

## **Concurring Separate Opinion of Judge Eboe-Osuji**

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## Concurring Separate Opinion of Judge Eboe-Osuji

*This perception that a conviction is an indication that the Court is doing its work, and that of an acquittal the reverse is true, must be disbanded. There is no such thing as an endemic right to a guilty verdict. The endemic right lies in a just verdict.*

—Anthony Carmona SC.\*

### I. The Crux of It

1. The crucial question in the appeal is not whether victims suffered violations. There is ample evidence that they did. And they deserve, in my view, every rehabilitative assistance that individuals,\*\* national governments and the international community can offer, including under the Rome Statute. The central question, however, is whether Mr Bemba, the Appellant, is criminally responsible for those violations that the victims suffered.

2. The appeal was much vexed in its host of issues, as the various opinions show. And I, too, fussed much—as this opinion shows. But, in the end, in my view, it all comes down to the following considerations.

3. A central feature of the case, which made it difficult for the prosecution in the specific circumstances of the case, is that the Appellant was not a perpetrator. He was a commander, and was at all material times remotely located in another country. While remoteness of location is not a controlling factor of innocence, it can complicate the question of guilt (as it does in this appeal) depending on the particular circumstances of a given case.

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4. At the conclusion of his trial, the Appellant was convicted of crimes against humanity and war crimes. But he was not charged with actually committing them himself. His charge, rather, was that, as a *commander*—though remotely located in a different country—he had failed to:

(a) prevent or repress those crimes against humanity and war crimes which his troops were alleged to have committed; and,

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\* Anthony Carmona SC, President of the Republic of Trinidad and Tobago (2013-2018); formerly Judge of the International Criminal Court; formerly Judge of the High Court of Trinidad and Tobago; formerly Prosecution Appeals Counsel, International Criminal Tribunal for the former Yugoslavia. Address at the International Criminal Court's Inaugural Ceremony for the Opening of the Judicial Year 2018, 18 January 2018 at the International Criminal Court, p 12. [Emphasis received]

\*\* Such individuals would include Mr Bemba himself. Indeed, in light of the outcome of the appeal, I must hope that Mr Bemba will use his new lease on freedom to do the following: assist victims of violations (including victims of rape) that occurred during the period of his involvement in the CAR war, regardless of the question of his own legal responsibility to do so; and, also, become an ambassador for lasting peace and human development in his country and continent.

(b) prompt the investigation and prosecution of those troops for such crimes.

5. Having found him guilty of such *omissions*, the Trial Chamber convicted him of those crimes against humanity and war crimes. He appealed. After much deliberation, three of the Appeal Judges (the Majority) decided that the Appellant's conviction must be reversed and a judgment of acquittal entered; while two of the Appeal Judges (the Minority) dissented, insisting that the Appellant's conviction must be upheld. In the end, the Appellant was acquitted on appeal, by a majority judgment. Although I had initially favoured a retrial instead of an acquittal, I decided in the end to form part of the majority for acquittal, for reason that I shall explain later.

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6. I am bound to stress at this juncture that what divides the majority and the minority of judges in this appeal is not that one side had fully considered the forensic data that the Trial Chamber had relied on, while the other side did not. Any suggestion or impression to that effect would be entirely inaccurate and unfortunate. To be clear, the minority did not review the evidence in the case any more so than did the majority. In fact, in the course of deliberations lasting about two years, all the appeal judges in the case had done extensive review of precisely the same forensic information indicated in the Trial Judgment. Having done so, the majority considered that they were not satisfied that a Trial Chamber properly directing itself as to the standard of proof beyond reasonable doubt could have convicted. The minority took the opposite view.

7. Indeed, in the common judgment, the majority chose the path of judicial economy: by focusing only on the dispositive issues of the case and on the critical forensic considerations that engaged reasonable doubt in the case (agreeing to discuss anything else in concurring separate opinions). It helps to keep in mind that, in a criminal case, it takes only a few critical forensic weaknesses—even one such weakness—to make a conviction unsafe. It does not require detail accounting for the kitchen sink. It was for that reason that the majority did not discuss all the 'evidence' which the Prosecution had tendered in the case.

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8. As will be seen later, what really separates the majority and the minority is the extent to which the idea of 'appellate deference' to factual findings should guide the judgment of the Appeals Chamber. It is correct to say that the majority reformulated what the minority described as 'accepted' standards of appellate review in which that idea of 'appellate deference' loomed so large in the appellate adjudication of this Court. I shall explain later on, in greater detail, why that reformulation is wholly right, and why the older standard was, in my respectful view, fraught with much risk of miscarriage of justice.

9. In any appeal against conviction in a criminal case, such as this, appeals judges *must* fulfil the essential task of satisfying themselves that guilt was established beyond reasonable doubt at trial. That essential appellate *duty* cannot be avoided or obscured by hugging the theory of 'appellate deference' to factual findings of the trial court. Appeal judges 'must

bring to bear the sum of their collective judicial experience'<sup>1</sup> in reviewing the complaints of the appellant against the evidence presented in the case; while taking care to not lightly disturb the factual findings of the trial court.

10. On the foregoing basis, I am not persuaded that the evidence indicated in the Trial Judgment could have satisfied a reasonable Trial Chamber beyond reasonable doubt that the Appellant deserved to be convicted of crimes against humanity and war crimes in the manner of the charges against him. I could therefore find no convincing basis to uphold the judgment of the Trial Chamber. The finding of guilt—or its sustainment on appeal—beyond reasonable doubt must result from a view of evidence that is naturally compelling: in the sense of pointing to guilt with unstrained confidence. It does not result from giving bloated significance to available evidence, in ingenious ways; nor, from an analysis of the evidence that suggests purposeful tropism in the light of the indictment. In these things, the mind can begin to ‘see’ what is not there. These should be general caveats in every criminal case. But, they are more exacting when the charge concerns criminal responsibility of a commander for the crimes of subordinates.

11. Since command criminal responsibility entails a degree of separation between the commander and the actual perpetration of the acts amounting to crimes, coupled with the mental disposition to commit the crimes, it is important that the finding of criminal responsibility must result from a clear analysis of the evidence in a manner that reveals beyond reasonable doubt that the commander’s failings suggest his own connivance in the crimes or his condonation of them—in the manner of wilful subscription or callous indifference—such as would convincingly approximate a mental disposition to commit the crimes that he failed to prevent or punish. I saw no such clear analysis in the Trial Judgment - nor, for that matter, that the revealed evidence would sustain it. In the absence of such clear analysis (especially when the charges are so grave as here), I do not accept it as correct that the Appeals Chamber should, through a methodised theory of ‘appellate deference,’ consign the fate of a convicted person to the undoubted good faith of the Trial Chamber whose verdict of conviction has been appealed. That would be to suffer an Orwellian catch that ill-serves any criminal justice system that purports a right of appeal against conviction. The benefit of ambiguity in a conviction judgment does not belong to the trial court that authored it. It belongs to the convicted person: by sheer operation of the requirement that guilt must be established beyond reasonable doubt. Even that is a settled idea in civil law—approximated in the Latin maxim *contra proferentem*.

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12. In the final analysis, since the Appellant did not commit the violations himself, the dispositive consideration in the case must then be whether he took all necessary and

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<sup>1</sup> See, for instance, *R v Beaudry* [2007] 1 SCR 190, para 58 [SCC]; *R v A G* [2001] 1 SCR 439, para 6 [SCC]; *R v Biniaris* [2000] 1 SCR 381, para 39 [SCC]; *R v Lake*, 64 Cr App R 172, pp 175-177 [EWCA]. It may be noted with the utmost humility that the accumulated weight of majority’s experience in international criminal law alone is no less than 55 years.

reasonable measures to prevent or repress the violations, or submit them to competent authorities for investigation or prosecution. It is for that reason that the majority limited the appeal as it did. Understandably, a commander's *wilful* failure to take necessary and reasonable measures that are available would suggest his own connivance or condonation, thus warranting attribution of criminal responsibility upon him *for* the concerned crimes. In this connection, one cannot lose sight of the significance of the requirement of wilfulness that is imposed in article 30 of the Rome Statute.<sup>2</sup> That significance is to the effect that the failures indicated in article 28 cannot result in criminal responsibility, unless such failures are wilful. While command responsibility is easier understood from the perspective of creation of danger of the risk of the concerned harm, the requirement of the mental element under article 30 must mean that the failings contemplated in article 28 must be wilful. The Trial Judgment reveals *no* shred of evidence, in my view, pointing to wilfulness on the part of the Appellant in relation to the failures attributed to him in the terms of article 28. The evidence shows the contrary.

13. The Trial Judgment unequivocally shows that the Appellant took certain actions. Those actions undermine any theory of connivance or condonation on his part. In particular, he had admonished his troops (to their displeasure), upon learning of allegations (regardless of proof) that they were 'misbehaving,' 'stealing', and 'brutalis[ing]' the civilian population. Two prosecution witnesses testified that following the admonition, crimes attributed to MLC troops diminished in the area, and the situation improved;<sup>3</sup> two testified that the situation did not improve;<sup>4</sup> and, one testified that things got worse.<sup>5</sup> But, the Trial Judgment revealed no real evidence showing that those admonitions were insincere. He set up a commission of inquiry to investigate those allegations of crimes. The Trial Judgment revealed no real evidence, beyond mere speculation, showing that the effort was sham. The most that the Trial Judgment suggests is that the inquiry was incompetent and unfit for purpose. But, the revealed evidence did not show that the Appellant had deliberately manipulated things to be that way, nor did the Trial Judgment suggest generally accepted standards against which such inquiries should be measured. He empanelled an independent court-martial that tried and convicted seven of his soldiers for violations. The Trial Judgment revealed no evidence that justifies attributing to him any identifiable short-comings of the court-martial, as a matter of bad faith; no more so than the chief executive of any country would deserve blame in a

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<sup>2</sup> Article 30 provides as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

<sup>3</sup> Trial Judgment, para 596.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

similar way for the failings of an independent judiciary. As a last act, he invited the United Nations and the *Fédération internationale des ligues des droits de l'Homme*—through their representatives—to assist him to complement his efforts for the sake of accountability. The UN representative held out hope of such assistance. But, it never came in the end. Rather, the matter got referred to the ICC Prosecutor. That the referral was in good faith needed not inure to his conviction at the end of his trial in spite of all the measures he had taken.

14. Against the background of the measures that he took, the following particular dilemma troubled this case. In a charge whose default basis of criminal responsibility was framed in the terms that the Appellant had failed to 'submit the matter to competent authorities for investigation and prosecution', the question arises whether the finding of guilt may be readily accepted as beyond reasonable doubt in light of the following actions credited to him: setting up at least one commission of inquiry, referring resulting cases to court-martial, and requesting assistance from the UN, in order to ensure that no stone was left unturned.

15. The measures he took, as outlined above, leave me with grave doubt that he could be reasonably said to have connived in or condoned the crimes with which he was charged. Each case must, of course, be judged on its own unique facts. But, I am not convinced that the Rome Statute was conceived to impose criminal responsibility for crimes against humanity and war crimes upon commanders in the specific circumstances of the Appellant. Often, justice requires only the punishment of the actual perpetrators for their own conducts, and not their commanders who in vain tried their best in the circumstances to prevent or repress the crimes.

16. The Trial Judgment reveals that motive was imputed to the Appellant, in order to discount the genuineness, hence the adequacy, of the measures he took. In that regard, it was said that he had acted merely to protect the image of his organisation. I concur with the view that acting to protect the image of his organisation (if that were truly the case) needed not be seen in the particular circumstances of the case as forensically synonymous with non-genuineness of measure. More fundamentally, in my view, the Trial Judgment revealed no concrete evidence that inevitably warranted such imputations of motive, other than mere personal (often vague) opinions or beliefs of witnesses, rising no higher than mere speculation. But, speculation does not become evidence merely because a witness had (even sincerely) uttered it in the courtroom having sworn to tell the truth. A witness's belief may be true to conscience but concrete evidence is required to convict in a criminal case.

17. The Trial Judgment also reveals that many critical findings made against the Appellant were in the nature of adverse inferences drawn from primary evidence, but without having eliminated all other inferences consistent with innocence. The adverse inferences were drawn on the supposition that they were reasonable in the circumstances, regardless of competing inferences pointing in the opposite direction. Those adverse inferences might have been reasonable indeed—in a civil case. But in a criminal case, the standard of proof of guilt beyond reasonable doubt forbids the drawing of adverse inferences without having eliminated all other inferences consistent with innocence.

18. In short, in reviewing the evidential analysis in the Trial Judgment, I was struck by an uneasy, yet distinct, impression that literally every measure that the Appellant took was bound to provoke a riposte of view as a shortcoming; even by way of adverse inference, with little or no effort made to eliminate reasonable inferences consistent with innocence. At times, limitations of the primary evidence in support of such adverse inferences were ignored. Many times, gaping holes were coped with logomachy.

19. We may consider here just one typical example, out of very many. There was evidence that an investigating mission had travelled to the theatre of war to interview witnesses. It was complained that they had gone there with heavily armed guards. The Trial Chamber accepted this as a deficiency, suggesting that the presence of armed guards had the effect of intimidating witnesses by creating a ‘coercive atmosphere’.<sup>6</sup> That deficiency was then attributed to the Appellant, to show the insufficiency of the investigation as a reasonable measure. But, the Trial Judgment did not reveal any evidence tending to show: (a) that any witness was actually intimidated because of the presence of armed guards; or, (b) that the Appellant had directed the investigative mission to be undertaken with the armed guards. But, assuming even actual evidence in those regards: it would still be insufficient to eliminate the inference that it was wholly reasonable for investigation missions to be undertaken under armed close protection, when conducted in the course of an armed conflict, by a party to that armed conflict. For, it is not unknown for officials of international courts and tribunals to undertake missions—including investigation missions—under the close protection of armed guards, even in peacetime. It would not be a shortcoming, attracting criminal responsibility at large to anyone even remotely associated to such missions.

20. The Trial Judgment was fraught with many concerns such as that exemplified above. Some of them have been adequately reviewed in the Majority Opinion. But, there was so much more.

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21. Humanity’s suffered experience in the history of evil amply shows the inclination of some people to commit shocking crimes. Those that do so deserve the heaviest punishment, when their guilt is established beyond reasonable doubt. So, too, must commanders be punished for the crimes of subordinates resulting from failure to prevent or repress those crimes, where such failings point beyond reasonable doubt to connivance or condonation. But, there is no justice in convicting a commander for crimes against humanity or war crimes (or any other crime in the Rome Statute) as a result of a technical interpretation of the Rome Statute, or an overworked appreciation of evidence that does not solidly satisfy that required standard of proof. That was the weakness with the case against the Appellant, appraised from the Trial Judgment.

22. As indicated earlier, my initial view of the proper outcome was to set aside the Trial Judgment and order a new trial, in light of many instances in which the Judgment had not

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<sup>6</sup> See Trial Judgment, para 725.



been clear in the analysis of the evidence. To that extent, I would have some sympathy with the Minority Opinion to the extent of their insistence that a case should be referred back to the Trial Chamber where the reasoning or analysis in the trial judgment is unclear as to the evidential finding. But my insistence on that approach in this case would still have left me in isolation as to the outcome, and would have resulted in an inconclusive judgment: since Judge Monageng and Judge Hofma saw no error with the Trial Judgment and would uphold it, while Judge Van den Wyngaert and Judge Morrison maintained that there were ample material errors that warranted reversing the Trial Judgment thus acquitting the Appellant. In order to avoid that outcome—and consistent with both the balance of justice in light of the evidence and the presumption of innocence<sup>7</sup> - I am constrained to join Judge Van den Wyngaert and Judge Morrison in the outcome, reversing the verdict of the Trial Chamber and acquitting Mr Bemba. And I share their essential reasoning for that outcome; except to the extent that I see the need for a different path of reasoning, such as is set out in this separate opinion and the accompanying appendices.

23. I was unable to join my highly esteemed colleagues in the minority in their decision upholding the Trial Judgment. To uphold the Judgment, as they have done, resulted, in my respectful view, from a bent of unquestioning appellate deference to the factual findings of the Trial Chamber—on virtually *every* impugned finding—in a case so complex and so circumstantial. The minority are not to blame for inventing the idea of ‘appellate deference’ to the factual findings of the Trial Chamber. Nevertheless, uncritical fidelity to the idea is really an apology for a virtual reign of judicial infallibility by another name. It does present the question: what use, then, is an appellate process in the administration of criminal justice, if all that appeal judges do is defer to *every* factual finding of the trial court—without asking whether the finding is truly consistent with the basic idea that guilt must be proved beyond reasonable doubt? That, in the end, is what divides the majority from the minority in this appeal.

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24. But, there is one more thing. It needs saying that the highest measure of justice is that the standards of its processes are good enough for everyone—including judges, prosecutors and defence counsel. Justice will have become wholly unfit for purpose—and much the poorer indeed—if those who administer it unto others prove unable to imagine themselves at the receiving end of the methods they apply. This golden rule of justice is not readily negated by any pretence that those who administer it are superior beings who never may find themselves at the mercy of the judicial process. It may not be necessary to dwell on how truly hazardous such pretence is to the notion of presumption of innocence. It is enough only to

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<sup>7</sup> Ordinarily, a verdict of guilt at the end of a criminal trial would terminate the presumption of innocence, assuming the verdict is not appealed. But, an appeal launched in time will have the effect of placing the presumption on life-support, in hopes of revival in the event of a successful appeal. It is in that sense that the presumption of innocence lingers on as a concept in the course of an appeal.

recall that the *Justice Case*<sup>8</sup> in Nuremberg amply proves the value of this golden rule—as judges and prosecutors found themselves as defendants in criminal cases.

25. The foregoing is the sum of my own concurring judgment in the appeal. The following explains my reassurance in getting there.

## II. A Foreword on Accountability

26. The outcome of this appeal impels me, as the President of this Court, to say a few words about accountability as the chief mission of this Court. Accountability essentially entails the subjection of a person to appropriate inquiry about the correctness of his or her own conduct—according to the rules that guide both the conduct in question and the inquiry itself—at the end of which the consequences on the person will follow the findings. Impunity entails, inversely, the absence of accountability; often leaving the impression that the person is above any inquiry about his or her conduct.

27. In criminal law, accountability is effectively achieved when the prosecutor subjects a suspect of crime to *bona fide* criminal investigation, at the end of which the prosecutor decides whether the complaint should be dismissed *in limine* as manifestly unfounded or whether there was probable cause to subject the accused to more comprehensive judicial inquiry. In the latter scenario, the prosecutor is never understood to have vouched for any particular outcome, such as to be seen as having ‘won’ or ‘lost’ the case. It is not the prosecutorial mandate to win or lose, but to assist the cause of justice according to the facts and the law. In that mandate, the prosecutor’s undertaking is only to prosecute in good faith, with due vigour and exacting rigour: leaving justice to take its course, according to the judges’ own views of the case. Perhaps, the separation of functions between the prosecutor and the judges may be illustrated by the following category of cases. The first category may involve the case where in her exercise of prosecutorial independence the Prosecutor chooses to terminate a case at the conclusion of her investigations, because she was satisfied that the complaint was provoked by the smell of a dead mouse. The second category of cases may involve those where her investigations revealed that the complaint was provoked by the smell—and evidence—of rancid flesh. In those kinds of cases, it is entirely proper that she should proceed in good faith with the judicial inquiry: leaving it to the judges, in their judicial independence, to decide whether the flesh was human flesh or merely pork. In the nature of things, most cases built on circumstantial evidence would fall in the second category of cases.

28. As the words of President Carmona (quoted in the epigraph of this opinion) make so clear, on no account is accountability to mean the conviction of everyone suspected or accused of crime, notwithstanding the dictates of the rules that guide the judicial inquiry. Not only would such an expectation ultimately undermine the notion of accountability itself: it would also invite the very searchlight of accountability upon the judicial system itself, as the *Justice Case* in Nuremberg soundly teaches. Indeed, accountability pursued in good faith

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<sup>8</sup> *United States of America v Alstötter & Ors* (1948) 6 LRTWC 1.

must mean that suspects must be discharged and accused acquitted, if such is the logical outcome of applying the rules of the inquiry in good faith. That is what the majority did.

### **III. Scope of this Separate Opinion**

29. The need I feel to write separately results from my own different understanding of some of the many legal questions that arose in this appeal, often answered differently in the various opinions (especially those of my highly esteemed colleagues in the minority) issued not only in this appeal, but in the earlier jurisprudence that inspired much of the division of judicial opinions in this appeal. The questions engage both general procedure in the administration of justice in this Court, as well as in the substance of the law as prescribed in the Rome Statute concerning war crimes and crimes against humanity.

30. Yet, a resolve to discuss the multitude of the legal issues arising in this appeal, or in their deserving detail, will greatly strain the endurance of even the most ardent scholars, let alone the average reader. I shall therefore limit myself to the following issues (and some others comprised within them):

- i. discrete issues of standards of appellate review
- ii. rulings in respect of admissibility of evidence
- iii. amendment of indictment after the commencement of trial
- iv. causation and other questions arising from article 28 of the Rome Statute, including:
  - (a) dereliction of duty versus accomplice liability as the object purpose of article 28
  - (b) endangerment as the rational explanation for command responsibility
  - (c) the commander's duty to withdraw rogue troops and the related question of military necessity
- v. 'organisational policy' as an element of crimes against humanity as defined in the Rome Statute.

31. It must also be stated immediately that a key motivation in engaging these discussions is to assist in the understanding in those aspects of the law that are applicable in this Court. Much of those topics resonated in this appeal in one way or another, in the fullness of its complexity. There is, however, much in the discussion that is motivated by the need to seize the opportunity presented, and engage more compositely with related aspects of the law which have vexed the minds of jurists over the years: beyond what is strictly necessary to dispose of the present appeal.

## IV. Standard of Appellate Review

32. In a sense, the worry that impelled this separate opinion—particularly in relation to the standards of appellate review as well as to rulings on admissibility of evidence—is partly captured by the story of a rocket launch that went horribly wrong right off the launch pad, in July of 1962 in Cape Canaveral, Florida. The minus (‘-’) sign had been omitted in the formula that was fed into the computer.<sup>9</sup> The facts of that event were not, of course, an issue in this appeal, and need not be pursued any further here, beyond that allusion. However, the incident affords a serviceable parable that illustrates just how wrong things can go when the minds of decision-makers are in thrall to faulty codes. The administration of justice is not spared that hazard.

33. Indeed, the path to miscarriage of justice is often strewn with seductive petals of juristic formulae that seem so convenient to judges and yet so questionable. That worry is palpable in this appeal: mostly in the matter of choices of approaches and formulae regarding standards of appellate review that guided obvious analyses and latent assumptions, especially in earlier judicial pronouncements that apparently guided much of the submissions and opinions in this appeal. Regrettably, in many instances, certain pronouncements made elsewhere in the appellate jurisprudence of this Court (adherence to which the minority fervently urged) are, as I understand them, starkly contradictory to basic principles of criminal law—and international criminal law—that should be familiar.

34. My difficulty is not, of course, that departures from familiar principles are never permissible. Surely, anachronistic principles or those originating from mistaken (or *per incuriam*) circumstances must be departed from; when corrective analyses are subsequently made, clearly identifying both the original flaws and the needed corrections. It is another matter, of course, to embark upon a train of reasoning that departs from familiar rules, with the impression conveyed of confident travel on an established route, often deep into treacherous territory.

35. Some of those troubling choices of analytical formulae and approaches advocated and sometimes followed in the Minority Opinion, ostensibly based on earlier pronouncements of the Appeal Chamber, include the following:

- (a) the proposition that if the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber’s finding, it is to be

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<sup>9</sup> As Stephen Pile recalled the story, ‘The Mariner I space probe was launched from Cape Canaveral on 28 July 1962 towards Venus. After 13 minutes’ flight a booster engine would give acceleration up to 25,820 mph; after 44 minutes 9,800 solar cells would unfold; after 80 days a computer would calculate the final course corrections and after 100 days the craft would circle the unknown planet, scanning the mysterious cloud in which it is bathed. However ... Mariner I plunged into the Atlantic Ocean only four minutes after takeoff. Inquiries later revealed that a minus sign had been omitted from the instructions fed into the computer. “It was a human error,” a launch spokesman said. This minus sign cost £4,280,000’: Stephen Pile, *The Book of Heroic Failures* (1979) pp 28—29. See also <<https://nssdc.gsfc.nasa.gov/nmc/spacecraftDisplay.do?id=MARIN1>>

presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings;<sup>10</sup>

- (b) the proposition that the Appeals Chamber would not review a factual finding that is ‘reasonable’, and will intervene *only* when it is determined that the Trial Chamber’s factual finding is one which no reasonable trier of fact would make;<sup>11</sup>
- (c) the apparently boundless solicitude for appellate deference to factual findings of the Trial Chamber—even when the ‘factual’ findings were in fact not based on any discernible evidence, or based on speculative opinions of witnesses presumed as factual evidence; and,
- (d) the insistence that even where an error has been demonstrated (either in law or in fact) the Appeals Chamber will not interfere unless the appellant demonstrated that the Trial Chamber would have rendered a judgment that is substantially different from the decision that was affected by the error had the error not been made.<sup>12</sup>

36. I shall discuss the foregoing difficulties and other reasons for my respectful difference of views from those of my highly esteemed colleagues in the minority, whose views are supposedly founded on an understanding of earlier jurisprudence of the Appeals Chamber.

#### ***A. The Place of Discretion in relation to Findings bearing on Guilt or Innocence***

37. There are certain propositions that have been accepted uncritically as part of the pronouncements of the Appeals Chamber on the topic of duty to give reasons.<sup>13</sup> The Minority had strongly urged adherence to them as part of the ‘settled’ standards of appellate review. But their implications go well beyond the duty to give reasons. The worry lies, perhaps, in the following pronouncement, which seems to have been imported into this Court’s appellate jurisprudence lock, stock and barrel from the pronouncements of the ICTY Appeals Chamber in the *Kvo ka* case:

[E]very accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98ter(C) of the Rules. However, this requirement relates to the Trial Chamber’s Judgment; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. *The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed*

<sup>10</sup> *Minority Opinion*, para 190.

<sup>11</sup> *Minority Opinion*, para 9.

<sup>12</sup> *Prosecutor v Bemba & Ors (Judgment)* dated 8 March 2018, ICC-01/05-01/13-2275-Red, para 99 and surrounding paragraphs [ICC Appeals Chamber]

<sup>13</sup> The latest instance of this trend in the jurisprudence is to be found in the Appeals Chamber’s judgment in *Prosecutor v Bemba & Ors (Judgment)*, para 105.

*that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement.*<sup>14</sup>

38. It must be stressed that any uncritical reception of the foregoing ICTY appellate dictum will not be fully in harmony with the text of the Rome Statute. Nor will it, indeed, be in keeping with either the *right* of an accused to a fair hearing or the dictates of transparency that make the administration of justice accountable to the public. First, the idea of 'discretion' is permitted, perhaps, greater licence than seems appropriate in the context. It may be assumed that the word itself might have been an original infelicity in the appellate jurisprudence of the *ad hoc* Tribunals in the relevant context. Unfortunately, the terminology and dicta that convey it have been accorded reverent reception more than once in the jurisprudence of our own Appeals Chamber.<sup>15</sup> And, that is the difficulty. For, there is reason to insist that any question that bears directly or indirectly on guilt or innocence in a criminal case is a matter that imports no 'discretion' as such for a court of law. It imposes an obligation—and a most exacting obligation at that—to do justice. Consequently, the judgment of the Trial Chamber must reveal, in an objectively verifiable and convincing way, that no reasonable doubt was left in both the substance and the analysis of the evidence that resulted in the conviction of an accused person. In the nature of things, such discharge of obligation (paradoxically in a seeming exercise of power) must, at the barest minimum, eschew 'discretion' in the consideration of any element of the case that is reasonably consistent with the innocence of the defendant.

39. Second, from the perspective of imperative statutory provisions, there is a discernible difference in the texts of the ICTY Statute and that of the Rome Statute, relative to the cogency of the quotation from the *Kvo ka* appeals judgment set out above. Specifically, article 23(2) of the ICTY Statute only requires that the judgment of the Trial Chamber 'shall be accompanied by a reasoned opinion in writing.' Similarly, rule 98ter(C) of the ICTY Rules of Procedure and Evidence requires the trial judgment to 'be accompanied or followed

<sup>14</sup> *Prosecutor v Kvo ka & Ors* (Judgment) dated 28 February 2005, para 23, emphasis added, [ICTY Appeals Chamber]. See also *Prosecutor v Bemba & Ors* (Judgment), *supra*, para 105, especially footnote 150.

<sup>15</sup> See *Prosecutor v Lubanga* (Judgment) dated 1 December 2014, ICC-01/04-01/06-3121-Red, paras 23 and 24 [ICC Appeals Chamber] [hereinafter '*Lubanga A 5 Judgment*']; *Prosecutor v Bemba & Ors* (Judgment), paras 93 and 94.

as soon as possible by a reasoned opinion in writing.’ There is no indication—in either the ICTY Statute or the ICTY Rules—as to the extent that and in what respect the reasons must be in writing. In contrast, article 74(5) of the Rome Statute requires that the judgment of the Trial Chamber ‘shall be in writing and shall contain a *full* and reasoned statement of the Trial Chamber’s *findings on the evidence* and conclusions.’ [Emphasis added.] Given the requirement upon the ICC Trial Chamber to give ‘a full’ and reasoned statement of its ‘findings on the evidence and conclusions,’ it may then not be so readily said that there is a ‘discretion’ in the Trial Chamber ‘to evaluate whether the evidence as a whole is credible’, as was asserted by the ICTY Appeals Chamber in *Kvo ka* and since by this Appeals Chamber.

40. Hence, there is an obligation on the Trial Chamber to address and resolve every piece of evidence (in both the substance and the analysis) that may cast serious doubt on the integrity of the Chamber’s finding; where that exercise bears materially on the eventual outcome on the merits of the case. This, of course, is barring certain forensic aberrations that would traditionally justify the avoidance of discussing the specific piece of evidence in question. Typically, these include irrelevance, cumulativeness, repetitiousness, surplusage, incongruousness, absurdity, etc.

41. In this connection, it is more desirable to speak of the need to address every piece of evidence which contradicts *the Prosecution’s proposition* as to the guilt of the defendant, rather than of evidence which ‘*contradict[s] ... the Trial Chamber’s finding*’. Although the outcome is effectively the same, it is important still to preserve the discussion within the adversarial theme that is the hallmark of ICC trials.

### ***B. Appellate Deference in relation to Factual Findings***

42. A further point of jurisprudence that separates me from my esteemed colleagues involves another analytical gremlin that my colleagues have embraced uncritically from the jurisprudence of the *ad hoc* tribunals—which jurisprudence provides most helpful guide to the ICC in many other respects. In the earlier jurisprudence of the Appeals Chamber, ‘appellate deference to factual findings’ is a central idea. And that, in turn, imports a propensity for appellate ‘deference’—of worrying solicitude, in my view—regarding the factual findings of the Trial Chamber. That aptitude over indulged observations such as the following: ‘[The Appeals Chamber] will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’<sup>16</sup> From that premise, a certain margin of deference results, in the implicit view of my highly esteemed colleagues, following earlier pronouncements of the Appeals Chamber. It was noted that ‘in assessing alleged errors of fact, the *ad hoc* tribunals also apply a standard of reasonableness, which accord a similar margin of deference to the Trial Chamber’s

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<sup>16</sup> See *Lubanga A 5* (Judgment), para 21 (footnotes omitted). See also *Prosecutor v Ngudjolo A* (Judgment), dated 7 April 2015, ICC-01/04-02/12-271-Corr, para. 22 [ICC Appeals Chamber] [herein after *Ngudjolo A Judgment*];

findings.’<sup>17</sup> To a similar effect, the Appeals Chamber recently observed as follows in a derivative case (the *Bemba No 2 Appeal*):

With respect to alleged factual errors, the Appeals Chamber’s task is to “determine whether a reasonable Trial Chamber could have been satisfied [...] as to the finding in question”, thereby applying a margin of deference to the factual findings of the trial chamber. In this regard, the Appeals Chamber has previously held that:

[I]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the “misappreciation of facts”, the Appeals Chamber has also stated that it “will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.”<sup>18</sup>

43. At the ICC, the notion of appellate deference to the factual findings of the Trial Chamber is inspired by the case law of the ICTY and the ICTR appeals chambers. The judgment of this Chamber in the *Lubanga* appeal makes that clear.<sup>19</sup>

44. But, much caution is required for the promotion of that idea into a legal standard that must always be followed by this Appeals Chamber. This is in the light of considerations reviewed below, which were not specifically addressed in the relevant context in the *Lubanga* appeal, beyond a broad reference to the ‘similarity between the Court’s legal framework and those under which the *ad hoc* tribunals operate[d].’<sup>20</sup> Hence, the notion of appellate deference for the factual findings of the Trial Chamber is arguably something of a blind-spot in the ICC appellate jurisprudence, resulting directly from the undiscerning reception of the notion from the jurisprudence of the *ad hoc* tribunals.

