an entirely novel approach to modern military operations. No place in the world would we respect the commander who simply abdicated command authority. That's not the way the law of war works.

Responsible command in the sense of the law doesn't connote a specific function, it connotes a *much larger holistic and vitally important, I would use the world "irreplaceable" role. Commanders are charged with a very special duty of preparing forces to go into a situation and execute a combat function with great discipline and prevision and difficulty. At the very same time they must do everything possible to comply with the laws of war. That, I would submit to this honourable Bench, is the object and purpose of Article 28, to ensure in the language of the Statute that commanders exercise control properly. Both of those things go hand in hand simultaneously, a per se legal duty imposed from above as an ad hoc subjective measure fundamentally violates but the plain language reading of Article 28.

And let's not forget the real-world consequences that we are talking about. As I said, this would force commanders into an untenable option. Either on the one hand they must relinquish actual command, or on the other hand they must simply abandon the mission. That would eviscerate the core military ethos: defeat is a bitter pill. It's hard. The abandonment of the military mission is not the first option, it is only as an absolute last resort, only in the eventuality that there is no other viable alternative. It's never imposed from above as a per se bright-line legal rule in the middle of an ongoing operation.

Let me talk for a second and then I will close about the real-world obligations here. We are not just talking about military defeat in your fourth question. We are talking about chaos. On the facts of this case, a lawfully elected leader is challenged by rebel forces within their country. To simply withdraw says, arguably, more civilians are

going to be killed and injured and damaged, and I don't care; it's not my problem. I don't think that's what Article 28 is about. Article 28 is about a balance between accomplishing a military mission and at the very same time doing all that is reasonably possible to protect the law. There's not one scintilla of evidence in State practice to buttress this artificially opposed -- imposed obligation. And I reiterate: The Trial Chamber provided not one scrap of legal support for this novel position. I close by paraphrasing the Spanish reservation to Article 86 of Protocol I, which says, and this is a close paraphrase, that the military imperatives remain determinative in evaluating the duties required by Article 28. Mr Bemba acted in a manner consistent with the concept of exercising responsible command. In my judgment and in the judgment of this team, he should not be the first commander in world history to be judged criminally accountable for the mere failure to terminate military operations at a time deemed most suitable by an after-the-fact subjective adjudication. Thank you, your Honour.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:05:38] Thank you very much. The floor is now to the Prosecution. Ms Brady.

MS BRADY: [14:05:43] Good afternoon, your Honours. I will be addressing, as I mentioned this morning, all five questions in group D, and I am grateful for you allowing me the extra 10 minutes to do so because they do traverse a lot of very interesting and difficult questions. Very novel questions too.

The first question you have asked is to what extent is a commander's motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy. A commander's motivation for taking measures to prevent or punish is not something that must be established in every case as a matter of law. But in some cases it may be evidentially relevant when assessing and examining the adequacy of

the measures that a commander has taken in order to assess whether he indeed did take all necessary and reasonable measures to fulfil his duties under Article 28. In other words, it may be relevant to assessing whether the measures taken were all that the commander could do in the circumstances. And this, we say, is what the Trial Chamber did in this case in paragraphs 727 and 728 of the judgment. In essence, it is going to be a factual question, in every case. For example, if you have a commander who has taken all the measures that were, in the circumstances, necessary and reasonable, an enquiry into his motivation may be irrelevant, even if he did take all of those measures for entirely the wrong reasons. Probably irrelevant to the analysis.

At the other end of the spectrum, when a commander has taken none of the reasonable and necessary measures which were open to him, his best motivations or best intentions will not exonerate him. But as you know, your Honours, most cases are not so black and white, and where -- and this is a perfect example of a case of this. *Where, as here, a commander has taken only minimal, limited and insufficient *measures, evidence of his motivation then may indeed illuminate the genuineness of the measures he took, and so assist the Trail Chamber to determine *their adequacy and whether the commander took, indeed, all necessary and reasonable measures within his material possibility.

And, your Honours, the fact-sensitive nature of this enquiry can be seen if we compare the approach taken in two ICTY cases. Your Honour Judge van den Wyngaert will be familiar with both of them because you sat on the trial benches of both cases.

In Boškoski, having decided that the accused had not failed to take the necessary and reasonable measures, the Trial Chamber considered that evidence suggesting the

accused would not have been motivated to do more than was required in the circumstances was considered irrelevant when assessing his reliability for failure to punish. The reference to Boškoski can be found in reference list note D.3.

A very different case is Strugar. In Strugar, evidence that the accused knew that the investigation into his subordinates' crimes was merely *a sham -- it was done as *damage control -- he knew that -- to help repair the army's standing and deflect international opinion. It was relied on in that case as relevant and probative to find that Mr Strugar did not take the necessary and reasonable measures to investigate and punish his subordinates' crimes. The reference to Strugar can be found at reference list note D.4.

And what the Trial Chamber did here was -- in fact, the reasoning was unassailable. It is not, as the Defence would portray it this morning, that he is criminally liable. Sorry. Just as we heard, that he is criminally liable just on the basis of his motivations alone.

This is a too simplistic rendition of what the Trial Chamber did. In fact, if you look at paragraphs 719 to 725 of the Trial Chamber's judgment, what the Trial Chamber does is it first reviewed the few measures that Mr Bemba did take. It then found -- so it went through each one. It then found in paragraph 727 *that they were a grossly inadequate response to the consistent information of the MLC soldiers' widespread crimes. It did then note, the Defence is correct, in paragraph 728, that those few measures were primarily motivated by his desire to counter the public allegations and sort of improve the -- or rehabilitate the MLC's public image. But then later, you will see that in paragraph 728, the Chamber concluded, firstly, from the fact that he used such minimal and inadequate measures to address all allegations of the MLC crimes, together with the evidence as to his motives for ordering such

measures, that his primary intention was to protect the MLC's image. Not, in fact, to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the crimes.

And these citations to the Trial Chamber judgment can all be found in our reference list note D.5.

So in summary, in our submission, the Trial Chamber was reasonable to consider Mr Bemba's motivations together, as a lens, together with the evidence of the measures themselves to reach its careful and nuanced findings that he had not taken all necessary and reasonable measures.

I will move on now. I will address question B. And you have asked -- the question asks about the notice an accused must be given of the measures which the Trial Chamber finds he could have taken as a commander. For Article 28 responsibility, an accused need not be notified in the charges of the specific measures that the Trial Chamber finds he could have taken as commander to prevent or punish the crimes of his subordinates. The ad hoc tribunals haven't required this, and this Court should take a similar position. And consistent with the approach of the ad hocs, in relation to the accused -- and I am only dealing now with this element. But in relation to that element about the accused's failure to take necessary and reasonable measures, what the accused has to be notified of -- and I am quoting here. This is from a number of decisions. I think we have quoted about six, seven decisions in reference list note D.6. He has to be notified of, quote, "the conduct by which he may be found to have failed to take the necessary and reasonable measures to prevent such crimes or punish his subordinates."

The ad hoc tribunals have generally found it legally sufficient that the charges plead that the accused did not take the necessary and reasonable measures to prevent or

punish the criminal acts of his subordinates. Again, I point to the authorities in note 6 of the reference list. And this was most recently confirmed by the Appeals Chamber in the Prlić appeals judgment. The reference to that judgment being at note D.7.

These ad hoc tribunals and courts have not required that the charges list the potential measures, each and every one, that the superior could have taken. And this makes good sense because what constitutes necessary and reasonable measures, which would fulfil the duty of a commander to prevent or punish, is not a question of substantive law; it is a question of evidence.

Even the Chamber itself noted at paragraph 197 that it will be a case-by-case enquiry addressed on the facts and depending on the commanders concrete material ability, in other words, his powers. So to reiterate, our position is that what must be pleaded are the superior's culpable omissions, or this could include his insufficient actions. That would be probably the best way of characterising what happened in this particular case. Any measures that he could have taken but did not would be merely evidence of his culpable inaction, and therefore would not need to be pleaded.

Bringing it down to this case, in this case the accused was properly notified of this element of his liability. And I note in this regard that the Appeals Chamber in this very case, in the Bemba case, has already found in its appeals judgment on the evidence decision, the early Appeals Chamber judgment that is listed in reference list note D.9, they found that Mr Bemba had been made fully aware of the allegations against him based on the confirmation decision, the DCC, and other documents.

What we say is that in this case, we went beyond what was legally required, and the accused was in fact on notice of all seven measures, which the Chamber identified in paragraphs 729 to 730 of the judgment which set out the measures, and he was on

such notice from the confirmation decision and DCC, in particular, with further notice being given in auxiliary documents, such as the evidence summary, the IDAC, and et cetera.

Now I'm going to show a slide. I would like that to be published, if I may. All the references, all the paragraph references I am going to refer to are contained in our reference list at note D.11, and I am happy to provide the Chamber and the parties and participants with a copy of the slide, if they would like. I will only be able --

THE COURT OFFICER: [14:17:20] In the meantime, I would like to inform the parties and participants that your table is actually published on the evidence 1 channel.

MS BRADY: [14:17:33] I will only be able to take you, rather briefly, through the slide, but you will be able to see it for yourself. This slide, this chart, tries to set out in very precise detail that of the seven measures which the Trial Chamber listed in paragraph 729 to 730, he was on notice of these matters. And I'll explain how this works.

In the first column, it sets out the list of measures that the Trail Chamber found he should have taken. They are the ones in 729 to 730.

Mr Bemba was on notice of all seven of these specific measures from the confirmation decision, and these are set out in the second and third columns of this chart. And this is including the Pre-Trial Chamber's findings on his material abilities and powers *in paragraphs 458 to 477, and its findings in the column number 3, its findings that he failed to take all necessary reasonable measures in paragraphs 491 to 501.

Now, I have given you the specific paragraph reference numbers in this chart, but they are contained within those paragraph numbers. He also got some further notice of these measures just by way of the pleading of the law on Article 28 in the fourth

column.

Not only that, but then he received further notice, and I believe my friend from the Defence agrees on that point, that he did then receive further notice of all seven from the DCC. Now I am talking about the post-confirmation document containing the charges, the latest one being dated 13 October 2010. And in the last two columns of this chart, the fifth and the sixth columns give the paragraph numbers wherein he was so notified. And again, it comes down to him being given notice from both the description of the powers or the material ability that he had to prevent or punish, set out in paragraphs 23 to 31 and paragraphs 58 to 71, and from the description of the measures he failed to take in paragraphs 91 to 100, and also from some description of the causal link to his crimes in paragraphs 72 to 75.

Your Honours, the Defence argued that he couldn't have known about -- earlier today argued that he couldn't have known that he was supposed to share information with CAR or other authorities, or prudent troop deployment, but you'll see from this chart, and when you analyse the confirmation decision and the DCC, that this is simply not the case.

Turning to the prudent troop deployment which Ms Gibson mentioned, he was on notice that he had powers in relation to the fact he could give orders. He was in charge of military strategy. He could select the battalions to deploy. And then, if you look at paragraph 91 of the DCC, the last bullet point in paragraph 91 actually specifically mentions this as something specifically he could have done. I will read that to your Honours. It says:

"One of the powers he had was to define the objectives of military operations, ie, he could give direct orders to ensure that the concept of operation did not involve the commission of crimes against the civilian population."