45. As a primary contrasting consideration, it must be observed that the Rome Statute does not suggest—let alone require—appellate deference to the factual findings of the Trial Chamber. Indeed, there are specific provisions of the Rome Statute the terms of which obstruct, at least, a clear view of appellate deference as a standard norm in final, merits appeals in this Court. Article 83(1) is one of them. It provides as follows: ‘For the purposes of proceedings under article 81 and this article, *the Appeals Chamber shall have all the powers of the Trial Chamber*’ [emphasis added]. As there is no equivalent provision in their statutes, the case law of the ICTY and ICTR may have forged a mould of appellate deference that may not fit the specific circumstances of administration of justice at the ICC, as a direct product of construction of the Rome Statute, and especially in light of the further analysis made below.

<sup>17</sup> *Prosecutor v Bemba & Ors (Judgment)*, para 92.

<sup>18</sup> *Prosecutor v Bemba & Ors (Judgment)*, para 91.

<sup>19</sup> See *Lubanga A 5 (Judgment)*, para 24.

<sup>20</sup> See *Lubanga A 5 (Judgment)*, para 27.



46. There may yet be a role for appellate deference at the ICC. Such a role, however, is necessarily a matter of judicial policy, for purposes of efficiency in the administration of justice. But, it is not a matter of law. Hence, in order properly to situate such policy-oriented consideration in its correct place, relative to other competing considerations, the greatest care must be taken to avoid obscuring direct inferences from statutory texts that create legitimate expectation let alone those that protect legal rights of parties (especially the accused), while giving the pride of place to judge-made policy considerations not specifically provided for in the Statute. That is to say, considerations of judicial policy must always yield the right of way to legal requirements, in the event of conflict. As seen immediately below, important dicta from national supreme courts, notably the United Kingdom and Australia, speak adequately to this precept.

47. In that regard, Lord Bingham wrote as follows:

It is undesirable that exercise of the important judgment entrusted to the Court of Appeal ... should be constrained by words not to be found in the statute and that adherence to a particular thought process should be required by judicial decision ... so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.<sup>21</sup>

48. One key legal requirement to keep in mind in this context is the right of fair trial. Unlike the notion of ‘appellate deference’ which the Rome Statute does not provide for, the Statute specifically provides for the right of fair trial. See, for instance, article 64(2) and article 67(1) of the Rome Statute. Against that right, the notion of appellate deference becomes a difficult one where an appeal is lodged on the ground that the trial has been so unfair as to engage the risk of a miscarriage of justice, because the Trial Chamber made serious mistakes in the admission, appreciation and evaluation of the evidence. Where such a ground of appeal is engaged in a final appeal against conviction, it does seem to me wholly unsatisfactory—indeed counter-intuitive—to say that the ICC Appeals Chamber will defer to the views of the very Chamber whose proceedings, verdict or findings formed the very basis of the appeal, as the gravamen of the complaint of unfair trial.

49. Although the *ad hoc* tribunals did not have to interpret a provision similar to article 83(1) of the Rome Statute, given its absence in their statutes, the ICC judiciary is not without help on how to approach that provision. There is such an insight in the observations of Viscount Dilhorne sitting in the House of Lords, about the powers of review that the Criminal Appeal Act 1968 gave to the Court of Appeal of England and Wales, also couched in broad terms, as an assurance against wrongful convictions. According to him: ‘The Act gives a wide power to the Court of Appeal and it would ... be wrong to place any fetter or restriction on its exercise. The Act does not require the Court, in making up its mind whether or not a verdict is unsafe or unsatisfactory, to apply any particular test.’<sup>22</sup> Viscount Dilhorne may reasonably be taken as speaking specifically against the House of Lord’s own power to

<sup>21</sup> *R v Pendleton* [2001] UKHL 66 [HL] para 19.

<sup>22</sup> *Stafford v DPP* [1974] 58 Cr App R 256, p 261 [HL].

impose, from above, legal requirements upon the intermediate appellate court below.<sup>23</sup> But, just as reasonable is the view that he was speaking more broadly to the need to avoid limiting—by way of *judicial decisions*<sup>24</sup>—the wide powers which a statute confers upon the class of judges concerned, and which may be differently exercised among those judges, in their judicial independence, according to the particular circumstances of specific cases before them. For our own purposes, the least common factor for both interpretations counsels caution in seeking to constrain the amplitude of powers that the Rome Statute has conferred upon the Appeals Chamber, particularly when such limitations do not flow directly or by necessary implication from the text of the Rome Statute; but were derived instead from received dicta of unexplained (or different) reasons, propounded by tribunals whose constitutive legal instruments contain no provisions similar to article 83(1) of the Rome Statute.

50. Further inspiration may be derived from the judgment of the High Court of Australia in *Fox v Percy* (discussed more fully below). There, Gleeson CJ, Gummow and Kirby JJ similarly observed that judge-made instructions on appellate standards of review ‘*could not derogate from the obligation of courts of appeal, in accordance with legislation ... to perform the appellate function as established by Parliament.*’<sup>25</sup> To a similar effect, Callinan J observed that ‘[t]o impose an unduly high barrier [against appellate intervention in respect of factual findings], and not one sanctioned by the enactment conferring the right of appeal would be to deny recourse by litigants to what the Parliament ... has said they should have.’<sup>26</sup> And continuing a little later in the same vein, he wrote as follows: ‘Occasional errors of fact are bound to be made. No litigant should be expected to accept with equanimity that his or her right of appeal to an intermediate court is of much less utility because it goes to a factual error that can be explained away by a judge-made rule, than an appeal on a question of law: or that although the trial judge was wrong on the fact, there are no incontrovertible facts against which the judge’s error could be measured.’<sup>27</sup>

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<sup>23</sup> In that context, his point was that it was not up to the House of Lords to fetter the wide powers that the 1968 Act had conferred upon the Court of Appeal, by imposing upon it restrictive tests that the Act did not require. The better approach, rather, was for the House of Lords to leave it up to the Court of Appeal to devise their own methods. As Viscount Dilhorne put it: ‘The proper approach to the question they have to decide may vary from case to case and it should be left to the Court, and the Act leaves it to the Court, to decide what approach to make. It would, in my opinion, be wrong to lay down that in a particular type of case a particular approach must be followed. What is the correct approach in a case is not, in my opinion, a question of law ...’: *Stafford v DPP*, p 261.

<sup>24</sup> Notably, in *R v Pendleton*, *supra*, Lord Bingham of Cornhill first noted that in creating the Court of Criminal Appeal in 1907, the intention of Parliament was not to undermine the role of the jury: it was rather ‘to arm the new Court of Criminal Appeal with powers sufficient to rectify miscarriages of justice, of which there had been notorious recent examples ...’: para 7. As regards the approach the Court of Appeal is to take in the exercise of its powers in view of *Stafford*, Lord Bingham observed that ‘[i]t is undesirable that exercise of the important judgment entrusted to the Court of Appeal ... should be constrained by words not to be found in the statute and that adherence to a particular thought process should be required by judicial decision ... so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty’: *R v Pendleton*, *supra*, para 19.

<sup>25</sup> See *Fox v Percy* [2003] 214 CLR 118 para 27 [Australia HC], emphasis added.

<sup>26</sup> *Ibid*, para 148.

<sup>27</sup> *Ibid*.

51. Perhaps, it is also to be kept in mind, in this connection, that the right of fair trial is a neutral right enjoyed at the ICC by the defendants, the Prosecution and the victims. The notion of appellate deference can prove just as inconvenient for the Prosecution and the victims, given the real possibility of a case in which they may complain that the Trial Chamber's acquittal of an accused resulted from an erroneous factual finding.

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52. Another specific legal requirement enshrined in the Rome Statute is the following command of article 66(3): 'In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond reasonable doubt.' [Emphasis added.] As this is an obligation on 'the Court', which includes the Appeals Chamber, the sway of the idea of appellate deference becomes very feeble indeed, when the appeal engages a compelling case that the factual finding does not meet the standard of proof of guilt beyond reasonable doubt. Notably, as with violations of the right of fair trial in a way that engages the risk of miscarriage of justice, mistakes in the admission, appreciation and evaluation of evidence at trial may materially anchor a complaint against a factual finding on grounds that are not borne out by the requirement that the court must be satisfied of guilt beyond reasonable doubt. The idea of appellate deference to factual findings thus becomes an awkward guest in the very appellate proceedings that the idea was intended to assist.

### *C. Reasonableness of Factual Findings*

53. One way, but not the only one, in which the legal requirement of proof beyond reasonable doubt can be violated—indeed the alluring siren call of the idea of appellate deference to factual findings—is merely to say that the Trial Chamber based the conviction upon a 'reasonable' interpretation of circumstantial evidence or upon a 'reasonable' inculpatory inference from primary evidence. But, it must be said that a self-contained idea of 'reasonableness', as reason for appellate deference, is a truly troubling formula in an appellate criminal appeal.

54. So, too, is the observation that when 'alleging factual errors, the appellant must "set out in particular why the Trial Chamber's findings were unreasonable. In that respect, repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence".'<sup>28</sup>

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<sup>28</sup> See *Lubanga A 5 (Judgment)*, para 33. Notably in *Ngudjolo A (Judgment)*, para 205, the Appeals Chamber had occasion to find as follows: '[A]t best, the Prosecutor is putting forward a possible alternative interpretation of the evidence, but she has failed to establish any error on the part of the Trial Chamber that would render the Chamber's approach unreasonable. Accordingly, the Prosecutor's arguments are rejected.' This was a correct finding in its own context, but it does not underscore a standard of appellate review of uniform application to the appeal of a convicted person. This is because it is not open to the Prosecution to challenge an acquittal on grounds that there is an alternative reasonable interpretation of the evidence which supports conviction, when acquittal is justified by a reasonable interpretation of the evidence. That complaint is not open to the Prosecution because of the obligation upon it to eliminate all other reasonable interpretations

55. These are hazardous pronouncements in criminal cases, because they specifically obscure the rule that requires the elimination of all other reasonable hypotheses that are consistent with innocence. It is encouraging, indeed, that this rule appears now finally to have been acknowledged by the Appeals Chamber very recently;<sup>29</sup> and even more so that my colleagues in the present appeal have rightly now recognised the rule as a standard of appellate review.<sup>30</sup> But, the rule must be given a meaning that truly enjoys appreciable significance in criminal cases. Hence, it is insufficient merely to say that the Trial Chamber’s factual findings were ‘reasonable’ in the circumstances, or to reproach the submissions of an appellant-convict for merely putting ‘forward a different interpretation of the evidence.’<sup>31</sup> For, while the findings of the Trial Chamber may be reasonable for purposes of liability in a civil case, which may be proved on a balance of probabilities, they would necessarily be insufficient to support a conviction in a criminal case, if all other hypotheses that are also reasonable and consistent with innocence remain undisturbed in the analysis of the Trial Chamber.

56. There is, therefore, much value in the following observations of Gleeson CJ and his colleagues at the High Court of Australia, about the mandate of the appellate court in relation to factual findings and the drawing of inferences:

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect”. In *Warren v Coombes*, the majority of this Court reiterated the rule that:

“[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.”

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of the evidence which are consistent with innocence. But, for a convicted person, the converse complaint is precisely viable as a ground of appeal. That is to say, it is a good ground of appeal to insist upon an acquittal on the basis of an alternative reasonable interpretation of the evidence which is consistent with innocence.

<sup>29</sup> *Prosecutor v Bemba & Ors* (Judgment), para 868. This is a very long-standing rule that ought to have been acknowledged in the jurisprudence of the Court from the outset: see *Peacock v R* (1911) 13 CLR 619 [Australia HC], p 629—630; *Barca v R* (1975) 133 CLR 82 [Australia HC], p 104; *Chamberlain v R* (No 2) (1984) 153 CLR 521 [Australia HC], per Gibbs CJ and Mason J (para 16), per Murphy J (para 7), per Brennan J (para 40); *Doney v R* (1990) 171 CLR 207 [Australia HC]; *Masih v R* [2015] EWCA 477 [England and Wales CA], para 3; *G & F v R* [2012] EWCA Crim 1756 [England and Wales CA]; *R v Jabber* [2006] EWCA Crim 2694 [England and Wales CA], para 19.

<sup>30</sup> See *Majority Opinion*, para 42.

<sup>31</sup> See *Lubanga A 5* (Judgment), *supra*, para 33. See also *Prosecutor v Bemba & Ors* (Judgment), *supra*, para 111.

As this Court there said, that approach was “not only sound in law, but beneficial in ... operation”.<sup>32</sup>

57. The essential point of the foregoing analysis is that there is much in the manner of legal requirements, which constrains the notion of appellate deference from overriding an appellate complaint that implicates material error in factual findings, when such an error bears directly or indirectly on the guilt or innocence of the accused.

#### ***D. Appellate Disadvantage in relation to Factual Findings***

58. Yet another consideration that weakens the grounds upon which the idea of appellate deference may stand concerns the original reason for the notion. This concerns the relative advantage of the trial court, inversely entailing appellate disadvantage, in appreciating the evidence heard at trial. The provenance of the hypothesis must be explained by the fact that transcripts of testimony were not always available—and still are not—in some national jurisdictions. In those circumstances, the appreciation of the evidence heard at trial was mostly a matter for the mental faculty of the fact finder, mostly according to his or her memory and any contemporaneous notes made of such testimony in the course of the trial. But this concern is largely inapposite at the ICC. There are precise transcripts created by highly trained and skilled professional stenographers, employing the latest technology. What is more, there are audio-visual recordings of the trial proceedings, such that any aspect of the hearing can, in most cases, be called up and reviewed by the Appeals Chamber, if need be. A further concern often invoked in justification of appellate deference is the supposition that the trier of fact enjoys a relative advantage in the appreciation of demeanour of witnesses. But a new-model approach to the value of demeanour, in addition to the availability of video recordings of testimony, do not fully warrant the traditional cognitive premise of courtroom demeanour as a controlling feature of the search for the truth in criminal cases. Here, the opinions of eminent judges from the national sphere provide helpful assistance.

59. In *Fox v Percy*, for instance, Gleeson CJ and his colleagues recalled their Court’s jurisprudence, which required appellate respect of the advantages of trial judges, especially where the trial judgment might be affected by impressions as to credibility of witnesses seen only by trial judges. Although that norm was stressed as the enduring instruction of their Court, Gleeson CJ and his colleagues, made sure also to underscore the norm’s boundaries in the following way:

[T]hat instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. *If, making proper allowance for the advantages of the trial judge, they*

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<sup>32</sup> *Fox v Percy*, *supra*, para 25.

*conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.*<sup>33</sup>

60. The ultimate emphasis remains with the authority and obligation ‘to discharge ... appellate duties in accordance with the statute.’ In doing so, appellate judges need ‘not shrink from giving effect to’ their own views of the case, merely because a trial judge preferred the testimony of one witness and rejected competing testimony. This is especially so in those cases where ‘incontrovertible facts or uncontested testimony ... demonstrate that the trial judge’s conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.’<sup>34</sup>

61. But, notably, the powers of the appellate court to intervene in factual findings are not limited to those instances where ‘incontrovertible facts’ show the trial judge’s conclusions to be erroneous. The appellate courts may also intervene when factual findings are ‘glaringly improbable’ or ‘contrary to compelling inferences’ in the case. As Gleeson CJ and his colleagues observed:

In some, quite rare, cases, although the facts fall short of being “incontrovertible”, an appellate conclusion may be reached that the decision at trial is “glaringly improbable” or “contrary to compelling inferences” in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must “not shrink from giving effect to” its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.<sup>35</sup>

62. Notably, the jurisprudence of the Supreme Court of Canada is much to the same effect. In *R v Beaudry*, for instance, the majority (of McLachlin CJ, Binnie, Bastarache, Deschamps and Fish JJ) shared the view that a verdict cannot be reasonable if it is ‘demonstrably incompatible’ with evidence that is ‘neither contradicted by other evidence nor rejected by the judge.’<sup>36</sup>

63. The essence of the approach revealed in the foregoing review is that the trial judge’s advantage in observing oral testimony does not conclusively preclude appellate courts from intervening against factual conclusions of the trial judge, when such conclusions are: (i)

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<sup>33</sup> *Ibid*, para 27, emphasis added.

<sup>34</sup> *Ibid*, para 28.

<sup>35</sup> *Ibid*. para 29.

<sup>36</sup> *R v Beaudry*, *supra*, see paras 80 and 98.

demonstrably incompatible with incontrovertible facts or facts not rejected by the trial judge, (ii) glaringly improbable, or (iii) contrary to compelling inference.

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64. In the context of the foregoing approach, Gleeson CJ and his colleagues re-iterated, in *Fox v Percy*, the challenge to the orthodoxy of promoting oral witness evidence against all other forensic considerations. In effect, they considered that incantations of general reliance on oral testimony may in truth not wholly serve the needs of justice in every case. They began by noting the historical countervailing judicial positions concerning the centrality of oral evidence in the administration of justice. In that regard, they observed as follows:

It is true ... that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")*: "... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."<sup>37</sup>

65. But, more empirically, Gleeson CJ and his colleagues invoked 'scientific research that has cast doubt on the ability of judges (or anyone else for that matter) accurately to tell truth from falsehood on the basis of observing the appearance of witnesses as they give evidence'.<sup>38</sup> It is such considerations that 'have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses' and to ground their conclusions, as far as possible, on the basis of 'contemporary materials, objectively established facts and the apparent logic of events.'<sup>39</sup> This approach does not entirely reject 'established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.'<sup>40</sup>

66. Callinan J framed his concurrence (with the above observations) against an extreme contrary dictum of a judge who had insisted (in an earlier judgment) that a review of oral evidence and findings based on it 'is altogether outside the reach of the appellate tribunal.' With equal clarity, Callinan J riposted as follows: 'And with the greatest respect to his Honour, I doubt whether many cases will truly turn, as he also contended, on a mere "gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence."<sup>41</sup>

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<sup>37</sup> *Fox v Percy*, *supra*, para 30.

<sup>38</sup> *Ibid*, para 31.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*, para 132.

67. In the same vein, Lord Devlin had approvingly made famous the following quote from another judge:

I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.<sup>42</sup>

68. To a similar effect, the Canadian Model Jury Instructions also tried to limit undue reliance on witness demeanour, by the following caution that a trial judge should give to the jury:

What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.<sup>43</sup>

69. A most useful summary of some of the reasons for the '[s]cepticism about supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness'<sup>44</sup> may be found in the opinion of Kirby J in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)*. According to him:

Apart from all else, demeanour is, in part, driven by culture. Studies suggest that evaluation of the evidence of women may sometimes be affected by stereotypes held by the decision-maker. This is doubtless also true in the case of evidence given by members of minority groups, whether racial, sexual or otherwise. Distaste or prejudice can cloud evaluation. Further, in a society such as Australia's, the capacity of the judiciary to respond to every cultural variety of communication is limited. ... The studies of experimental psychologists since that time have confirmed the danger of placing undue reliance upon appearances in evaluating credibility. Such studies were not available to the appellate courts when the rules of deference to the assessments of trial judges on questions of credibility were first written. They are available to us today. Although they have not yet resulted in a re-expression of the appellate approach (and by no means expel impressions about witnesses from the process of decision-making) the studies have two consequences. Trial judges should strive, so far as they can, to decide cases without undue reliance on such fallible considerations as their

<sup>42</sup> Patrick Devlin, *The Judge* (1979), p 81, quoted in *R v NS* [2012] 3 SCR, para 100, per Abella J.

<sup>43</sup> See *R v NS*, *supra*, para 101.

<sup>44</sup> See *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* [1999] HCA 3 [Australia HC], p 46.



assessment of witness credibility. And appellate courts should refrain from needlessly expanding the categories of trial conclusions about the facts which are effectively unreviewable because of presumed or inferred credibility considerations.<sup>45</sup>

70. Kirby J did not consider it necessary to abandon the respect that prevailing jurisprudence requires appellate courts to accord to the advantages that trial judges enjoy. What is required, instead, is the normative re-examination of precisely what those advantages are, in contrast to the need to permit the appellate court to have ‘a second look at the facts, usually with more opportunity to evaluate particular facts than is possible in the midst of a trial and with the appellate advantage of viewing such facts in the context of the record of the complete trial hearing.’<sup>46</sup>

71. Indeed, Kirby J continued, much may be acknowledged by way of true advantage on the part of the trial judge<sup>47</sup>—in ‘a relatively limited class of cases ... where the decision depends upon resolving a clash of critical oral testimony, oath against oath.’<sup>48</sup> But, even in those instances, the trial judge’s credibility finding does not mark an end to appellate analysis in the relevant respect. It is only the beginning of a related manner of analysis concerning ‘the proper outcome of the entire trial, and hence of the appeal.’<sup>49</sup> Kirby J next engaged some of the circumstances that may compel a further inquiry into the sustainability of credibility findings in particular cases. The value of his discussion in that regard warrants setting it out in detail:

1. In some cases the evidence of the witness, where credibility is in question, although relevant to the outcome of a trial, relates only to particular aspects of the parties’ dispute and leaves untouched other evidence which requires separate evaluation with no obstacle of a credibility finding. In such cases, to avoid appellate reversal, the trial judge must demonstrate that such evaluation has occurred. It will be rare, in large and complex cases presenting multiple issues, for the entire decision to hang on the credibility of a single witness, although that can certainly happen. Where there is other evidence, unchallenged, unanswered, ostensibly reliable and supported by uncontested contemporaneous records, an adverse credibility finding in respect of one witness or more does not remove from consideration all of the other evidence. Nor can it relieve the trial judge, or the appellate court when required, of the duties of analysis and the provision of reasons to demonstrate and explain that such analysis has occurred.

2. It may be possible to show, by reference to incontrovertible facts or uncontested testimony, that although the trial judge reached conclusions which were adverse to the credibility of an important, even crucial, witness, such conclusions are plainly wrong. For example, they may be based upon expressed or implied assumptions about the evidence (e.g. that witnesses are in conflict) which careful analysis of the record demonstrates to be incorrect.

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<sup>45</sup> *Ibid*, pp 46—47.

<sup>46</sup> *Ibid*, p 48.

<sup>47</sup> *Ibid*, pp 48—49.

<sup>48</sup> *Ibid*, p 49.

<sup>49</sup> *Ibid*, p 50.

3. It may also be possible to demonstrate that, although the trial judge reached conclusions adverse to the credibility of an important witness, this has been done on the basis of evidence which was wrongly admitted. Where such evidence has occasioned a substantial miscarriage of the trial it may be excluded and the foundation for the credibility finding may then be knocked away.

4. The reasons given by the trial judge for rejecting the evidence of a particular witness may go beyond a simple statement about the witness's appearance or demeanour. The additional reasons may demonstrate that the judge took into account irrelevant considerations or has not properly weighed all of the relevant considerations.

5. The circumstances in which evidence was procured on a critical point, pertinent to the credibility of a crucial witness, may be unsatisfactory. Those circumstances may undermine the acceptability of the judicial determination of the credibility of a crucial witness. They may authorise the appellate court to set that determination aside.

6. Conversely, in a particular case, a trial judge may make it plain that the conclusion reached does not depend upon credibility considerations or impressions about the demeanour of a witness but upon the judge's assessment of objective facts or inferences to be drawn from the facts as found. Ordinarily, the appellate court will then be in as good a position as the trial judge to make the assessment and draw the inferences. Care must be taken not to exaggerate the significance of such expressed conclusions. A failure specifically to mention a witness's appearance or demeanour does not necessarily exclude that consideration if it is deemed inherent in the conclusion which was reached. Similarly, the fact that a judge may not feel justified in condemning a witness as untruthful is not necessarily equivalent to an affirmative opinion by the judge that the witness has endeavoured to give truthful testimony.

7. There is also the case, as was accepted in the early Privy Council decisions, where, although a credibility finding has been made which represents an apparent obstacle to appellate review, it is so contrary to the "extreme and overwhelming pressure" resulting from the rest of the evidence, or is so "glaringly improbable" or "contrary to the compelling inferences of the case", that it justifies and authorises appellate interference in the conclusion reached by the trial judge. In this, as in other areas, the law recognises imperfection of its processes and the need to avoid absolute and inflexible rules. It affords to the appellate court the power to intervene so as to prevent the risk of a serious injustice where this is clearly demonstrated. Such jurisdiction, held in reserve, is exercised with a full appreciation of the elusiveness of certainty in any trial process; the value accorded to the interest of finality in litigation; and a realisation of the costs and other disadvantages inherent in appeal and retrial. Full reasons must be given by the appellate court to demonstrate that, notwithstanding the credibility finding, the result of the trial is "palpably", "glaringly" or "compellingly" erroneous when viewed in the light of all of the evidence. If this Court considers that the circumstances are insufficiently exceptional, the reasons unpersuasive and the interference unwarranted, it may say so. It will then restore the trial judge's findings as, from time to time, it has done.<sup>50</sup>

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<sup>50</sup> *Ibid*, pp 50—52.

72. It is, perhaps, opportune to observe, at this juncture, that the requirement of verdicts to be *reasonable* has the consequence of making it truly difficult to insulate any factual finding from appellate scrutiny, as the majority of the Supreme Court of Canada correctly pointed out in *Beaudry*.<sup>51</sup> An appreciation of that consequence begins with the implication of the test that animates the requirement of reasonableness. The test proceeds from the cardinal question: ‘whether the verdict is one that a properly instructed [trier of fact] acting judicially could reasonably have rendered.’<sup>52</sup> As Arbour J pointed out on behalf of the Supreme Court of Canada, the test requires the appellate court to determine what a reasonable trier of fact ‘properly instructed, could judicially have arrived at’ in the circumstances. That question, in turn, requires the appellate court ‘to review, analyse and, within the limits of appellate disadvantage, weigh the evidence.’<sup>53</sup> And, in that exercise, ‘the reviewing court must engage in a *thorough re-examination* of the evidence and *bring to bear the weight of its judicial experience* to decide whether, on all the evidence, the verdict was a reasonable one.’<sup>54</sup>

73. All that is to say, the theory of ‘appellate deference’ to factual findings cannot truly absolve an appellate court from the task of ‘thorough re-examination of the evidence’, in any judicial exercise that requires the appellate court to satisfy itself that the trial court’s factual finding was a reasonable one.

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74. In the end, it may be that the difficulty attending a proper understanding of appellate deference for factual errors is that the idea is not always clearly articulated in the jurisprudence as amounting only to a general rule. Completely stated in the light of its exceptions, it permits appellate intervention where there is an error in the appropriate degree—that being to a degree that suggests an appreciable risk of miscarriage of justice. And in the inquiry as to whether a factual error was committed to such a degree, the appellate court may be required to re-evaluate and re-weigh the evidence. Indeed, article 83(1) of the Rome Statute settles the position in that way in conferring on the Appeals Chamber *all* the powers of the Trial Chamber.

75. In view of the jurisprudence, it is possible to restate the essence of the principle of appellate deference in this way. Where the factual finding of the trier of fact is, on any view, a reasonable finding that a trier of fact is entitled to make, having directed his or her mind to the usual principles that guide judicial determination—chief among which is the requirement to establish guilt beyond reasonable doubt in a criminal case—the appellate court may not substitute its own views for those of the trial court. But, where the collective judicial experience of the appeals court leads it to the view (which must be clearly articulated) that the finding of the trial court was not reasonable, in the light of the usual principles that guide judicial determination in a criminal case, the appellate court must intervene.

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<sup>51</sup> *R v Beaudry*, *supra*, para 62.

<sup>52</sup> See *ibid*, para 55. See also *R v Yebes*, *supra*, p 185.

<sup>53</sup> See *R v Biniaris*, *supra*, para 36. See also *Beaudry*, *supra*, para 55.

<sup>54</sup> See *R v A G*, *supra*, para 6, emphasis added.

76. With the relative advantages of the trial court thus limited, it becomes difficult to see what remains as the basis for sustaining the idea of appellate deference; especially when (a) matched against the legal requirements that the trial must be fair and that the accused may not be convicted unless guilt is established beyond reasonable doubt, and (b) appellants are entitled to expect the Appeals Chamber to engage in a meaningful review of compelling complaints of infidelity to those legal requirements in the course of the trial.

77. Any such remaining ground for appellate deference must be more than a formulary dictum that the Trial Chamber is better placed to appreciate the ‘overall forensic dynamics’ of the trial from the perspective of the evidence in the case. For, this would be an inadequate basis to ignore the specific obligation that the trial must be fair and that an accused must be proved guilty beyond reasonable doubt before he can be convicted. The inadequacy of the ‘overall forensic dynamics’ of the trial consideration is apparent in light of its rational opacity, among other things. It is rationally opaque because the appellant that seeks a review of the factual finding will in many cases insist that there is nothing in the overall dynamics of the trial that would justify the impugned finding of fact. Against such an argument, the Appeals Chamber will be hard-pressed to identify the precise element of ‘overall forensic dynamics’ of the particular trial that warrants appellate deference to the Trial Chamber as regards particular findings of fact, which particular element is beyond both the ability of counsel on either side to isolate and debate on appeal and of the appellate judges to comprehend. As a practical matter, then, the ‘overall forensic dynamics’ could not sustain the idea of appellate deference; since all that is required to attend to it is for the respondent to identify some specific elements of such ‘overall forensic dynamics’ which would illustrate or fully show the validity or reasonableness of the impugned factual finding.

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78. But, there may be a need to stress the critical importance of avoiding a state of affairs in which ‘appellate deference’ is permitted to become a convenient subterfuge for appellate courts to escape the laborious and unglamorous work of conducting the thorough evidential review that may be necessary in the given appeal, in order to be convinced (in the face of the contrary complaint) that the trial was fair or that guilt was proved beyond reasonable doubt or that the factual finding was reasonable, as the case may be. There is no need to insist on the possibility of that subterfuge<sup>55</sup>—though it should not be ignored. It is only necessary to insist that the criminal justice process is so onerous in its consequences on citizens and their human rights that appellate judges must see zero-tolerance for material mistakes in the trial process

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<sup>55</sup> At the High Court of Australia, Kirby J invited the suspicion that the professed attitude of appellate deference to factual findings of trial courts is possibly explained, at least in part, to the lingering traces of a feeling—though no longer declared as readily in the modern era as in the past—that the task of fact-finding is beneath the dignity of appellate judges. See *State Rail Authority (NSW) Pty Ltd v Earthline Constructions (in liq)*, *supra*, para 73, per Kirby J, having recalled (in para 72) the dictum of Lord Holt CJ expressed thus in a 17<sup>th</sup> century decision: ‘[A]ll causes generally consist more of matters of fact, than of law, and it is beneath the dignity of their Lordships, to be troubled with matters of fact’: *R v Earl of Banbury* (1694) Skinner 517, 523 [90 ER 231, 235].

as the cardinal creed of their duty. And that is particularly so when the law either compels that creed or does not expressly obstruct it.

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79. In the final analysis, the proper place for the idea of appellate deference (so called) rises no higher than the proposition that the Appeals Chamber should not lightly overturn the factual findings of the Trial Chamber. Yet, that proposition should not deflect the Appeals Chamber from what is at once an obligation and a prerogative to review factual findings of the Trial Chamber, when there is an appellate complaint that factual findings were not borne out by applicable legal requirements that must control the particular factual findings before the Trial Chamber.

80. When the idea of appellate deference is confined to the understanding that the Appeals Chamber should not lightly overturn factual findings, the procedural result becomes this. An appellant's bare complaint of erroneous factual finding will be insufficient to warrant disturbing the Trial Chamber's factual finding. The appellant must make a compelling case to bear out the complaint. Where no such case is made, the finding will not be reversed. But, where a compelling case is made, the Appeals Chamber must review the finding and decide the point on a substantive footing. And that conveniently brings us to the next subject concerning materiality of appellate errors.

### ***E. Materiality of Errors***

81. The Appeals Chamber will not apply its remedial powers at the instance of a trifling or harmless error (of law, fact or procedure). The error in question must be *material*. An error will qualify as *material* if it reasonably compels the view of *likelihood* that the Trial Chamber *might have* rendered a substantially different judgment had the error not occurred; or if the appellate court *could not be sure* that the trial court would have rendered the same judgment had the error not occurred.

82. It may be noted immediately that the test of materiality formulated here—in light of the emphasised words—is indeed a departure from the test adopted in earlier jurisprudence of the Appeals Chamber. There, the effective test of materiality ultimately appears to have amounted to the suggestion that ‘the appellant needs to demonstrate’ that in the absence of the error ‘the judgment would have substantially differed from the one rendered.’<sup>56</sup> That is part of the panoply of the ‘settled’ standards of appellate review that we were pressed to follow.

83. With respect, that test calls for caution in two significant ways. Beginning with the last element indicated: the test of materiality that speaks in terms of what the Trial Chamber

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<sup>56</sup> See *Lubanga A 5 (Judgment)*, para 20; *Ngudjolo A (Judgment)*, para 21; and *Prosecutor v Bemba & Ors (Judgment)*, para 99.

‘would have’ done (but for the error) is obviously awkward; as it imports an element of assured prediction of outcomes that defies human affairs. The more workable formulation is that seen in the case law of some national jurisdictions, where formulation such as follows have been accepted as adequate for the intended purpose: that ‘*there might have been reasonable doubt in the minds*’<sup>57</sup> of the trier of fact (but for the error); that the error ‘*might have had an effect on the minds of any jury properly directing their minds to the matter*’;<sup>58</sup> or that ‘it is impossible to say that the jury *might not have had a reasonable doubt in the matter*’ (had the error not been committed).<sup>59</sup> It is significant that in Canada, the prosecution has a limited right of appeal of an acquittal, in the sense of the right depending only on an error of law on the part of the trial court. It has been held in that context that ‘[i]t is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge *might reasonably be thought*, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. *The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.*’<sup>60</sup> The moral of this illustration is to the following effect. That the prosecution is not required to persuade the appellate court in that degree sharpens the view of awkwardness of requiring such a degree of persuasion from the defendant-appellant.

84. Second the imposition of the burden of demonstrating the materiality uniformly upon ‘the appellant’ runs an appreciable risk of distorting the accepted standards of the administration of criminal justice. This is specifically in the sense that it may unfairly shift the burden of proof in a criminal case, by the mere virtue of an appeal against conviction founded on an error. It makes little difference, in my view, that in some jurisdictions the appellate burden of persuasion is distributed between the prosecution and the defendant: with the prosecution bearing the burden of demonstrating that an error of law had no material impact, while the defendant bears the burden in relation to appeals on ground of errors of fact.<sup>61</sup>

85. Indeed, the accused may be appealing an error—even an error of fact—committed by the Trial Chamber at the urging of the Prosecutor. In those circumstances, it would be strange indeed to impose the burden of demonstrating the materiality of that error upon the appellant-convict, when the error—which may well have alleviated the Prosecutor’s traditional burden of proof at trial—should not have occurred in the first place. The unfairness of such a burden

<sup>57</sup> See *R v Parks*, *supra*, 1486 and 1488 [*per* Lord Parker CJ].

<sup>58</sup> *Ibid*, p 1887.

<sup>59</sup> *Ibid*, p 1888. See also *Stafford v DPP*, *supra*, p 263, where Viscount Dilhorne accepted as proper the following question: “‘Might this new evidence have led to the jury returning a verdict of Not Guilty?’” If the Court thinks that it would or might, the Court will no doubt conclude that the verdict was unsafe or unsatisfactory’: p 263 [HL]. In *R v Pendleton*, Lord Bingham spoke of the test in the terms that ‘it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe’: para 19 [HL].

<sup>60</sup> *R v Graveline* [2006] 1SCR 609, para 14 [SCC], emphasis added.

<sup>61</sup> See, for instance, *R v Morrissey* (1995), 97 CCC (3d) 193 [CA, Ont]. See also *R v Khan* [2001] 3SCR 823, para 23, *per* Arbour J [SCC].

upon an appellant-convict should be further apparent in an ICC trial, in the light of a very recent development in the jurisprudence in the manner of a new theory suggesting that the practice of rulings on *admissibility* of evidence need not be followed in ICC trials, in favour of a theory of *submission* of evidence: in the result that the Trial Chamber need not explain at all at any time whether it relied on *disputed* evidence when arriving at its judgment.<sup>62</sup> [In view of the far-reaching implications of that development in administration of justice at the ICC, including in the context now under discussion, it is necessary to register some initial observations in Appendix I to this opinion.] Consequently, a convicted defendant becomes saddled with the burden of demonstrating, on appeal, the materiality of the admission at trial of what may have been inadmissible evidence, but in relation to which the Trial Chamber did not indicate any ruling to the effect that such evidence was not considered for purposes of the judgment. The unfairness of the burden is apparent, given that the undifferentiated receipt of all evidence ‘submitted’ at trial may have resulted in the adulteration of admissible evidence with the inadmissible ones, hence possibly alleviating the prosecution’s burden of proof. In those circumstances, it would be unfair to require the appellant-convict to demonstrate the materiality of the error in the manner of showing that in the absence of the error, ‘the judgment would have substantially differed from the one rendered’.

86. It is also possible to consider the legal mischief of any such burden from the perspective of those cases in which the defendant is self-represented or represented by counsel of questionable competence. How would such a defendant fairly be expected to shoulder the appellate burden of showing the materiality of an error? Would the appellate judges, like Pontius Pilate, abdicate their responsibility to do justice in the given case? No. The better approach, in my view, requires no formulation that necessarily places the burden on the appellant-convict to establish the impact of the error. It is enough for him (or his counsel) to assist the appellate court with a clearly identified complaint in the manner of grounds of appeal and supporting submissions, to the maximum extent of the appellant’s ability. In most cases where the appellant is represented by counsel, the best efforts of able counsel will be good enough to assist the Appeals Chamber to do justice. But, the appellate judges must, in their turn, discharge their own responsibility to do justice in the given case, as best they can. It is not without significance, even in this connection, that it has been repeatedly said that in the exercise of the appellate review power the appeal judges must ‘bring to bear’ the collective or accumulated weight of their ‘judicial experience’.<sup>63</sup> No doubt, the ultimate value of such experience will guide the appeal judges in discerning the impact of the impugned error, with the best assistance that the parties can give.

87. Noting the foregoing concerns, then, it is accepted that a certain onus is placed upon an appellant to demonstrate his complaint. The correctness of that requirement is anchored in the fact that the judgment of the court below must be given legal recognition as settling the state of affairs necessarily implicated in the questions that the trial judgment has answered.

<sup>62</sup> See *Prosecutor v Bemba & Ors (Judgment)*, paras 572—628.

<sup>63</sup> See, for instance, *R v Beaudry*, *supra*, para 58 [SCC]; *R v A G* [2001] 1 SCR 439, para 6 [SCC]; *R v Biniaris*, *supra*, para 39 [SCC]; *R v Lake*, *supra*, pp 175-177 [EWCA].

This is because the appellate court is no longer dealing with a *tabula rasa* in relation to those questions. Hence, the appellant may be required to persuade the appellate court as to the need to disturb the legal *status quo* that has been settled by the judgment below. However, this requirement to persuade the appellate court should not be taken to import any higher obligation than the ordinary requirement to make out a realistic complaint, as opposed to a fanciful one or a bare assertion, that there had been an error. If not, the judgment below remains undisturbed and continues to govern the legal situation and circumstances of the parties in the relevant respect. But, once such a reasonable appellate case has been made out as to the occurrence of an error, the weighing of its impact on the outcome of the process in the trial court must follow the event, with the appellate judges bringing the cumulative weight of their experience to consider the impact. It should not require a separate obligation upon the appellant to show that the outcome ‘would have been’ different if not for the error.

88. To be clear, the proposition here is not that a finding of materiality must follow the event of finding of an error. It is, rather, that the secondary inquiry as to whether or not an error has been material should be an assessment that the appellate judges must make on their own, with any assistance that the appellant can provide through the submissions of counsel, without considering that there is an additional obligation upon the appellant to demonstrate the materiality of the error as a distinct obstacle that the appellant must surmount.

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89. It is obviously not always easy to construct strict compartments between appellate grievances, separating the category of material errors (of law, of fact or of procedure) from the category of unfairness amounting to miscarriage of justice. This is the case especially considering that an isolated *material* error of law or fact or procedure may not readily be seen as amounting to miscarriage of justice, yet a catalogue of rampant little errors of law or fact or procedure may in their accumulated weight or harassing minions or in their proportion, amount to unfairness rising to miscarriage of justice; when their joint or several incidence overwhelms the fitness of the proceedings and its resulting judgment or sentence to stand up as a *reliable* expression of justice.

90. Of course, the nature of the appellate grievance as either of the category of *unfairness* (affecting reliability of the decision or sentence) or of *errors* (of law, of fact or of procedure) will influence or calibrate the appropriate appellate remedy: such as whether reversal, amendment or retrial will be warranted. For instance, and without limiting the generality of the hypothesis, an isolated material error of law (or of fact, or of procedure) may be more amenable to the appellate remedy of limited amendment of the trial judgment (or limited remand to the Trial Chamber or limited factual inquiry by the Appeals Chamber itself) than the remedy called for when the grievance is one of unfairness amounting to miscarriage of justice.



## V. Rulings in Respect of Evidence

### A. *The Concern as Registered in the Present Appeal*

91. One concern that resonates in this appeal—although not identified specifically as a ground of appeal—relates to the manner in which the Trial Chamber considered the evidence. The concern is to the effect that the Appellant was left without clarity as to the relevance and probative value of the evidence upon which the Trial Chamber relied to convict him, and why exculpatory evidence was not clearly or sufficiently addressed in the Trial Judgment. That concern is registered in the following paragraphs, among others, in the Appellant’s Brief:

228. In the present case, the Trial Chamber erroneously dismissed, on a wholesale basis, documentary and testimonial Defence evidence with direct relevance to the central question of the proceedings; the command of the MLC contingent in the CAR. Had this evidence been considered, the Trial Chamber could never have concluded that Mr. Bemba was liable as a commander. This evidence, individually and cumulatively, undermines the Trial Chamber’s findings on command. The fact that it features nowhere in the Trial Chamber’s reasoning is a legal error warranting the reversal of the decision.

[...]

322. The Trial Chamber’s error lies in its approach. Packaging together all evidence of any reports of MLC crimes, the Trial Chamber concluded in sweeping terms that throughout the 2002-2003 Operation, Mr Bemba knew that the MLC forces “were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging.”

323. The Trial Chamber erred in failing specifically to enquire whether sufficient evidence supported a finding that Mr Bemba had actual knowledge that the MLC troops were committing or about to commit murder, as opposed to rape or pillage. The Trial Chamber asserts, for example, that the intelligence reports Mr Bemba was receiving referred to “theft, pillaging, rape, the killing of civilians, harassment of persons, and the transportation of looted goods.” The evidence cited, however, refers almost exclusively to theft, looting and harassment. The media reports which “consistently reported allegations that MLC soldiers were committing acts of pillaging, rape, and murder”, regularly refer to only pillage and/or rape. There were no credible reports of murder committed by MLC troops sufficient to support a finding of actual knowledge.

324. The Trial Chamber also failed to consider whether any evidence would cast doubt on such a finding. ...

[...]

466. [...] The Trial Chamber held Mr Bemba liable for each of the underlying acts of rape and pillage based on a cumulative assessment of identification criteria. For each of the 28 instances of rape, for example, the Trial Chamber addressed the identification of each of the perpetrators in one paragraph:

...the same identifying characteristics were also present in respect of the perpetrators of the other acts identified above, namely, the repeated interactions between the victims and witnesses and the MLC soldiers, the fact that the victims and witnesses identified the perpetrators as “Banyamulengués” or MLC, the troop movements and exclusive presence of the MLC in the relevant locations at the time of the crimes, the perpetrators’ language, their uniforms, **and/or** the fact that their actions accorded with evidence of the MLC’s *modus operandi* and the perpetrators’ general motives in targeting the civilian population. Further, P119 testified that soldiers arriving at her house in PK12 – in the immediate vicinity of which two of the acts identified above occurred – told her that they were sent by “Papa Bemba”.

467. The only individualised assessment was in relation to P29, who testified that the foreign dialect spoken by her attackers was “probably not Lingala”. The Trial Chamber found, regardless, that there were sufficient factors enabling it to identify P29’s attackers. These factors were not identified, apart from being “set out above”.

468. This was insufficient. Identification was a crucial live issue in the case. The Defence made extensive submissions as to why the evidence of particular witnesses meant their attackers could not have been MLC soldiers. The Trial Chamber’s sweeping assessment of identification meant that these submissions were never addressed. P22, for example, testified that she was raped by men wearing uniforms of the “Garde présidentielle”, or the GP. They had “GP” on the arm of their uniforms. There is no evidence that the MLC wore Presidential Guard uniforms, or that Mr Bemba ever had effective control over members of the Presidential Guard. This should have been sufficient to rule out the MLC as perpetrators, or at least warrant a reasoned opinion as to why the Trial Chamber was still satisfied beyond reasonable doubt that the GP-uniformed attackers were, in fact, part of the MLC contingent. The “sweeping analysis” obviated the need for basic judicial reasoning on crucial identification evidence.

92. Although the present appeal does not directly engage the question of absence of rulings on admissibility of evidence, it does engage the very cognate question of absence of a ‘full and reasoned statement ... on evidence and conclusions,’ as required under article 74(5) of the Rome Statute. In the result, a regime which permits the absence of rulings on admissibility of evidence is bound to result in the multiplication of the kinds of complaints seen in this case, concerning the absence of full reasoning on evidence and conclusions.

93. But more directly, a regime of appellate review which appears to place upon an appellant the burden of demonstrating materiality of the errors on the part of the Trial Chamber very critically puts in issue the need for an appellant to see with clarity whether or not, and to what extent, the Trial Chamber had relied upon contested evidence submitted at trial. It is for those reasons that I have found it necessary to discuss the need for the Trial Chamber to make rulings in respect of admissibility of evidence. That discussion appears in Appendix I to this opinion.

## VI. Amendment of the Indictment by the Trial Chamber

94. In his second ground of his appeal, the Appellant mainly contends that the conviction exceeded the charges, for purposes of article 74(2) of the Rome Statute: because his conviction was partly based on individual acts of murder, rape and pillaging committed against particular victims at specific times and in places that had not been confirmed in the Pre-Trial Chamber's Confirmation Decision. In that respect, he argues that the scope of the trial against him must be limited to the criminal acts that were specifically confirmed by the Pre-Trial Chamber in the Confirmation Decision. He argued that a criminal act that 'was not confirmed by the Pre-Trial Chamber' may 'not form part of the charges and cannot be used to found a conviction.'<sup>64</sup> Stated that way, the Appellant's complaint goes well beyond a basic complaint that criminal acts which were not part of the indictment may not be used to sustain a conviction. The complaint also appears to imply a proposition that only the Pre-Trial Chamber may amend an indictment: hence, a Trial Chamber is precluded from amending the indictment after the commencement of trial.

95. For purposes of this ground of appeal, I concur with the Majority Opinion as to both the findings and conclusions, in relation to the Appellant's main argument that his conviction exceeded the scope of the charges, for purposes of article 74(2) of the Statute.

96. I do, however, see a need to discuss the broader proposition implied in the Appellant's submissions: that a Trial Chamber is precluded from amending the indictment after the trial has commenced.

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97. It must be said at once that this Appeals Chamber must not be quick to foster a course of jurisprudence the effect of which is to deny the Trial Chamber the power to do any of the following things after the trial has begun:

- (a) vary the indictment in a manner that may not amount to an amendment of charges; or even,
- (b) amend the charges in the truest sense of the idea.

98. It may be that there are some with whom such a denial of powers may sit well, for reasons entirely peculiar to them. But, it is quite another matter to suppose that such a denial of powers results inescapably from a fair interpretation of the Rome Statute. Such, in my respectful view, would be a profligate supposition.

99. It must particularly be stressed, indeed, that such a foreclosure is not compelled by any view of general principles of law recognised in the realms of administration of criminal justice in the modern world. To begin with, there is no such principle in the administration of

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<sup>64</sup> Appellant's Brief, paras 117-118.

international criminal justice. As will be seen presently, the tendency of general principles of law is in the direction of permitting amendments to indictments *at any stage* of the proceedings, if it is in the interest of justice to allow the amendment in the given circumstances—provided no injustice is occasioned to the accused.

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100. Notably, the *Akayesu* jurisprudence, which holds that genocide can come in the manner of rape,<sup>65</sup> was the direct product of an amendment of the indictment that the ICTR Trial Chamber had permitted long after the trial had begun.<sup>66</sup> The amendment was in fact made after the conclusion of the case for the prosecution.<sup>67</sup> The *Akayesu* amendment was entirely consistent with the principle in many national jurisdictions, which authorises judges to amend the indictment *at any stage* of a trial, in order to conform the indictment to the evidence heard in the case, if it is in the interest of justice to do so; as long as the amendment does not result in injustice. In *R v Smith, Pople & Ors*,<sup>68</sup> the Court of Appeal of England and Wales did—as was done much later in *Akayesu*—also permit an amendment to the indictment made at the close of the prosecution case, pursuant to s 5(1) of the Indictments Act, 1915. In Canada, the same power is found in s 601(2) of the Criminal Code.<sup>69</sup> Similar provisions abound in other domestic jurisdictions including, but not limited to, Botswana,<sup>70</sup> New South Wales,<sup>71</sup> New Zealand,<sup>72</sup> Nigeria,<sup>73</sup> and Tanzania.<sup>74</sup>

<sup>65</sup> See *Prosecutor v Akayesu* (Judgment) dated 2 September 1998 [ICTR Trial Chamber], paras 507 and 508.

<sup>66</sup> See *ibid*, para 6: ‘The Indictment against Jean-Paul Akayesu was submitted by the Prosecutor on 13 February 1996 and was confirmed on 16 February 1996. It was amended during the trial, in June 1997, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A and 12B)’.

<sup>67</sup> See *ibid*, para 23: ‘As stated above, 24 May 1997 marked the end of the first part of the trial of the Accused with the testimony of the last prosecution witness. However, on 16 June 1997, the Prosecutor submitted a request to bring an expedited oral motion before the Chamber seeking an amendment of the Indictment. During the hearing held to that end on 17 June 1997, the Prosecutor sought leave to add three further Counts, namely, Count 13: rape, a Crime Against Humanity, punishable under Article 3(g) of the Statute, Count 14: inhumane acts, a Crime Against Humanity, punishable under Article 3(i) of the Statute, and Count 15: outrages on personal dignity, notably rape, degrading and humiliating treatment and indecent assault, a Violation of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II, as incorporated in Article 4(e) of the Statute. The Chamber granted leave to the Prosecutor to amend the Indictment and postponed the date for resumption of the trial to 23 October 1997.’

<sup>68</sup> *R v Smith, Pople and Others* (1950) 34 Cr App R 168.

<sup>69</sup> The main frame of s 601(2) is as follows: ‘Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence ...’. [Section 587 concerns the power of a court to order the Prosecutor to furnish particulars of an offence for purposes of a fair trial. The only exception to the power to amend an indictment under s 601(2) is the statutory bar against amending the indictment to add to overt acts in cases of treason: see s 601(9).] In *Wallace v R* (2002) 53 WCB (2d) 353 [NS CA], the Court of Appeal for Nova Scotia dismissed a ground of appeal that attacked the decision of the trial judge permitting an amendment of the indictment which was prompted by the defence closing speech at the end of the trial.

<sup>70</sup> See the Criminal Procedure and Evidence Act of Botswana, s 149(1): ‘(1) Whenever, on the trial of any indictment or summons, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment or summons have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment or summons the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment or summons will not

101. In the UK, the power to amend the indictment ‘at any stage of the trial’ was used to amend an indictment at the end of a trial, in the course of jury deliberations. The jury could not (either unanimously or by a majority) agree on a verdict on the only offence originally charged. The sole aim of the ensuing amendment was to enable a conviction on a lesser included offence that had not been charged all along. The Court of Appeal upheld the amendment as having caused no injustice to the accused.<sup>75</sup> Similarly, the Court of Appeal has allowed, as harmless, amendments to the indictment after a successful no-case-to-answer submission.<sup>76</sup> In Canada, an indictment may even be amended by the court of appeal, if no injustice would result to the accused.<sup>77</sup>

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102. In the light, then, of the tendency of the general principle of law in many parts of the world, which permits amendment of the indictment at any stage of the trial, as seen above, it is important to recall the views of Lord McNair, according to which: ‘Treaties must be applied and interpreted against the background of the general principles of international law. ... Moreover, those principles are always available for the purpose of supplementing treaties, and for interpreting them, when interpretation is necessary ...’.<sup>78</sup> The minimum value of that view, for present purposes, must be that the greatest caution is called for when a proposed interpretation of the Rome Statute would result in a norm which contradicts generally accepted wisdom, practice or procedure in large sections of the international community—even when such generally accepted wisdom, practice or procedure is not uniformly shared.

103. At any rate, it will be difficult to excuse an elective interpretation of the Rome Statute which regresses to methods and ideas that had been practised and ultimately discarded in large sections of the international community, because those methods and ideas were deemed too anachronistic for modern sensibilities, especially when they are prone to occasion absurdities and injustice. The law reform in the representative domestic jurisdictions

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prejudice the accused in his defence, order that the indictment or summons be amended, so far as it is necessary, by some officer of the court or other person, both in that part thereof where the variance, omission, insertion, or error occurs, and in every other part thereof which it may become necessary to amend.’

<sup>71</sup> See Criminal Procedure Act of New South Wales, s 21(1): ‘(1) If of the opinion that an indictment is defective but, having regard to the merits of the case, can be amended without injustice, the court may make such order for the amendment of the indictment as it thinks necessary to meet the circumstances of the case.’ And particularly s 21(4): ‘An order under this section may be made either before trial or at any stage during the trial.’

<sup>72</sup> Criminal Procedure Act, s 133(1): ‘A charge (including any of the particulars required to be specified in a charging document under section 16(2)) may be amended by the court at any stage in a proceeding before the delivery of the verdict or decision of the court.’

<sup>73</sup> Criminal Procedure Act, s 163: ‘Any court may alter or add to any charge at any time before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused.’

<sup>74</sup> See Criminal Procedure Act, ss 234(1) and 276(2).

<sup>75</sup> See *R v Collison* (1980) 71 Cr App R 249 [CA].

<sup>76</sup> *R v Teong Sun Chuah* [1991] Crim LR 463. In *R v Rogers* [2014] 2 Cr App R 32, the amendment made after a successful no-case submission was to add a new count to the indictment.

<sup>77</sup> See Criminal Code, s 683(1)(g): ‘For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice ... amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.’

<sup>78</sup> Lord McNair, *The Law of Treaties* [Oxford: Clarendon Press, 1961(reprinted 2003)] p 466, footnotes omitted.

considered above, now permitting amendment of indictment *at any stage* of a trial, is precisely on point here.<sup>79</sup>

104. And it makes it necessary to observe that the Rome Statute may indeed be unique in many aspects. There is, however, nothing at all in it that is substantively unique enough to justify fundamental departures from the general idea of administration of criminal justice. Such departures must be justified on solid and demonstrable considerations of harm to the interest of justice; well beyond over-indulgence to words and phrases in the Rome Statute or the Rules, as if those mere words and phrases were ‘sovereign talismans’ that compel blind faith in their goodness, and fatalism to deviation. It is for that reason that the Statute lays great store in enlisting unto the Court’s judiciary, legal professionals of great experience in the administration of criminal justice in the domestic and international realms. Hence, it is necessary in this Court to pay careful heed to the wisdom of certain generally accepted points of practice and procedure in other realms, and consider their values in truly *complementing* the cause of justice pursuant to the Rome Statute. That will serve the ICC much better in its complementary jurisdiction than the hubris of uniqueness that often strokes the cloistered mind.

105. It stands, then, to reason that the Rome Statute is not readily to be interpreted in a manner that puts it at odds with what generally obtains in the administration of criminal justice in the wider world. And the one thing that generally obtains in the administration of criminal justice at both the international realm and much of the national is that the trial court may grant leave to amend the indictment at any stage of the trial, if it is in the interest of

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<sup>79</sup> Notably, in *R v Smith, Pople & Ors, supra*, the Court of Appeal upheld an amendment to the indictment made pursuant to s 5(1) of the Indictments Act, which permits amendment of the indictment ‘at any stage of the trial.’ In the course of giving the judgment of the Court, Humphreys J explained the provenance and rationale of s 5(1) as follows: ‘The first question argued before us on this appeal was whether the learned judge had any jurisdiction to direct that amendment. Now, the power to amend an indictment has been contained since 1915 in section 5(1) of the Indictments Act of that year. *That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the section in question provides, and, as we think, was intended to provide that in future the power should be very considerably extended.* The section runs as follows: “Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case”. Then follow the all-important words—“unless, having regard to the merits of the case, the required amendments cannot be made without injustice ...”. The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore is bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case or in any case where the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment to direct that one person should be tried separately from others, or the trial may be postponed. It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, that is the valuable security with which in fact that building society parted. We have no hesitation in this case in supporting the action of the learned Judge in amending the indictment’: *ibid*, pp 176–177, emphasis added. See also *R v Johal; R v Ram* (1972) 56 Cr App R 348, p 351.

justice to do so, provided there is no injustice occasioned to the accused. Thus, unless the words of the Rome Statute—when the Statute is read in its entirety—inescapably compel shutting an ICC Trial Chamber out of the authority to amend the charges or adjust the indictment in any other way, after the trial has begun, when it is in the interest of justice to do so, the Appeals Chamber must not rush ahead to shut that door. As will be shown in the discussion that follows, the Rome Statute does not compel such foreclosure.

106. It should, of course, not be necessary to stress here that the Trial Chamber (under the oversight of the Appeals Chamber as necessary) can be left, from first principles, to know when to decline to exercise the power of amendment for reasons of incompatibility with the interest of justice or risk of irreparable prejudice to the accused. In UK jurisprudence, for instance, judges take seriously the matter of amendment of indictments late in the trial. They are viewed with particular caution, out of fear that the later the amendment the higher the risk of injustice. Still, amendments made very late have been permitted, if the court considered both that the interest of justice required it and there was no injustice to the accused.<sup>80</sup>

### ***A. Purposive Interpretation***

107. Whether or not the Rome Statute precludes a Trial Chamber from amending the indictment after the commencement of trial compels recalling the place of purposive interpretation in relation to the Rome Statute.

108. In 1917, Cardozo J felt constrained to observe as follows: ‘The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.’<sup>81</sup> Many jurists see the Cardozo approach as the correct one in the administration of justice, whenever mere absurdity—let alone injustice—may result from the construction of words in legal documents. There may of course be circumstances when the balance of justice recommends that the prosecution should suffer fatal consequences on the altar of technical slips. This is especially the case when, for instance, the particular criminal proceedings portend disproportionately serious penal consequences to the accused,<sup>82</sup> when the applicable legislation has not kept pace with much needed reform; or, when the criminal justice system is used as a tool of a broader political agenda that is objectively repugnant to natural justice, equity and good conscience, thus spurring the judiciary on to its defining task as the last bastion of checks and balances.<sup>83</sup> The balance of justice does not generally lean, in

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<sup>80</sup> See *R v Rogers*, *supra*; *R v Collison*, *supra*; and *R v Teong Sun Chuah*, *supra*.

<sup>81</sup> *Wood v Duff*, (1917) 222 NY 88, 91 [NY, CA].

<sup>82</sup> For instance, there was a time, in England, when the death penalty was a rampant punishment for many offences even minor ones, in an obvious effort to protect the upper classes from the poorer. L Radzinowicz, *A History of English Criminal Law* (1948) vol 1, pp 97—103.

<sup>83</sup> That is what Lord Bingham of Cornhill must be taken to have had in mind when he said this: ‘Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place’: *R v Clarke*; *R v McDaid* [2008] UKHL 8, para 17 [House of Lords].

a similar way, against recognising in a trial court the authority to permit amendments to the indictment in the interest of justice where no irreparable prejudice is caused to the accused.

109. But, if it is possible and permissible (as it should be) to get around ‘precise words’ (reprising the words of Cardozo J) that may produce absurdity, there must then be no excuse at all to surrender to absurdity in the very absence of ‘precise words’ that may be held out as inescapably compelling such absurdity.

110. It has indeed been long recognised by eminent authorities in both international and national domains that whenever possible legislation is to be interpreted in a manner that avoids absurdity, as the legislator is not to be presumed to intend it. Both Grotius<sup>84</sup> and Vattel<sup>85</sup>—two of the leading luminaries in classical international law—said so in their time. Closer to our own time, it is similarly explained in *Maxwell’s* that between absurd consequences and the awkwardness of acknowledging unintended shortcomings in legislative drafting, it is ‘more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.’<sup>86</sup> And speaking to the very question of human fallibility of the legislator, an experienced parliamentary counsel and an acknowledged authority in statutory interpretation in his own right has plainly attested that legislators do tend to be more slovenly—and more often—than permits unlaboured admission. According to Bennion, ‘[t]he interpreter needs to remember that drafters are fallible,’<sup>87</sup> and that ‘[d]rafting errors frequently occur.’<sup>88</sup> In the domain of international law, a similar observation was registered in *Oppenheim’s* in the following

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<sup>84</sup> Hugo Grotius taught that consequences are a proper clue to correct interpretation. As he put it: ‘Another source of interpretation is derived the consequences, especially where a clause taken in its literal meaning would lead to consequences foreign or even repugnant to the intention of a treaty. For in an ambiguous meaning such an acceptance must be taken as will avoid leading to an absurdity or contradiction’: Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations* (translated from the original Latin with notes and illustrations from political and legal writers, by A C Campbell) (1901), p 179.

<sup>85</sup> Vattel begins by observing as many before and after him have done that ‘[t]here is not perhaps any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense’: Emer de Vattel, *The Law of Nations* (ed B Kapossy and R Whatmore (2008), p 416. When that happens, the rules that may be employed in the interpretation process include this: ‘Every interpretation that leads to an absurdity, ought to be rejected; or, in other words, we should not give any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. As it is not to be presumed that any one means what is absurd, it cannot be supposed that the person speaking intended that his words should be understood in a manner from which an absurdity would follow. ... We call *absurd* not only what is *physically impossible*, but what is *morally* so ...’: *ibid*, p 418, emphasis added.

<sup>86</sup> According to *Maxwell*: ‘BEFORE adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. *It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their primary or grammatical meaning actually express the real intention of the legislature.* It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended’: *Maxwell on Interpretation of Statutes*, 12<sup>th</sup> edn by P St J Langan (1969), p 105, emphasis added.

<sup>87</sup> F Bennion, *Bennion on Statutory Interpretation — A Code*, 5<sup>th</sup> edn (2008), p 566.

<sup>88</sup> See F Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001), p 48, emphasis added.



words: ‘an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility.’<sup>89</sup>

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111. The foregoing considerations afford adequate impetus for the purposive approach to the interpretation of legal texts. That approach is clearly entrenched in article 31(1) of the Vienna Convention on the Law of Treaties, which, as will be recalled, provides as follows: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose.*’ [Emphasis added.]

112. We pause here to observe that spliced within that provision is also the widely accepted tenet that the interpretation of a treaty requires reading it as a whole. The opening words say so: ‘[a] treaty shall be interpreted *in good faith ...*’. That opening focus is on the *treaty* as such—not yet on the specific terms of any given provision. From there, article 31(1) goes on, naturally, to require ‘ordinary meaning to be given to the terms of the treaty.’ Yet, that is not all that is said about giving ordinary meaning to the terms of the treaty. Notably, the Vienna Convention on the Law of Treaties insists that words in a treaty must not be taken out of context and given a blinkered reading. Hence, the important qualification that ordinary meaning is to be given to words of a treaty ‘in their context and in the light of its object and purpose.’ That tells us again to consider the treaty in its entirety. This is not only because the possessive adjective ‘its’—in relation to the ‘object and purpose’—refers to the entire treaty, but also because the entire treaty, just as much as parts of it, can supply the ‘context’ of the terms used in particular provisions of the treaty. That this is so is clear enough from the message of article 31(2), which indicates that—in addition to the text—the ‘preamble’, the ‘annexes’, and even related subsequent agreements, can supply the context of the terms of the treaty.

113. Indeed, that a treaty is to be read as a whole is an idea that has been fully recognised in the pronouncements of international courts, such as the following from the Permanent Court of International Justice: ‘In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.’<sup>90</sup>

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114. And, the particular value of reading the treaty *as a whole*—and *in its context*—lies in the frequent phenomenon that a question raised (and unresolved) in one provision may ultimately find its answer by having a thoughtful regard to another part of the treaty,

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<sup>89</sup> *Oppenheim’s International Law*, vol 1, 9th edn [R Jennings and A Watts] (1996) Parts 2 to 4, p 1273, fn 12, quoting the *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, p 418.

<sup>90</sup> *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos 2 and 3, p 23.

especially in a treaty that constitutes a system. No doubt the Rome Statute constitutes a system for the administration of justice. The system is thus impoverished by an approach to statutory interpretation that reads parts of the treaty in complete isolation from the other parts.