It is there in black and white. And I remind your Honours that the confirmation decision and the document containing the charges both have to be read as a whole, just as at the ICTY an indictment had to also be read as a whole. And the references for that can be found in D.12.

This is not a guessing game. We are not saying, you know, "It is somewhere in there. Find out what you could have done." It is actually a narrative. If you read the confirmation and the DCC, it is a narrative of his powers. It is a statement that he didn't take necessary and reasonable measures. It is very clear, and it is set out in the DCC, even in more black and white terms, that he did not take those certain measures despite having powers.

In summary, your Honours, Mr Bemba was properly notified that he failed to take all necessary and reasonable measures, and his claim that he didn't have proper notice of the charges is not sustainable.

I will turn now to the quite different topic of causation, and I would like to deal with the questions in a *reverse order than the questions that you have posed. I will deal first with question D and then I will deal with question C.

In question D you have asked: 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?

As you already know from our response brief, the Prosecution's position is that causation is not a required element for liability under Article 28. As we have shown in that brief, the principles of interpretation in the Vienna Convention on the Law of Treaties do not support having such an element for Article 28. We have also shown that the reasoning and rationale is not, with respect, on this point, on close analysis, convincing; and indeed it gives rise to several practical and policy challenges. I

won't repeat those arguments. We were very extensive in our brief.

But what I would like to stress is that customary international law, as recognised and applied by all the ad hoc tribunals for the past more than 20 years, has firmly rejected any such element for superior responsibility. This Court, of all the international courts and tribunals established this century, the past century, should not be the first to take the regressive step of requiring proof of causation for this mode of liability.

And in answering your question on overlap between assessing causation and assessing the commander's failure to take all necessary and reasonable measures to prevent or punish his subordinates' crimes, I will in the course of that briefly highlight some of the problems we see arising from the inclusion of this element.

Turning first to a commander's failure to prevent his subordinates' charged crime.

A commander's failure to prevent his subordinates' charged crime, which usually involves a temporal and situational closeness, specificity to the crime, will in practice, as a matter of evidence, almost always overlap with any requirement that he causally contributed to the charged crime.

Even the ad hoc tribunals, which, as you will know, reject a causal element, have consistently recognised that there is this evidentiary connection between the two notions. And this can be seen in the references such as Hadžihasanović and others which we have listed in the reference list note D.13.

And Judges Steiner and Ozaki both recognised this in their separate opinions. In other words, when a commander -- when the evidence establishes that a commander failed to prevent a crime, when he knew or should have known his subordinates were committing it or about to commit it, this will almost always be sufficient from an evidentiary point of view to show that he failed to exercise control properly over his subordinates, thus resulting in crimes.

However, such evidence would be insufficient if the causal standard required to link the commander's failure to fulfil his general duty to exercise control properly with the subordinates' crimes is higher than what is required for the specific duty to prevent. Yet this would divorce Article 28 from its object and purpose. This is highly important.

The point of command responsibility is to focus on the objective question of the superior's breach of his specific duties to prevent and punish his subordinates' crimes. And what it would do is essentially convert it into some form of participation in the subordinates' crimes, and it would do that based on a sort of nebulous assessment of whether the superior was a good or a bad commander or exercised -- acted responsibly. And as we have shown in our response brief, this for us is an untenable position.

On the other hand, if you turn to a superior's failure to repress a crime or to submit the matter to competent authorities, which, for ease of reference, I will call failure to punish, as such, per se this failure can never overlap with a requirement to have causally contributed to that crime. I mean, this is a matter of basic logic: A failure to punish cannot per se cause a crime that's already occurred. You can't cause a crime retroactively. That's basic. The Pre-Trial Chamber recognised this. The Judges in their separate opinions did too.

However, a commander's failure to punish a subordinate's previous crime may, in the circumstances, amount to a failure to prevent a subsequent crime. And in that case the causal relation is then between the commander's failure to act and the resulting impunity for the perpetrators, generated at least in part by the commander's inaction. So in this sort of scenario, evidence proving that the commander failed to punish his subordinates will also almost always satisfy a requirement that he failed to exercise

control over his subordinates, thus resulting in the crimes. And this is what the Trial Chamber appears to have had in mind when it found that certain measures that Bemba could have taken would have diminished or even eliminated this climate of acquiescence. That was the finding in paragraph 738.

Now, this logical difficulty, which is most clear for the failure to punish situation or the per se situation, the logical difficulty in applying a causal nexus to failure to punish led the Pre-Trial Chamber to reject causation for this form of Article 28. On the other hand, the Trial Chamber required proof of causal nexus for both failure to prevent and failure to punish. It made sense, Judges Steiner and Ozaki explained, otherwise it would be inconsistent with the chapeau.

Now, what the Trial Chamber judges did in the judgment, they got over this sort of logical difficulty because they required proof of the commander's separate what they called general duty to exercise control properly. For Judge Ozaki, she observed that the duty, which would also include setting up effective systems of supervision and discipline, operates before the forces commit or are about to commit the crimes. That's in her separate opinion at paragraph 17.

For Judge Steiner, who looked to Article 87(2) of Additional Protocol I and the ICRC Commentaries to define what is this concept of general duty, and she said it was things like ensuring the subordinates understand their IHL obligations, maintaining order, having an effective reporting system. She also saw the general duty as different and extending beyond the temporal and substantive scope of the commander's duties to prevent and punish.

And then the Trial Chamber, when it found that Mr Bemba did not exercise control properly over the MLC forces, it relied -- and this is contrary to how the Defence has presented it. The Defence has presented that it somehow just relied on the same

facts again as for failure to prevent or failure to punish, but it actually relied on both, the findings that he failed to take all necessary and reasonable measures to prevent and punish the crimes, as well - it was a dual analysis - as well as its findings that he breached his general duty to exercise control properly, such as ensuring they knew about their IHL obligations and received adequate pay and rations.

But, your Honours, it is on this need to prove that the commander failed in his so-called general duty to exercise control properly where we have most disagreement. And as we have shown in the response brief, one of the problems is that the scope and the content of such a general duty is most unclear.

The IHL doctrine of responsible command may provide assistance in some cases - it did here - to define a commander's general duty to exercise control properly. But we ask, rhetorically speaking: Why go there? The ICTY Appeals Chamber in Halilović dealt with this issue of what it means, this general duty, and they clearly rejected that there was a need to prove such an additional element for superior responsibility.

The reference to Halilović can be found in note D.19.

The criminal law doctrine of command responsibility can be applied universally and objectively. But how a commander may carry out his command responsibly, which is really about the doctrine of responsible command, will depend on several factors, which may vary country by country, army by army, and for - commanders may differ - for commanders of irregular forces. It is also difficult, outside a police context, to apply this concept to civilian superiors.

We invite this Chamber to follow the Halilović appeals judgment and confine the conduct elements of superior responsibility to only the commander's specific duties to prevent or punish and not to additionally require proof that the commander failed to carry out his general duty to exercise control properly or indeed to require any proof

of a causal element at all for Article 28.

Your Honours, I will turn now to the question C.

This is actually my fourth question but the third in your list. You have asked: If causation is required under Article 28(a), what degree of nexus is required? Do you use a "but for" test, a high probability, reasonable foreseeability or some other test?

Well, given our position that Article 28 should not include a causal element at all, the Prosecution is somewhat between a rock and a hard place to answer this question. That being said, if this Chamber were to decide that Article 28 requires a causal link between the commander's failure to exercise control properly over his forces and the subordinates' crimes, it should be no higher than the commander's failure increased the risk of the commission of the subordinates' crimes. This will come as no surprise. This was the standard the Pre-Trial Chamber adopted in its confirmation decision and the one that the Prosecution followed at trial.

In other words, your Honours, a low standard, and distinct from those applied in Article 25, to reflect that a commander's liability under Article 28 is - this is important to remember - it is for failing to fulfil his duties as a commander under IHL. It's not a form of participation in a crime.

In actuality even this low standard in our view adds little or indeed nothing to the culpability of the superior's breach of his duties while potentially impeding the fair, consistent and effective application of the law across the diverse range of groups of individuals to which it applies or may apply in the future, military, paramilitary and civilian superiors, in every kind of organisation from non-state organised groups to the most professional state military forces.

So for these reasons we don't agree or we cannot concur with any of the causal standards in your question, the other ones - but for, high probability, reasonable

foreseeability - and we can't see a solution in other tests which have been proposed, like substantial operating cause, significantly contributes or any of these sorts of standards. In our opinion all of these standards suffer from the same problem although to slightly different degrees.

On the facts of this case, the Trial Chamber found that Mr Bemba's conduct was causally linked to the subordinates' crimes and indeed it applied a high standard. It applied what I would call a variant of the "but for" test for causation. Had he taken the identified measures, quote, "the crimes would have been prevented or would not have been committed in the circumstances in which they were". This is at Trial Chamber judgment 213 and 241.

But it's interesting to note that neither the Trial Chamber nor the Pre-Trial Chamber could really resolve this causation conundrum. The Trial Chamber couldn't agree on a minimum standard for causation and stressed that its factual finding on causation was in fact higher than required by law. Judges Steiner and Ozaki both acknowledged the difficulty of determining causation for omissions in general, as did the Pre-Trial Chamber. This was quite apart from the further difficulty of reconciling causation with the doctrine of superior responsibility.

Even the Pre-Trial Chamber, which at least on this issue reached judicial consensus, only found it possible to say that no direct causal link needs to be established and it only *needs to be proved that the commander's omission increased the risk of the commission of the crimes. And even for that attenuated form standard, that only applied to failure to prevent and not to failure to punish.

In our view, Judge Steiner's proposed test of high probability and Judge Ozaki's test of reasonable foreseeability do not offer any better prospect. A high probability is essentially similar to a but for test but with a somewhat lower degree of predicted risk,

and for the same reasons *I have outlined would be inapposite for superior responsibility. And a reasonable foreseeability test, by focusing on the mental state of a reasonable superior in the accused's position, firstly it looks more like a mens rea standard, but if you take it as an actus reus standard, it seems more than just an objective test. And it's difficult to see how that reasonable foreseeability test could be applied consistently and fairly for all groups to whom Article 28 applies, paramilitary, military and civilian superiors.

So in summary, your Honours, on this point it may well have been straightforward in this case to find causation proved, but to assume that all Article 28 cases, all cases of superior responsibility in the future will be like this one and to require this element in future cases would, in our submission, be unwise. Although we've sought to answer your question, we remain of the view that the imposition of any degree of causal requirement would subvert the object and purpose of Article 28, remove its focus from the superior's breach of his duties to prevent and punish, and is inconsistent with both customary international law and international humanitarian law.

That brings me to the final question which I will do in the next five minutes.

This concerns whether a commander is under a legal duty to withdraw his troops in the event he becomes aware that they are committing crimes and the associated questions.

A commander may on the facts of the case be under a duty to withdraw some or all of his troops if he becomes aware that they are committing crimes. But let me stress, and in this respect I agree with Professor Newton, this is not an absolute legal duty. It doesn't accrue to every commander regardless of the circumstances. Such a duty would only arise where, in the particular circumstances of the case, full or partial withdrawal of the troops is or becomes a necessary and reasonable measure to meet

his or her duties under Article 28.