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115. Around the world, courts have also embraced the purposive approach to interpretation. Canadian courts, for instance, follow an approach that outlines the steps to be followed in purposive interpretation—with the view to avoiding absurdities. For instance, the Ontario Court of Appeal has recently summarised the steps as follows: ‘The purposive approach required the judge to first consider the ordinary meaning of the word or words being interpreted; next, the context in which the words are found and the purpose of the legislation; and then, whether the proposed interpretation produced a just and reasonable result.’<sup>91</sup> In another case, the Court of Appeal had insisted that a statute must be read *in its entirety*, in harmony with its object and purpose. Consequently, the Court refused to accept the accused’s argument of ‘restrictive interpretation,’ given the ‘illogical outcome that would ensue.’<sup>92</sup>

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116. According to the purposive approach, the interpretation of the Rome Statute should involve more than a reductive, mechanical reading of words and phrases in a discrete provision and applying them at face value: and, then, indifferently shrugging off any foreseeable (even gratuitous) absurdity that such a mechanical reading may produce; and by taking refuge behind glib proclamations of fidelity to mere words. That mischief looms large in any approach which insists that the Trial Chamber lacks power to amend the indictment, in the interest of justice, after the trial has begun—notwithstanding that such an amendment will cause no prejudice whatsoever to the accused in the case at hand (and may even be to his ultimate advantage, given the considerations of double jeopardy).

117. In the context of this appeal, it may broadly be considered that the Rome Statute gives the ICC no higher purpose than to do justice, as a court of justice. And that purpose must be construed in the more specific context of both the States Parties’ affirmation ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’ and their determination ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’<sup>93</sup>

### ***B. Construing article 61(9)***

118. It is important to keep the foregoing considerations firmly in mind when considering Ground 2 of the Appellant’s appeal. In that ground of the appeal, the Appellant impugns the

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<sup>91</sup> *Wilk v Arbour* (2017) 135 OR (3d) 708, para 20 [Court of Appeal for Ontario].

<sup>92</sup> *R v Brode (K)* 2012 ONCA 140, para 46 [Court of Appeal for Ontario], emphasis added.

<sup>93</sup> See the Preamble to the Rome Statute.

Trial Chamber's reliance on facts and circumstances which the Pre-Trial Chamber had not confirmed. In the law regarding indictments, the phrase 'facts and circumstances' may be accepted as a longer and double-barrelled alternative for the shorter term 'particulars'. For purposes of convenience, I shall use the latter word whenever possible. According to the Appellant, those particulars that had not been confirmed by the Pre-Trial Chamber fall legally outside the scope of the indictment, and cannot therefore be relied upon to convict. As I understand his argument, it is wholly immaterial that he may not have been substantively prejudiced all along by the incidence of those particulars led as part of the evidence during the case.

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119. That ground of appeal immediately engages the task of construction of article 74(2) of the Rome Statute, which provides that the judgment of the Trial Chamber on the merits 'shall not exceed the facts and circumstances described in the charges and any amendments to the charges.'

120. The construction of article 74(2) may or may not engage a correlative interpretation of article 61(9). The latter provision may not be engaged if the Trial Chamber only received the additional particulars after the Pre-Trial Chamber's Confirmation Decision, while taking no decision to reflect them in the text of the indictment. That scenario will present a pure and simple question of whether or not the additional particulars can properly form the basis of the merits judgment of the Trial Chamber.

121. But, where the Trial Chamber took a decision that adjusted the indictment to reflect the additional particulars, article 61(9) will also need to be construed in an integrated way with article 74(2).

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122. Now, very careful attention must be paid to the following point. What is inescapably captured by article 61(9) may be much less than what a casual or hasty reading of the provision may suggest. That point becomes evident when it is considered, first, that the provision's opening words are that '[a]fter the charges are confirmed *and before the trial has begun*', the Prosecutor may not 'amend the charges' at her own discretion [emphasis added]. She would need judicial permission. What the provision did in this connection is *nothing more than mention* the Pre-Trial Chamber as the judicial authority to grant such leave. It is thus eminently reasonable to say that the stated purpose of that provision is *not* to foreclose the prospect of amendment of the charges with leave of the Trial Chamber after the trial has begun. The stated purpose rather is to preclude the Prosecutor from amending the charges as she pleases without judicial authorisation. That singular purpose amply justifies the legislative effort invested in that provision, as a matter of the rule of effectiveness expressed in the maxim *ut res magis valeat quam pereat*. It is therefore not necessary to extend the value of the provision into the realms of a necessary implication that precludes the Trial

Chamber from amending the charges after the trial has begun, if the interest of justice requires it.

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123. The foregoing analysis is not altered by any argument of negative implication that seeks to batten all analysis down to the mere fact that the provision mentions the Pre-Trial Chamber and not the Trial Chamber as the authority from whom the Prosecutor is to seek leave to amend the charges; an argument inspired no doubt by the much abused and often misunderstood Latin expression *expressio unius exclusio alterius*.<sup>94</sup> The answer to that argument begins with noting that the provision delineates a period within which the Pre-Trial Chamber is the designated leave granting authority for purposes of amendment of the charges: that period is '[a]fter the charges are confirmed and before the trial has begun'. That factor must be considered in the light of article 61(11), which requires the Presidency to compose a Trial Chamber and transfer the file to them 'once' the charges have been confirmed. It, thus, stands to reason that during the *transitional* period between confirmation of the charges and commencement of the trial, the Pre-Trial Chamber will be more conversant with the case and the evidence in the case. It thus puts the Pre-Trial Chamber in the more efficacious position to deal with any question of amendment of the charges during that transitional period.

124. Furthermore, the period *before* the commencement of the trial is substantively still the 'pre' trial period, notwithstanding that the case may have been transferred to the Trial Chamber pursuant to article 61(11). Hence, it is substantively unremarkable that the Pre-Trial Chamber is given residual jurisdiction to consider amendments to the charges during that period. Indeed, article 64(4), which recognises that even the Trial Chamber may always (for

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<sup>94</sup> The abuse of the *expressio unius* maxim has been roundly dealt with by many jurists of note. The late US Supreme Court Justice Antonin Scalia and the renowned legal lexicographer Bryan Garner, have rightly observed that '[v]irtually all the authorities who discuss the negative implication canon emphasize that it must be applied with great caution ...'. This is because the maxim's 'application depends so much on context': Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* [St Paul, MN: Thomson/West, 2012], p 107. According to Scalia and Garner, '[t]he doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved': *ibid*, emphasis received. That observation is fully consistent with the observations of Lord Reid who once wrote at the House of Lords that 'the brocard *expressio unius exclusio alterius* must be applied with some caution.' This is particularly so, where it is clear that 'all the details [of the statute under consideration] have not been fully thought out ...': *Re Newspaper Proprietor's Agreement*, [1964] 1 WLR 31, p 38 [House of Lords]. At first instance, Russell J had declined to apply the maxim because it 'would produce a wholly irrational situation' in the particular circumstances: *Re Newspaper Proprietor's Agreement*, [1962] 1 WLR 328, p 335 [UK, England Restrictive Practices Court]. To the same effect, Lord Justice Lopes wrote in *Colquhoun v Brooks* that the maxim 'is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to *inconsistency or injustice*. I think a rigid observance of the maxim in this case would make other provisions of the statute *inconsistent and absurd*, and result in injustice. I cannot, therefore, permit it to govern my decision': *Colquhoun v Brooks*, (1888) 21 QBD 52, p 65 [CA England and Wales] [emphasis added]. Similarly, Lord Justice Jenkins once declined to apply the maxim where it would have led to a 'capricious ... operation' of the statute in question: see *Dean v Wiesengrund*, [1955] 2 QB 120, p 131 [CA England and Wales].

reasons of efficiency) refer certain preliminary questions to the Pre-Trial Chamber, does speak to an integrated system of administration of justice which makes it quite regular that the Statute should recognise the residual jurisdiction of the Pre-Trial Chamber as the authority to grant any needed leave to amend the indictment during the transitional period ‘[a]fter the charges are confirmed and before the trial has begun’.

125. That is to say, granting the Pre-Trial Chamber residual jurisdiction for purposes of leave to amend the charges before the trial has begun is quite simply a legislative act that recognises the residual jurisdiction of the Pre-Trial Chamber during that period. It *is only a rule of efficiency* that recognises the good sense of giving the Pre-Trial Chamber the authority to deal with a procedural matter that it will typically be better placed (than the Trial Chamber) to deal with. It need *not be a rule of exclusion* that implies a legislative intention to deprive the Trial Chamber of authority to deal with the same type of question at a much later stage of the case—outside the transitional period—when the Trial Chamber would be clearly better placed (than the Pre-Trial Chamber) to deal with the matter.

126. To be recalled in this connection is Lord Justice Jenkins’ correct observation that the *exclusio* maxim ‘has little, if any, weight where it is possible ... to account for the *inclusio unius* ‘on grounds other than an intention to effect the *exclusio alterius*.’<sup>95</sup>

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127. Article 61(9) is also to be considered from the perspective of its provision that a further confirmation hearing must be held if the Prosecutor’s request for amendment involves upgrading a charge or adding a new one. The significance of this requirement is considered further elsewhere. For now, however, it need only be observed that the requirement operates in those circumstances where the Prosecutor seeks leave from the Pre-Trial Chamber to amend the charges during the transitional period after their confirmation and before the trial has begun. As observed elsewhere in this opinion, there is nothing that compels reading the provision as evidence of legislative intention to preclude the Trial Chamber from the authority to grant leave to amend the charges after the trial has begun.

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128. To be considered in the same vein is the provision in article 61(9) stating that after commencement of trial, the Prosecutor may not withdraw charges without leave of the Trial Chamber. Once more, a legislative intention to deny the Trial Chamber the authority to grant leave to amend charges after the trial has begun is not a necessary, let alone the only, purpose of this provision. That is to say, that purpose does not become inescapable merely because the only mention made of the Trial Chamber’s authority to grant leave is in relation withdrawal of charges after trial has begun. That provision does not alter the character of

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<sup>95</sup> *Dean v Wiesengrund*, *supra*, p 131. Scalia and Garner said much the same thing: ‘The doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved’: see Scalia and Garner, *supra*, emphasis added.

article 61(9) as dealing only with the *transitional* period between confirmation of charges and commencement of trial.

129. Rather, the only purpose that is more apparent for the provision—and that purpose does not perturb the Trial Chamber’s authority to grant leave to amend the charges after the trial has begun—is the purpose of making it abundantly clear that it is only the Trial Chamber (not the Pre-Trial Chamber) that has the authority to permit the withdrawal of charges, after the trial has begun. The need for this clarification is apparent from the value of article 61(9) in granting the Pre-Trial Chamber residual authority to permit the amendment of charges, even after the case has been transferred to the Trial Chamber pursuant to article 61(11). Without clarifying that it is only the Trial Chamber that can authorise the withdrawal of charges, there might have been some confusion as to which Chamber has the authority to withdraw charges after commencement of the trial, given that article 61(9) has already recognised a residual jurisdiction in the Pre-Trial Chamber to amend the charges, even after the case has formally been transferred to the Trial Chamber pursuant to article 61(11).

130. Also, given that article 64(4) recognises for the Pre-Trial Chamber a residual jurisdiction to consider any other question that the Trial Chamber may refer to it—which questions may indeed conceivably include amendment of indictment after the trial has begun—there is an important value in making it very clear in article 61(9) that after the commencement of trial, it is only the Trial Chamber that can grant leave to withdraw charges.

131. Once more, this necessary clarification is an ample enough value for article 61(9) in the relevant respect, which need not imply a legislative intention to preclude the Trial Chamber from permitting an amendment to the charges where it is in the interest of justice to grant such leave, without injustice to the accused.

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132. In the final analysis, what is apparent in article 61(9), on any view, is that the provision is *necessarily silent* on the matter of whether the indictment can be amended after the ‘trial has begun.’ That silence cannot be readily converted into an inescapable conclusion either that an amendment is impermissible *at all* after the trial has begun, or that any amendment in those circumstances is only possible with leave of the Pre-Trial Chamber. There is nothing at all in necessary implication that compels reading the provision in that way.

133. Beyond what is already said above, there are additional reasons that obstruct any attempt to construe necessary implication into article 61(9) so as to preclude amendments to the indictment post-commencement of trial. First such a bar may not be in the interest of the accused, given the possibility that the *ne bis in idem* provision may not prevent a separate indictment or a further trial on the additional particulars—either at the same time or later. Second, in any circumstances where another trial is legally permissible on a separate indictment for a concurrent or subsequent trial, to bar an amendment the aim of which is to

avoid such separate indictment will not be a necessary implication from the perspective of the administration of justice. The rule of efficiency in the administration of justice frowns upon the multiplicity of proceedings. And, finally, such a bar would also not be consistent with the idea of justice for the victims and the community, if there is a possibility that another or subsequent trial may be precluded by the operation of the doctrine of *ne bis in idem*.

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134. There is also no necessary implication that *compels* referring the question of amendment to the Pre-Trial Chamber after the trial has begun—rather than merely leaving it to the Trial Chamber to decide the matter itself, or elect to refer the question to the Pre-Trial Chamber pursuant to the permissive powers indicated in article 64(4).

135. The considerations in this regard must begin with the realisation that the ICC is not a moot court. The interest of real-life justice that it administers should not be hostage to interesting but ultimately meretricious arguments. Here the question is this: what is to be achieved by requiring the Trial Chamber to send to the Pre-Trial Chamber every question of amendment that arises after the trial has begun in a case that the Pre-Trial Chamber has already confirmed to proceed to trial? Will the purpose *still* be to restrain the Prosecutor from the ability to subject a person to the jeopardy of a criminal trial, without the intervention of judges to vet the charges? Surely, that cannot *still* be the consideration: for, the jeopardy of criminal trial has already attached to the accused who is already being proceeded against in the trial before the Trial Chamber. And there are still judges (now of the Trial Chamber) who will stand between the accused and the Prosecutor in relation to any unfair or unwarranted new or amended charges.

136. Also, the argument for a statutory requirement to send the question of amendment of charges to the Pre-Trial Chamber after the commencement of the trial cannot be founded upon any compelling need to conduct a further confirmation hearing before the Pre-Trial Chamber, in relation to the new facts. Here, it bears keeping in mind that beyond the need to ensure that indictees are not left at the mercy of the Prosecutor without judicial oversight, the matter must be looked at from the perspective of what must inform the Pre-Trial Chamber's decision to confirm an indictment. It is the *measure of evidence*. Invariably, the measure of evidence of which the Pre-Trial Chamber needs to be convinced is typically less substantive or qualitative than the measure of evidence that is usually tabled before the Trial Chamber. In other words, by the time the Prosecutor would have requested an amendment of the charges in an *ongoing trial*, the evidence in that regard would generally have been more substantive than the sort of evidence on the strength of which an indictment may be confirmed before the Pre-Trial Chamber. There is, then, no compelling reason to require sending the case to the Pre-Trial Chamber in order that the indictment may be confirmed, typically on evidence of a lesser measure. It is for this reason that the common ground for permitting amendments of indictments in the course of a trial—from the ICTR (*vide* the *Akayesu* case) to Canada and elsewhere—is to conform the indictment to the evidence heard in the case.

137. A related further consideration that militates against sending to the Pre-Trial Chamber questions of amendment, arising after the trial has begun, is that the Trial Chamber at that stage would be more readily conversant with what had transpired in the trial up to that point. In other words, the same underlying principle of efficiency (that made it sensible to refer questions of amendment to the Pre-Trial Chamber during the transition period between confirmation of charges and commencement of trial) will now operate in favour of the Trial Chamber. It, thus, puts the Trial Chamber in a better position to consider whether the amendment might be prejudicial to the accused person or inefficient at least. And, lastly, not to be ignored are concerns about interruptions to the trial proceedings, in situations where questions arising after commencement of trial (including amendments to the indictment) are referred to the Pre-Trial Chamber in a case that is on-going before the Trial Chamber.

138. The foregoing reasons and more make it truly difficult to conclude that an amendment of the indictment may not be done at all after the trial has begun or that such an amendment can only be done by a Pre-Trial Chamber.

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139. What, then, to do in the face of the lacuna evident in article 61(9) concerning questions of amendment of the indictment after the trial has begun simply presents a question of balanced justice. This is in the sense of justice for the accused, the victims and the community. That question of justice can only be answered by the usual recourse to purposive construction of the Statute, coupled with the need to read it in its entirety. That approach allows the different parts of the Statute to co-operate harmoniously to deliver a just and reasonable outcome. As discussed earlier, such a composite or harmonious approach to the construction of legal instruments permits looking at other provisions in the instrument in order to answer questions arising from other parts. Thus, a seeming initial gap may suddenly disappear, when the construction of other parts of the Statute are brought into play.

140. The better view, then, is that the gap that is initially apparent in article 61(9), when a question arises about amending an indictment after the trial has begun, must be re-appraised in the light of the obligation and power of the Trial Chamber—under article 64—to conduct a fair trial.<sup>96</sup> In the exercise of that power or the discharge of that obligation, it falls for the Trial Chamber to decide whether the interests of justice, in the particular circumstances, would permit the amendment or not. In the event of a positive answer to the question, the remaining question becomes whether there is a need to allow the accused more time and facilities to prepare, in light of the amendment.

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<sup>96</sup> Yes, this is so, even taking into account the reading of article 61(11) which refers to exceptions indicated in article 64(4) and 61(9). For, there is an arguable case to be made about the good sense of referring ‘preliminary questions’ to the Pre-Trial Chamber before the trial ‘has begun’—possibly even after the trial has begun—if the Pre-Trial Division is better placed to deal with such preliminary questions more efficiently. Such preliminary matters contemplated by article 64(4) may rightly encompass amendment of charges. Article 64(4) coincides with article 61(9) in making the Pre-Trial Chamber the sensible authority to consider that question, in certain circumstances. But neither article 64(4) nor article 61(9), as has already been argued, compels a referral of the question of amendment of the indictment to the Pre-Trial Chamber after the trial has begun.



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141. But, even assuming that reasonable people can agree that article 61(9) means either than an amendment of ‘the charge’ is not possible at all after the commencement of the trial, or that it is only the Pre-Trial Chamber that can amend ‘the charge’ at that stage, it will still be possible in the interests of justice to accept that the Trial Chamber can adjust the indictment to a certain degree that does not offend the strict terms of article 61(9) to any extent that the provision might be generally accepted as requiring seising the Pre-Trial Chamber of the request to amend ‘the charge’.

142. In this regard, it is notable that in some jurisdictions, there is a clear distinction between permission to amend the indictment at large and permission to amend the indictment in a manner that does not alter the character of the offence charged. An example of such a distinction is to be found in section 96 of the Criminal Procedure (Scotland) Act, which provides as follows:

(1) No trial shall fail or the ends of justice be allowed to be defeated by reason of any discrepancy or variance between the indictment and the evidence.

(2) It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the indictment by deletion, alteration or addition, so as to—

(a) cure any error or defect in it;

(b) meet any objection to it; or

(c) cure any discrepancy or variance between the indictment and the evidence.

(3) Nothing in this section shall authorise an amendment which changes the character of the offence charged, and, if it appears to the court that the accused may in any way be prejudiced in his defence on the merits of the case by any amendment made under this section, the court shall grant such remedy to the accused by adjournment or otherwise as appears to the court to be just.

[...]

143. Certainly, the Scotland model indicates a middle course where amendments are still permitted within the indicated limits: that is, where amendments can be made at any stage of the trial, if it does not alter the character of the original charge.

144. Notably, however, the limitation in Scotland against an amendment ‘which changes the character of the offence charged’ is not uniformly shared by other jurisdictions, which generally authorise amendments of the indictments provided that injustice must not result to the accused. In particular, the jurisprudence of the Court of Appeal of England and Wales has since rejected as overly broad the proposition in the headnote of *R v Harden*, which had been stated in the terms that ‘an amendment of a count in an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged.’ The current law was stated by Ashworth J in *R v Johal; R v Ram*. Addressing the headnote in *Harden*, he said as follows: ‘As a statement of principle, to be applied generally, this is, in the judgment of this Court, too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally

charged, or for the purpose of adding a further charge, injustice would be caused by granting the amendment. But in some cases (of which the present is an example) no such injustice would be caused and the amendment may properly be allowed.’<sup>97</sup>

145. Having reviewed earlier jurisprudence on the issue, Ashworth J returned to the controlling principle, and said as follows: ‘In the judgment of this Court, there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise. The words in section 5(1) of the Indictments Act 1915 [which permits amendment of the indictment] “at any stage of the trial” themselves suggest that there is no such rule; if the suggested rule had been intended as a limitation of the power to amend, it would have been a simple matter to include it in the subsection.’<sup>98</sup> That limitation, of course, is seen in the Scotland Criminal Procedure Act. But, it is not shared by all other jurisdictions that permit amendment at any stage of the trial.

146. That said, it must also be observed that judges in England and Wales will bring heightened scrutiny to bear when a request for a late amendment involves the addition of a ‘fresh or new charge’, though there is no general bar to such amendments. Notably, the Court of Appeal has allowed substitution of a charge made during jury deliberations, as the amendment did not involve inclusion of fresh or new charges.<sup>99</sup>

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147. At the ICC, it should not be necessary to follow the Scotland model, if the overall interest of justice as discussed above warrants an amendment after the trial has begun, with no prejudice caused to the accused. But, *in extremis*, the Scotland model is a more tolerable interpretation of the Rome Statute than one that either (a) forbids the Trial Chamber to consider any amendment after the trial has begun, or, (b) requires such an amendment to be granted only by the leave of the Pre-Trial Chamber.

148. In this connection, it may additionally be recalled that article 61(11) provides that subject to article 61(9), the Trial Chamber ‘may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in [the trial] proceedings.’ It must immediately be said that any function of the Pre-Trial Chamber that is relevant and capable of application in a trial, within the meaning of article 61(11), must then include such powers of the Pre-Trial Chamber to adjust the indictment, short of what is inescapably captured by article 61(9).

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<sup>97</sup> *R v Johal; R v Ram*, *supra*, p 353 [CA].

<sup>98</sup> *Ibid.*

<sup>99</sup> In a case in which the trial judge had granted leave to amend the indictment in the middle of jury deliberations, in order to add a lesser included offence which had not been charged before. The Court of Appeal asked ‘Was there in this case injustice to the defendant from allowing the amendment to be made? In our judgment there was not. The amendment which was allowed did not involve the inclusion of a fresh or new charge. Unlawful wounding was a charge already before the jury as the unstated alternative lesser charge comprehended in the one count in the indictment of wounding with intent.’ *R v Collison*, *supra*, p 254.

149. In all of this, the interests of justice in that regard will, as discussed above, take into account the need to do what is just and fair for the accused, the victims and the community; as well as the need to avoid multiplicity of proceedings if it was practically possible, and not prejudicial, to try together all the crimes in which the accused is implicated in the known facts and circumstances.

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150. On a final note, the implication of article 61(11) is that ‘the functions’ of the Pre-Trial Chamber which the Trial Chamber may exercise as a matter of that *statutory* provision must include all the functions which the plenary of ICC judges may agree to recognise for the Pre-Trial Chamber in any ‘Chambers Manual.’ So, nothing in any Chamber’s Manual can escape the imperatives of article 61(11).

## VII. Causation in article 28 and Related Questions

151. The Appellant’s prosecution proceeded on the basis of superior responsibility, and he was convicted accordingly. In deciding the appeal, I generally concur with the Majority Opinion, as to the findings, conclusions and outcome: but also more generally as to the essential limitation of the issues to what is dispositive of the appeal.

152. However, my concurrence with the Majority Opinion does not preclude the additional observations that I see the need to make below: mostly born out of the need to assist in a greater understanding of many of the discreet legal questions arising.

153. The subject of superior responsibility in international criminal law comes with inherent complexities, even when formulated in a short sentence in linear form. It is all the more so when its formulation comprises a medley or layers of elements—or moving parts—that must be reckoned with. These are words and phrases that bring their own peculiar intricacies into the mix of analysis. Such is the circumstance of article 28 of the Rome Statute. Perhaps, a better sense of the matter may be readily grasped by taking a look at article 28(a) alone—leaving article 28(b) and its own peculiarities aside for now. Article 28(a) provides as follows:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

154. One of the moving parts—perhaps, pieces of a jigsaw puzzle—of article 28 is the phrase ‘as a result of’ occurring in the norm formulated in the general part of the provision. It says, apparently, that a commander (or a person effectively acting as such) shall be criminally responsible ‘for crimes ... committed by forces under his or her effective command and control ... *as a result of* his or her failure to exercise control properly over such forces ...’. [Emphasis added.] The emphasised phrase is at the centre of this appeal.

155. In this appeal, the phrase has provoked spirited debate on the subject of causation as an element (or not) of superior responsibility—in the especial manner of article 28. The Trial Chamber<sup>100</sup>—and before them, the Pre-Trial Chamber<sup>101</sup>—had contemplated ‘causality’ as an essential element of responsibility pursuant to article 28. They thought so, as an interpretive consequence of the specific phrase ‘as a result of’. The Appellant’s counsel argue that the Trial Chamber was right to recognise causality as an essential element of superior responsibility: yet, they contend that the Trial Chamber had misapplied the concept in relation to the Appellant. For, in the view of the Appellant’s counsel, the case for causality was not made out in the evidence. From their own perspective, the Prosecution similarly argued that the Chamber had misapplied the concept of causality, were it the case that causality is an essential element. But, more fundamentally, the Prosecution argued that causality is not a required element of superior responsibility under article 28.

### ***A. Causation as a Complex Legal Concept***

156. The mesh of disagreements seen in this appeal on the question of causation is not at all surprising. Causation is a topic that presents a perennial thorn in the side of criminal law. It is almost always present as a question to be answered in any judicial inquiry in which a prohibited harm is said to have resulted from human agency.<sup>102</sup> Yet, an objective answer to the question remains almost always elusive.

157. Stripped down to its barest generalities, causation is a notion that describes the relationship between two events, in which the preceding event is said to have occasioned a subsequent one. But, eminent philosophers ancient and modern—amongst them, Plato,<sup>103</sup>

<sup>100</sup> Trial Judgment, para 211.

<sup>101</sup> Confirmation Decision, paras 423-426.

<sup>102</sup> As it was observed in Simester & Sullivan: ‘The requirement of causation is fundamental to our understanding of the actus reus in criminal law’: *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 4<sup>th</sup> edn (2010), p 84. Similarly in Smith & Hogan, the following is said: ‘In every result crime causation is, by definition, an issue. Although the issue often arises in the context of homicide, causation is important in all result crimes. In many cases it is not a contentious issue because it is not disputed. When it is disputed, the prosecution must prove that D, by his own act or unlawful omission, caused the relevant result’; Smith and Hogan, *Criminal Law*, 12<sup>th</sup> edn (2008), p 74.

<sup>103</sup> See Phillip DeLacy, ‘The Problem of Causation in Plato’s Philosophy’ (1939) 34 *Classical Philology* 97.

Aristotle,<sup>104</sup> St Thomas Aquinas,<sup>105</sup> Thomas Hobbes,<sup>106</sup> Spinoza,<sup>107</sup> David Hume,<sup>108</sup> Kant,<sup>109</sup> John Stuart Mill,<sup>110</sup> and Bertrand Russell<sup>111</sup>—and their followers have struggled and quarrelled over the question of the degree of that relationship such as warrants its rational legitimacy in the chain of events. The troubling questions include the following. Is the relationship deterministic (in the sense that the preceding event must have necessitated the subsequent event) or is it probabilistic? Is the relationship exclusive (in the sense that no other preceding event may also operate to stimulate the existence of the subsequent event) or merely conducive? And so on. There are no generally agreed answers to these questions (and more) that vex the philosophical meaning of causation.

158. Jurists have fared no better in coming to agreement on similar questions of causation in the functions of the law. It is thus unsurprising, as will be seen shortly, that the law has largely settled for pragmatic acceptations of causation that rest on policy choices in most cases—rather than on a unitary system of rational theorems that must be applied universally to determine the relationship between two events.<sup>112</sup> As it was starkly put in *Smith and Hogan*: ‘The best that can be offered by way of guidance is a series of principles, some of which are openly in conflict.’<sup>113</sup> For our own present purposes, a promise to do better may entail a hopeless ambition.

### ***B. The Pragmatic Approach to Causation***

159. Turning more specifically now to criminal law’s pragmatic approach to questions of causation, it is worth noting that eminent criminal law jurists agree that ‘[c]ausation is a complex topic’.<sup>114</sup> In underscoring that complexity, it has been noted that H L A Hart and Tony Honoré wrote ‘a book on causation in law of over 500 pages with a 24-page table of cases.’<sup>115</sup> Commenting in the same vein, the House of Lords (as it then was) observed in *R v Kennedy* that ‘[q]uestions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises.’<sup>116</sup>

<sup>104</sup> See Melbourne Evans, ‘Causality and Explanation in the Logic of Aristotle’ (1959) 19 *Philosophy and Phenomenological Research* 466.

<sup>105</sup> See G E M Anscombe, *Metaphysics and the Philosophy of Mind (The Collected Philosophical Papers of G E M Anscombe)* Vol 2 (1981), pp 152—153.

<sup>106</sup> *Ibid*, p 134.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*, p 135.

<sup>110</sup> *Ibid*.

<sup>111</sup> Bertrand Russell, ‘On the Notion of Cause’ (1912-1913) 13 *Proceedings of the Aristotelian Society* 1.

<sup>112</sup> See Simester & Sullivan, *supra*, p 86. See also Smith & Hogan, *supra*, pp 74 and 79.

<sup>113</sup> Smith & Hogan, *supra*, p 79.

<sup>114</sup> See Andrew Ashworth, *Principles of Criminal Law*, 6th edn (2009) p 113.

<sup>115</sup> See Smith & Hogan, *supra*, p 75. See Hart and Honoré, *Causation in the Law*, 2<sup>nd</sup> edn (1985).

<sup>116</sup> *R v Kennedy* [2007] UKHL 38 [House of Lords], para 15.

160. In his seminal reasoning in *Empress Car Co*, Lord Hoffman had gone to great lengths to outline the complex matter of causation in criminal law.<sup>117</sup> He politely took cautious issue with the earlier pronouncements of some of his predecessors on the bench, who had intoned that questions of causation are best answered ‘by ordinary common sense.’<sup>118</sup> But, to Lord Hoffman, common sense can get overwhelmed by questions of law that the issue of causation may present in particular cases. While granting that ‘the notion of causation should not be overcomplicated,’ he insisted that the notion should not, on the other hand, ‘be oversimplified’,<sup>119</sup> by a purported reliance upon common sense to supply the correct legal answer. ‘It is remarkable’, he lamented in relation to a particular statute, ‘how many cases there are under this Act in which justices have attempted to apply common sense and found themselves reversed’ on appeal for error of law.<sup>120</sup>

161. In seeking, then, to give necessary guidance on the matter of causation, Lord Hoffman made a number of points which I highly recommend. First, he emphasised that ‘common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed.’<sup>121</sup> Continuing with that theme, Lord Hoffman observed that ‘[n]ot only may there be different answers to questions about causation when attributing responsibility to different people under different rules ... but there may be different answers when attributing responsibility to different people under the same rule.’<sup>122</sup> Hence, common sense, in such circumstances, cannot give an ‘answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule.’<sup>123</sup> The initial matter of identifying the scope of the rule laid down for the attribution of responsibility ‘is not a question of common sense fact; it is a question of law.’<sup>124</sup>

162. Having regard to the rule by which responsibility is being attributed, Lord Hoffman noted that it may be that such a rule in a particular instance is one that imposes a duty ‘to take precautions to prevent loss being caused by third parties or natural events.’<sup>125</sup> And necessarily incidental to questions concerning the nature of the duty imposed by the statutory provision under consideration is the question of whether the duty ‘include[s] responsibility for acts of third parties or natural events and, if so, for any such acts or only some of them? This is a

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<sup>117</sup> *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 [House of Lords].

<sup>118</sup> Lord Wilberforce and Lord Salmon expressed such a view in *Alphacell Ltd v Woodward* [1972] AC 824 [House of Lords], p 834 and, p 847.

<sup>119</sup> *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*, *supra*, 29C.

<sup>120</sup> *Ibid*, p 29E.

<sup>121</sup> *Ibid*, p 29F.

<sup>122</sup> *Ibid*, p 30A.

<sup>123</sup> *Ibid*, p 31E.

<sup>124</sup> *Ibid*, p 31H.

<sup>125</sup> *Ibid*, p 31C.

question of statutory construction, *having regard to the policy of the [statute under construction]*.<sup>126</sup>

163. This consideration is particularly important for our present purposes, as we seek to apply the provisions of article 28 of the Rome Statute. We must ‘hav[e] regard to the policy of the [statute under construction].’ Between the preamble to the Rome Statute—including its cross-reference to the purposes of the UN Charter, the first of which is ‘to save succeeding generations from the scourge of war’—and the various operative provisions prohibiting war crimes, crimes against humanity, genocide and wars of aggression, it is not difficult to discern a palpable policy aimed at protecting innocent civilians from the ravages of armed conflicts waged, or participated in, by persons in positions of command over the human agents of those conflicts. The significance of that policy must comprise questions about the criminal responsibility of those implicated in creating the danger of such ravages of armed conflicts upon innocent civilians. That policy thus directly invites an appreciation of the value of the endangerment rationale of command responsibility (discussed below).

164. Still on the theme of the complexities of causation, Lord Hoffman’s pronouncements stand against a simplistic appreciation (if not total misunderstanding) of ‘the principle that a voluntary intervening act removes or displaces the previous actor’s causal responsibility.’<sup>127</sup> This, too, is an important consideration in the interpretation and application of article 28 as a statutory provision the apparent purpose of which is to attribute the crimes of subordinate armed fighters to their commanders. Quite significantly, Lord Hoffman insisted that a particular view of what the prosecution must prove in a charge of ‘causing’ is not a necessary function ‘of anything inherent in the notion of “causing”’. It is because of the structure of the [particular provision] which imposes liability’, according to the unique features of the particular provision.<sup>128</sup> As noted earlier, the provision in question may have imposed a duty that includes responsibility for acts of other persons or acts of nature. Hence, particular care must be taken to avoid reading into the provision more requirements than it truly dictates. A classic instance of the erroneous tendency to construe more than is necessary into the notion of causation comes in the manner of the view that causation in criminal law requires the conduct of the defendant to be seen to have been the ‘immediate cause’ of the harm suffered.<sup>129</sup> And that can be a by-product of a view of ‘the principle that a voluntary intervening act removes or displaces the previous actor’s causal responsibility’. In the absence of statutory language that compels such enhanced requirement, there is no reason why ‘a sufficient causal connection’ (established on the evidence), between the prohibited conduct of the defendant and the prohibited harm suffered, should not warrant a finding that the harm was caused by the defendant.<sup>130</sup>

<sup>126</sup> *Ibid*, p 32B, emphasis added.

<sup>127</sup> See Ashworth, *Principles of Criminal Law*, *supra*, p 112.

<sup>128</sup> *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*, *supra*, p 27F.

<sup>129</sup> See *ibid*, p 28D—28G.

<sup>130</sup> See *ibid*, p 28E.

165. In the final analysis, Lord Hoffman held that depending on the particular purpose and scope of the statutory provision under consideration, it may be ‘wrong and distracting’ to ask “‘what’” caused the prohibited harm.<sup>131</sup> For, ‘[t]here may be a number of correct answers to a question put in those terms.’<sup>132</sup> Proper regard to the statutory language, purpose and scope may reveal that ‘[t]he only question which has to be asked’ for the purposes of the provision under consideration is “‘Did the defendant cause the [prohibited harm]?’”<sup>133</sup> In Lord Hoffman’s view, ‘[t]he fact that for different purposes or even for the same purpose one could also say that someone or something else caused the [prohibited harm] is not inconsistent with the defendant having caused it.’<sup>134</sup> It is thus possible for there to be multiple legal causes that contributed to a given harm.<sup>135</sup> In those circumstances, the test becomes ‘whether the defendant’s contribution was, by the time the consequence came about, still a “significant and operating cause.” If so, then, it is irrelevant whether that same consequence can also be attributed to other defendants.’<sup>136</sup> As discussed later in this opinion, these observations sufficiently resonate in the writings of Grotius.<sup>137</sup>

166. In the requirement that the defendant’s contributory cause must be *significant*, caution has been signalled against confusing ‘significant’ with ‘substantial’; for, it is misleading to say that the contribution must be ‘substantial.’<sup>138</sup> What is required is merely that the defendant’s ‘contribution must be more than negligible or not to be so minute that it will be ignored under the “*de minimis*” principle.’<sup>139</sup> I am inclined to that view.

### *C. Omission as Cause*

167. Adding to the complexities of causation, there is also the question whether omission is causative. And that question is directly provoked by the immediate impression of article 28 as sounding in omission. Views abound to the effect that ‘omissions cannot be causes.’<sup>140</sup> Those views are principally anchored upon the respect that criminal law generally accords to individual autonomy when regulating human conducts<sup>141</sup> ‘emphasising the distinctive responsibility of citizens for their own actions.’<sup>142</sup> The approach of individual autonomy eschews a general ‘doctrine of collective social responsibility’.<sup>143</sup> That is to say, in a large part of the world, ‘[i]t is inappropriate in a liberal culture to force us to be the guardian of others on pain of criminal conviction.’<sup>144</sup> It is for this reason that the law, in common law

<sup>131</sup> See *ibid*, p 30F.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*.

<sup>135</sup> See Simester & Sullivan, *supra*, p 88.

<sup>136</sup> *Ibid*.

<sup>137</sup> See Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625), Bk II, ch XVII, § X.

<sup>138</sup> See Smith and Hogan, *supra*, p 77.

<sup>139</sup> *Ibid*. See also Simester & Sullivan, *supra*, pp 86—87.

<sup>140</sup> For a listing of some of the literature on that debate, see Simester & Sullivan, *supra*, p 103, footnote 208.

<sup>141</sup> See Smith & Hogan, *supra*, p 61.

<sup>142</sup> Simester & Sullivan, *supra*, p 84.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*. See also Glanville Williams, ‘*Finis for Novus Actus*’ (1989) 48 *Cambridge Law Journal* 391. It must be noted, however, that in France, there is an offence (punishable by a fine of up to €75,000.00) of wilful failure to



jurisdictions, as *R v Clarkson* illustrates, has been reluctant to recognise mere presence without further evidence of encouragement as sufficient to support a charge of complicity in a crime as an aider and abetter.<sup>145</sup>

168. But it has been observed that in spite of the '[c]onsiderable controversy'<sup>146</sup> that attends the question of whether omission can amount to a cause, it remains the case that 'neither ordinary language nor the law has much compunction about attributing causal responsibility for omissions.'<sup>147</sup> Broader arguments of 'social responsibility' may be made to rationalise an 'obligation' to prevent harms, such that an omission in respect of it should anchor criminal responsibility upon strangers who refrain from intervening.<sup>148</sup> But, it may be safely said that the law is a long way from converting bare considerations of 'social responsibility' into actionable duty of care. As Grotius correctly observed: '[T]hough it may be wrong to omit any duty enjoined by the law of charity, there can be no redress for such omission ...';<sup>149</sup>—let alone make criminals out of those who decline the role of Good Samaritan.

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169. Omissions have indeed been held to amount to causes. But that is when the defendant was under a specific duty deriving directly from a reasonable expectation or requirement imposed by law to not cause the harm in question by his own conduct of omission. There is

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offer assistance to a person in danger (or to initiate rescue operations for that purpose, if the accused could have done so without risk to himself or to a third party [see article 223-6 of the Penal Code of France]. But such Good Samaritan obligation is not yet a general principle of law that is universally recognised around the world.

<sup>145</sup> *R v Clarkson* [1971] 1 WLR 1402 [Courts-Martial Appeal Court]. The Courts-Martial Appeal Court quashed the conviction of two soldiers—both at the rank of private—who were present during a rape, watching without intervening to stop it. The appellate court roundly condemned the conduct of the defendants as thoroughly deplorable—observing that the 'only thing to be said in their favour is that they may have been in a drunken condition when their moral sense and sense of the requirements of human decency had left them.' [*Ibid*, p 1404F.] But, the appellate court had insisted, the question of their criminal responsibility for the rape was another matter. [*Ibid*, p 1404C.] Accordingly, merely standing by and watching the rape did not amount to aiding and abetting it as a matter of criminal law, in the absence of further evidence to show that the two soldiers not only encouraged the rapists in fact, but had done so 'wilfully.' [See *ibid*, p 1406C, emphasis received.] For purposes of conviction, 'there must be an intention to encourage; and there must be encouragement in fact.' [*Ibid*, p 1407A.] The soldiers' convictions were quashed given the appellate court's finding that 'there was no evidence on which the prosecution sought to rely that either of the defendants ... had done any physical act or uttered any word which involved direct physical participation or verbal encouragement. ... Therefore, if there was here aiding and abetting by the defendants ... it could only have been on the basis of inferences to be drawn that, by their very presence they, each of them separately as concerns himself, encouraged those who were committing the rape.' [*Ibid*, p 1405D.] But, the appellate court held that mere presence is insufficient to warrant the finding of encouragement. [*Ibid*, p 1406C.] As the court noted, 'It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime.' [*Ibid*, p 1406A.] Although, depending on the particular circumstances of a given crime, voluntary and purposeful presence can afford cogent evidence upon which a finder of fact can rely to find wilful encouragement amounting to aiding and abetting. [*Ibid*.]

<sup>146</sup> See Smith & Hogan, *supra*, p 61.

<sup>147</sup> Simester & Sullivan, *supra*, p 103.

<sup>148</sup> See Smith & Hogan, *supra*, p 61.

<sup>149</sup> See Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625) [TRANS: A C Campbell, *The Rights of War and Peace* (Washington: Dunne, 1901)], pp 197—198. Also to the same effect: 'the imperfect obligations of charity, and other virtues of the same kind, are not cognizable in a court of justice': *ibid*, p 272.

an inevitable appearance of circularity to the explanation. But the circularity is readily broken by subtracting bare considerations of social responsibility as the mark of the prohibited conduct. It is, perhaps, enough to consider that in the many instances in which the law has recognised a legal duty of care, such recognition has been based on more exacting jural rationales than mere social responsibility. Take *Donohue v Stevenson*, for instance, a case famously taught to all students of law in any common law faculty. The defendant manufactured for public consumption ginger beer contained in opaque bottles. A friend bought a bottle of the ginger beer for the plaintiff. The plaintiff allegedly suffered severe shock and gastro-enteritis, having seen the rotten remains of a snail tumble out of the bottle after she had already imbibed some of the contents of the bottle. In his effort to define duty of care in a way that limits its scope, without being too restrictive, Lord Atkin supplied the following classic definition of the concept of duty of care that also accounts for *omission*:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, [‘]Who is my neighbour?['] receives a *restricted* reply. You must take reasonable care to avoid acts or *omissions* which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>150</sup>

170. According to that precedent, an omission can indeed be a cause of harm: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’ That *Donohue v Stevenson* was a tort case strengthens its precedent, in a way, for mapping out the outer precincts of legal duty arising from omissions for purposes of penal sanctions.

171. In other cases, duty of care in criminal law has been held to exist when harm resulted from an omission to perform a contract. In the classic case of *R v Pittwood*, for instance, a gatekeeper was convicted of manslaughter for his negligent failure to close a railway crossing gate, in consequence of which a train collided with a horse drawn cart, killing the train driver.<sup>151</sup> The Court found that the gatekeeper had been employed under a contract to open and close the gate. His negligent omission to close the gate attracted criminal liability upon him, given an accident that would not have occurred had he taken care to close the gate.

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172. The law of public nuisance also recognises that omissions can cause harm. In a recent restatement of that law—also known as common nuisance—Lord Bingham held, in *R v Rimmington*, that the offence comprises the question ‘whether the act or *omission* contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance

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<sup>150</sup> *Donoghue v Stevenson* [1932] AC 562 [House of Lords], p 580, emphasis added.

<sup>151</sup> *R v Pittwood* [1902] TLR 37.

would be apparent; if not, not.’<sup>152</sup> That consideration was a function of Lord Bingham’s acceptance of the definitions of the offence of public nuisance as offered in Sir James Stephen’s *Digest of the Criminal Law* (1877) and in *Archbold’s (Criminal Pleading, Evidence and Practice)* (2005)—minus an original reference to ‘morals’. According to Stephen’s (as cited by Lord Bingham in that case) public nuisance is ‘an act not warranted by law or an *omission* to discharge a legal duty, which act or *omission* obstructs or *causes* inconvenience or damage to the public in the exercise of rights common to all Her Majesty’s subjects.’<sup>153</sup> And according to *Archbold’s* (as also cited by Lord Bingham in that case): ‘A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) *omits* to discharge a legal duty, if *the effect* of the act or *omission* is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.’<sup>154</sup>

173. It may be observed, of course, that when armed conflicts are viewed from the lens of public nuisance, the following point becomes inescapable. Few punishable conducts amounting to public nuisance could be more hazardous than war to life, health, property or comfort of the public or obstructive of the public in the exercise or enjoyment of rights common to the citizens of a given realm. Thus, the incidence of duty of care (as a matter of acts or omissions) attendant upon those who wage war ought to press considerably harder than the analogous duty of care engaged by other conducts punishable as public nuisance.

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174. In their classic text on causation in the law, Hart and Honoré noted that ‘there is no special difficulty about omissions.’<sup>155</sup> This is because ‘the *failure* to initiate or interrupt some physical process; the failure to provide reasons or draw attention to reasons which might influence the conduct of others; and the failure to provide others with opportunities for doing certain things or actively depriving them of such opportunities’ is in many contexts ‘thought of in causal terms.’<sup>156</sup> Hence, ‘no rational distinction can be drawn between the causal status of acts and omissions, but there is room, in relation to both, for a distinction between conduct which is deliberate or, still more, intended to produce harm, and conduct which is culpably inadvertent.’<sup>157</sup> There may, of course, be circumstances in which it will be inapposite to employ the verb ‘to cause’ in relation to an omission, because the context more accurately recommends ‘permitting’ or ‘not preventing’ the prohibited harm.<sup>158</sup> Yet, it is ‘a mistake to

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<sup>152</sup> *R v Rimmington; R v Goldstein* [2005] UKHL 63 [House of Lords] para 36.

<sup>153</sup> *Ibid*, emphasis added.

<sup>154</sup> *Ibid*, emphasis added.

<sup>155</sup> Hart and Honoré, *supra*, p 139.

<sup>156</sup> *Ibid*, pp 2—3, emphasis received.

<sup>157</sup> *Ibid*, p 139.

<sup>158</sup> *Ibid*, p 140.

introduce this distinction when the question is not how the defendant’s conduct should be described but whether certain harm is the consequence.’<sup>159</sup>

175. Centuries before Hart and Honoré wrote on causation, Hugo Grotius also discussed the subject: specifically from the perspective of omission. He did so in the context of his discussion of the obligation to repair damage or losses occasioned by wrongdoing. We trace the causation discussion, beginning with a general outline of the liabilities of primary and secondary parties to wrongdoing. Beginning with the primary party, Grotius wrote as follows:

Besides the one who *causes* damage in person and “directly”, others also are liable, by reason of their act or their *failure to act*. By an act some are liable primarily, others secondarily. He is liable primarily who orders the act, or gives the necessary consent, or aids, or receives stolen goods, or in some other manner shares in the crime itself.<sup>160</sup>

176. Next, came the secondary parties: ‘Those are liable secondarily who give advice, praise,<sup>1</sup> or approval to the act. “What difference is there”, says Cicero in the second *Philippic*, “between one who advises an act and one who approves of the act?”’<sup>161</sup>

177. From those premises, Grotius elaborated that the obligation resulting from *failure to act* may similarly be viewed from primary and secondary perspectives. As he put it: ‘Likewise an obligation is created by failure to act, either primarily or secondarily; primarily, when one, who is in strict legal duty bound to forbid the act by a command, or to render aid to one who has been injured, does not do so.’<sup>3</sup> Such a person by the Chaldean paraphraser, *On Leviticus*, xx.5, is called “a strengthener of wrong-doing.”’<sup>162</sup>

178. Keeping in mind the enhanced, ‘primary’ responsibility of the person who failed to discharge a ‘strict legal duty’ imposed on him in light of his office ‘to forbid the act by a command’, Grotius next passes on to the secondary liability of the person who ‘ought’ to have dissuaded the crime or reported it—still as a matter of law and not charity. In that regard, Grotius wrote as follows:

A person is liable secondarily who does not dissuade when he ought, or who keeps to himself a fact which he ought to make known. But in all these cases we refer the word ‘ought’ to that true legal right which is the object of expletive justice, whether it arises from statute law or from a special quality. For if one is under obligation according to the rule of love, by

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<sup>159</sup> *Ibid.*

<sup>160</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625) [Francis W Kelsey translation (Oxford: Clarendon Press, 1925)] Bk II, ch XVII, §VI, p 432, emphasis added.

<sup>1</sup> Totila in his speech to the Goths in Procopius, *Gothic War*, III [III.xxv], says: ‘For he who praises one who is doing anything must himself be considered as responsible for the deed.’ Ulpian, *Digest*, XI.iii.I.§4, says: ‘Even if the slave were going to run away or commit the theft in any case, if this man has praised his purpose, he will be held liable. An evil deed, in fact, ought not to be increased by praise.’ [Received footnote].

<sup>161</sup> Grotius, [Francis W Kelsey trans], *supra*, Bk II, ch XVII, §VII, p 432, internal footnote 2 omitted.

<sup>3</sup> Nicetas of Chonae in the life of *Michael Comnenus* [*Manuel Comnenus*, I.iii] says: ‘A fire is not only to be charged against the one who applied the torch, but also against the person who would not put it out when he could.’ [Received footnote].

<sup>162</sup> Grotius, [Francis W Kelsey trans], *supra*, Bk II, ch XVII, §VIII, p 432.

omission he will sin indeed, but he will not be held to make reparation; for the source of the obligation to make good is the true right, properly speaking, as we have previously said.<sup>163</sup>

179. Indeed, Grotius wrote that acts and omissions, as he discussed them above, can be appreciated in terms of *causation* properly conceived. In his words (as translated by Kelsey):

It should also be understood that all those whom we have mentioned are under obligation to make good *if they have really been the cause of damage*; that is, if they have *contributed* to the damage either in whole or in part. For in the case of those in the second class who *act or fail to act*, and sometimes even in the case of some in the first class, it often happens that the one who has *caused* the damage would have been sure to *cause* it even without the act or neglect of others. In such cases the others, whom I have mentioned, will not be liable.<sup>164</sup>

180. The importance of the foregoing quotation is to be appreciated against the background of earlier discussion concerning whether the defendant's contribution was a 'significant and operating cause', among multiple agentive factors that may have united to occasion the given harm at the material time.<sup>165</sup> To be recalled here is Lord Hoffman's view that '[t]he fact that for different purposes or even for the same purpose one could also say that someone or something else caused the [prohibited harm] is not inconsistent with the defendant having caused it.'<sup>166</sup> That point appears in relief in the following words of Grotius, as a continuation of the passage quoted above (as translated by Kelsey):

Yet this must not be understood in such a way that, if there were no lack of others to advise or aid, those who did advise and aid should not be liable in case the one who caused the damage would not have caused it without aid or advice. For even the others would have been liable if they had advised or aided.<sup>167</sup>

181. Perhaps, the message of the passages appears clearer to some readers of the A C Campbell translation of the same passages. As part of the principle that 'a person may be guilty of offences by negligence'<sup>168</sup> as well as by the commission of certain acts', Grotius is translated as saying as follows:

It is to be observed also that all the parties above-mentioned, if they have been *the real occasion of loss* to any one, or have abetted the person doing him the injury, are so far

<sup>163</sup> *Ibid.*, §IX, pp 432—433.

<sup>164</sup> *Ibid.*, §X, p 433, emphasis added.

<sup>165</sup> See Simester & Sullivan, *supra*, p 88.

<sup>166</sup> *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*, *supra*, p 30F.

<sup>167</sup> Grotius, [Kelsey trans], *supra*, Bk II, ch XVII, §X, p 433.

<sup>168</sup> It is clear that the word 'negligence' may safely be replaced by 'omission'. In that regard, see Campbell's combined rendition of paragraphs VIII and IX explaining the 'obligation to repair losses suffered by negligence' [sic] as follows: 'The obligation to repair the losses suffered by negligence may be considered in a two-fold light. Firstly, when any person, whose peculiar office it is, neglects either to forbid the commission of an injury, or to assist the injured party. And secondly, when the person, who ought to do it, either does not dissuade from the commission of an offence, or passes over in silence, what he is bound to make known. In these cases, when it is said that a person OUGHT to do, or to forbear doing certain actions, it is meant that he is bound by that right, which strict justice requires, whether that duty arises from law, or from the capacity, which the person bears. For though it may be wrong to omit any duty enjoined by the law of charity, there can be no redress for such omission, but every LEGAL REMEDY must be founded on some PECULIAR RIGHT': Grotius, [Campbell trans], *supra*, Bk II, ch XVII, §X, pp 197—198.

implicated in the guilt, as to be liable to full damages, or, at least, proportionably to the part they have taken. For it may and often does happen that a crime would have been committed by an offender, even without the aid of other principals or accessories. In which case he alone is answerable. Yet neither principals nor accessories will be allowed to plead as an excuse, that if they had not aided or abetted, others would have been found to assist and encourage the perpetrator in the commission of the act. Especially, if it appears that without such assistance from them the crime would never have been committed. For those other imaginary abettors would themselves have been answerable, if they had given their advice or aid.<sup>169</sup>

182. It is thus clear that where more than one person may be reasonably said to have caused harm by their acts or omissions, the more just approach is not to absolve all from responsibility, leaving the victim bereft of justice. The more just approach is to attribute responsibility ‘at least, proportionably’, according to the part that each accomplice had played. In criminal law, that approach is readily accounted for as a matter of sentencing.

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183. Against that background we may then consider that one important way that Hart and Honoré proposed to look at the causal status of an omission is in the terms of ‘provision of an opportunity’ that is actually exploited by a third party to cause harm.<sup>170</sup> The main legal application of the idea ‘is where an opportunity is provided for harm by the neglect of a common precaution.’<sup>171</sup> Such an opportunity is afforded when ‘[t]he first person does something, often unintentionally, which renders the second person’s action possible or at least easier.’<sup>172</sup> The idea is illustrated as follows:

A man who carelessly leaves unlocked the doors of a house, entrusted to him by a friend, has provided the thief with an opportunity to enter and steal the spoons though he has not caused him to steal or made him steal. Of course providing such an opportunity is an omission to take a common precaution against a common danger, and hence the causal language used in other cases of omission, where harm ensues without the deliberate intervention of others, is easily extended to this case. It would be natural to say that the loss was the consequence of the failure to lock up the house; the careless friend might be held morally and legally bound to compensate the owner for the loss just as for loss ‘directly’ caused, for example, by carelessly starting a fire.<sup>173</sup>

184. In the idea of omission as causing harm by the provision of the opportunity that made the harm possible or easier to occur, ‘[t]he line between causing harm by initiating a sequence of physical events, and by creating opportunities for others to do harm, though it is conceptually distinct, is often neglected for practical purposes.’<sup>174</sup>

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<sup>169</sup> Grotius, [Campbell trans], *supra*, Bk II, ch XVII, §X, p 198, emphasis added.

<sup>170</sup> As they put it: ‘[T]he idea that the provision of an opportunity, commonly exploited for good or ill, may rank as the cause of the upshot when the opportunity is actually exploited is very important both in law and history’: Hart and Honoré, *supra*, p 2.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, p 59.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

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185. The foregoing review does bear directly on the analysis of the individual criminal responsibility of a commander in international criminal law. And, it may be summed up as follows. In the first place, the criminal responsibility arises from the failure to discharge a specifically stipulated duty to prevent, repress or punish crimes committed by subordinates. Beyond that, the duty is entirely justified on the basis of the endangerment rationale explained below. As will become apparent, the endangerment rationale is precisely anchored on the reasoning that the commander afforded, or participated in affording, the opportunity for the crime to be committed. Indeed, the manner in which the opportunity was afforded goes well beyond merely ‘permitting’ or ‘not preventing’ the forbidden harm—it indeed involves ‘setting in motion’<sup>175</sup> a chain of tangible events (notably training, arming and deploying the subordinates), which culminated in the resulting harm. Those considerations are sufficient, therefore, to place the commander in a unique category of circumstances—quite different from those of a mere Good Samaritan—in relation to the duty to prevent, repress or punish the harms of his subordinate. His circumstances are thus adequately captured by the legal axiom that anyone who enables the prospects of harm by creating the danger of their occurrence cannot be heard to protest against the attribution upon him of the legal responsibility for the resulting injury.

#### *D. The Question of Causation in the Present Appeal*

186. It is against the foregoing background that I now return to the question of causation posed in this appeal. The need is unavoidable in this appeal to make sense of the phrase ‘as a result of’, as one of the vexing moving parts of article 28 of the Rome Statute. But, the sense to be made of the phrase, in the light of the language, purpose and scope of the provision and the policy choices compelled by the purpose of the Rome Statute, engage in my mind discussions on a range of discreet sub-topics that obtrude on the mind when contemplating the responsibility of superiors in consequence of crimes committed by their subordinates. Those sub-topics include the following but are not limited to them: a choice of basic theories of responsibility under article 28—as between dereliction of duty or complicity; endangerment as an underlying rationale of command responsibility; the duty to abate criminality, by withdrawing troops, as an incidence of the endangerment rationale; the question of military necessity, as an incidence of the endangerment rationale; pacific settlement of disputes as critical to military necessity; and, the significance of international human rights law to the matter of military necessity.

### **VIII. Basic Theories of Responsibility under Article 28**

187. Regarding causation, it is possible to consider the norm of command responsibility in article 28 from the perspective of two alternative theories: dereliction of duty and complicity. Each of those theories will be discussed in turn below. In that discussion, it will become apparent that one common value that both theories serve is to situate the liability of the

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<sup>175</sup> See *ibid*, p 139.

commander within the general rule of personal culpability, usually encapsulated in the Latin maxim *nulla poena sine culpa*. It may further be observed from the outset that the good sense of either theory is further buttressed by the concept of endangerment (alluded to earlier and discussed below), as an underlying rationale of command responsibility.

### ***A. Dereliction of Duty as a Theory of Command Responsibility under Article 28***

188. According to the prevailing jurisprudence of the *ad hoc* tribunals, the criminal responsibility of commanders is *sui generis*: because it contemplates a species of criminal liability more comfortably explained by the theory of the commander's dereliction of duty than by the theory of vicarious liability—the latter entailing punishment of the commander *for the crimes of* subordinates.<sup>176</sup>

189. In modern international law, there is a general tendency to trace command responsibility to article 86(2) of Additional Protocol I to the Geneva Conventions. It provides as follows:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

190. However, article 86(2) does not dictate the choice of theory—as between dereliction of duty and complicity—by which command responsibility is to be rationalised in international criminal law. In other words, the provision is entirely silent on whether or not the superior may be held liable *for* the crimes, as such, committed by subordinates. For present purposes, two critical distinctions may be noted between the texts of article 28 of the Rome Statute and article 86(2) of Additional Protocol I (API). The first distinction is that article 28 of the Rome Statute speaks of ‘criminal responsibility *for* crimes’ committed by the subordinates; whereas article 86(2) of API speaks only of ‘penal or disciplinary responsibility, as the case may be’. In other words, article 86(2) does not say that such responsibility shall be ‘for’ the crimes committed by the subordinates. All that it contemplates is ‘penal or disciplinary responsibility’ *simpliciter*, with no words of limitation indicated. The second distinction is that article 86(2) does *not* itself truly *impose* such ‘penal or disciplinary responsibility.’ It merely *validates* responsibility regardless of the theory employed to generate it in the first place, by denying the commander the consolation of valid complaint against it. It only says that the commander is *not absolved* from penal or disciplinary responsibility. In contrast, article 28 of the Rome Statute does proactively *impose*

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<sup>176</sup> See, for instance, *Prosecutor v Hadžihasanovi & Kubura* (Judgment) dated 22 April 2008 [ICTY, Appeals Chamber] para 39; *Prosecutor v Hadžihasanovi & Kubura* (Decision on Interlocutory Appeal Challenging Jurisdiction In Relation To Command Responsibility) dated 16 July 2003 [ICTY Appeals Chamber] Partial Dissenting Opinion of Judge Shahabuddeen, para 32; *Prosecutor v Krnojelac* (Judgment) dated 17 September 2003 [ICTY Appeals Chamber] para 171.



criminal responsibility upon the superior for the crimes of subordinates, in terms that he ‘shall be criminally responsible for’ those crimes. Hence, article 86(2) is wholly suited to accommodate either of the theories of dereliction of duty or complicity in the crimes of the subordinate.

191. For purposes of article 28 of the Rome Statute, the rational impulse for the dereliction of duty theory stems, no doubt, from the discomfort of its proponents to accept the idea that a superior could be punished *for* subordinates’ crimes, when he neither participated in the *actus reus* nor shared the *mens rea* of the crimes in the primary sense of desiring it. The discomfort is thus nurtured by an instinctive sensitivity to the purity of the principle *nulla poena sine culpa*. The principle, however, is never pure. It would not be correct to insist that criminal law never imposes liability without proof of personal fault. Regard need only be had to the many instances in which the law imposes strict liability upon those who would not be punished according to the ordinary parameters of the maxim *actus reus non facit reum nisi mens sit rea*.<sup>177</sup> Nevertheless, what is called for in the task of disentangling any expression of the norm of criminal liability is to be sure that such an exceptional imposition has indeed been made. In other words, can we really be sure, under the particular statutory scheme, that a commander ‘shall be criminally responsible *for crimes ... committed by forces* under his or her effective command or control’? [Emphasis added.] It is a lack of confidence in the clarity of article 28 of the Rome Statute in that regard that recommends dereliction of duty to some as a plausible theory in the interpretation of article 28. According to that theory, the better view of the intendment of article 28(a) is merely something to this effect: *The failure of a commander to control his or her subordinates properly shall occasion individual criminal responsibility for the commander in any situation in which the subordinates commit a crime within the jurisdiction of the Court, provided the circumstances indicated in clauses (a)(i) and (ii) are established. With necessary variation, a similar understanding goes for article 28(b).* Such a regime of criminal responsibility is not unusual. But, the emphasis, then, is on the criminal responsibility *for the commander*—as a matter of *his own* failing only—in the sense of his own failing being only dereliction on his part and nothing more. It is not really about his or her own individual criminal liability ‘*for the crimes of subordinates.*’

192. Arguably, then, it would be unnecessary to fit that particular idea of responsibility—or its associated considerations of causality—into the narrow bodice of concepts like ‘causal contribution’ or ‘accessorial participation.’<sup>178</sup> This would especially be the case, given that neither the Trial Chamber nor the Pre-Trial Chamber, in the present case, had considered the question of causality in terms of ‘causal contribution’ or ‘accessorial participation.’ The Trial Chamber, notably, merely premised its limited pronouncement on the proposition that ‘it is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of *some form of personal nexus* to it.’<sup>179</sup> However, that observation, according to the dereliction of duty theorists, would not inevitably connote

<sup>177</sup> See Ashworth, *supra*, p 137 and pp 160 *et seq.*

<sup>178</sup> See Prosecution Brief, para 234, emphasis added.

<sup>179</sup> Trial Judgment, para 211, emphasis added.

‘causal *contribution*’ or ‘accessorial *participation*’ in the same way that the Prosecution employed those phrases in this appeal, after introducing them into the discourse, specifically engaging an inquiry into the *mens rea* or ‘guilty mind’ of the commander for the crimes that the subordinates had committed.<sup>180</sup>

193. Nevertheless, careful attention must be paid to the Prosecution’s argument that the ‘personal nexus’ of the commander in ‘some form’ is a proposition that ‘need not be understood solely in causal terms.’<sup>181</sup> Purely from the perspective of the theory of dereliction of duty, this may yet lead to a better gateway to the more acceptable analysis of the manner of personal nexus implicated in article 28, between the commander’s failure of control and the crimes committed by the subordinates. In any event, to the extent that the actual text of article 28 speaks in terms connoting causality, purposive construction may, as a ‘perfectly proper interpretive approach,’ require ‘strained construction’ to be put on statutory language: ‘for the good cause of justice, if to do so would avoid an absurdity that defeats the purpose of the statute, while still giving statutory language an alternative meaning that it can bear.’<sup>182</sup> In the result, the element of causality in article 28 may well be adequately satisfied by considerations of dereliction of duty, and, beyond that, endangerment. Whether article 28 contemplates no more than that is quite another matter. That further matter is addressed below.