And it is well-established what will amount to necessary and reasonable measures. It's not a matter of substantive law, it's one of the evidence. And this means two criteria have to be met.

First, the superior must take the measures that are necessary in the circumstances, it must be appropriate for the superior to discharge his obligation to prevent or punish his subordinates' crimes. The reference, the authorities in support of that proposition are listed in the note D.25.

And second, the superior need only take measures that are reasonable. The measure must fall within his material powers or ability *which is linked to his effective control. The authorities are in reference note D.26.

In practice, a large-scale withdrawal of troops will usually not become necessary and reasonable on the facts until all other options have been exhausted, and in that respect we find some agreement with Professor Newton about the nature of this last, last resort nature. Another way of putting that is that usually a sledgehammer is not necessary to crack a nut, though it will undoubtedly do the job.

So before the wholesale withdrawal of troops may ever become legally required, the commander will have other more targeted and more directly relevant measures such as redeploying particular subordinates, changing plans, implementing disciplinary measures, triggering criminal investigations and so on and so forth. They will be both the necessary and reasonable measures and failure to take those measures will suffice for liability.

And this is just such a case. The Trial Chamber in fact concluded its analysis on Mr Bemba's failure to take all necessary and reasonable measures. It's true they observed that he could have withdrawn his troops and did not do so. That's in

paragraph 730. But what's important to note is that it preceded this observation by detailing all the other necessary and reasonable measures he had failed to take in the paragraphs 729, 730 preceding that.

So while this measure formed part of the Chamber's analysis of all the measures he could have taken, in our submission it was not at the heart of his conviction.

The Trial Chamber found that Mr Bemba failed to take what could be called a panoply of preventative and disciplinary measures of which an order to withdraw was merely the ultimate resort.

On this basis your Honour's question about the possible consequences of an order to withdraw becomes somewhat academic. However, our position is that as a matter of principle, if complete withdrawal of troops becomes necessary and reasonable to discharge a superior's duty to prevent or punish crimes, this cannot be subordinated to any competing objective of military advantage or to avoid military defeat. In another area of our response brief on pillaging, we have shown, we have argued that international criminal law has consistently rejected a general defence of military necessity. Nor does IHL contemplate that criminal means are permitted in the pursuit of military victory. In other words, the means and methods of warfare are not unlimited. And likewise in the context of superior responsibility, both the ICTR and the ICTY have rejected the idea that a superior might be excused from taking measures which were genuinely necessary and reasonable even in the most difficult of prevailing circumstances. And I point your Honours to the cases in reference list D.27, Bagosora and Popović.

And, your Honours, those conclude my submissions on group D questions.

Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:46:22] Thank you very much,

Ms Brady. You are well in time.

So now the word is to the victims, Maître Douzima.

MR N'ZALA: [14:46:40] (Interpretation) Thank you, your Honour, for allowing me to address the Court.

I shall endeavour to respond to the first question under -- which forms part of group D and then my colleague Ms Douzima will take over.

The question deals with the motivation of a commander to take reasonable and necessary measures in the event --

THE INTERPRETER: Inaudible.

MR N'ZALA: [14:47:38] Under 28(a)(i) the commander or a similar person who does not take all possible measures in his power or, for example, asking for an inquiry before the relevant authorities, this is the statutory provision that we are dealing with here.

Now, if we look at 28(a)(i) we can consider the provision from three different viewpoints.

Now, first of all, first of all, the duty to prevent the commission of crimes before or during the actual event, that is to say the crimes, there is a duty to keep such crimes from happening. Afterwards, there is the requirement to refer such matters to the competent authorities for investigation. According to ICTY jurisdiction, the court has but one duty, namely, to determine the responsibility of the authority. This was pointed out in the Delić case of 15 September.

Now, regarding the three levels of duty, first of all, the duty to prevent crime. We look to the Pre-Trial Chamber that identified such matters in the decision relating to the confirmation of charges of 15 June 2009.

It states in this ruling that although the Statute does not provide details about this

duty, the Pre-Trial Chamber agreed with the ad hoc tribunals regarding measures, for example, ensure that the forces be sufficiently trained in international humanitarian law; ensure that the conduct of warfare follows the usual standards or -- and, finally, take disciplinary measures in the event of atrocities.

Now, concerning the duty to prevent and to punish crimes, there are two prongs. First of all, to stop, to put a stop to the crime that is being committed. And then there is the other prong, namely, punishing the troops responsible for the crime.

Now, regarding the third perspective, that is to say, referral to appropriate authorities for investigation regarding reasonable, the reasonable measures, the jurisdiction tends to point towards an individual case-by-case assessment with regard to the commander's ability to take such measures.

Now, the grounds, or the motivation, rather, of the commander must be in light of the circumstances, the facts, and the commander must ensure that wrongdoing is not carried out within the territory under his control.

Now in the case at hand, well, Mr Bemba, as the supreme commander and as the top commander, was bound to take all reasonable steps to prevent crimes committed by the MLC, and to punish those who committed such crimes by referring individuals to the relevant authorities. This was ruled upon by the Chamber at paragraph 133.

Mr Bemba did take a number of steps but not particularly to keep crimes from being committed. But, rather, he took a number of steps that were very much in his own personal interest, the interest of the MLC as well. Proof of this can be found in the trials, that is to say, the court martials in Gbadolite a number of soldiers were trialed for a number of extremely minor offences. Also during that trial a number of people were punished, but I do need to point out that only low-ranking soldiers were put on trial. Subsequent to the decisions taken by the court martial, there was -- such

decisions were very much harmful, prejudicial to victims, because there was actually no provision made for the victims. As for the measures taken during the trial, these measures were insufficient and did not meet the threshold of Article 28. These requirements were notified to Mr Bemba in the decision confirming the charges, and he was fully aware of these matters before the trial. So this concludes my arguments, and I will now turn over to Ms Douzima.

PRESIDING JUDGE VAN DEN WYNGAERT: Thank you.

MS DOUZIMA-LAWSON: [14:54:13] (Interpretation) With regard to subparagraph b that has to do with information and the measures that the accused was to take, we must point out that the Chamber was seized of the matter after the fact, not when the crimes were being committed. Thus, the committee cannot rule upon measures that were taken at the time of the actual events.

In our opinion, the Chamber's finding regarding measures can only be given when the decision is issued on guilt in consideration of evidence brought before the trial, brought before the Chamber during the trial. So it is during the trial that the Trial Chamber can realise that the measures taken were not effective, that were not sufficient, that were not proportionate to the events, that being before or during the commission of the crime. It is not the judge's job to tell the accused during the trial what he was supposed to do. Because the Chamber -- and we would not want the accused to be complaining about a presumption of guilt.

Regarding the causal link. Now, if we consider the specific nature of command responsibility, Article 28, let us say a commander is put on trial for an omission, it is not necessary to establish a direct causal link between the commander's inaction and the crime committed by his subordinates. And I refer to the decision confirmation of charges paragraph 425.

What is more, this is not required under Article 28 of the Statute. The Judges of the Pre-Trial Chamber and the Trial Chamber wanted, for this particular mode of responsibility, they thought it was sufficient to show that the accused's inaction increased the risk that crimes would be committed, the crimes that formed the bases for the charges.

What is more, the Pre-Trial Chamber observed that 28(a) of the Statute does not explain the degree of causation required, and that Chamber suggested that the degree could be determined by using a common law threshold. That is to say "but for", but for the failure of the commander to take reasonable and necessary steps to prevent the crimes. And had it not been for that "but for", the crimes would not have been committed by the troops under his authority.

Now the Court's jurisprudence shows us that if a commander is to be found criminally responsible under 28(a) of the Statute is sufficient to show that his inaction increased the risk of crimes being committed, namely, the crimes forming the basis of the charges.

As for question D, which has to do with the assessment of the causal link, to my mind there are no additional supplementary elements. It suffices for those elements to be -- which be appropriate for the military commander to take on his responsibilities and reasonable steps, that is to say, reasonable steps that are within his power.

Now, if we can move on to the following sub question: Does a military commander have an obligation to withdraw his troops in the event he were to realise that such troops were committing crimes?

Well, we believe that a commander must assess within a certain framework, namely, the measures to be taken. So this is not a legal requirement. But a commander, as a hierarchical leader, must assess what measures should be taken. There are three

levels of measures that can be taken before, during and after, as my learned colleague mentioned. And furthermore, measures or steps can be taken during the conduct of warfare that can restrict or limit the commission of crimes or even to put an end to the commission of crimes.

THE COURT OFFICER: [15:00:10] Maître Douzima, you have two minutes.

MS DOUZIMA-LAWSON: [15:00:13] (Interpretation) I am at the end now. I would like to say that regarding the time of implementation of this withdrawal measure, would it concern all the troops or only the elements who have perpetrated crimes? Our answer is yes, but once again you have to identify the perpetrators. But I repeat once again: The commander has to carry out an assessment depending on the circumstances in order to determine whether to withdraw only the perpetrators of the crimes or all the troops in the field. So it has to be assessed on a case-by-case basis. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:01:18] Merci, Ms Douzima.

Ms Brady.

MS BRADY: [15:01:20] No, your Honour, we won't need to make a response to that. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:01:24] Thank you.

Professor Newton.

MR NEWTON: [15:01:29] Madam President, may it please the Court. I rise just to take a couple of minutes and then I will defer to my colleague, if that's appropriate. I want to respond, firstly, to the assertion made at the very end of the Prosecution's intervention that this case has anything to do with the concept of military necessity. The concept of jus in bello military necessity is not raised on our pleadings; it was not part of our arguments. It's a completely irrelevant, extraneous concept.

The Prosecutor argued that imputing a causation requirement would have the effect of turning Article 28 -- and I will quote it here, "converting it into some form of participation". The commander is way past that. The commander is a participant in the conflict, albeit a very special participant with a very special set of duties and a very special set of irreplaceable duties. That's why the nexus requirement embedded into Article 28 in the language as a result of is so important.

There has to be a causal nexus demonstrated by the evidence and found as a matter of law by the Court in order to link a commander to the actual crimes committed on the ground. And in that vein, I wish to make two very short points.

Number 1, effect of the Prosecution position is to simply rewrite the meaning of the word "properly" as it has been established in case law and in customary State practice all around the world. And here I would just direct the Court. As we all know, the commander's duty is to take feasible measures within his or her power to oppress. We all agree on that. That's easy law.

Go back and look at the reservations taken by NATO allies to that language, Article 86 and 87. What you will see, nation States around the world making very express reservations to that word "feasible". And I will read it to you because it's important to get precisely. That the commander has to take the actions that are practically -- practicable or practically possible, taking into account all circumstances ruling at the time, including -- and here is the emphasis -- including humanitarian and military considerations. The Prosecutor would simply have military considerations written out of that equation at some unspecified point. She uses the phrase "after all other obligations have been exhausted there is a duty to withdraw". When is that? That puts the commander in a Hobson's choice. She listed the things, the feasible measures that a commander might take in response to particular pieces of

information. Oddly enough those were the exact same set of actions that Mr Bemba took on these facts.