### 1. The Awkwardness of Dereliction of Duty Theory in the Bemba Case

194. As a practical matter and more, there are certain considerations that make the dereliction theory rather awkward in the circumstances of the *Bemba* appeal. To begin with, there is the peculiar concern that the Appellant had been charged, tried and convicted of murder and rape as *crimes against humanity*; and of murder, rape and pillaging as *war crimes*. He was not charged, tried and convicted of *dereliction of duty*. It will thus be awkward for the Appeals Chamber to consider his appeal—which may result in confirmation of his conviction—on the basis of dereliction of duty. The awkwardness of proceeding in that way is underscored by the very fact that what recommends the theory of dereliction of duty is precisely the reasoning that the Appellant should not be convicted of crimes that he did not commit—i.e. murder and rape as *crimes against humanity*; and murder, rape and pillaging as *war crimes*. In stark terms, then, the juristic dilemma presented as a matter of pleading becomes this. If the Trial Chamber was wrong to convict him ‘for’ those crimes against humanity and war crimes committed by his subordinates (because he did not commit them himself)—but, then, he was neither charged with (nor convicted of) dereliction of duty—on what legal basis, then, is the Appeals Chamber to assess his criminal responsibility for dereliction of duty?

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<sup>180</sup> See *Prosecution Brief*, para 230.

<sup>181</sup> *Ibid.*

<sup>182</sup> See *Prosecutor v Ruto & Sang (Decision on Defence Applications for Judgments of Acquittal)* dated 5 April 2016, ICC-01/05-01/08-T-373-ENG: Reasons Judge Eboe-Osuji, para 418 [ICC Trial Chamber].

195. But, more fundamentally—and as a general proposition in every case—there is a self-defeating dilemma that peculiarly confronts the dereliction of duty theory, for purposes of article 28. That dilemma stems from the very purpose of the dereliction of duty theory, which is the felt-need (as alluded to above) to avoid convicting accused persons for crimes they did not commit. In the Appellant’s case, those crimes are murder and rape as *crimes against humanity*; and murder, rape and pillaging as *war crimes*. That purpose makes it difficult to reconcile the dereliction of duty theory with the terms of article 28, which expressly require the commander to be held responsible ‘*for crimes within the jurisdiction of the Court.*’ While that phrase—‘crimes within the jurisdiction of the Court’—is not defined for purposes of article 28, there is a credible basis to consider that the drafters of the Rome Statute did not contemplate the usage of the phrase in any manner that would satisfactorily accommodate the offence of dereliction of duty for purposes of article 28. This is because the drafters of the Statute had in article 5 employed the phrase ‘crimes within the jurisdiction of the Court’ to account for certain crimes therein nominated: specifically, genocide, crimes against humanity, war crimes and the crime of aggression. Dereliction of duty is not one of them.

196. This difficulty is not readily resolved by any argument to the effect that the ‘dereliction of duty’ theory only serves to attribute criminal responsibility—an adjectival purpose—rather than to nominate a substantive crime. It may be noted, of course, that in some national jurisdictions, dereliction of duty or an equivalent offence is a substantive offence in its own right.<sup>183</sup> The inadequacy of the argument that dereliction of duty only serves to attribute responsibility lies chiefly in the consideration that the object of the rules indicated in the Rome Statute for attribution of criminal responsibility is usually to attribute criminal responsibility ‘*for crimes within the jurisdiction of the Court.*’ The intended outcome of those rules is the pronouncement of a verdict of guilty or not guilty ‘*for crimes within the jurisdiction of the Court*’—specifically, genocide, crimes against humanity, war crimes and the crime of aggression. That strategy is clear from the texts of both articles 25(3) and 28(1), which expressly contemplate the responsibility of the accused ‘*for a crime [or crimes] within the jurisdiction of the Court.*’ The indicated strategy (for the attribution of criminal responsibility) in relation to article 25 is surely not intended to assist the Court to avoid holding the accused criminally responsible specifically for genocide, crimes against humanity, war crimes or the crime of aggression—as ‘a crime within the jurisdiction of the Court’. Why then should the strategy for the attribution of criminal responsibility in article 28 be employed to such an effect? This is given that the purpose of the resort to the theory of dereliction of duty is precisely to enable the Court to avoid holding a commander responsible for a crime of genocide, a crime against humanity or a war crime committed by a subordinate.

197. Thus, the outcome of the dereliction of duty theory is that the accused may be held responsible for some other crime; but not for genocide, crimes against humanity or war crimes committed by a subordinate. That being the case, it becomes difficult to sustain in a meaningful way the proposition that the dereliction of duty theory serves only the adjectival purpose of attribution of criminal responsibility, rather than the indication of a substantive

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<sup>183</sup> See, for instance, s 219 of the Criminal Code of Canada.

crime. For one thing, that argument provokes the critical question: If the dereliction of duty theory only serves to attribute responsibility rather than create a substantive crime, what then is the substantive crime for which dereliction of duty serves to attribute responsibility? If the direct answer to that question struggles to go beyond ‘dereliction of duty’, then, the theory does contemplate dereliction of duty as a substantive crime, which is not listed among ‘the crimes within the jurisdiction of the Court’. But, if the answer to the question is that the accused will be held responsible for one of the crimes nominated in article 5 as ‘crimes within the jurisdiction of the Court’, then, the dereliction of duty theory loses its very own purpose.

### ***B. Complicity as a Theory of Command Responsibility under Article 28***

198. All this is to say that article 28 does contemplate much more than dereliction of duty. Indeed, it is substantively possible to see complicity as the basis of command responsibility under article 28. In that sense, command responsibility under the provision will not be *sui generis*. That is because the liability stands on the readily appreciable footing of the commander’s inculpation in the crime of his subordinate—ahead of its commission—as an accessory before the fact. This is in the sense that not only did he help in creating the danger of the crime, but he also voluntarily condoned the crime or connived in it, when he was in a position to prevent it before its commission or suppress it while in progress. The prospect is not legally unrealistic, given that the historiography of warfare never ruled out the possibility that certain commanders would refrain from intervening against subordinates’ inclinations to commit rapes and pillage: treating such violations as veritable bounties of war to deserving soldiers; and, thus encouraging further crimes of that kind.<sup>184</sup>

199. In the right circumstances, it would be eminently just to hold a commander responsible *for* the crime of his subordinate, in accordance with this theory. That is to say, the principle *nulla poena sine culpa* is not violated if a commander is held responsible for the crimes of the subordinates if the following conditions are met:

(1) Where it is shown that the commander really had *effective control* over the subordinates, but *wilfully* declined or abstained from exercising such effective control, resulting in failure to prevent or repress the crime; or that he *wilfully* failed to punish or prompt the punishment of rogue subordinates in a manner that emboldened them subsequently to commit the same or kindred crimes that the commander voluntarily failed to punish on a previous occasion. As part of this condition, it must be shown that the failure to exercise proper control (which is the commander’s indicted failing) is attributable to the commander’s *wilful* abstention from exercising effective control *that was within his ability* at all material times: it may not be enough that the failure to exercise effective control is merely symptomatic of his real lack of effective control in the first place (except possibly in circumstances where the doctrine of endangerment may prevent him from escaping criminal responsibility, if he created the danger in the first place, but failed to put commensurate measures in place ahead of time to control the danger);

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<sup>184</sup> A review of some of the literature in this connection may be found in C Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (2012), pp 90—93.

(2) Where it is shown that the crimes committed *after* the failings indicated above are the demonstrable ‘result of’ those failures. Indeed, this is in the sense that those failings had encouraged the crimes that had been committed; and

(3) Where the further conditions indicated in article 28(a)(i) and (ii) are also clearly established.

200. If this approach captures—and it does—what the drafters of article 28 contemplated, then the literal text of article 28 would make perfect sense. It can then not be convincingly argued that the principle of *nulla poena sine culpa* was transgressed—or that there had been unfair labelling—in holding the commander liable *for* the crimes committed by the subordinates. In the circumstances, the commander’s personal nexus to the crime will have been amply demonstrated.

201. Notably, the observations of Grotius adequately bear out the complicity theory as outlined above. As reviewed extensively elsewhere in this opinion, in his classic work *De Jure Belli ac Pacis*, he made sure to cover the subject of ‘communication of punishment, as inflicted upon accomplices, who, in that capacity, cannot be said to be punished for the guilt of others, but for their own.’<sup>185</sup>

202. But the warrant for holding a commander responsible *for* the crimes of the subordinates according to the accomplice liability theory requires high fidelity (and not glib allusion) to proof of all the conditions set out earlier—including causation in the appropriate sense. This involves an exacting burden upon the Prosecution to prove the indicated links of complicity between the subordinate’s crime and the commander’s prior connivance or condonation—keeping in mind the pragmatic approaches to causation (in all their imperfections) discussed earlier. Failure to discharge the burden of proof on the criminal standard will result in an acquittal, as is the case with the present appeal.

### **1. Failure to Submit the Matter to Competent Authorities as a Matter of Accomplice Liability**

203. In the analysis of commanders’ criminal responsibility, the dereliction of duty theory commands, perhaps, the highest attraction in cases involving the commander’s failure to punish subordinates who committed crimes within the jurisdiction of the Court. I shall presently discuss the merits of dereliction of duty theory even in that regard. But, first, there is a necessary discussion about the syntax in which the norm of command responsibility is often formulated, from the perspective of failure to punish subordinates suspected of criminal conduct.

204. Article 28 of the Rome Statute is, in its structure, similar to the precedents of other statutory formulations of the norm on command responsibility: in the manner of a run-on sentence that begins with the duty to prevent and ends with the duty to submit the matter to

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<sup>185</sup> Grotius, [Campbell trans] *supra*, Bk II, ch XXI, §I p 256.

the competent authorities for investigation and prosecution,<sup>186</sup> with the duty to repress occasionally stated in the middle. In that arrangement, the failure to punish or, in the case of the Rome Statute, to submit the matter to the competent authorities for investigation and prosecution is typically given the semblance of a virtual afterthought—a veritable runt of the litter.

205. But, the necessarily terse statutory sentence, that typically formulates command responsibility in that way, need not also result in a bonded conception of command responsibility in practice. In the bonded conception, every instance of criminality by subordinates, tends always to occasion prosecution on a theory of criminal responsibility for the commander: engaging an undifferentiated analysis that impleads the very same incidence of criminal conduct as an issue of not only a failure to prevent or repress but also a failure to submit the matter to the competent authorities for investigation or prosecution.

206. The better approach, it seems, would lie in a disaggregated treatment of the different kinds of failure: according to their applicable facts and circumstances—especially when the facts of the case warrant the greater prosecutorial attention to be focused on the failure to prevent or repress. In other words, it is possible—indeed desirable—to give separate life—by way of a focused analysis—to the commander’s failure to submit the matter to competent authorities for investigation or prosecution: concentrating on its very own significance as a factual incident. It may be that such focused analysis will in the end coincide with the same penal consequences as a related instance of failure to prevent or repress the crime—as a matter of cause and effect. It is nevertheless necessary to address the failure on its own separate merit.

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207. Focusing then on the failure to submit the matter to competent authorities, as a distinct factual incident, regardless of the further normative question as to whether the failure sounds in dereliction of duty or in accomplice liability, there is undoubted good sense in any legal regime that attracts penal sanctions for that failure. The endangerment rationale (discussed below) would sufficiently validate such penal sanction on either of the two theories.

208. Indeed, depending on the text and structure of the specific provision on command responsibility and the overarching legislative policy, the commander’s failure to submit the matter to competent authorities can sound in dereliction of duty or in accomplice liability. The question then, for purposes of article 28, is which. As indicated earlier and for the reasons given, especially as regards what article 28 means when it speaks of holding the commander criminally responsible ‘*for crimes within the jurisdiction of the Court,*’ I am not

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<sup>186</sup> See, for instance, article 6(3) of the ICTR Statute: ‘The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the 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.’

confident that article 28 contemplates dereliction of duty as the nature of the commander's criminal responsibility—even for failure to submit the matter to the competent authorities. That leaves accomplice liability standing as the remaining theory of responsibility.

209. Indeed, the text and structure of article 28 and the statutory policy of the Rome Statute, together with questions of fairness about holding an accused responsible when other persons commit crimes—all of which are discussed above—also apply with necessary variation in the analysis of the commander's failure. Those considerations do not add up convincingly in support of the dereliction of duty theory, as they do for accomplice liability. In the circumstances, accomplice liability is left as the more credible theory of command responsibility for purposes of article 28 in its own terms regarding the failure to submit the matter to the competent authorities—regardless of the text of any other legal instrument that also contemplates criminal responsibility for commanders when subordinates commit crimes.

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210. From the perspective of accomplice liability, a focused appreciation of the legal consequences of the commander's failure to submit the matter to the competent authorities requires keeping in mind that the commander (whose only prosecutable conduct is failure to have the matter investigated or prosecuted, because he was never in a position to prevent or repress) need not be held criminally responsible 'for' the crime of the subordinate in *every* instance of such a crime. It is possible—and indeed legally more sensible—to punish the commander 'for crimes within the jurisdiction of the Court' committed by a subordinate, whenever it can be shown beyond reasonable doubt that the commander's failure to punish *resulted* in the subordinate's commission of a 'crime within the jurisdiction of the Court.' That means, then, that while every instance of failure can be viewed as dereliction of duty (assuming that dereliction is 'a crime within the jurisdiction of the Court'—a proposition already shown as highly doubtful indeed), not every instance of failure can be viewed as having *resulted* in the subordinate's commission of a 'crime within the jurisdiction of the Court.' This is particularly the case when the subordinates commit no further crime, following the one that the commander failed to submit the matter to the competent authorities.

211. But, there may be cases in which a commander's failure to submit the matter to the competent authorities will appreciably be seen as having *resulted* in a subordinate's *subsequent* commission of a 'crime within the jurisdiction of the Court.' As noted earlier, the annals of warfare never ruled out the possibility that certain commanders would wilfully refrain from having subordinates who committed war crimes investigated or prosecuted (typically rapes and pillage), treating such violations as licenses to deserving soldiers, thus encouraging further crimes of that kind.<sup>187</sup> Thus, for purposes of article 28, a commander whose *past* failure is proven to have resulted in subordinates' *subsequent* commission of crimes may, specifically in the terms of article 28, be held criminally responsible 'for' such subsequent 'crimes within the jurisdiction of the Court.'

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<sup>187</sup> See Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, *supra*, pp 90—93.

212. It is granted that, aside from considerations of dereliction duty, the complexities of article 28 may engage the possibility that a commander may be punished, as an accessory after the fact, for the first (and possibly only) instance of the subordinates' commission of crimes. Still, from the point of view of principle, the only way in which it will be fair to convict a commander 'for' the crime committed by the subordinate is if the commander's conduct contributed to the offence: that is to say, the offence was as 'a result of' the commander's failure. Failure with respect to a first or only violation cannot be said to have contributed to that particular violation.

213. It may be convenient, for purposes of prosecution based on the theory of accomplice liability, that the precedent and the subsequent episodes of criminality may be in close temporal proximity to one other, both occurring during the tenure of the accused commander. But, that such was not the case would be entirely irrelevant in characterising the nature of the commander's responsibility under article 28—as either dereliction of duty or accomplice liability—for failing to submit the matter to the competent authorities. Indeed, it should not matter that the commander who had failed to have subordinates investigated or prosecuted on the previous occasion of criminal conduct may no longer be in post as commander at the time of the subsequent commission of crimes. All that matters is the import of the phrase 'as a result of' in article 28, which connects the subordinate's crime to the commander's failure to submit to competent authorities for investigation or prosecution. And, it means that the failure of the accused commander to have the earlier criminal conduct investigated or prosecuted had resulted in the subsequent one.

214. It may be noted at this juncture that there is no statute of limitation for international crimes. Thus, provided there is cogent evidence showing that a subsequent crime was as a result of a wilful failure to have an earlier crime investigated or prosecuted, the commander who failed to investigate or prosecute the precedent crime may still be prosecuted and held responsible for the subsequent crime, though that commander was no longer in post when the subsequent crime was committed.

215. Upon the foregoing analysis, the theory of accomplice liability continues to rationalise the norm of command responsibility for both the purposes of the failure to submit to competent authorities for investigation and prosecution subordinates who committed crimes and the failure to prevent or repress the crimes of subordinates.

216. To conclude the discussion in this segment, it may be said that the theory of complicity puts two important and necessarily connected considerations into sharper relief. First, it makes the element of causality plainer to see in the interrelated criminality of the conducts of both the superior and the subordinate. And, in consequence, it puts in plainer perspective the fairness of holding the superior criminally responsible for the crimes committed by the subordinate. But, it all comes at the price of proof beyond reasonable doubt that the latter was caused by the former. And it is a very fair price.



## 2. Contrasting Aiding and Abetting under Article 25(3)(c)

217. The accomplice liability theory of command responsibility, for purposes of article 28, may understandably raise questions concerning the applicability of article 25(3)(c). Such questions are specifically engaged by the possible view that accomplice liability theory may well be superfluous in article 28, because the commander can be proceeded against under article 25(3)(c), which entails that kind of liability by virtue of aiding, abetting or otherwise assisting the commission of crimes. In its terms, article 25(3)(c) provides that ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ... For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission ...’.

218. It is certainly the case that article 25(3) catalogues sundry manner of accomplice liability generally known to criminal law. It is, however, a provision in *generalia*. And, it is understandable that some may see commanders as coming within its broad remit of accomplice liability. But that does not make article 28 redundant for its own *particular* purpose. Here, the maxim *generalia specialibus non derogant* comes to mind: to the effect that provisions of a general nature do not derogate from a specific provision on the same subject matter. On this view, article 28 is a special provision of accomplice liability with regard to the specific matter of command responsibility.

219. But, there are indeed specific elements of article 28 that are peculiar to it, which are not as clearly indicated as part of article 25(3)(c). Notable among the unique features of article 28 is the *duty* upon the commander to prevent or repress the commission of crime or submit the matter to competent authorities . Such a duty is not as clear in article 25(3)(c). It was thus possible (as seen earlier) to acquit two soldiers (of the rank of private) of aiding and abetting rape in *R v Clarkson* for standing by watching the commission of a rape, without interfering to stop it. Notably, the Courts-Martial Appeal Court had relied on the following famous pronouncement of Hawkins J in *R v Coney* as to the meaning of aiding and abetting:

In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, or gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non- interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged

and so aided and abetted. But it would be purely a question for the jury whether he did so or not.<sup>188</sup>

220. Hence, the point of principle separating attribution of criminal responsibility by way of aiding and abetting, on the one side, and attribution of responsibility by way of command responsibility, on the other, may be stated along the following broad lines. For the general principle of aiding and abetting, mere presence is insufficient to anchor criminal responsibility.<sup>189</sup> In other words, for purposes of aiding and abetting, ‘It is no criminal offence to stand by, a mere passive spectator of a crime ... . Non-interference to prevent a crime is not itself a crime.’<sup>190</sup> It may well be that the peculiar circumstances of a given case, may warrant a finding of encouragement—hence aiding and abetting—to be derived from evidence of voluntary and purposeful presence.<sup>191</sup> But, those would be variable circumstances to be examined on a case by case basis. It remains then to be seen whether the particular circumstances of a given case will permit two soldiers in a generally similar situation as in *R v Clarkson* to mount a similar defence successfully against a charge brought under article 25(3)(c) of the Rome Statute.

221. But, for purposes of responsibility under article 28, the argument of ‘a mere passive spectator of a crime’ is *never* available to a commander in respect of a crime under the Rome Statute when committed by subordinates, in circumstances where the commander has effective control over the subordinates but wilfully refrained from exercising it in order to prevent or suppress the crime. For him, the conversion of his conduct as a ‘mere passive spectator’ of the crime of his subordinate into his own criminal responsibility for that crime does not depend on the peculiar circumstances of the case, once the conditions of article 28 have been met. Indeed, the exclusion of the ‘mere passive spectator’ defence is the very object of article 28. The commander who has effective control is under a specific obligation to prevent and repress such crimes and to cause their perpetrators to be punished. To that extent, article 28 of the Rome Statute is materially different from article 25(3)(c).

222. Hence, the particular accomplice liability theory under article 28 is not superfluous because of the general catalogue of accomplice liability in article 25.

### 3. Complicity under article 25(3)(c) and article 28: Lessons from Grotius

223. Notably, as mentioned elsewhere in this opinion, in *De Jure Belli ac Pacis*, Grotius did engage the subject of complicity, for purposes of attribution of criminal responsibility for the actual crime. He taught that the notion covers a range of conducts. The applicable range captures persons aiding and abetting or otherwise assisting, in any of the ways indicated in article 25(3)(c) of the Rome Statute; as well as the commander who fails to prevent or suppress a crime, in the manner indicated in article 28. His general proposition (according to the Campbell translation) is that ‘communication of punishment, as inflicted upon

<sup>188</sup> *R v Coney* (1882) 8 QBD 534, p 557, cited in *R v Clarkson*, *supra*, pp 1405H—1406B.

<sup>189</sup> See *R v Clarkson*, *supra*, p 1406C (citing *R v Coney*).

<sup>190</sup> *Ibid*, p 1406A.

<sup>191</sup> *Ibid*.

accomplices, who, in that capacity, cannot be said to be punished for the guilt of others, but for their own.’<sup>192</sup> That general proposition applies to commanders as well. In the main, he enunciated the accomplice liability principle as follows (in the Campbell translation):

[P]ersons ordering the commission of any wicked or hostile act, *giving the requisite consent to it, supplying the aggressor with assistance, or protection, or, in any other shape, partaking of the crime, by giving counsel, commendation, or assent to his act, or when they have power to forbid the commission of such an act, by forbearing to exercise their authority, or by refusing to afford the succour, which they are bound by the law of nature, or by treaty to give to the injured party, by not using with the offender that power of dissuasion, which they have a right to do, or lastly by concealing what they ought to make known, in all these cases, such persons are punishable as accomplices, if they are convicted of that degree of malice, which constitutes a crime, and merits punishment: ...*<sup>193</sup>

224. Connivance and encouragement are dominant themes in the complicity theory of liability. Grotius illustrated the point in the observation that ‘a father is not answerable for the misconduct of his children, a master for that of his servants, nor a ruler for the acts of those under him, unless there appears in any of these some connivance, or encouragement in promoting that misconduct, of those acts.’<sup>194</sup> Clearly, command responsibility under article 28 of the Rome Statute amply engages the examples of the relationship between master and servant or ruler and subject. Contemplating the (command) responsibility of sovereigns in this respect, Grotius observed as follows: ‘In the case of a sovereign’s responsibility for the acts of his subjects, there are two things to be considered, which require minute inquiry, and mature deliberation, and those are the forbearance, and the encouragement or protection, which he has shewn to their transgressions.’<sup>195</sup>

225. Grotius’s elaboration of forbearance resonates strongly in a commander’s duty in modern international law to prevent or repress the crimes of subordinates. According to him: ‘As to forbearance, it is an acknowledged point, that when he knows of a delinquency, which he neither forbids nor punishes, when he is both able and bound to do so, he becomes an accessory to the guilt thereof.’<sup>196</sup> And Grotius relied on the authority of Cicero on the following point, among other things: ‘If a slave has committed a murder with the knowledge of his master, the master becomes answerable for the entire deed, *as it was done with his concurrence*.’<sup>197</sup>

226. Indeed, the doctrine of command responsibility is even more unmistakable in the Kelsey translation of the same passages of *De Jure Belli ac Pacis*. It may be noted, to begin with, that Kelsey employed the concept of ‘toleration’ of the crime as the anchor of the superior’s criminal responsibility for the crimes of subordinates. In that regard, Kelsey rendered Grotius as follows in the passages equivalent to those appearing immediately above:

<sup>192</sup> Grotius, [Campbell trans], *supra*, Bk II, ch XXI, §I, p 256.

<sup>193</sup> *Ibid*, pp 256—257, emphasis added.

<sup>194</sup> *Ibid*, §II, p 257.

<sup>195</sup> *Ibid*.

<sup>196</sup> *Ibid*.

<sup>197</sup> *Ibid*, emphasis added.

Now of the ways in which those who have control over others come to participate in a crime, there are two which are especially common, and which require careful consideration, toleration, and refuge.

With respect to toleration we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime. Cicero, in his speech *Against Piso*, declares: 'There is not much difference, especially in the case of a consul, whether he himself troubles the state by dangerous laws or wicked harangues, or permits others to do so.' Brutus wrote to Cicero: 'Will you then, you will say, hold me responsible for another's fault? Certainly for another's, if it could have been foreseen and prevented.' Agapetus, commenting on Justinian, says: 'Not to restrain wrong-doers is the same as the committing of wrong.' 'Whoever suffers a sinner to sin,' says Arnobius, 'lends strength to his boldness.' Says Salvianus: 'He who has it in his power to prevent an action orders its accomplishment if he does not check it.' With truth Augustine adds: 'Whoever fails to oppose an act, when he can, gives his consent to it.'<sup>198</sup>

227. It is significant that Grotius was careful to stress the importance of effective control in the theory of complicity by toleration or connivance. In the Campbell translation, the point is rendered in the following way: 'But, as we have said before, besides the knowledge of a deed, to constitute a participation in the guilt, the person so knowing it, must possess the power to prevent it. And this is what is meant by the legal phrase, that the knowledge of a crime, when it is ordered to be punished, is taken in the sense of forbearance or connivance, and it is supposed that the person, who ought to have prevented it, did not do so.'<sup>199</sup> Perhaps, the point is more clearly rendered in the following version in the Kelsey translation: 'But, as we have said, to participate in a crime a person must not only have knowledge of it but also have the opportunity to prevent it. That is what the law means when they say that knowledge, when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not do so; and that the knowledge to be considered here is that associated with the will, that is knowledge is to be taken in connexion with intent.'<sup>200</sup>

228. On that thesis, 'the master is not to be held responsible in case the slave has formally claimed his freedom, or if he has treated his master with contempt; for surely he is blameless who knows of an intended crime, but is unable to prevent it. ... For that one person may be held responsible for the act of another, these two elements, knowledge and the failure to prevent, should be present in like degree.'<sup>201</sup>

229. It may also be noted that Grotius had enunciated congruent principles of complicity in the context of liability for damages or loss occasioned by injury and the obligation to repair them, as reviewed earlier in the context of the discussion about omission. As may be recalled, he wrote that besides those who directly cause injury personally, other persons may also be held liable, by reason of their acts or omissions—either as primary or secondary parties to

<sup>198</sup> Grotius, [Kelsey trans], *supra*, Bk II, ch XXI, §II(2), pp 523—524.

<sup>199</sup> Grotius, [Campbell trans], *supra*, Bk II, ch XXI, §II, p 257.

<sup>200</sup> Grotius, [Kelsey trans], *supra*, Bk II, ch XXI, §II(4), p 524.

<sup>201</sup> *Ibid.*

wrongdoing. Among the primary parties are those who order the act, those who give the necessary consent, and those who aid or abet the crime in other ways.<sup>202</sup>

230. Although his discussions in that regard pertain to complicity in relation to liability to repair loss, Grotius would still consider them useful in shedding light upon kindred principles of criminal responsibility. ‘For the partnership in loss, and the partnership in guilt are regulated by nearly the same principles.’<sup>203</sup>

231. The essential point of the foregoing review reverts to validation of the commander’s punishment—as an accomplice—‘for’ the crimes of subordinates; recalling that Grotius had explained that validation in the terms that ‘communication of punishment, as inflicted upon accomplices, who, in that capacity, cannot be said to be punished for the guilt of others, but for their own.’ For the commander, a further rational explanation of that validation lies in the doctrine of endangerment, explained immediately below.

## **IX. Endangerment as the Ultimate Anchor of Criminal Responsibility**

232. Beyond considerations of dereliction of duty and complicity, the endangerment liability affords, perhaps, a fuller appreciation of the rationale of command responsibility, as a general proposition.

233. We may begin by noting that criminal law’s concerns in punishing individuals whose conducts violate the interests of others are not limited to conducts in the nature of attacks against those interests in a manner that causes actual harm. The concerns of criminal law also extend to conducts that create the threat or risk of actual harm. Attribution of liability in the order of the latter category is generally termed ‘endangerment’ liability.

234. Culpability on grounds of endangerment does not always require proof that the defendant’s conduct caused actual harm. It may be enough that his conduct created a dangerous situation, regardless of the outcome.<sup>204</sup> The penalisation of such conducts has generally been accepted as justifiable.<sup>205</sup> Indeed, it is fully consistent with the fault element of *mens rea*, in the latter’s enhancement of ‘the constitutional values of legality and rule of law’, according to which citizens are reassured ‘that they will be liable to conviction ... only if they knowingly cause or risk causing a prohibited harm.’<sup>206</sup> At an appreciable level of intellection, the balance of justice that such penal schemes seek to achieve is quite apparent. It strikes an appropriate balance between the principle of individual autonomy (which leaves choices and their control in the hands of the individual)<sup>207</sup> and the normative kernel of the commonwealth (‘which favours the imposition of standards of behaviour on citizens because their behaviour

<sup>202</sup> See Grotius, [Kelsey trans], *supra*, Bk II, ch XVII, from §VI (p 432) to §XI (p 433).

<sup>203</sup> Grotius, [Campbell trans], *supra*, Bk II, ch XXI, §I, p 256.

<sup>204</sup> See Andrew Ashworth, *Principles of Criminal Law*, 6th edn (2009), p 290.

<sup>205</sup> *Ibid.* See also R A Duff, ‘Criminalizing Endangerment’ [2005] 65 *Louisiana Law Review* 941, p 952

<sup>206</sup> See Ashworth, *supra*, p 155.

<sup>207</sup> *Ibid.*, p 76.

... can so easily impinge on others, with disastrous consequences’).<sup>208</sup> And this is particularly so ‘in situations where the conduct has little social utility or where the risk is well known.’<sup>209</sup>

235. The relevant point of principle may thus be expressed as follows. Persons led by their own choices to modify the ordinary ecology of activities in ways that introduce the risk of danger on the shared plains of human encounters must take care to insulate innocent strangers from the resulting harm. The fairness of that proposition is starker when the dangerous condition was forced upon the victims without their consent, and holds no promise of benefit to them.

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236. Some domestic jurisdictions have a general endangerment offence or liability, typically expressed as reckless engagement in conduct that places another person in danger of death or serious injury. A renowned example of such a regime is found in the US Model Penal Code (s 211.2), as well as in some states and territories of Australia.<sup>210</sup> For many jurisdictions, however, the approach to endangerment liability follows the *ad hoc* model of penalising endangerment in particular circumstances to deal with specific manner of mischief.<sup>211</sup> Road traffic offences are a common type of such *ad hoc* penalisation of endangerment. In addition, in domestic jurisdictions such as the UK, an employer is also under a duty ‘to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.’<sup>212</sup> And, it is an offence for a person to fail to discharge that duty.<sup>213</sup>

237. In the classic form, endangerment liability is non-consummate, in the sense, as indicated earlier, that no proof of actual harm may be required. But, in the modulated form, liability may be described as consummate, if it depends on proof of actual harm.<sup>214</sup> As a further consideration, liability for endangerment can be strict. This is so when the defendant’s guilt does not depend on any subjective or objective awareness of the risk created. But endangerment liability does not come in the mode of strict liability if conviction depends on

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<sup>208</sup> *Ibid*, p 75.

<sup>209</sup> *Ibid*, p 319.

<sup>210</sup> See K J M Smith, ‘Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation’ [1983] *Criminal Law Review* p 127; D Lanham, ‘Danger Down Under’ [1999] *Criminal Law Review* 960; R A Duff, ‘Criminalizing Endangerment’ [2005] 65 *Louisiana Law Review* 941; C M V Clarkson, ‘General Endangerment Offences: The Way Forward?’ [2005] 32 *Univ of Western Australia Law Review* 131.

<sup>211</sup> In the Criminal Code of Germany (StGB), for instance, there are a number of provisions on endangerment, including the following: sections 250(1)(c) [the perpetrator or another participant in the robbery places another person in danger of serious health damage]; 330(a) [serious endangerment by release of poisons]; 330(2)(1) engaging in intentional acts under ss 324 to 329 and thereby placing another human being in danger of death or serious health damage or a large number of human beings in danger of health damage. Article 223-1 of the Penal Code of France makes it an offence to directly expose another person to an immediate risk of death or injury by the manifestly deliberate violation of a specific obligation of safety or prudence imposed any statute or regulation.

<sup>212</sup> See the Health and Safety at Work etc Act 1974, s 3(1).

<sup>213</sup> *Ibid*, s 33(1).

<sup>214</sup> See Duff, *supra*, pp 954–955.

proof of a fault element. Such fault element would be typically expressed not in the manner of intention to cause harm, but rather in the manner of practical indifference or reckless disregard to the interests put in danger of harm.<sup>215</sup>

### *A. The Endangerment Rationale for Article 28*

238. It must be emphasised from the outset that the present discussion about the endangerment rationale in the context of article 28 of the Rome Statute does not serve an elemental purpose—in the sense of importing additional elements that must be proved or disproved for purposes of liability. The discussion merely enables a fuller appreciation of the nature and justice of the criminal responsibility under consideration.

239. That the liability contemplated in article 28 is ultimately in the nature of endangerment liability is inescapable in the context of armed conflict. This is so, because warfare is a mortally dangerous transaction with limited social utility—much less so to the civilian victims who are the veritable grass trampled upon by duelling elephants.