And at some unspecified place at some unspecified time the commander magically has a duty to withdraw that appears post hoc. It's a Hobson's choice: I either withdraw upfront or I risk the fact that somebody later in a subjective post hoc manner will say, "Ah, you didn't withdraw quickly enough and therefore you are criminally culpable". There is no case in international law that takes that standard and that would violate State practice by eliminating valid military considerations from the step of what's feasible.

And secondly, very quickly, the Prosecutor's position would essentially turn Article 28 into strict liability. There is nothing in the travaux of the Rome Statute, there is nothing in State practice that says that a commander is responsible simply by virtue of that position, and in fact that's the very reason why there's been so much focus put on the duties of the commander to balance humanitarian imperatives with the proper accomplishment of the mission. Because the commander is the focal point, the commander is the key player in that process. Deleting the words in the nexus requirement what we call the causal connection, causation, as a result of is in the Rome Statute, the Prosecutor would essentially delete that from the Rome Statute.

Madam, with your permission I turn to my colleague.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:05:44] Thank you.

MS GIBSON: [15:05:45] Thank you, Madam President.

Just a few points from me in response.

Firstly on the question of a commander's motivation. We didn't submit that the Trial Chamber only took into account Mr Bemba's motivation when finding that he failed to take measures, we said it was one of the factors relied upon by

the Trial Chamber. And we agree with the Prosecution that at paragraph 728 of the trial judgment the Trial Chamber took into account motivation together with other factors, but for us that's still a problem. And in our view that's reflected in the case law. And the Prosecutor's reliance on the Strugar case is misplaced because in that case the Trial Chamber did make reference in its reasoning to the fact that the accused wouldn't want the events of 6 December, the shelling of the old town, investigated properly.

But on our reading of the trial judgment it didn't then use this motivation to undermine the measures that General Strugar subsequently took, and that's the key difference. The Trial Chamber ultimately found General Strugar liable on the basis that he didn't take any measures to prevent and punish crimes. If you look at the Trial Chamber's conclusion at paragraph 446 of the judgment, the Trial Chamber found the general liable on the basis that he took no measures, not because the measures that he did take were motivated by not wanting the JNA to look bad in the eyes of the international community.

So even in a case where a Trial Chamber identified that an accused had a particular motivation not to want to put in place measures, they still didn't take it into account in undermining the measures that he did take. So it's different from the Bemba case, it's a wholly separate situation where our Trial Chamber assessed Mr Bemba's motivations and used that to specifically impugn the measures that he took.

Turning then quickly to the question of notice. The Prosecution argues that at the ad hocs there was no requirement to list the measures that a commander should have taken in the indictment. But if I draw your attention to just some of the ICTY indictments you can see that the prosecution did it because they realised that it was part of giving an accused the tools that he needed to effectively defend himself. The

Boškoski amended indictment at paragraphs 15 to 17 lists with precision the inquiries and the investigations Boškoski should have taken, into whom and from what dates. The indictment in Mladic, the indictment in Halilović, the indictment in Hadžihasanović, they all set out the measures that the commanders should have taken and failed to take.

And if you look at the case law that the Prosecution relies upon, the language of that is actually quite important and it stems back to the Media judgment, the Appeals Chamber judgment in the Media case and, I will just read the language, the Appeals Chamber of the ICTR said "it will be sufficient in many cases simply to plead that the accused did not take any ... measures".

But you have to consider the context of the Rwandan cases. In Rwanda, it wasn't the case that you had these commanders who were taking some measures and not taking others and they weren't really adequate. You had commanders who were taking no measures to prevent and punish crimes and who were often in the mix with the perpetrators committing the crimes themselves. So in those sorts of cases of course the level of detail needed in the indictment would be less. The indictment just says the accused took no measures and the Prosecution's evidence was the accused took no measures and then the judgment said the accused took no measures. It's not the case that the judgment in the end said: Well, here is the list of specific measures that you didn't have notice of that we think you should have taken.

So the context was very different in those cases and so that case law doesn't necessarily assist. And in fact the strongest indicator that we have that the specific measures should be listed in the indictment is the fact that the Prosecution did it. And they didn't just do it in our case. If you look at the indictment in the Ntaganda case or in the Gbagbo case, the Prosecution lists the measures with specificity, the

measures that it said President Gbagbo could have taken and didn't. And so that's looking like a practice now at the ICC.

And it's not the Prosecution's fault that the Trial Chamber ended up convicting him on the basis of measures that we didn't have any notice of. The Prosecution in this case did the right thing, they put the measures in the DCC for us. When the judgment came out in March 2016 it was revolutionary to us that Mr Bemba was held liable on the basis of these factors, but it must have been extremely surprising for the Prosecution as well because there was no indication anywhere in this case that Mr Bemba was going to be held liable for not moving troops to avoid civilians. It wasn't in the indictment, it didn't come from the witnesses, it wasn't in the closing brief. It literally came from nowhere. And now the Prosecution has to put together this chart where it's patching together paragraphs from six different documents to try and put together something that we should have had notice of in 2008 in the indictment.

The very fact that the Prosecution is forced to make a chart like this where it refers to hundreds of pages of pleadings and you have to acknowledge that in our case just the IDAC was 670 pages long, the fact that they need to put this together to try and show that Mr Bemba did have notice really proves our point.

Turning then briefly to the question of the causal nexus. Clearly we take an opposite position from the Prosecution on the question of causation, whether or not there is a causal nexus in Article 28. We say that clearly there is. But I note that the Appeals Chamber's question directs us to consider to assume that there is a causal nexus in Article 28, so I don't intend to go into this question beyond just making reference to paragraph 52 and following of our reply brief.

But one last point I would like to make is that my learned friend in her submissions

seemed to argue that the Trial Chamber did make a finding on the causal nexus and she cited to paragraph 213 of the judgment. And if you look at this paragraph, this is the paragraph in which we say the Trial Chamber explicitly declined to define the causal nexus that is required in Article 28. They say a nexus requirement would be satisfied if X. That standard is too high. "Nonetheless, in light of the factual findings below, the Chamber does not consider it necessary to further elaborate on this element."

The Trial Chamber didn't define the nexus and it couldn't because we see from the separate opinions that two of the three Judges actually have a different opinion on where it should lie. Judge Ozaki saying it should be reasonable foreseeability. Judge Steiner saying it should be a high probability test. So they couldn't make that finding and they didn't make that finding. And we say that that's a significant error that undermines the causation finding that my learned friend's submission seem to skip over in that sense.

And those are the points we would like to make in the time we were allotted.

Thank you, your Honour.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:13:38] Thank you very much, Ms Gibson.

So we are now going to withdraw for half an hour and then come back with questions from the Bench, if any, and possibly with the next topic.

THE COURT USHER: [15:13:55] All rise.

(Recess taken at 3.13 p.m.)

(Upon resuming in open session at 3.49 p.m.)

THE COURT USHER: [15:49:57] All rise.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:50:24] May I start with a question to Ms Brady. So it is about Article 28 being a mode of liability, if I understand you correctly, but there is no causation required. So my question is: How does that -- how can you combine that with the principle nullum crimen sine culpa? What's the link? How can you make the link between the commander and the crimes? Because you say it's a mode of liability. Wouldn't it be more appropriate then to consider it as a pure dereliction crime, a stand-alone crime, without relation to the crimes committed by the subordinates?

MS BRADY: [15:51:25] Thank you for the question, your Honour.

Yes, our position is that Article 28 is a mode of liability, but it is a sui generis one. That's the best formulation for it.

We don't think it should be considered just a dereliction of duty offence. And indeed, the commander ends up being responsible for the crimes of his subordinates. That's clear.

Your question is: How does this square with the principle of culpability? And in our submission, what is required essentially for a principle of culpability is you've got to have a personal nexus to a crime. It is not fair to hold someone responsible unless there is a personal nexus.

But in our view, a personal nexus is not just about strict causation. You can have a personal nexus, in our view, in other ways. And in our submission, the other elements of command responsibility, Article 28, provide the reason why you should be culpable. You are the commander of this essentially what could turn out to be a lethal killing force. You had the material duty to prevent or punish. You knew or you should -- you knew or you should have known of the subordinates' crimes. And here is the key: You failed in your duty to prevent or punish. We say that that is

sufficient to satisfy the principle of culpability in criminal law doctrine.
I tried to think of an example when I was thinking about this question myself earlier before the hearing. I tried to think of an example of where you could have a domestic counterpart. We all know that, for example, a parent who leaves a child -- a parent has a duty of care towards, say, a child, a young baby. If the parent leaves the baby in the room and - I mean, doesn't place the baby in the room, just it's left in the room - and leaves the room, leaves the house, well, the door is open, of course, the baby could, and does, die of thirst.
Now, what did the baby die of? It died because it did not drink. But the parent is clearly going to be -- in most jurisdictions, common law at least, I can say that that parent is going to be legally criminally responsible. Why? Because of this duty that the parent had to the child.
I think another example could be where you put someone in a position of danger. You know, there is the duty to rescue cases in common law. You don't have to -- if I see somebody standing on the road wearing headphones and a blindfold, and a truck -- and a truck, I know, is coming down, I don't actually have a duty in common law to step in. But if I've put that person there, then I do have a duty.
Now, you could say that it was the truck that -- let's say the truck comes along and kills the person because they don't hear or see the truck. In that situation, what killed the person? The truck. But I didn't actually do anything, because I just put the person on the road, not intending necessarily that a truck was going to come along, but I would still be morally - and criminal law should follow moral culpability - I would be morally and criminally responsible in that situation.
So in short, the other elements satisfy it. I hope that satisfies your Honour's question.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:55:16] (Microphone not activated) I have seen Professor Ambos being eager to answer.

Now, I would advise us not to engage too much in comparative criminal law discussions, because this is precisely an area where the civil law and the common law are very different. So if we can keep it short and proceed to the next question.

MR AMBOS: [15:55:34] Yes, I mean, just the example which was given by Helen Brady is an example. We chose that the position not to require causality is the wrong position, because in this case of a parent who would leave the baby alone, not giving -- not feeding the baby, it's not just the duty. The duty makes an equivalence between act and omission.

And that's, by the way, it's across the board, it's common law and civil law jurisdiction, but it's in addition the but-for causation, because I'm only responsible -- under all our jurisdictions, all your jurisdictions on the Bench and from the OTP and our jurisdictions, you would only be responsible if you caused the death of your child by not feeding it.

So the question you posed, Judge van den Wyngaert, is a very important question. Apart from the "as a result of," the wording of Article 28, which is very clear, I mean, if you look through the books, and my colleague quoted our reply in the response para 41 and following, there are a few topics -- maybe not one topic where the literature, the academics do not agree that this is causality, "as a result of". We even quote the five versions, Arab, Russian, Spanish, French of the Statute, to interpret this. But apart from this literal argument, the core argument was in your question. That's a question of culpability, or what we say is that a causation in criminal law is the fundamental of everything. I cannot be responsible. Look at Michael Moore's work, blaming in law, common law and civil law authors, there is no responsibility without

a cause, my cause or contribution to result. So that's logically impossible. Thanks.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:57:29] Thank you.

Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [15:57:32] Yes, to follow up on that, Ms Brady, one thing that has resonated in not only your written submission but also your submissions this morning, cutting across what Mr Cross said when he spoke, was that Article -- your position is that Article 28 is not causation. It creates a sui generis crime, so to speak. Now, can we look at, please, Article 28. I am taking you through Article 28 and back to Article 5, and so on. Article 28 -- are we there? -- begins "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court." Now that phrase, "crimes within the jurisdiction of the Court", now, that phrase, "crimes within the jurisdiction of the Court", keeping that in mind, let's go to Article 5. Article 5 specifically repeats that phrase as the title of Article 5, quote, "Crimes within the jurisdiction of the Court", unquote, tells us there: "The crime of genocide, crimes against humanity, war crimes, the crime of aggression". And you tell us that Article 28 creates a sui generis crime.

How do we locate -- how do we characterise, to begin with, that sui generis crime? And how do we locate it in the context of Article 5, crimes within the jurisdiction of the Court?

And then we go over to Article 22(2), Article 22(2) tells us: "The definition of a crime shall be strictly construed and shall not be extended by analogy."

How do we reconcile all of that? Where does your sui generis crime fit in in all of this?

MS BRADY: [16:00:30] Your Honour, I think you have hit on a key point in the opening part of your question when you say that at the beginning of Article 28 it says,

"In addition to other grounds of responsibility for crimes within the jurisdiction". In addition, I mean you have to ask why would we even need Article 28 if you could -- you could actually, if you need a causal requirement and it becomes therefore a sort of accessorial form of participation in crime, well, Article 25(3)(c) on aiding and abetting would have done the job because, effectively, it would deal with the situation where a commander was considered to be participating in the subordinates' crime because you're requiring that causal link.

And this is indeed the problem that we see with causation. We think that the Trial Chamber -- or if you require a causal link -- misperceives Article 28 as a participatory or accessorial mode of liability when it's not. It is sui generis. I don't know quite how else to put it. It's its own mode. It's been a mode that has been applied without anyone seriously considering that there was not -- it breached the principle of personal culpability --

JUDGE EBOE-OSUJI: [16:02:05] Could it be that the reason why it is sui generis relative to Article 25 would be because Article 28 creates a duty which Article 25 does not create?

MS BRADY: [16:02:19] Yes, your Honour. That is a very good way of putting it. It's a unique non-participatory mode of liability. It sort of restores the balance between Article 25 and 28. If you require causation, you're essentially making Article 28 substantially redundant.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:02:45] Is that really so? Because the mode of liability is different, or the mens rea is very different from Article 25(3)(a).

MS BRADY: [16:02:54] Yes, but there are other modes, your Honour, in Article 25(3) that have a lower requirement than Article 25(3)(a). So, I mean, when the drafters put this in, into the Rome Statute, they were obviously keen to criminalise a mode of

liability which was different from forms of what we might call direct or direct participation in crime.

And why? Because --

PRESIDING JUDGE VAN DEN WYNGAERT: [16:03:21] I'm sorry, I must correct myself, I meant to say (c), aiding and abetting.

MS BRADY: [16:03:26] Oh, (c), yes.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:03:27] And so there of course the mode, the mens rea is very different.

MS BRADY: [16:03:32] Your Honours, I think I would have to think about that question further before giving a definitive answer. But in our submission the general answer is that once you require a causal link, you are effectively turning this into an accessorial form of participation, and it is not.

JUDGE EBOE-OSUJI: [16:03:59] What's wrong with that?

MS BRADY: [16:04:01] Because it's not needed. Because the whole purpose of command responsibility is to make sure that a subordinate - that a superior who has charge of this lethal killing force, potential lethal killing force which is sanctioned to go out and kill in certain situations, to make sure that he or she keeps his troops under control properly. And that is expressed in the two duties, which are failure to prevent and failure to punish.

And that should be enough to support liability. If a person who has all those powers, material powers over the subordinates, and they commit crimes, in light of their duties to prevent or punish, that, in our submission, should be sufficient for criminal liability.

And it's just different. It's a different animal. It wouldn't be correct to call it accessorial liability. Why put it in that box? Why confine, why conflate those two

things, they're clearly separate in the Statute, as you've pointed out.

JUDGE EBOE-OSUJI: [16:05:10] Now, going still on the same theme, you submitted that causation is not a requirement according to the jurisprudence of the ICTY, which you cited in your list of authorities. Now, could it be that the reason why the ICTR, ICTY authorities would be correct in their own realms would be necessarily as a result of the text of the Statutes of those tribunals?

Mr Cross this morning told us that we are to stick, I think, to paraphrase his submission, we are to stick with the provisions of the Rome Statute regardless of what the ICL says. He can correct me.

Now, let's look at, again, back to Article 28. Maybe you don't need to look at Article 28, because we know that Article 28 says "as a result of", and that is the bridge that connects the commander to the subordinate. We agree with that.

MS BRADY: [16:06:26] Yes. Well, I'm not sure if I completely agree with that, because, your Honour, *"as a result", the crimes which the – "as a result" could modify either criminal responsibility or crimes. And we say that the reading of Article 28 has two alternative plain readings. The first one would be that the subordinates' crimes result from the superior's failure to exercise control properly.

JUDGE EBOE-OSUJI: [16:06:59] (Microphone not activated) what we agree on is that in respect of --

THE INTERPRETER: [16:07:05] Microphone please.

MS BRADY: Oh, microphone.

JUDGE EBOE-OSUJI: [16:07:07] Yes. Sorry. In the text of the Rome Statute in Article 28, the phrase, quote, "as a result of", unquote, appears.

MS BRADY: [16:07:17] Yes.

JUDGE EBOE-OSUJI: [16:07:21] We agree with that.

Now, can we go to Article 7 of the ICTY Statute. Article 7(3) in ICTR would be 6(3), the identical term. But Article 7(3) tells us this:

"The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Unquote. It does not say "as a result of", doesn't it?

MS BRADY: [16:08:14] That's correct, your Honour.

JUDGE EBOE-OSUJI: [16:08:15] So, in a sense, is it possible to say that what Article 7(3) does is more or less create - negate a possible Defence that the defendant may make, once you consider that they're part of, they participated, the defendant cannot say, "Sorry, I did not, I was not part of it", and it says, "No, that's not good enough." Whereas Article 28 actually requires a more positive involvement in the enterprise, the one they characterise as criminality.

MS BRADY: [16:09:08] Your Honours, of course we can see a difference in the language used between the ICTY and the ICC. This textual problem did not arise in the ICTY that we're confronted with today. And, your Honours, I think the best way I can address this question is - and, again, to rely heavily on what we've already submitted in our response brief, and that is how now should you read what these words mean?

Yes, they are, quote, "new". They weren't in the ICTY and ICTR Statutes. But that's where we say there is no interpretation, there is no ordinary meaning. It's not in any of the, in the English in any of the authentic texts. It is not clear that it is an unambiguous element. At the best you have ambiguity.

And then we say you have to then look at the provision in the context, and a contextual analysis certainly doesn't support causation and for many reasons we've shown it is hard to reconcile the failure to punish with causation, at least for the per se, for the first crime or the first in a series of crimes. And also because, as your Honour has pointed out, that there are separate modes in Article 28 and Article 25, and they should be read separately.

Also very important, why you should -- I'm not saying you should read the words out, because, for us, it's ambiguous that they should be read in in the way that the Defence is suggesting.

Also, you also have to look at the object *and purpose --

PRESIDING JUDGE VAN DEN WYNGAERT: [16:11:02] In the context.

MS BRADY: [16:11:05] In the context.

JUDGE EBOE-OSUJI: [16:11:06] Could it be that that context is because they're going to hold somebody criminally responsible for a crime that they themselves did not use their hands in committing and which you cannot say, or you may not be able to say that they had formulated the intent to commit that crime? Could that be the context to look at it?

MS BRADY: [16:11:26] That might be a factor, your Honour. But I think that when we talk about context in this situation, we're talking about the context of the whole Statute and in light of the object and purpose of what command responsibility.

Having a causation requirement is actually contrary to the object and purpose of Article 28. It would significantly affect or restrict the Prosecution, especially for failures to punish.

I mean, you could never have successor commander liability, for example, if you have causation requirement. And that then defeats a goal of IHL.

Yes, that's where I'll stop.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:12:13] May I at this point in time perhaps turn to Professor Newton, because thinking of IHL, Article 86, 87, and you were making the point about these reservations. Can you please expand a little bit on this? Because I'm not sure I fully understand what you meant to say.

MR NEWTON: [16:12:36] Well, the point very simply is that the reservations themselves - well, let me backtrack just a *second with your permission, Madam President.

I vehemently disagree with the reading this morning as articulated by Mr Cross that the word properly, that you can divorce Article 28 from existing State practice. Article 21 explicitly says that in particular international humanitarian law and State practice are relevant to interpreting and applying the Statute.

What that means in this context is in the plain language of Article 28, as a result of the failure to command -- the commanders' failure to exercise proper control, fair enough. The implications of that reading is that properly is to be interpreted solely within the context of the Rome Statute. The problem with that is it's nowhere defined, which means by definition you have to reach out to the broader patterns of State practice and establish customary international law. And in this context one of the strongest indicators -- I was speaking narrowly on the duty to withdraw, but I think it also has implications for larger questions such as the appropriateness of measures, other aspects here. But the fact is that the reservations are very clear. NATO countries, and I can give you the list, Australia, let me find my piece of paper here, the UK, Algeria, Austria, Canada, Germany, Ireland, Italy, The Netherlands, Spain and among others have taken a specific reservation for the purposes of the word "feasible", interpreting what's proper for a commander to take responsibilities, that it balances

both humanitarian, in other words, the core imperatives of the laws of armed conflict, jus in bello, to protect civilians and military objectives.

And the point I was making was that imposing a duty to withdraw at some arbitrarily defined point based on some in this case brand new appearance in international criminal law negates the military considerations. It simply says humanitarian considerations dominate at all times for all purposes. At some unspecified point you had a duty to withdraw which you therefore failed to do; therefore, that was a reasonable measure; therefore, you're responsible for everything that came after the point that we arbitrarily decided as a post hoc subjective matter you should have withdrawn. And Ms Brady essentially said that. She said after all objectively possible things, as an absolute last resort.

The problem for a commander on the ground is that the law of war is extremely clear. He has competing duties, both to civilians and at the same time simultaneously to control combat operations and achieve the mission. The possibility of just walking away and saying "I quit" will get him relieved on the spot. He will not be a commander or she will not be a commander any more. The law absolutely allows commanders at all levels at all times to balance those competing considerations, both in the language of the reservations, both humanitarian considerations and military considerations, to take what's practical, what's feasible.

As another example that's why in so many other places in jus in bello you see this tension embedded. The duty to warn when circumstances permit. There is no strict hierarchy between, it's all contextual. And that's the point I was making, that a strictly imposed legal duty to withdraw has been nowhere recognised in the case law. In a similar way, there's no specific duty to issue a clarifying order. There's no court yet that has said, ah, we explicitly recognise this duty or that duty. It's all contextual.

And therefore coming along and imposing an automatic duty to withdraw undermines that norm and violates established customary international law and widespread, I would say, universal State practice.