240. Not many modern day international lawyers would rush to support General von Clausewitz’s argument that ‘usages of international law’ and humanitarian considerations must not operate to modulate the idea of war in its philosophical conception.<sup>216</sup> Yet, the basic description he gives to war in his classic work *On War* underscores what no one may reasonably deny as a notorious fact. War, he observed, is violence deployed ‘on an extensive scale.’<sup>217</sup> According to him, the core of war’s ideal conception involves ‘the tendency to destroy the adversary’.<sup>218</sup> Putting it differently, he maintained that ‘[w]ar is an act of violence pushed to its utmost bounds; as one side dictates the law to the other, there arises a sort of reciprocal action, which logically must lead to an extreme.’<sup>219</sup> It is a view that General Norman Schwarzkopf of the modern era has resonated as follows: ‘War is a profanity because, let’s face it, you’ve got two opposing sides trying to settle their differences by killing as many of each other as they can.’<sup>220</sup> In a similar vein, Geoffrey Parker has observed that ‘the business of the military in war is killing people and breaking things.’<sup>221</sup> So, too, David Chuter has observed that war is, simply put, ‘episodes of mindless slaughter and wanton destruction.’<sup>222</sup> From a distance, it will be possible to debate niceties about some of these descriptions; but innocent victims who have lost limbs, loved ones and livelihoods in war will brook no quibble.

241. Still, a particularly worrying phenomenon of war is the brunt of it that the innocent people are often left to bear directly in those excesses, due to no fault of their own. It is not

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<sup>215</sup> *Ibid.*, pp 944–945.

<sup>216</sup> Carl von Clausewitz, *On War*, (Graham tr) (1918) vol 1, p 2.

<sup>217</sup> *Ibid.*, p 1.

<sup>218</sup> *Ibid.*, p 4.

<sup>219</sup> *Ibid.*

<sup>220</sup> See Bob Woodward, *The Commanders* (1991) p 313.

<sup>221</sup> Geoffrey Parker, ‘Dynastic War: 1494-1660’ in Geoffrey Parker (ed) *Cambridge Illustrated History of Warfare* (1995) p 161.

<sup>222</sup> David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (2003) p 5.

just each other that the opposing combatants are trying to kill—and killing in fact. The so-called ‘collateral’ casualties of war is also a notorious phenomenon, which J Glenn Gray (a veteran of World War II) described as follows in his classic memoir *The Warriors*:

[M]odern wars are notorious for the destruction of nonparticipants and the razing of properties in lands that are accidentally in the path of combat armies and air forces. In World War II the number of civilians who lost their lives exceeded the number of soldiers killed in combat. ... Through folly or fear, nearly every officer has exposed his own men to needless destruction at one time or another. Add to this the unnumbered acts of injustice so omnipresent in war, which may not result in death but inevitably bring pain and grief, and the impartial observer may wonder how the participants in such deeds could ever smile again and be free of care.

The sober fact appears to be that the great majority of veterans, not to speak of those who helped to put the weapons and ammunitions in their hands, are able to free themselves of responsibility with ease after the event, and frequently while they are performing it. Many a pilot or artilleryman who has destroyed untold numbers of terrified noncombatants has never felt any need for repentance or regret. Many a general who has won his laurels at a terrible cost in human life and suffering among friend and foe can endure the review of his career with great inner satisfaction. So are we made, we human creatures!<sup>223</sup>

242. Indeed, these observations have received the imprimatur of judicial notice. To that effect, the US Military Tribunal in Nuremberg observed as follows: ‘War is human violence at its utmost. Under its impact, excesses of individuals are not unknown in any army.’<sup>224</sup>

243. Keeping in mind the character of armed conflicts as notoriously dangerous (Von Clausewitz wrote of it in the terms of ‘such dangerous things as War’),<sup>225</sup> it becomes easy to appreciate how the endangerment rationale underscores the aim of article 28, in seeking to protect innocent victims from the risk of the excesses that is so notoriously a feature of armed conflicts.

244. Considered from the angle of policy that should guide the interpretation of article 28, the value of the endangerment rationale becomes fairly apparent in the light of the key mischief and the necessary remedy that inspired the adoption of the Rome Statute. That mischief is the history of a world in which ‘children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’. And the necessary remedy is the State Parties’ active determination ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’

245. To be clear, the conceptual barrier that demarcates *jus in bello* inquiries from *jus ad bellum* concerns does not obstruct the point of principle to the effect that those who engage in warfare—by training, arming and deploying soldiers and planning and executing their

<sup>223</sup> J Glenn Gray, *The Warriors: Reflections on Men in Battle* (1959), pp 172—173.

<sup>224</sup> *The Trial of Wilhelm von Leeb & Ors (The German High Command Trial)* (1948)XII Law Reports of Trials of War Criminals [US Military Tribunal, Nuremberg] p 75.

<sup>225</sup> Von Clausewitz, *supra*, p 2.



operations—in close proximity to civilians must take care to ensure that innocent victims are not subjected to undue harm, beyond what is strictly permitted by military necessity (specifically discussed below for its proper meaning). For, that is a necessary inquiry in the realms of *jus in bello*.

246. Indeed, this interpretation of command responsibility is in the general order of the endangerment liability that anchors a duty upon, say, an employer in England to take care to ensure that his industrial operations do not cause harm to strangers to his enterprise. In article 28, the duty upon the commander is to take care—through proper supervision of his subordinates—to ensure that his belligerent operations do not cause harm to innocent victims. But, the commander’s endangerment liability under article 28 comes in the more attenuated form, in that it is both result-regarding and fault based, taking into account all the stipulated modulations for liability. There is, therefore, no question of strict liability or of vicarious liability.

### ***B. Unfounded Worry about Strict Liability***

247. It was wise, indeed, of Ms Gibson to have readily accepted the endangerment rationale on behalf of the Defence during the oral hearings.<sup>226</sup> Notably, however, co-counsel Mr Newton, was not as forthcoming. His hesitation, it seems, results primarily from his worry that the endangerment rationale might be a Trojan horse that may conceal considerations of strict liability. He further worried that the endangerment rationale may not be consistent with a certain view of how things work in the ‘real world’ during war, because we are not living in a perfect world where ‘we would fight wars in deserts’ in order to minimise undue danger to civilians.<sup>227</sup> I address these two worries in turn.

248. The fear of strict liability must be allayed. As a general proposition, there is no known legal theorem that makes strict liability an ever-constant companion to the doctrine of endangerment. All depends on the very text of the applicable provision. So it is with article 28, as noted earlier, given its preconditions of liability.

249. Quite significantly, the framework of command criminal responsibility, pursuant to article 28, secures that responsibility within two bracketing imperatives. The opening bracket, appearing in the nature of a condition precedent, so to speak, requires that crimes of the subordinate must have been committed ‘as a result [of the commander’s] failure to exercise control properly’ over such subordinates. But, that is only the starting point of the inquiry, not the end of it. For, there is also the closing bracket formed by two provisos, in the nature of conditions precedent. That aspect comprises both the inculcation of the commander’s knowledge of the crimes, and the exculpation of necessary and reasonable measures within his or her power to prevent or repress the crimes or submit the matter to the competent authorities for investigation and prosecution. Failure of the prosecution case in any of these pre-conditions will absolve the commander from criminal responsibility.

<sup>226</sup> Appeals Hearing Transcript 10 January 2018, p. 125, lines 8-16.

<sup>227</sup> Appeals Hearing Transcript 10 January 2018, p. 111, line 8; p. 126, line 15 to p. 129, line 20.

250. It must be stressed that liability cannot be secured if both opening and closing brackets—or conditions precedent and subsequent—are not firmly in place. In other words, even when it is established that the crimes resulted from the commander’s failure to exercise control properly, he can still escape criminal responsibility, if it is not shown that (a) he knew or should have known in the circumstances that the subordinates were committing or about to commit the crimes; or (b) that he took all necessary and reasonable measures within his powers to prevent or repress the crimes or to submit the matter to competent authorities for investigation and prosecution.

251. That arrangement entails a series of checks against the risk of strict liability that worried Mr Newton so; while still allowing unobstructed the theory of endangerment as explaining the commander’s criminal responsibility. This is in the sense that the commander’s complicity in the subordinates’ crimes originated when (s)he created or fostered the danger of the subordinates’ criminality (by training them, arming them and/or deploying them, so as to be able to commit those crimes), and that complicity was consummated when (s)he failed to exert authority (that was effectively available to be exerted) properly to prevent or repress the crime (including through punishment), when s(he) knew (or should have known) that the subordinates were committing or about to commit such crimes. That is the essence of the endangerment rationale.

### ***C. Anachronistic dichotomy between jus in bello and jus ad bellum***

252. Mr Newton’s second reason for hesitation to accept the endangerment rationale is that it may not correctly reflect the ‘real world’ during war, in which wars are not required to be fought exclusively ‘in deserts’ in order to minimise risk to civilians. That concern falls short of its persuasive mark in a number of ways. First, the point of the endangerment rationale is not so much to *minimise risk* to civilians as it is to afford a rational basis for the commander’s criminal responsibility for the crimes of subordinates. And the argument about needing, then, to fight wars in deserts leaves the commander’s criminal liability entirely unexplained—even alternatively. More specifically, the argument does not deny the truism that war is a most dangerous enterprise that involves the killing and maiming of people and the destruction of cherished things. Nor does it deny that the commander is implicated in the training, arming and deployment of soldiers to engage in those activities. In those circumstances, then, the endangerment rationale for the commander’s responsibility is not readily displaced by the bare assertion that it does not reflect the ‘real world,’ because wars are not required to be fought exclusively in deserts.

253. Second, the implicit argument in the observation that wars are not required to be fought exclusively in deserts is also unpersuasive on its own force, because it adumbrates the red herring of the dichotomy between *jus in bello* and *jus ad bellum*. To begin with, that argument throws no light at all on why the commander is held responsible for the crimes of his subordinates as a matter of *jus in bello*. What is more, just as the ICTY Appeals Chamber in *Tadi* was constrained to recognise the eventual blurring of the ‘stark dichotomy’ that

international law had traditionally drawn between the sets of rules that applied in international and internal armed conflicts,<sup>228</sup> the time has come for the Appeals Chamber of this very Court to recognise the bridging of the gap between *jus in bello* and *jus ad bellum*. Without a doubt, the authoritative basis for that recognition lies in legal developments concerning the crime of aggression within the Rome Statute. It began with both the recognition and the definition of that crime within the Rome Statute—respectively in article 5(d) and article 8*bis*—and culminated in its eventual jurisdictional activation by an Assembly of States Parties resolution of 14 December 2017, effective on 17 July this year.<sup>229</sup>

#### ***D. The Fault Element of article 28***

254. Now, beyond the failure to exercise proper control over subordinates, it is recalled that the further fault element of article 28 requires that (i) the commander knew or should have known (from the prevailing circumstances) that the subordinates were committing or about to commit the crimes; and, (ii) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress the violation in the first place or submit the matter to competent authorities for investigation and prosecution. The inquiry into the fault element may culminate in—or, indeed, concentrate on—the commander’s failure to take all necessary and reasonable measures to prevent or repress the violation in the first place (in circumstances where he or she knew or should have known that the subordinates were committing or about to commit the crimes) or to occasion investigation for purposes of prosecution.

255. But, the inquiry into that fault element may—in the broader context necessarily engaged by the endangerment rationale—encompass more than the immediate circumstances in which subordinates were committing or about to commit the proscribed crimes, in the actual or notional knowledge of the commander. The inquiry into the necessary and reasonable preventive measures may contemplate steps that the commander took—or failed to take—well ahead of time to reduce the possibility of subordinates committing foreseeable violations during armed conflicts. Among what may be considered in this regard would be any failure to inculcate in subordinates the basic ethos of correct soldiery, including basic discipline and the elementary proscriptions of international humanitarian law. Such anticipatory measures are the starting point of the exercise of proper control, with the view to forestalling later criminality in the headier circumstances of armed conflict: mindful of the reality, as noted earlier, that armed conflicts are a most dangerous enterprise, notoriously characterised by a tendency to commit excesses against innocent civilians. Hence, those who play a commanding role in them must make sure to train their subordinates reasonably, in order to avoid such violations.

256. While the obligation in this regard will naturally lie with the higher echelons of command, commanders at the operational level will still bear a responsibility to do their best

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<sup>228</sup> See *Prosecutor v Tadi* (*Interlocutory Appeal on Jurisdiction*) dated 2 October 1995 [ICTY Appeals Chamber] paras 96 and 97.

<sup>229</sup> See ICC, Assembly of States Parties, Resolution ICC-ASP/16/Res 5 of 14 December 2017.

to train those under them—or refresh, maintain and update their training in the proper way—as best as can be done in the circumstances, while also doing their best to prompt the higher authorities to ensure such trainings or refresher courses.

257. But failure to inculcate in the troops the ethos of basic discipline and the elementary humanitarian proscriptions is not a self-contained fault element. It is only one factor among the totality to be taken into account in the appraisal of a broader failure to take all necessary and reasonable measures to prevent or repress violations, within the meaning of article 28. The foremost inquiry retains its focus on the actions and omissions of the commander in the light of actual or constructive knowledge of on-going or imminent violations or completed ones. The commander who had failed in the obligation to instil basic discipline and respect for humanitarian norms may be more exposed to charges of ‘failure to exercise control properly,’ hence his or her individual criminal responsibility for the violations of subordinates. But, the commander who did instil basic discipline and respect for humanitarian norms may still, for other reasons implicated by the facts and circumstances of the situation, be exposed to charges of ‘failure to exercise control properly’: if he or she knew or should have known that subordinates were committing or were about to commit violations. The particular facts of each case will necessarily determine whether or not a finding of individual criminal responsibility may properly be made.

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258. For the foregoing reasons, I would not subscribe to any interpretation of the Majority Opinion as suggesting that the geographic remoteness of a commander is a factor all of its own, which would necessarily insulate him from criminal responsibility. Geographic remoteness is only a factor to be considered among other circumstances or peculiarities of a given case. It serves its greatest value in the assessment of what is *reasonable* as a measure to prevent or repress violations to submit them to competent authorities for investigation and prosecution. It is noted, in this connection, that the obligation is not to do *all* that is *conceivable* and necessary, considered from hindsight. It is, rather, to do *all* that is *reasonable* and necessary—no doubt in the circumstances at the time.

259. However, the foregoing disclaimer does not contradict the overall *factual* analysis made in the Majority Opinion as regards necessary and reasonable measures in the factual matrix of the case at bar. Indeed, more than that, I am not persuaded that the evidence in the case confidently pointed to ‘effective control’ over the troops to the degree and extent that the Trial Chamber found. I do readily accept that the Appellant had effective control to the extent that the evidence showed that he deployed his troops into the CAR and withdrew them eventually—all as a matter of his own orders. It may be that such is enough to find effective control on his part. But, it bears keeping in mind that the order to withdraw troops may be a measure of last resort when every other measure has failed. (More on this later.) Therefore, its particular efficacy in the given circumstances affords no proof of the commander’s effective control in all other respects.

260. With respect, the Trial Chamber's analysis<sup>230</sup> suggests a distraction occasioned by the question whether the MLC troops had been subordinated to the CAR military hierarchy, thus breaking the chain of responsibility between the Appellant and his troops. This is a distraction that effectively diverted the Trial Chamber's inquiry away from 'effective control' and confused it with an inquiry concerning chain of command within which control is retained. This does not address the question whether such control is *effective* even within the chain of command. This confusion resulted, in my view, in a failure of analysis as regards effective control.

261. This confusion had the added difficulty of refracting views of the Appellant's ability to take particular measures in the order of what was necessary and reasonable in the circumstances of the case. To be noted, in that connection, is the Trial Chamber's findings as to what the Appellant could have done in this case 'in light of his extensive ability to prevent or repress the crimes.'<sup>231</sup> That conclusion was largely based on the Trial Chamber's finding that the Appellant had 'effective control' over his troops; which finding was, in turn, confused with the inquiry as to whether the MLC troops had been subordinated to the CAR military hierarchy.

262. We may now look at some of those findings that motivated the Trial Chamber's conclusion that the Appellant had 'extensive ability to prevent or repress the crimes.' First, he was found to have exercised 'primary disciplinary authority' over MLC troops.<sup>232</sup> That was a finding correctly made to show that the primary disciplinary authority was not with the CAR military hierarchy. That finding does not answer the question whether such primary disciplinary authority was necessarily *effective* upon its subjects. Second, the Appellant was found to have had the 'ultimate decision-making authority.' For this finding to translate into a finding as to *effective* control, the record needed to show consistent evidence that the subjects of such decision-making power were consistently responsive to the power, such as would compel the view of the ultimate decision maker's ability to prevent and repress crimes of the subordinates. Third, it is found that the Appellant 'controlled the MLC's funding.'<sup>233</sup> But, to translate this into effective control may be to give too much play to the epigram that he or she 'who pays the piper dictates the tune.' The paid piper may refuse to play, for very many reasons. Finally, it was found that the Appellant retained 'disciplinary powers over MLC members, including the power to initiate inquiries and courts-martial.'<sup>234</sup> Again, that speaks to *de jure* powers, rather than effective control powers. Powers are not always effective in the hands of those who are entitled to exercise it. Evidence of effective exercise is needed. In the end, the 'extensive ability to prevent and repress the crimes' is more of a conclusion than the evidence shows in fact.

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<sup>230</sup> Trial Judgment, paras 696 to 705.

<sup>231</sup> Trial Judgment, para 729.

<sup>232</sup> Trial Judgment, para 703.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

263. It is for reasons such as this, among others, that I was inclined to order a retrial. In the unique circumstances of this case, however, as explained earlier, I am satisfied that the balance of justice impels me to join Judge Van den Wyngaert and Judge Morrison in the outcome of the Majority Opinion, for a judgment of acquittal.

### *E. The Control Paradox*

264. Perhaps, one of the values of the endangerment rationale is the assistance it lends in resolving a certain dissonance as regards the element of control as a legal factor of liability for purposes of command responsibility. The dissonance occurs in this way. Command responsibility depends, on the one hand, on the existence of effective control. Yet, the very gravamen of command responsibility is the failure of control—in the manner of improper control. Hence, the conundrum becomes this. The *presence* of effective control anchors liability when the offence is, on an appreciable view, the *absence* of proper control. The question must then be grappled with: whether proof of failure of control—expressed as ‘improper control’ in the usual parlance—is not the very proof of absence of effective control. That of course undermines the idea that a commander may be held criminally responsible *for* the actions (in the manner of crimes) of troops whom he could not control in the theatre of war.

265. The view is assisted by keeping in mind that the killing of another human being would ordinarily be a criminal offence in any civilised society; so, too, the destruction of property. And there is ancillary criminality in training, arming and deploying people in order that they may kill or destroy; as well as planning either such killings and destruction or transactions, or planning dangerous activities that carry foreseeable risk of such killings and destruction. As these would ordinarily constitute criminal conducts, it is only military necessity—when *properly conceived* (as discussed below)—that can justify them in the context of an armed conflict.

266. Put differently, the distinction between, say, criminal homicide in peacetime and homicide by operation of war is the occurrence of the latter in the context of military hostility. That distinction similarly separates the responsibility of the crime boss and that of the military commander; though each had (by training, arming and deployment or planning) facilitated or contributed to the homicide committed by his subordinate, though for different purposes. Thus, the sympathy of justice is appreciably dulled for the military commander who unleashes such homicidal or destructive forces through the agency of subordinate soldiers, only later to plead loss of control over those subordinates that have gone rogue and committed excesses using the facilities of the training, arming, planning and deployment that the commander had put at their disposal.

267. In those circumstances, justice is seldom served in absolving commanders of criminal responsibility merely because they may truly have lost control of their troops in the actual theatre of war. Where innocent victims are left to suffer (as foreseeable events) the physical hazards of violent crimes committed against them by soldiers that defied control of their commanders, the heart of justice will not bleed readily for the commander who trained,

armed, and deployed those rogue soldiers—but then lost control over them. In those circumstances, justice may indeed strain to compel such commander to contend with the hazards of criminal law for his loss of control over those troops—in the absence of evidence that he had put in place (and properly maintained) an effective system of countermeasures against the violations in question. That, in the final analysis, is the essence of the endangerment rationale in relation to the responsibility contemplated in article 28. But, that said, we must still recognise the particular value of article 30 of the Rome Statute, which requires that for purposes of criminal responsibility under the Rome Statute, the commander’s failures must be shown to be wilful.

268. Beyond the foregoing scenario, the control paradox serves an alternative purpose in demonstrating the object of command criminal responsibility: as complicity and not merely dereliction of duty. And this is in the sense of presenting contradictory values to the factor of control. It is recalled that *presence* of ‘effective control’ anchors liability, while the offence is effectively the *failure* to exercise proper control. When so pointing in opposite directions, simultaneously at both exoneration and culpability, the factor of control cannot properly anchor criminal responsibility in the same person. To resolve the dissonance in a way that aligns all the needles of control in the direction of liability, requires insisting that once the presence of effective control has been found, the failure to exercise proper control must be wilful, in a way that truly amounts to connivance in or condonation of the crimes of the subordinates. Hence, the commander who genuinely lost control over his troops may not be held criminally responsible for their unforeseen criminal conducts. The only remaining basis of criminal liability will be the proven failure to take necessary and reasonable measures ahead of time to prevent the commission of crimes that were foreseeable in the circumstances of the particular armed conflict or of armed conflicts in general.

269. The forgoing analysis fully justifies the reversal of the Appellant’s conviction in this case. As was demonstrated in the Majority Opinion with which I concur, the evidence reviewed in the Trial Judgment did not establish beyond reasonable doubt that the conduct of the Appellant amounted to wilful failure that truly amounted to connivance in, or condonation of, the crimes of his subordinates.

#### ***F. Definition of Necessary and Reasonable Measures***

270. In a debate of interest to the preceding discussion, the Appellant complained, as part of his third ground of appeal, that the manner in which the Trial Chamber considered and determined the question of what reasonable and necessary measures were left open to him, did not take into account the feasibility of those measures in the circumstances. In reply, the Prosecutor contended that there is no support for the claim that necessary and reasonable measures are separately subject to the test of feasibility, provided they are necessary and reasonable.

271. On its face, the argument of the Prosecution may present no difficulty if the point is that the inquiry need not dwell on feasibility of measures as a ‘separate’ element. But, that is not the end of the matter. For, there may well be an issue ultimately with feasibility of

measures—even if such an issue is implicit in the concept of the *reasonableness* of measures. Indeed, in the context of a legal requirement of measures to be ‘reasonable’, it is generally a good defence to contend that a particular measure was not feasible in the circumstances. For any measure that was not feasible in all of the cognisable circumstances would not be reasonable.

272. That then engages the inevitable question as to the definition of the phrase ‘necessary and reasonable measures.’ To be noted in that regard is the following definition to be found in the jurisprudence of the *ad hoc* tribunals: ‘A “necessary” measure is one that is appropriate for the commander to discharge his obligation, whereas a “reasonable” measure is one reasonably falling within the material powers of the superior.’<sup>235</sup>

273. I am, with respect, of a different view. A ‘necessary’ measure, in my view, is one which must be taken in the circumstances, in order to avert the contemplated mischief. While a ‘reasonable’ measure is that which reality shows to be available and good sense recommends as appropriate in the circumstances, in order to avert the contemplated mischief. Naturally, measures falling beyond the realistic abilities of the commander at all material times will not qualify as ‘reasonable’. In this connection, all material times are not limited to the circumstances directly proximate to the commission of crimes. They would include measures that ought to have been taken ahead of time to prevent the commission of crimes that were reasonably foreseeable in the circumstances of that particular armed conflict or in the general circumstances of armed conflicts, in light of the notorious tendency of soldiers to commit such crimes as a general proposition. These include crimes of sexual violence and pillaging, which have been a notorious feature of armed conflicts through the ages.

274. Thus, where the commander is implicated in the creation of the danger of these crimes being committed—such as by training troops in a manner that gives them the violent ability to commit these crimes, arming them with weapons capable of employment in the commission of the crimes and deploying them to places where they could commit such crimes—it would be no defence on his part merely to say that he was deprived of the material ability at the time to take measures to prevent and repress the crimes. In those circumstances, exoneration of the commander would require evidence that he had taken measures ahead of time—and maintained them in the meantime—to prevent the commission of such crimes.

## **X. The Duty to Withdraw Troops in Abatement of Criminality**

275. A disputed issue in this appeal is whether the necessary and reasonable measures that the commander must take within the meaning of article 28 could ever contemplate a duty to withdraw troops who commit crimes against civilians.

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<sup>235</sup> *Prosecutor v Halilović* Appeal (Judgment) dated 16 October 2007 [ICTY Appeals Chamber] para 63; *Prosecutor v Ori* Appeal (Judgment) dated 3 July 2008 [ICTY Appeals Chamber] para 177.



276. The Trial Chamber ‘emphasise[d] that one key measure at Mr Bemba’s disposal was withdrawal of the MLC troops from the CAR.’<sup>236</sup> The Trial Chamber found that there was evidence that the Appellant had acknowledged both that measure and his ability to take it.<sup>237</sup> Yet, he failed to withdraw the troops when such withdrawal would have prevented the commission of the crimes.<sup>238</sup> As I understood them, the Prosecution defended that finding, as a matter of fact. The Defence disputes the existence of any such duty, even as a matter of law, quite apart from the question whether any such duty was exigible in the practical, factual or procedural circumstances of the present case. I shall address first the law of the matter.

277. It may be useful to approach the discussion from the perspective of the debate between the Appellant and the Prosecutor during the hearing. On behalf of the Appellant defendant, Mr Newton contended that there is no such duty as a matter of law. His argument may be summed up as follows. First, that there is no judicial precedent in support of the proposition. And, secondly, the very idea of any such duty will be incompatible with ‘the real world’ in the course of war in which commanders have a military obligation to accomplish their military objectives.<sup>239</sup> Responding on behalf of the Prosecution, Ms Brady argued that Mr Newton was effectively raising an argument of military necessity as obstructing the view of a duty to withdraw. She insisted that Mr Newton’s argument was unsustainable to that extent, since case law has now settled the law to be that military necessity cannot override the military obligation to respect the laws of war which protect civilians against violations.<sup>240</sup> In reply, Mr Newton denied that his argument was one of military necessity.<sup>241</sup> But, he did not controvert Ms Brady’s submission that the law is now settled that military necessity is now subject to the dominion of the law, which proscribes the perpetration of violations against civilians. That exchange between counsel is significant.

278. The objection to the existence of a duty to withdraw troops (who commit crimes against civilians) could find no higher or firmer ground of validity than military necessity. The point hopefully becomes clear in the following question. Other than military necessity, on what controlling legal basis does a commander stand to protect his military objective, hence refusing to withdraw troops from proximity to a civilian population, in the face of proven criminality of those troops against that civilian population, and not merely the risk of it? That remained unanswered during the hearing. This Appeals Chamber could not possibly be assisted by the argument that there is no prior judicial precedent on the existence of duty to withdraw troops. Arguments of that kind have never been known to obstruct a court of appeal from interpreting the law in light of its object and purpose, let alone when (as in this case) there is no showing that another international criminal court has fully considered the question and rejected it with reasons, let alone ones that bind this Court. Nor am I assisted by the argument that the idea of the duty to withdraw is incompatible with ‘the real world’ of

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<sup>236</sup> Trial Judgment, para 730.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, paras 740 and 741.

<sup>239</sup> Appeals Hearing Transcript 10 January 2018, p 111, line 8.

<sup>240</sup> Appeals Hearing Transcript 10 January 2018, p 86, lines 13-16.

<sup>241</sup> Appeals Hearing Transcript 10 January 2018, p 91, lines 22-25.

warfare, in which commanders have a duty to accomplish military objectives. Despite Mr Newton's denial that he was arguing military necessity, the substance of his argument has no higher purchasing power than the doctrine of military necessity. It is therefore much too weak, in my view, to defeat the idea of duty to withdraw (in whole or in part) troops who violate civilians.

279. The Trial Chamber was correct, in my view, to emphasise withdrawal of troops as key among the range of measures that must come within a commander's duty to take all reasonable measures to prevent or repress the commission of crimes by subordinates or to submit the matter to the competent authorities. In a manner of speaking, such withdrawal amounts to reversal of their deployment, as it were, from the place where the crimes are being committed or will imminently be committed. Depending on the circumstances and the commander's position in the military echelon, withdrawal may be from a country or from a particular locale within a country. And it may be limited in scope, to withdrawing no more than only the identifiable rogue elements among the troops.

280. The obligation to withdraw is, without more, entirely a matter of common sense. And it falls squarely within the logic of the endangerment theory. This, on either view, is in the sense that anyone who introduces a potentially deleterious physical agent into a place must promptly do his best to arrest the resulting harm as soon as it has become clear. What is done in that regard must include removal of the thing in abatement of harm—and particularly so if it can be easily removed. Failure to do so will, at the barest minimum, consummate the initial endangerment liability. But, more than that, it may aggravate the liability. Hence, as a matter of the duty to take necessary steps to repress or punish, there is a legal obligation upon a commander to withdraw troops deployed to a place where they are known to be committing crimes. That obligation is more exacting in the circumstances of engagement in an armed conflict that is not compelled by considerations of military necessity in the manner of the inherent right of self-defence—according to article 51 of the UN Charter—on the part of the commander.

281. But, it may be necessary to take a closer look at the idea of military necessity, in order to underscore why it was correct that the law has now made clear that military necessity must remain within the dominion of the law. I conduct that discussion in Appendix II to this opinion.

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282. In the factual circumstances of the case at bar, I am bound to note that the duty to withdraw, as discussed generally above, does not affect the outcome of the appeal. I am satisfied that the reasoning in the Majority Opinion has adequately addressed the question of necessary and reasonable measures in the particular circumstances of this case.

## XI. Organisational Policy

283. Although the outcome of the appeal does not turn on the question bearing on ‘organisational policy’, the topic still remains of general importance in the conception of crimes against humanity for purposes of the Rome Statute, which was charged in this case.

284. There are two exchanges in the course of the oral arguments that I take as points of departure for the discussion on organisational policy. One of them had to do with Mr Haynes’ argument made in the course of discussions concerning the watering down of the provisions of the Rome Statute.<sup>242</sup> But to the extent that the concern about ‘watering down’ provisions of the Rome Statute has any normative value, it only presents a ‘zero-sum game’ proposition relative to both defendants and victims whose interests are contra-positioned across the line. Both sides cannot win. A choice must be made, as a matter of the policy of protection indicated in the Rome Statute. From that perspective, it becomes clear that the complaint appears entirely oriented in the wrong direction, as the aim of the concern was to protect defendants from prosecution. But, is the worry of the Rome Statute the prevention of a ‘watering down’ of its provisions? Or is the Statute’s concern, rather, oriented towards the protection of victims against violations: such that any concern about ‘watering down’ has to be that the provisions of the Statute are not diluted in a manner that reduces its deterrent value, resulting in turn to reduced protection for victims of atrocities?

285. The second exchange concerned Mr Haynes’ reprising of the much-travelled repartee that care should be taken to avoid the indictment of gang members at the ICC. When asked whether he was suggesting that gang members could never commit crimes against humanity, he suggested that the question does not really matter, because the text of the Rome Statute in the relevant part does not contemplate the possibility.<sup>243</sup> But, that only begs the question.

286. The exchange concerning the possibility of prosecuting gang members for crimes against humanity under the Rome Statute leaves undisturbed an earlier analysis offered in *Ruto & Sang* regarding the interpretation of ‘organisational policy’ within the definition of crimes against humanity. The essence of that analysis was to ensure that the Rome Statute, in the light of its object and purpose, is not compromised in its ability to protect humanity against the gross atrocities that fall within the class of crimes over which the Court enjoys jurisdiction.<sup>244</sup> That analysis is extensive and comprehensive enough, and covers the question of whether gang leaders may be held responsible for crimes against humanity. I shall not rehash it. As I have read or heard nothing to displace its value in the context of the present appeal, I hereby fully incorporate it by reference.

287. It suffices only to say that the essence of ‘organisational policy’ is to ensure that for the attack against a civilian population to amount to a crime against humanity, the conduct of

<sup>242</sup> Appeals Hearing Transcript 11 January 2018, p. 39, line 11 to p. 42, line 17. See also p. 36, line 6 to p. 39, line 10.

<sup>243</sup> Appeals Hearing Transcript 11 January 2018, p. 39, line 22 to p. 40, line 1.