The only alternative is that a commander simply severs relationship with troops and says "I don't want to hear anything. I don't want to know anything. I don't want any reports" which would be irresponsible in its own right. And as I said, that would violate every tenet of command authority.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:17:02] But back to the reservations, what I'm not clear about in my mind is if Articles 87, 86 and 87 stand for customary international law, how then can reservations be of guidance to interpret the rule of customary international law?

MR NEWTON: [16:17:19] Well, that's a good point. The reservations in fact reflect State practice.

Let me put a very tangible example here. When a Canadian or a German military commander, the Kunduz was mentioned investigated by my colleague, when a German unit goes in a NATO operation, it would be completely irresponsible and unprecedented for either one of those two extremes to happen, either A, the Germans or the Canadians or any other NATO ally sends that force and severs all command relationship, we want no information, no logistics, no nothing, you're now under the complete authority of some other commander, that does not happen in State practice. And it's not just a matter of what the language and opinio juris. That's State practice, universal State practice.

On the other extreme, it's also universal State practice that when there are allegations, and this is the discussion earlier this morning about the linkage between the level of knowledge and the appropriate measures, that's why that's so important, because

contextually the necessary and reasonable steps that I'm required to take are absolutely dependent on the knowledge that I have and the sources of that knowledge, the information as I had it at that time then determines what's necessary and reasonable.

What the Prosecution and the Trial Chamber recommends now is that at some unspecified point my duty to withdraw automatically supersedes all of my efforts to prevent and repress and take necessary and reasonable measures. There is no citation for that in State practice or an opinio juris in the Trial Chamber's opinion. And I would argue that that would fundamentally, as I said, fundamentally change the construct of the laws of war.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:19:02] Thank you.

Do you have a follow-up question, Judge? Yes.

JUDGE EBOE-OSUJI: [16:19:07] But, Mr Newton, this, you did argue earlier as part of your presentation earlier in the main part that the presence of warfare imposes absence of order and morality. I'm quoting you.

In a sense that is something that some known generals have in a sense said, from von Clausewitz that said war is violence on an extensive scale; to General Schwarzkopf, who is known to have said that war is a profanity, people trying to kill each other. When you have that situation of what we can accept as extreme danger created by circumstances of war, does it not impose an obligation to abate the danger given the particular circumstances of the case? Is it unreasonable then to construe that duty to abate the danger to mean possibly withdrawing troops in whole or in part?

MR NEWTON: [16:20:49] Thank you so much for allowing me to address that. It's an excellent question and I hear this all the time from people who would essentially

approach jus in bello that are uncomfortable with the very idea that the law of war, because it has this tension, simultaneously allows permitted killing and permitted destruction of property and horrible things.

Going back to *Vattel, Vattel wrote, and you mentioned some later writers, this is an old idea, that we absolutely should avoid war at all costs, from which the idea that we should withdraw at the very first opportunity in order to minimise costs. That's the roots of that idea.

The problem with it is that's not the real world. The law of armed conflict makes a very sharp distinction between the jus ad bellum, the entry into conflict, and the jus in bello, from which the commander's duty derive, different bodies of law. So the duty to withdraw, once you're lawfully into an armed conflict under appropriate circumstances, cannot arise as a necessary and reasonable measure because the law embeds, it suffuses would be the word, suffuses these competing duties simultaneously at all times in all places.

On the one hand, the appropriate pursuit of the military mission, and on the other hand, overarching dominating humanitarian concerns. Those exist in the same time in this place. And the implication of the position that you would advocate -- I don't know that you're advocating, you're asking -- would be that if I were on the other side, I would watch the very best commanders that are deployed, the very best units, the very most combat effective units, which, oh, by the way, by definition are the ones who's commanders are most on the ball in terms of exercising appropriate command functions, imposing discipline, doing investigations, controlling the operations. Those are the very best commanders, predictably therefore the most combat effective commanders.

And the minute that happens, I would immediately begin filing reports and fake

news and social media accounts and flooding accounts so that at some arbitrary level down the line a duty to withdraw is kicked in.

And my point would be in response to that sort of line of argument that the law of war cannot belong to the party that achieves as an asymmetric advantage through having the best media outlets and the widest distribution and the best reporters, that is not what the war of law is about. It's about simultaneously achieving both a military advantage that's appropriate and lawful and complying with the requirements of the law. And that's why in all precedent to this point in time there has never been a case anywhere, and frankly, it's not only not recognised in the case law, it's never even been hinted at or alluded at in the case law.

JUDGE EBOE-OSUJI: [16:23:51] So you're saying that the question had not been considered and rejected? Let me rephrase.

MR NEWTON: [16:24:04] No, no, I understand. I understand. It's not only that it's not -- it's not been considered and rejected, because it's such a fundamental modification of the basic construct of the laws of war. The laws of war from the ground up are designed to do both simultaneously.

Allowing the law itself through a per se legal duty to be withdrawn, and to go back to the earlier position by Ms Brady, at some subjective point when somebody later post hoc decides, oh, you at this arbitrary point had done enough, she made the point that it ought to be the last resort, when is that for a commander on the ground? When I'm on the ground conducting hostilities I have these two completing tensions. And as I said it's a Hobson's choice for me. As I'm beginning to take necessary and reasonable measures on a whole variety of things, that's where the case law addresses that.

And so if in fact it's not this that it's not been considered and rejected, it's not even

part of the law. That's why it's such a fundamental or would represent such a fundamental modification of the basic fabric of the laws of war.

And going back to the reservation point, you would simply be saying the only thing that matters in an ongoing military operation at some arbitrarily designated point are the humanitarian imperatives, military considerations, military efficacy, strategic matters. And my argument is that that would actually introduce chaos. It would open the door to allow more war crimes.

JUDGE EBOE-OSUJI: [16:25:35] I haven't heard you argue, perhaps I don't know whether you meant just to leave that blank spot completely or what, that there may be a situation where criminality, at the barest minimum criminality, rampant criminality of troops may really not be something that competes with a military objective in certain circumstances. In a sense you have troops who were running amok murdering raping women, pillaging, murdering people, but there is was no military objective nearby, you're saying that even in those circumstances there is no duty to withdraw those troops?

MR NEWTON: [16:26:20] That's exactly what I'm saying, your Honour, because the requirement of what's necessary and reasonable in that sense is context specific.

I can think of lots of things right off the bat that I might do. I might -- well, for one thing I'm going to be doing investigations and prosecutions on the ground, which were done. The Prosecution simply assumes here that prosecutions are always appropriate. No. I have to have actual evidence against specific individuals.

I might well take, as has happened in countries around the world, a particular commander and say "You have created an enabling atmosphere", and here I'm citing the AFRC case paragraph 290. The situation you allude to is some lower level commander that has allowed a permissive environment, an enabling atmosphere. I

might relieve that commander for cause. I don't need to pull out the entire unit. I put a new commander in who I trust. I do perhaps what Mr Bemba did. I send my executive officer, I send someone that I trust to go say "Hey, I'm hearing all these rumours about all these terrible things. That is not my commander's intent. I want you to go onto the ground and tell me exactly what's happening." Also an appropriate, necessary and reasonable step, exactly what was done in this case.

The problem is if you presume that there is a duty to withdraw, a duty imposed as a matter of law, it's impossible for me acting in realtime on the ground as a commander to take that step unless, the only alternative would be that this Court, this Bench fashioned some temporal test, some other subjective test. And the problem with that is, in all of the case law, the law is very clear, both in opinio juris and state practice, that this is always a contextual test. And the point is that I can think of lots of other things I would do, you know? I could investigate, I could prosecute. I could issue, as in Hadžihasanović, clarifying instructions. I have heard all these things are true; here is my clarifying instructions. Another necessary and reasonable step that was taken in this case.

I could revise my rules of engagement, which has been done in state practice both in Afghanistan and Iraq. There are lots of other things I could do short of just saying, "Ah, we've now reached the magic point and I must withdraw."

Does that answer your question, your Honour? Is that responsive?

JUDGE EBOE-OSUJI: [16:28:48] You've made your submission, so we'll take all that into account when we deliberate.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:28:55] I was thinking of an example of the Strugar case that you mentioned this morning or this afternoon. In Strugar, the appropriate reasonable measure would have been to take Mr Kovačević

from the Hill Srd that was shooting the Dubrovnik. So here we have an example of something that was feasible in the concrete situations of the case, but I wouldn't generalise that, of course.

So are there any more questions?

MS BRADY: [16:29:24] Your Honours, could I just make a few brief comments on this line of argumentation. You know, your Honours, the more I hear the submissions, I think we're perhaps not so far apart, because the Defence is basically, Mr Newton has basically said that there is some sort of automatic duty to withdraw that comes up at a certain time, and that's just very hard and places the commander in a Hobson's choice. But our position on when there is a legal duty to withdraw is a much more nuanced one than the one he's presenting.

Your Honours, and it's the one that the Chamber did in these circumstances. We're not suggesting that one crime or pillaging, "Oh, quick, we've got to get -- the military commander has got to remove the whole lot of troops." That would be absolutely unrealistic. Of course not.

Or even, you know, moving it up. Some, you know, greater amount of criminality. But it all comes down to what is necessary and reasonable. If the whole group, if the whole set of troops is, to use a very colloquial expression, rotten to the core, then, after taking all the necessary - or other necessary and reasonable measures, if they don't work, I mean, how could you leave this group who is raping, pillaging, murdering people, how could you leave them in situ, I ask? It just seems to be completely irresponsible.

And just a word on how the laws of war operate and jus in bello and jus ad bellum, the position that we've advocated that commanders have a duty when dictated by circumstances to withdraw their troops to discharge their duties under Article 28, it's

clear it's not engaging any questions of jus ad bellum about the resort or not to armed conflict.

The position we're advocating falls squarely within and only engages questions of jus in bello, and that is that once an armed conflict is on foot, those who are participating in it, it's a simple proposition, I think it's uncontroversial, must discharge their obligations under IHL to protect persons who are not or no longer participating in hostilities. This is a very basic proposition. And to limit the effects of armed conflict.

The rules of war IHL, as we know, prohibit winning a war by any means. And they restrict the means of warfare. So it follows then that principles, or IHL through principles such as the doctrine of command responsibility prohibit a commander from focusing solely on winning the war and hence shutting their eyes to atrocities that their subordinates have been engaging in in the armed conflict. So that's why the test is they must take all necessary and reasonable measures to prevent, repress or punish these atrocities.

I don't see, they can't escape responsibility by pleading that in order to win the war they could only pursue certain measures less than those that were necessary and reasonable, which might ultimately, and it's a nuance, it's a last resort, we have said that, that it might ultimately include more drastic measures leading to withdrawal of troops if these measures were the only way or the most appropriate way to halt these atrocities. And this appears to have been what the Trial Chamber had in mind.

And I also note that we have to also look at the facts, look at the facts here.

Mr Bemba acknowledged in November of 2002 in a meeting with the UN secretary-general's representative, Mr Cisse, that he could and would ensure an orderly withdrawal of troops, so had that in mind.

I believe the decision within the MLC to make the order for *withdrawal was mid-January, but it's not actually -- an order to *withdrawal is not given by Mr Bemba -- January of 2003. Mr Bemba doesn't give the order for another month, mid-February.

And, in fact, the total withdraw has not happened, is not complete until a month later, mid-March. And, you know, the crimes that occurred in that time in Mongoumba, for example, could have been prevented in that time had he not delayed in taking what was at that point a necessary and reasonable measure. Why? Because the other measures were clearly not stopping these crimes.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:34:20] I have a factual question here: Isn't it the case, I may be mistaken on the facts, but isn't it the case that after January/February there is a decrease in the underlying crimes, underlying acts in the way? Because if you take the scope of Mr Gallmetzer, of course, that doesn't matter, but if you look at the charged crimes, underlying crimes, isn't there a decrease?

MS BRADY: [16:34:47] Your Honours, this also touches on tomorrow's question, because crimes are continuing. And for the purposes of the contextual element of crimes against humanity the crimes are continuing. However, we did not charge crimes -- we did not give him notice of underlying acts beyond what was contained in the underlying acts.

So, therefore, I don't think you could make the per se statement that categorically there was a decrease. What we do have is we have his conviction based, and that's different, we have his conviction based on the events that happened in Mongoumba around about early March 2003.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:35:41] The underlying acts charged there are much less than what you charged, for example, in PK12. That

there is a procedural difference there, isn't there?

MS BRADY: [16:35:49] Yes. I mean, clearly, the Prosecution's -- the central focus of the Prosecution's case was in Bangui, P12 and P22. But there were also crimes which occurred in Sibut in late February and then Mongoumba in March of 2003.

So what I'm saying is I don't think --

PRESIDING JUDGE VAN DEN WYNGAERT: [16:36:11] (Overlapping speakers) only one crime in Sibut.

MS BRADY: [16:36:14] Yes, but it doesn't mean, your Honour, it doesn't mean that only one crime happened.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:36:19] (Microphone not activated)

MS BRADY: [16:36:22] It means that we only charged for that one, which we accept.

MR NEWTON: [16:36:31] Your Honour, may I make just a very --

PRESIDING JUDGE VAN DEN WYNGAERT: [16:36:31] I'm sorry.

MR NEWTON: [16:36:31] I just want to make a very narrow, quick -- since we went back to the facts it very precisely illustrates the point that I was perhaps ineloquently trying to make a while ago. Look at the facts. There are rumours and allegations from some media sources and from some other maybe perhaps reliable sources that reach Mr Bemba's attention. That's in the record. That's unquestioned.

What does he do? He initiates contact with the UN. He requests an international investigation. He issues his own. He sends his executive officer. He sends people he trusts. He sends people to develop court martial. They do some court martials, admittedly of low-level people, but that's precisely the kind of action that we ask commanders to do to prevent an enabling atmosphere. I mean, there is a famous quote from a very famous British historian that says when an officer -- SLA Marshall -- when an officer winks at a depredation by his men, he's adopting that

depredation. This is not what Mr Bemba did. He took action. He took a succession of actions. Arguably, on these facts, an increasing succession of actions. Now, as Ms Brady just said, after they have taken all of these actions, if they don't work -- and that's precisely my point -- where is the arbitrary point that in that realtime decision-making I'm supposed to magically wake up one day and say, aha, the law has always allowed me to balance humanitarian imperatives with my duties as a commander and a civilian superior. Now, magically, I have reached the end of that road. And that's why I said earlier that, in essence, once I've reached that magical point that was subjectively created post hoc, anything that happens after that I'm now strictly liable for. That's not the law of command responsibility. That is not at all what the law of command responsibility is supposed to do. As long as I'm taking actions that I subjectively believe based on the information that I have available to me -- and I may not have correct information always. The point is that as long as I am continuing to take actions to create what -- or to prevent what the *AFRC Appeals Chamber called an enabling atmosphere, to stamp that these are wrong and I don't condone that activity, as long as I'm taking actions, I have met my responsibilities. And continuing -- then it's impossible to withdraw without contextual detail a precise point at which we say, ah, now you have the duty to withdraw. And I defer very quickly to my colleague, with your permission.

MR AMBOS: [16:39:06] I have two quick follow-up points. The first refers to the previous discussion on the structure of Article 28. I mean, we should really not lose sight that the connection is to the crimes. So that's why it was correct when Judge Eboe-Osuji made his point taking part in the crimes. Yes, the commander is taking part in the crimes and the link is as a result of. Otherwise, we would have a dereliction of duty offence or failure of supervision offence as in the German law,

which I drafted with other colleagues, Claus Kress and others.

We have three provisions. We have a command responsibility provision with the failure to intervene, and being responsible for the crimes, and we have a dereliction of duty offence, which is independent of the crimes.

You know, you can say a commander failed to properly supervise without any impact on the crimes. That may be an offence, more lenient offence. Or you say he failed to supervise and as a result of this failure crimes have been committed. And that's the situation of 28.

And the second point is, we should not forget we are talking about criminal law responsibility. We talked about jus in bello all the time. That's a primary provision. In the Kunduz case, which we mentioned, the Afghanistan Kunduz case of the German general, he was removed from his position. He had disciplinary proceedings. The German prosecutor general stopped proceedings on the basis of command responsibility, but still he had a lot of sanctions. So that's another thing. And here in this field we are talking about the criminal law of command responsibility, and that should have a more restrictive interpretation.

And I think we very much *agree with OTP, if you say pressing social needs, this kind of terminology you used in your brief shows to us that we are very, very far away, because we demand realistic application of the command responsibility doctrine. Otherwise we will be counterproductive. If we have overly broad command responsibility doctrine, in the end nobody will apply this doctrine any more. It's just not applicable in the field.

Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:41:21] Thank you.

Judge Monageng.

JUDGE MONAGENG: Thank you, Presiding Judge.
I would like both parties and participants to comment on this question.
With respect to the issues of whether a commander is required to be given notice of the measures that he failed to take, could it not be said that those measures are inherent in the commanders' duty; for example, withdraw and redeployment of his troops, and that therefore that no notice need to be given to him. Thank you.
Maybe we start with the Defence.
MS GIBSON: [16:42:20] Thank you very much, Judge. The situation in this case was that Mr Bemba was given notice of a specific number of particular measures that he -- it was alleged that he was required to take and failed to do so. And if you look at the jurisprudence on measures, there is no particular checklist that exists in international law that a commander can necessarily tick off and say: I've done all these measures and therefore I cannot be criminally liable for the actions of my troops.
And the law has specifically moved away from creating that kind of a checklist because these cases are so fact specific. There will be some cases in which, to use your example, redeploying troops to avoid civilians would be a reasonable measure and in other cases where it wouldn't necessarily be so. And so to argue that you can just put in an indictment that generally you didn't take necessary and reasonable measures wouldn't give the Defence, wouldn't give the accused enough notice to be able to properly defend the charge because it could end up happening, as was in the case with Mr Bemba, that he was convicted on the basis of specific things that he could have asked questions to witnesses about, that he could have brought evidence about, but he wasn't able to because he didn't have that notice.
And if we were in a situation where international criminal law had created this sort of

checklist, then I would say yes in answer to your question. But the law has specifically shied away against that and has allowed the Prosecution and the Defence to run each case on its facts.

MS BRADY: [16:44:06] Your Honour, Judge Monageng has raised I think a very interesting point and it's very relevant to this case. It may go a little far, and we don't need to rely on that proposition, but if you look at the measures that the Chamber found that Mr Bemba should have taken, they are the basic things that a commander should -- are inherent in his duties.

He should ensure -- I'm just going from the list in the Trial Chamber's judgment: He should ensure that his troops have proper training in IHL, that they are properly supervised. He should ensure that he conducts investigations and prosecutions and punishments if need be. He has to give proper orders. If necessary, he has a duty to replace and remove and dismiss subordinates.

Those four I think are absolutely going to be in every case. So, I mean, that's why they are also not just in the factual assertions that we've made in the confirmation decision and the DCC but also in the statement of the law on Article 28 which appears in the confirmation decision.

I take Ms Gibson's point that there will be measures that may be required in some cases, not in others. To be honest, the only one that I think is kind of specific to this case is that he was under an obligation to share information with the CAR or the other authorities, but that's really just a subset of his more general duty to take necessary and reasonable measures to submit to a competent authority a matter, if he's on notice of the crimes.

So I think your Honours, you have an interesting point, but probably the Prosecution, we don't need to go so far. I think that, you know, it is only fair to give some notice

of the reasonable measure, the reasonable, necessary -- to say that he did not take the necessary and reasonable measures and then in light of the material powers that he had, that is set out. It's clear that sufficient notice is given.

I hope that answers your question.

JUDGE MONAGENG: Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [16:46:26] Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [16:46:30] Yes, question for Ms Gibson. You submitted that in the main part of your submissions earlier today that it will be incorrect to assess the criminal responsibility of the commander in the terms that -- or, rather, from the point of view that his *omission increased the risk of subordinates committing the crimes. Now, in the exchange with Mr Newton earlier, the Prosecution spoke to that, it seems to be common ground that warfare is a dangerous enterprise, and you will not dispute that. If that is so, is it correct then to assess the responsibility of a commander, as you appear to have done in your submission, from the perspective of an ordinary accused, knowing that -- again, Mr Newton spoke about the AFRC case from the Special Court for Sierra Leone setting up the proposition that assessment of a commander's responsibility would be done from seeing whether or not his conduct enabled the *crime? That enabling of the crime, is it possible or not to look at it from the perspective of the concept of endangerment given that the *war circumstances create circumstances of extreme danger. You have a situation where one could say that the commander is implicated in *a construct of circumstances that created the risk of harm, training of soldiers, arming them and possibly deploying them to the place where they're put in a position to commit crimes.

If all that is correct, would it then be correct to assess his responsibility or his failure from the perspective of any old, any ordinary accused person in a criminal case?

MS GIBSON: [16:49:17] Thank you very much for the question, Judge.
It would be our position that a commander is not necessarily like any other accused who's charged under other modes of liability. And because of the very factors that you mentioned, because a commander necessarily is involved in arming people, giving people guns and then sending them out into areas where they are going to be around civilian populations in extremely difficult circumstances, it's precisely because of that that command responsibility exists and imposes these obligations on commanders which allow them to be held liable in this very unique circumstance. It's not like someone who is accused of committing or who is accused of aiding and abetting. This is a form of liability. We don't agree with the Prosecution that it's a crime. It's a form of liability that's unique in that it means people can be convicted, commanders can be convicted, even when they didn't commit the crime. Have a look at the facts of Mr Bemba's case. He wasn't committing the crime. He wasn't one of the perpetrators. He wasn't in the same country as the perpetrators. He didn't give orders to commit the crime. He didn't share the intent of the perpetrators. He didn't have any relationship to the crime base itself. But we're saying, we're acknowledging that command responsibility is unique because of the specific circumstances of warfare that allows for someone who is properly charged and with evidence against them to be held responsible.
I mean, if you think of an aider and abettor, for example, if someone is accused of aiding and abetting, what is their relationship to the crime base? Someone who is aiding and abetting is encouraging, assisting or lending support to the principal perpetrators and they're doing so in the knowledge that their substantial contribution is assisting in the commission of specific crimes.
Command responsibility is so much more arm's lengths than that. This comes back

to the discussion of whether or not command responsibility could be given away just because we have accessorial liability in the Statute or whether or not command responsibility really is a form of accessorial liability. It's not. It's something that's very different and unique and it allows for criminal culpability to arise in circumstances where you have someone who is so far removed from the crime base and it's because of these very factors that you mentioned that it allows for that culpability to arise if all the circumstances are fulfilled.

JUDGE EBOE-OSUJI: [16:52:01] So you would accept then, is it the case, that one way of looking at Article 28 may be from the lens of the theory of endangerment, the crime of endangerment? I see somebody nodding on your end.

MS GIBSON: [16:52:22] I'm happy to *cede to any of my colleagues, but I mean, all the writing, all the academic writing on command responsibility sort of justifies, justifies the fact that you're imposing liability on someone who is necessarily so removed from the crimes on the basis of this idea that they've sent -- they've given people guns and sent them out into a civilian population. So to that extent, yes, I agree with you.

MR NEWTON: [16:52:45] Can I add two sentences to that, your Honour? That's precisely why the causal nexus is so important here, causation, as a result of, because from the perspective of the victim, take a proportionality offence, absolutely from the victim's perspective they can't tell at all whether a particular bombing, or a particular -- endangerment is not quite correct because all civilians in a war zone are in danger to some extent. That's why the law of armed conflict has such a broad general set of protections embedded for civilians.

So just looking at it from the endangerment perspective from the perspective of the victims doesn't quite get at the legal nexus. That's why "as a result of" is important,

because there is always endangerment at some level for civilians in a conflict. And whether that's a patrol of Bosra, British patrol, they're fired upon, innocent civilians are killed as a result of the very fact that the British sent out a patrol. They didn't shoot them, but they're killed as a result of the fact that they sent out a patrol. Yes, the very act of sending out a patrol endangered civilians in that sense, but nobody that I know would say the very act of sending out a patrol automatically generates criminal liability if you are ambushed and a round -- a stray round goes through a wall and kills a civilian. That's why the "as a result of" language in Article 28 is so important, that the commander assume has legal criminal liability as a result of the failure to exercise control properly. That's why that phrase must be read in its entirety. I'm sorry, that was more than two sentences.

JUDGE EBOE-OSUJI: [16:54:22] That's all right. But I'm trying to understand from your submission how the theory of endangerment is necessarily inconsistent with causation. It seems to me you are saying that it is the same thing that --

MR NEWTON: [16:54:40] Well, endangerment, I would use the other phrase "risk of harm", the very act of deploying into an area where there are no civilians. In a perfect world, we would fight wars in deserts. That would have my vote. In a perfect world we would fight no wars.

The very act of deciding to deploy forces by necessity creates endangerment or in your words risk of harm to civilians. That's why the very fabric of the laws of war jus in bello puts such an onus on the commander. So that's why a pure endangerment approach or a risk of harm approach doesn't quite get there because it undermines or underweights, undervalues, would be the right word, the appropriate professional obligations of the commander.

Yes, civilians are going to be endangered. That in turn creates in me the professional

obligation to do all the things that we expect professional commanders to do, to ensure operations, to receive reports, to prosecute people, to conduct investigations, all of those things anticipate and allow for a zone of endangerment. It's impossible to imagine some arbitrary legal standard where we say just the risk of harm has now been sufficiently met that, boom, criminal liability or endangerment.

That's why the language, and I go back to it, the language in the AFRC opinion is useful because it talks about an enabling atmosphere. That's not just the possibility that crimes would occur. I think we're saying the same thing. In all wars there is a possibility that crimes will occur. In all armed conflicts civilians are endangered. Every time I do anything of a military nature there is a risk of harm. That does not suffice for command responsibility in the criminal sense under Article 28 of the Statute or any other established military practice, your Honour.

JUDGE EBOE-OSUJI: [16:56:31] But it seems to me from your submission now and from what you've said also earlier that I sense from you a certain concern about strict liability. And I think you did speak in those terms, that that is what Article 28 is not about, you're saying it is not about strict liability. And the Prosecution, they're saying that they do not argue that it is about strict liability.

Now, for you, does that fear really arise, when you looked at Article 28 in the terms of the first part saying "as a result of" in proper control as a result of. So --

MR NEWTON: [16:57:17] Madam President, with the permission of the Bench I take 45 seconds?

PRESIDING JUDGE VAN DEN WYNGAERT: [16:57:21] Sorry?

MR NEWTON: [16:57:22] With the permission of the Bench perhaps 45 seconds to respond?

PRESIDING JUDGE VAN DEN WYNGAERT: [16:57:25] 45 seconds to respond?

MR NEWTON: [16:57:27] I'm conscious of the hour in light of what was said earlier.
JUDGE EBOE-OSUJI: [16:57:31] If I can finish.
MR NEWTON: [16:57:32] Oh, I'm sorry.
JUDGE EBOE-OSUJI: [16:57:34] I haven't finished actually. Sorry. I was setting up my question. The first part of 28 speaks of improper or failure to control properly as a result of. So that in a sense one might say, correct me if I'm wrong, that would be a condition precedent to liability. It opens the door.
But the box, that's not the end of the story. *There is also… there may be something in the nature of a condition subsequent, which is what you see when it says failure, where "knew" or "should have known" or -- and failed to take reasonable measures. So you may have a scenario where your condition precedent is met. But then liability is dissolved if you look at the condition subsequent. So you open the door and close it the other way. Does that still worry you about strict liability?
MR NEWTON: [16:58:48] I think I would just revert to what we said earlier, your Honour. It's a great insight, and I have to think in more detail about some hypotheticals that might meet those sets -- set of facts on the ground. What we strive for, and what Article 28 does on its face, is create a symmetry. In the law of command responsibility, to impute that criminal responsibility on to commanders, as you say, both those elements, what you term "condition precedent" and "condition subsequent", that's only appropriate in a situation where you have a high level of responsibility. That's why the Prosecution's submission that any increased risk, that does not get you to liability under command responsibility, which is why we go back to the endangerment or risk of harm language.
There has to be a sufficient symmetry between the individual positive act and, in this context, the act of omission, the failure to take necessary reasonable -- that's why that

standard has to be very high. What we've said is but-for. There has to be a causal nexus. That's true both in the language of Article 28, and I believe it's true in light of the larger obligations established in customary law and State practice.

That's what we expect commanders to do, to do everything within their power to eliminate that causal nexus. And that's why we hold them accountable when they fail to do that. We don't hold them accountable on a strict liability basis for everything that conceivably happens, et cetera.

PRESIDING JUDGE VAN DEN WYNGAERT: [17:00:08] Thank you. I think there is a last observation or question, because we are nearing the end of the hearing.

JUDGE MORRISON: [17:00:15] It just occurred to me, Professor Newton, when you said you wish wars are fought in the desert. Of course, in times gone by, in the Middle Ages, wars were fought on a battlefield by professional soldiers who would march from different directions to the battlefield, and the side that had the most men alive at the end of the day was deemed to have won the war. I mean, I think what you are saying is the changing nature of warfare means that you can't have a one size, one solution fits all prognosis.

MR NEWTON: [17:00:52] I would concur with that, your Honour. Remember, on these facts there were seven different groups operating, seven different loyalist groups operating in that environment. And so disaggregating in this complex environment specific responsibility to a specific individual becomes very difficult. That's why we've got to get the law right here.

PRESIDING JUDGE VAN DEN WYNGAERT: [17:01:14] Okay. I think this brings this very interesting hearing to an end. So thank you to participants, parties, interpreters, stenographers, judges. So we will resume tomorrow morning at 9.30. So the hearing comes to an end.

THE COURT USHER: [17:01:32] All rise.

(The hearing ends in open session at 5.01 p.m.)

CORRECTIONS REPORT

The Appeals Chamber has made the following corrections in the transcript:

*Page 36, line 8: “primary” is corrected to “binary”

*Page 123, line 10: “submission” is corrected to “omission”

*Page 123, line 18: “crime.” Is corrected to “crime?”

*Page 123, lines 19-20:

“war, circumstances, create circumstances of extreme danger, you” is corrected to

“war circumstances create circumstances of extreme danger. You”

*Page 123, line 21: “constructive” is corrected to “a construct of”

*Page 128, line 8: “The results of that” is corrected to “There is also… there”

SECOND CORRECTIONS REPORT

The Court Management Section has made the following corrections in the transcript:

*Page 5, line 2: “Appeals Chamber” is corrected to “the Appeals Chamber”

*Page 5, line 13: “on in” is corrected to “in an”

*Page 7, line 3: “question B” is corrected to “ ‘question B’ ”

*Page 7, line 4: “sub-question 3” is corrected to “ ‘sub-question iii’ ”

*Page 7, line 8: “fina” is corrected to “fine”

*Page 16, line 24: “there is” is corrected to “those”

*Page 20, line 4: “if may I” is corrected to “if I may”

*Page 30, line 13: “you” is corrected to “we”

*Page 30, line 17: “an objective” is corrected to “the objective”

*Page 30, line 24: “claim” is corrected to “blame”

*Page 33, line 21: “Profession” is corrected to “Professor”

*Page 33, line 23: “principle” is corrected to “principal”

*Page 38, line 14: “and” is corrected to “of the”

*Page 39, line 24: “wherefore” is corrected to “where for”

*Page 40, line 1: “queue” is corrected to “cue”

*Page 46, line 7: “specious” is corrected to “species”

*Page 47, line 11: “likes” is corrected to “lights”

*Page 51, line 6: “pack” is corrected to “back”

*Page 58, line 14: “widely” is corrected to “wildly”

*Page 69, line 5: “must” is corrected to “much”

*Page 71, line 15: “Whereas” is corrected to “Where, as”

*Page 71, line 16: “measures. Evidence of” is corrected to “measures, evidence of”

*Page 71, line 17: “the” is corrected to “their”

*Page 72, line 5: “a sham. It was done” is corrected to “a sham -- it was done”

*Page 72, line 6:

“damage control. He knew that “is corrected to “damage control -- he knew that “

*Page 72, lines 18-19:

“that there were grossly” is corrected to “that they were a grossly”

*Page 75, line 21:

“in paragraphs 458 to 477 and its findings in the column number 3. It's findings” is corrected to “in paragraphs 458 to 477, and its findings in the column number 3, its findings”

*Page 77, line 15: “reserve” is corrected to “reverse”

*Page 83, line 20: “need” is corrected to “needs”

*Page 84, line 1:

“I have outlined be inapposite” is corrected to “I have outlined would be inapposite”

*Page 85, line 10: “which is he linked” is corrected to “which is linked”

*Page 104, line 14:

“as a result, the crimes which the -- as a result could modify” is corrected to “ ‘as a result ‘, the crimes which the – ‘as a result’ could modify”

*Page 106, line 10: “in” is corrected to “and”

*Page 107, line 7: “session” is corrected to “second”

*Page 111, line 4: “Vitale, Vitale wrote” is corrected to “Vattel, Vattel wrote”

*Page 117, lines 1 and 2: “withdraw” is corrected to “withdrawal”

*Page 119, line 14: “FRC” is corrected to “AFRC”

*Page 120, line 17:

“agree with OTP. If you say” is corrected to “agree with OTP, if you say”

*Page 125, line 11: “accede” is corrected to “cede”