<sup>244</sup> Prosecutor v Ruto & Sang (Decision on Defence Applications for Judgments of Acquittal) dated 5 April 2016, ICC-01/05-01/08-T-373-ENG: Reasons Judge Eboe-Osuiji, paras 298-463 [ICC Trial Chamber].

the assailants must not be sporadic or spontaneous. That is to say, even a widespread attack against a civilian population must exhibit the condition or quality of also being coordinated or *organised* (hence ‘organisational’), in a manner that revealed *forethought* (or ‘policy’). But, it need not require the complicity of an aggregate entity in the attack, for it to amount to a crime against humanity. It goes without saying, of course, that what makes such an attack a coordinated or organised endeavour may indeed implicate the complicity of an aggregate entity, where such is the case; and hence the criminal responsibility of its members in the resulting crimes against humanity. But, an attack that shocks the conscience of humanity is not disqualified from consideration as a crime against humanity within the jurisdiction of this Court, merely because it is not easy to say that the perpetrators belonged to an aggregate entity engaged in the attack. In other words, *individuals* can, in their coordinated actions, commit crimes against humanity—and be prosecuted as such at the ICC—without proof that they had acted under the aegis of an aggregate entity seen as an ‘organisation’.

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288. Yet, it is one thing to say that the manner of attack betrays a systematic criminal enterprise at the level of the actual perpetrators—as individuals—implicating them as such in crimes against humanity within the jurisdiction of the Court. It is quite another matter, however, to conceive of the conduct(s) of the individual perpetrators as implicating other persons in crimes against humanity, merely because they are associated in an enterprise not formed for purposes of the attack in question. Due to the manner of the indictment in this case, the question presented in this appeal involves the latter difficulty.

289. In my view, the Trial Judgment did not convince me that criminal responsibility was established beyond reasonable doubt against the Appellant for crimes against humanity. This is specifically, because the evidence as reviewed in the Trial Judgment does not prove beyond reasonable doubt the charge laid against the Appellant. That charge was that the MLC as an aggregate entity (of which the Appellant was the leader) had organised the commission of crimes against humanity in the CAR. The charge was not made out to the criminal standard, let alone made out in any manner that revealed *forethought* on their part to commit such crimes. To the extent that it is even reasonable to say that crimes against humanity were committed, such evidence rises no higher than to show that the perpetrators were on a ‘frolic of their own’—as a well-known legal expression goes. But, what is more, the evidence reveals quite clearly, actions on the part of the Appellant showing, as discussed below, clear efforts to discourage and reproach the commission of crimes and causing their perpetrators to be subjected to criminal judicial proceedings.

## **XII. Reasonable Measures**

290. Uncontroverted evidence in this case reveals that the Appellant took steps to discourage and submit to investigation and prosecution, members of the MLC alleged to have committed or were inclined to commit crimes against civilians. Those actions have been sufficiently set out in the Majority Opinion with which I concur.

291. It is important to stress here that the inquiry into ‘necessary and reasonable measures’ required of the Appellant, for purposes of article 28, must not obscure the jural value of these measures for purposes of assessing whether the MLC may attract aggregate complicity in the crimes committed by its members, for purposes of conception of those crimes as part of the MLC’s ‘organisational policy’ pursuant to article 7. This is because the article 7 inquiry entails active complicity—of both action and its actuating state of mind—in the attack. And indeed, the establishment of that manner of active complicity engages questions of criminal responsibility at the primarily level of accomplice liability. As a general proposition, the Prosecution is required to establish such active complicity by positive proof beyond reasonable doubt. The defendant is not required to *prove* his or her innocence in relation to such active complicity, by *persuading* the Court—to any generally agreed upon standard of proof—that he took *any*, let alone ‘all’, reasonable measures showing that he shared no active complicity in the attacks against the civilian population. Hence, *any* credible measure that the defendant took, which is inconsistent with participatory action in the attack, or its actuating state of mind, will necessarily prove fatal to the finding of active complicity that the article 7 inquiry requires—in the absence of other overriding evidence of active complicity in the attack. Rather than evidence of active complicity, what the Trial Judgment reveals in this case is evidence in the opposite direction. In particular, the Appellant had admonished his troops (to their displeasure) against the commission of crimes, upon learning of allegations that they were committing crimes. There was no real evidence, beyond mere speculation, showing that those admonitions were insincere. He set up a commission of inquiry to investigate allegations of crimes. There was no real evidence, beyond mere speculation, showing that the effort was sham. He empanelled an independent court-martial to try violations. There was no evidence that justifies attributing to him any short-comings of the court-martial, any more so than the chief executive of a country would deserve blame in a similar way for the failings of an independent judiciary. As a last act, he invited the United Nations and the *Fédération internationale des ligues des droits de l’Homme*—through their representatives—to assist him with any further actions beyond those he had already taken for the sake of accountability. The assistance from the former never came and the latter informed him it had seised the ICC Prosecutor of the matter.

## Disposition

292. For the foregoing reasons, complemented by the discussion in the Appendices below, I concur with the judgment of the Appeals Chamber as indicated in the Majority Opinion.

Done in English and French, the English being original



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**Chile Eboe-Osuji**  
Judge

Dated this 14<sup>th</sup> June 2018  
At The Hague, The Netherlands

## APPENDIX I: Rulings on Admissibility of Evidence

### A. Appeals Chamber's 2011 Decision: Obligation of Evidential Ruling

293. I wholly reject the import of the recent judgment of the Appeals Chamber, the effect of which is to say that an ICC Trial Chamber is free to decline to make any ruling at all on the admissibility of evidence even when such evidence has been challenged by the opposing party.<sup>245</sup> It is one thing to accept (as I do) that the Trial Chamber enjoys the discretion of timing as to when to make the ruling. It is altogether a very different proposition—indeed startling—to say that the Chamber may ignore making any ruling at all at any time. The implication of the latter proposition is not only bound to compound appellate proceedings in this Court, but it is bound to leave a profound feeling of hollowness in the hearts of parties, who may be left in the dark about what evidence the Trial Chamber had relied on in arriving at its judgment, in circumstances where the quality or propriety of evidence had been challenged at trial.

294. It is all too clear that the judgment of the Appeals Chamber in question was motivated by the need to make life more convenient for judges who may be strangers to the tradition of evidential rulings on the spot. There are other ways of addressing that entirely understandable anxiety: and I offer some practical solutions at the end of this commentary, by way of alternative solutions. But the ideal solution could never be total avoidance to make any rulings at all, at any time.

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295. For present purposes, we may begin by recalling an earlier decision of the Appeals Chamber, rendered in 2011. It involved an appeal by both the Prosecution and the Defence against the decision of the Trial Chamber deferring evidential rulings until the end. In that decision, the Appeals Chamber held that the Trial Chamber had acted outside the legal framework of the Court, by admitting into evidence all the items on the Prosecutor's Revised List of Evidence based on a 'prima facie finding of admissibility,' without an item-by-item evaluation or giving reasons.<sup>246</sup> According to the Appeals Chamber, while a Trial Chamber is left with a choice as to when to make evidential rulings—between the point of tendering the evidence and the course judgment delivery—the Trial Chamber has an obligation to make that ruling at some point. It was indeed an *obligation* on the Trial Chamber, which the Appeals Chamber had *specifically* stated as follows:

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<sup>245</sup> See *Prosecutor v Bemba & Ors* (Judgment), paras 552—628.

<sup>246</sup> *Prosecutor v Bemba* (Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'), dated 3 May 2011 [ICC Appeals Chamber].

[T]he Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69(4), taking into account “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.” Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. Nevertheless, under article 64(2) of the Statute, the Chamber must always ensure that the trial “is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision. Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it *will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings*—when evidence is submitted, *during the trial, or at the end of the trial.*<sup>247</sup>

296. The emphasis in that pronouncement is that the Trial Chamber ‘will have to’ consider the relevance, the probative value and the potential prejudice of ‘each item of evidence’ at some point in the proceedings—following the submission of evidence—‘during the trial, or at the end of the trial.’ Given that the foregoing pronouncement was made in the context of an appeal concerning the power of the Trial Chamber to ‘rule or not on the relevance or admissibility when evidence is submitted to the Chamber,’ there is no question that the import of the Appeals Chamber’s pronouncement is that the Trial Chamber ‘will have to’ *rule* on ‘the relevance, the probative value and the potential prejudice of *each item* of evidence at some point in the proceedings’ [emphasis added]. It is an obligation either to be discharged immediately or to be deferred until later. There is limited permissiveness in the regime. That permissiveness is only as regards the choice as to when the ruling is to be made. There is no ‘discretion’ to avoid making the ruling altogether. The Appeals Chamber was correct in saying—in the 2011 decision—that the Trial Chamber ‘will have to’ make a ruling at some point in the proceeding. Notably, that sense of obligation is fully underscored by the words of article 74(5), saying that the judgment on the merits ‘*shall* be in writing and *shall* contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.’

### ***B. Appeals Chamber’s 2018 Decision: No obligation of Evidential Ruling***

297. In light of the foregoing observations, I am unable, then, to subscribe to the reversal lately attempted by the Majority in a differently constituted Appeals Chamber in the derivative case (the ‘*Bemba No 2 Appeal*’), Judge Henderson dissenting. According to them, there is no general obligation on the Trial Chamber to make a ruling—at any time at all—on

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<sup>247</sup> *Ibid*, para 37, emphasis added.



the evidence, beyond the occasional instances where provisions of the Statute or the Rules prescribe a specific qualification for the evidence.<sup>248</sup> Having carefully considered the reasoning of the Majority and that of Judge Henderson in that appeal, I am in the fullest accord with Judge Henderson and I fully adopt his opinion and fully recommend it. Much begs to be said in addition, but I limit myself to only the following.

298. I begin with the observation that the reasoning of the Majority in the *Bemba No 2 Appeal* was evidently distracted by their concern that a ruling on admissibility at the ICC—quite apart from relevance, which any Trial Judge can very easily rule upon by reference to the indictment in the case—requires schooled familiarity with the set of artful ‘tests’<sup>249</sup> that constrain questions of admissibility in criminal proceedings in the common law system. These are ‘tests’ that notoriously exclude all sources of information from ‘the record’ of the proceedings, until formally ‘admitted’ one-by-one by the ritual of the trial judge and marked as ‘exhibit’ to be considered; or marked ‘for identification’ and left in evidential purgatory until something more is done to rescue them for formal ‘admission’ into the trial record and promoted to ‘exhibit’ to be considered.

299. But, as Judge Henderson correctly pointed out, the common law admissibility rituals need not be followed at the ICC. Yet, it does not follow that ICC Trial Chambers are free to avoid making admissibility rulings altogether—in their own way. For, fairness of the trial process contemplates at least—if not circumstantially requires—that Trial Chambers will make evidential rulings; when evidential issues are raised pursuant to rule 64 (discussed immediately below). In the circumstances, questions of admissibility of evidence are more generally and flexibly guided, by the requirements of fairness and expeditiousness of the trial and the judges’ overall sense of justice in the case, beyond the specific instances where provisions of the Statute or the Rules indicate a particular qualification that evidence must meet before it can be received into the record.

### ***C. Rule 64 as contemplating evidential rulings***

300. Inevitably, careful attention must be paid to rule 64 of the ICC Rules of Procedure and Evidence. As its title indicates, it deals with ‘Procedure relating to the relevance or *admissibility* of evidence.’ [Emphasis added.] I pause immediately to note that the title of rule 64 does specifically contemplate ‘admissibility of evidence’; and rule 64(3) provides that evidence ‘ruled ... inadmissible shall not be considered by the Chamber.’ I make that observation: for the benefit of those predisposed to suppose a dichotomy between the procedures at the *ad hoc* tribunals and at the ICC, in the terms that the former is about ‘admission’ while the latter is about ‘submission’ of evidence. Rule 64 requires parties to raise any evidence related issues at the time that the evidence is being ‘submitted’ to the Chamber. Notably, such an objection (or raising of issues relating to relevance or

<sup>248</sup> See *Prosecutor v Bemba & Ors (Judgment)*, paras 552—628 [ICC Appeals Chamber].

<sup>249</sup> *Ibid*, paras 570, 583, 586, 588, 589, 592.

admissibility) is the precursor to the ruling on *admissibility* contemplated in rule 64(3). I shall return to this later.

301. The view is tempting, of course, that rule 64 does not explicitly *require* the Chamber to make a ruling, when evidence-related issues are raised at the point of submitting the evidence. But, with respect, it is a most meretricious view for many reasons. First, it would be idle for the law to require litigants to raise issues related to evidence, if such issues are not to be ruled upon, after they have been raised. Second, it would be strange, indeed, for a Court of law to refrain from ruling on an evidential issue that a party has raised as troubling in a case; let alone where the objection in question is to the effect that the evidence should not be received or considered as part of the trial. The situation here is not different from the many other instances where generally accepted case management practices and traditions have impelled trial judges to make rulings on motions and other procedural issues raised in a case, in order to clear the way for issues on the merits; even in the absence of specific statutory text spelling out a duty to make such rulings. It is one thing to leave the timing of the ruling to the discretion of the trial judge; but it is simply astonishing to say that the trial judge may make no ruling at all at any time. Third, it is highly inefficient to the administration of justice in this Court if a case is reversed on appeal, because of an evidential issue that the Trial Chamber could have ruled upon at trial but declined to do so. The more such troubling issues are raised, the stranger it will be for the Trial Chamber to avoid ruling on them. It is matter for debate as to the point when the resulting absurdity of the avoidance to make a ruling creates an obligation of common sense to make them. And, finally, although rule 64(2) does not specify the *obligation to make a ruling* on the evidence, it does specify an *obligation to give reasons* for any evidential ruling made, which ruling ‘shall’ be placed on the record of the proceedings. And, according to rule 64(3), ‘[e]vidence *ruled* irrelevant or *inadmissible* shall not be considered by the Chamber.’ [Emphasis added.]

302. There is no question, then, that in expressly *requiring* parties to register their objections at the point of submission of evidence, rule 64 does—as a matter of *necessary* implication—require trial judges to play their own incidental part, by ruling upon the evidential concerns raised by the parties, even if the provision does not expressly say so.

303. In light of that necessary implication in rule 64, it is difficult to insist that the ICC Trial Chamber is entirely absolved from making evidential rulings, because ICC Trial Chambers do not ‘admit’ evidence. The reasoning (of the Majority in *Bemba No 2 Appeal*) that the Statute uses the word ‘submit’ to indicate what parties may do with evidence is far too tenuous to justify removing from Trial Chambers the obligation to render evidential rulings.

304. Remarkably, it is possible that the implication of the Majority’s ruling in *Bemba No 2 Appeal* is not merely to save Trial Chambers the inconvenience of obligations to make evidential rulings. There is also the possible interpretation of *Bemba No 2 Appeal* as lending itself to the most improbable proposition that the Trial Chamber is precluded from making such evidential rulings as it may see fit to make. This results from the reasoning of the *Bemba*

*No 2 Appeal* that the legal framework contemplates a regime in which parties ‘submit’ evidence, rather than one in which the Trial Chamber ‘admits’ evidence. There is thus a paradigm shift from the power of the Trial Chamber to ‘admit’ evidence to the right of the parties to ‘submit’ evidence. That paradigm shift must thus result in a view of a reduction of the power of the Trial Chamber to exclude from the record, evidence that the parties submit, except in the few instances in which the Statute or the Rules has specifically indicated qualifications for the evidence.

#### ***D. Evidential Rulings as a Matter of Fairness of Trial Proceedings***

305. It is also highly unpersuasive to reason, as the Majority did in the *Bemba No 2 Appeal* judgment, that a Trial Chamber’s failure to make evidential rulings—at any time—is not a violation of the accused person’s right to fair trial.<sup>250</sup> According to that reasoning, ‘what is at issue is the trial chamber’s compliance with its duty under article 74(5) of the Statute to provide “a full and reasoned statement of its findings on the evidence and conclusion” in support of its decision on the guilt or innocence of the accused.’<sup>251</sup> The reasoning is strange, indeed, first, because it ignores the fundamental rationale indicated in the Appeals Chamber’s conclusion in 2011 that the Trial Chamber ‘will have to’ make the evidential ruling at some point in the proceeding. And that fundamental rationale is that the Trial Chamber ‘must always ensure that the trial “is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”’ What is more, the Majority’s contrary observation in the *Bemba No 2 Appeal* judgment would turn the requirements of article 74(5) into a legal mirage, entailing no consequence exigible to the accused who was convicted in the impugned judgment. It fails to appreciate the elementary proposition that failure to provide a reasoned judgment is fundamentally a violation of the right of fair trial, which includes an accused person’s entitlement to know the basis of the Trial Chamber’s decision on the guilt of the defendant. A litmus test of that entitlement is that a fully reasoned opinion may reveal a faulty basis for conviction, thus enabling the accused to appeal the conviction successfully. And, a classic faulty basis for conviction is the taking into account evidence which should not have been taken into account.

306. But, the last consideration is an elementary proposition, because the dispositive powers of the Appeals Chamber eventually derive from unfairness of the proceedings. This is so, on a view of article 83(2), which empowers the Appeals Chamber to reverse or amend the verdict or sentence, or order a new trial. The basis of that power is that the proceedings ‘were *unfair* in a way that affected the reliability of the decision or sentence’ [emphasis added] or that ‘the decision or sentence appealed from was materially affected by error of fact, *law* or *procedural error*’ [emphasis added]. In any number of ways, the failure of the Trial Chamber to give ‘a full and reasoned statement of its findings on the evidence and conclusion’ in support of its decision on the guilt or innocence of the accused, as required in article 74(5), does bear on concerns indicated in article 83(2). For instance, the Trial Chamber may have

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<sup>250</sup> *Ibid*, para 596.

<sup>251</sup> *Ibid*, para 597.

used evidence in a manner that was ‘unfair in a way that affected the reliability of the decision or sentence’ and undermined the fairness of the trial, but failed to make that apparent to the accused by refusing fully to explain how it resolved issues raised (pursuant to rule 64) against the evidence.

307. Indeed, the danger of miscarriage of justice in this way is quite immediate, given the overly convenient trend in the jurisprudence of the Appeals Chamber to accept a *presumption* that ‘the Trial Chamber evaluated all the evidence before it ... as long as there is no indication that [it] completely disregarded any particular piece of evidence.’ For present purposes, this may be called the ‘global evidential presumption’ [or ‘GEP’ for short]. Quite significantly, the Majority in *Bemba No 2 Appeal* had also grafted this presumption onto their reasoning that a Trial Chamber need not make any evidential ruling.<sup>252</sup>

308. We may look past the uneasy feeling that the GEP inspires as a general matter. But, for what it is worth, the GEP is designed to only see an error where the trial judgment failed ‘completely’ to account for particular evidence of obvious forensic significance. Notably, the GEP was not designed to capture the equally disturbing problem of the instances where highly prejudicial or spurious evidence was taken into account in convicting an accused. Quite the contrary, the GEP leans towards the effect that such problematic evidence has indeed been taken into account. It may be the case, and rightly so, that the presumption of good faith does not readily warrant an understanding of the GEP in the cynical sense that a Trial Chamber had taken problematic evidence into account for purposes of conviction. But, it is equally difficult to give the GEP the amazing Swiss Army knife meaning: to the effect that the Trial Chamber took all the evidence into account; and, in so doing, the Trial Chamber is also to be presumed to have rejected ‘all’ the bad evidence, while accepting and giving appropriate value to ‘all’ the good ones. Such a presumption is nothing short of the beginnings of a presumption of judicial inerrability, which will not command serious consideration.

309. Additionally, an accused may complain on appeal that the failure to make an evidential ruling to resolve an evidential issue raised under rule 64 was either a legal error or a procedural error, for purposes of article 83(2). But, an appellant inclined to make such a complaint is confronted with the requirement of showing that the error was material and not harmless. The best demonstration of materiality of the error is by a showing of unfairness. Once more, the concern is engaged about unfairness that is hidden from view, because the Trial Chamber refused fully to explain how it resolved issues raised.

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<sup>252</sup> In the words of the Majority in *Bemba No 2*: ‘it is to be presumed that the Trial Chamber evaluated all the evidence before it, “as long as there is no indication that [it] completely disregarded any particular piece of evidence”. This presumption may be rebutted “when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber’s reasoning”. As explained in detail below, in the legal framework of the Court, evidence is properly before a trial chamber when it has been “submitted” and “discussed” at trial and has not been otherwise excluded by the trial chamber as irrelevant or inadmissible’: *ibid*, para 105.

### *E. Customary international criminal procedural law*

310. Finally, it is observed that the Appeals Chamber in the *Bemba No 2 Appeal* judgment considered (Judge Henderson dissenting) that there is no need to follow the guidance of the practice established at the other international criminal tribunals that operated before the ICC. The reason that ICC judges may go their own way is because the Majority in *Bemba No 2 Appeal* ‘consider[ed] it important to emphasise the difference between the relevant provisions in the legal instruments of the Court and those applicable in the proceedings before the other international(ised) tribunals on this particular matter.’<sup>253</sup> But, I respectfully must observe that the difference as suggested in this context is more figmental than real: and much was made of it. For, instance, chief among those important differences is that the instruments of the other international courts speak of the Trial Chamber *admitting* evidence, while the ICC instruments speak of the parties *submitting* or the Chamber *allowing the introduction* of evidence.<sup>254</sup> Looking beyond the variant choice of words and phrases, it is truly difficult to see the material difference in saying that the Trial Chamber in one court *admits* evidence, while the Trial Chamber in another court *allows the introduction* of evidence. Nor, indeed, should the judges of this Court (regardless of their divisional hierarchy) accept that they—unlike judges of other international courts—are bound to accept whatever evidence a party ‘submits’, merely because that word occurs in the legal framework of this Court. The true test of the proposition, perhaps, lies in this question. Is a Trial Chamber really bound to accept whatever evidence a party ‘submits’—however absurd, or repetitive or inefficient and however much it prolongs the trial process? In addition to earlier observations about the perceived dichotomy between the ‘admission’ procedure and the ‘submission’ procedure, it is the answer to that simple question that determines the true value to be placed on the occurrence of the word ‘submits’ (employed in the ICC legal instruments) in relation to trial evidence, as opposed to saying that a criminal court ‘admits’ evidence at trial.

311. Perhaps, the most valuable reference point of similarity in the instruments of both the ICC and the other international tribunals comes in their union of mandate to do justice in the sphere of international criminal law. And the other tribunals have had admirable success and experience administering *international* criminal justice—certainly no less so than the ICC—that strongly recommend the guidance of their procedure as a practical matter.

312. Their instruments also share with the ICC’s a common provision to the effect that the international court is not bound by rules of evidence peculiar to any national system.<sup>255</sup> For the ICC, that provision is particularly interesting for present purposes, because it comes with the proviso that the ICC Trial Chamber may apply such law of evidence that is applicable through the route of article 21 of the Rome Statute. One interesting significance of this is that article 21(1)(b) allows the Trial Chamber to apply rules of evidence derived from

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<sup>253</sup> *Ibid*, para 577.

<sup>254</sup> *Ibid*.

<sup>255</sup> See rule 63(5) of the ICC Rules of Procedure and Evidence. See also rule 89(a) common to the ICTR, the ICTY and the SCSL Rules of Procedure and Evidence.

international law. Given the approach followed ‘in the proceedings before the other international(ised) tribunals on this particular matter’<sup>256</sup>—which has been fairly consistent and salutary to the administration of international criminal justice—it is possible to speak of that approach as representing uniform practice in the manner of customary international criminal procedural law. Their approach—which has produced great results in terms of both judicial efficiency and respect for the fair trial rights of the accused—is thus applicable at the ICC, via, article 21(1)(b). This is especially so, to the extent that there is no explicit prohibition for the approach in the legal framework of the ICC.

### ***F. The Efficiencies of Evidential Rulings during Trial***

313. In contrast to the important value that evidential rulings serve as a matter of the right to a fair trial, the judicial avoidance to make evidential rulings in the course of trial has, on its face, the allure of convenience for the trial judge. But, on proper consideration, what is offered is only the initial attraction of the broad and easy road to much gnashing of judicial teeth in the end. Perhaps, the greater benefit lies in the straight and narrow path of evidential ruling in the course of the trial. This is because such rulings are a great enabler of efficiency in administration of justice in a party-driven trial process. That efficiency quotient is already built into the nature of a classic inquisitorial system in its own way, which operates on the basis of a dossier compiled by an impartial magistrate. That magistrate, in compiling the dossier, sifts out the evidential chaff from the wheat: thus leaving trial judges to focus their inquiry efficiently and appropriately on ‘the wheat’ section of the dossier.

314. In the party-driven trial process, on the other hand, parties want to make their case. But, that comes with a built-in temptation to submit to the Court whatever the party sees as useful for success, notwithstanding considerations of fairness, prejudice, repetitiveness and cogency. With no evidential ruling made at the time of tendering the evidence, the evidential record can get highly cluttered, making trials longer. And, out of abundance of caution, the opposing party is pressured to conduct his or her case, by seeking to submit contrary evidence to rebut the clutter, which the Trial Chamber did not weed out by making exclusionary rulings. That only leads to more clutter, making the trial even longer. It is possible that highly efficient judges can still remain on top of the process, though the risk remains high that such may not uniformly be the case. But, even the highly efficient judge will be assisted along the path of greater efficiency if the record of the case is not cluttered with evidence that could have been excluded at the point of introduction.

315. What is more, at the time of judgment writing, an ICC Trial Chamber is confronted with the imperatives of article 74(5), which dictates that the judgment ‘shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.’ The Chamber that deferred evidential rulings, must now confront the difficulty of having to explain clearly in the judgment, both the basis of the acceptance of the evidence relied upon and the basis of rejection of evidence that the losing party tendered in

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<sup>256</sup> *Ibid*, para 577.

the view that the evidence will help his or her case. Writing the judgment and reading it becomes an extremely unwieldy affair, if the judicial explanation concerning the evidence is required to address not only forensic value, but also questions of relevance and admissibility that the Trial Chamber had deferred making a ruling upon—assuming that the Trial Chamber can still efficiently recall the context and dynamics of the circumstances attending the objection made against the evidence when it was submitted. It thus becomes far more efficient to have made those rulings at the point of tendering the evidence—by way of very few words of the presiding judge spoken onto the record at the time.

316. In any event, much chagrin attends the train of reasoning of the Majority in the *Bemba No 2 Appeal* judgment, which seems to valorise general judicial avoidance to make any evidential ruling during trial or at any time at all, and which seems to imply error on the part of judges who take the time and the trouble to make such rulings. As Judge Henderson quite rightly reasoned, the scenario presented would suggest an erroneous approach on the part of all the judges who administer criminal justice according to the general requirement to make evidential rulings in the course of trial. These would include not only judges from the common law legal system, but also judges of virtually all other international criminal courts, not only the older international criminal courts but also contemporaneous ones. The suggestion of erroneous approach on their part is wholly unsustainable—for, those who would make such a suggestion at the ICC may not truly have a credible basis in greater experience to make the suggestion.

### ***G. Some Practical Solutions to the Problem—Alternative Approaches***

317. To conclude, the solution to the anxieties that encouraged the ruling in the *Bemba No 2 Appeal* judgment does not lie in the pretence that the failure to make evidential rulings at all is an approach that is conducive to fair trial. The solution lies, rather, in devising alternative strategies for judges who prefer not to make such evidential rulings under pressure in the heat of trial, out of concerns about inconsistent rulings and the need to have a holistic picture before making the rulings.

318. Two alternative approaches may be considered. The first could be to require each party to *submit* to the Chamber ahead of time, in a motion for admission of evidence, all the evidence that the party foresees using in the case. This is the so-called ‘Bar Table Motion’ procedure. This enables the Trial Chamber to make a consistent ruling on all the evidence, with a holistic picture of the entire body of evidence thus submitted and ruled upon. Indeed, some Trial Chambers had followed a variation of this approach, combined with evidential rulings in the heat of the trial.

319. A second alternative approach will be to reserve evidential rulings until the time of judgment writing and make the rulings then. Here, the evidential rulings could be made in the body of the judgment, if that can be done conveniently. Otherwise, the evidential rulings at the time of the judgment could be made in separate volume (either a second volume of the judgment or a stand-alone decision) serving as a compendium of evidential rulings.

Ideally, the compendium *may* account for *all* the evidence tendered in the case, if convenient. In any event, it *must* account for a *minimum* of all the evidence that the Trial Chamber *relied* upon in reaching a verdict, thus making clear that the Chamber did not rely upon any other evidence not accounted for in the compendium. This approach could be used exclusively or in combination with the first alternative approach, to account for additional evidence received in the course of the trial.

320. The second alternative approach is very easily followed in practice. It is a matter of recording the admissibility ruling upon reviewing the evidence for use in the process of judgment-writing, after the Trial Chamber has completed the trial; and then publishing the rulings at the time of publication of the trial judgment. That done, the parties would not be left in any doubt about the evidence considered by the Trial Chamber.

## APPENDIX II: **Military Necessity**

### ***A. Military Necessity Properly Conceived***

321. As observed earlier, the theory of endangerment, as an underlying rationale for superior responsibility under article 28, does engage the notion of military necessity. It is engaged especially in the stream of considerations as to whether the creation of the mortal danger that is the very essence of warfare was justifiable in the first place. And, beyond that, whether the commander was justified in any failure to withdraw troops from where they were committing or about to commit crimes. In other words, is it open to the belligerents to plead that the particular circumstances of the armed conflict in question raise military necessity as a consideration that would override those of endangerment and the duty to withdraw troops?

322. In any consideration of military necessity for purposes of international criminal law in general—and of article 28 in particular (vide the doctrine of endangerment as the underlying rationale of that provision)—it is important to avoid confusing ‘military necessity’ with *military objective*. This caveat is warranted by the frequency of discussions of ‘military necessity’ conducted in a sense which suggests that once a *military objective* is conceived, much that is seen as necessary to meet that objective becomes a matter of ‘military necessity.’ Such confusion is evident in the following representative explanation of the concept in the nutshell:

Military necessity is a legal concept used in international humanitarian law (IHL) as part of the legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects. It means that military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning. The concept of military necessity acknowledges that even under the laws of war, winning the war or battle is a legitimate consideration, though it must be put alongside other considerations of IHL.



It would be overly simplistic to say that military necessity gives armed forces a free hand to take action that would otherwise be impermissible, for it is always balanced against other humanitarian requirements of IHL. There are three constraints upon the free exercise of military necessity. First, any attack must be intended and tend toward the military defeat of the enemy; attacks not so intended cannot be justified by military necessity because they would have no military purpose. Second, even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated. Third, military necessity cannot justify violations of the other rules of IHL.<sup>257</sup>

323. The foregoing explanation did well to reflect the usual caveats aimed at constraining the pursuit of military objectives, in a bid to strike a ‘balance’ between military objectives and humanitarian considerations; accepting ‘winning the war or battle’ as a ‘legitimate consideration’ to ‘be put *alongside* other considerations of IHL’ [emphasis added]. Nevertheless, the confusion of *military objectives* with *military necessity* still persists generally in the explanation. This is particularly seen in the author’s equivocation about which of IHL and military necessity controls the question of subjecting innocent civilians to harm during warfare. But, the relationship between IHL and military necessity is capable of a straightforward statement, it accommodates no equivocation.

324. Regrettably, the judgment of the US Military Tribunal in Nuremberg in the *Hostages Case* is a case study in this manner of confusion. Although the Tribunal had initially aimed to dispel it—observing that ‘the plea of military necessity’ was confused in the case ‘with convenience and strategical interests’<sup>258</sup>—yet, much that the Tribunal itself ultimately said did not, in my view, assist in conveying a proper understanding of the notion of military necessity. As they explained it:

Military necessity permits a belligerent, subject to the laws of war, to *apply any amount and kind of force* to compel the *complete submission of the enemy* with the *least possible expenditure of time, life and money*. In general, it sanctions measures by an occupant *necessary to protect the safety of his forces* and to *facilitate the success of his operations*. It permits the *destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war*; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. *There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces*. It is lawful to destroy railways, lines of communication or any other property that might be utilized by the enemy. *Private homes and churches even may be destroyed if necessary for*

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<sup>257</sup> Françoise Hampson, ‘Military Necessity’ in Roy Gutman, David Rieff and Anthony Dworkin, *Crimes of War*, 2nd edn (2007) p 297.

<sup>258</sup> *The Trial of Wilhelm List & Ors (The Hostages Case)* (1948) VIII Law Reports of Trials of War Criminals [US Military Tribunal, Nuremberg] 34, p 63.

*military operations*. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.<sup>259</sup>

325. The general import of the words and phrases emphasised in the quote are all but obvious, in helping to convey the impression represented in the message that ‘private homes and churches even may be destroyed if necessary for military operations’. Of particular note also is the risk of conveying the idea that the law may permit a belligerent, as a matter of military necessity, ‘to apply *any amount and kind of force* to compel the *complete* submission of the enemy’ [emphasis added]. Also worth examining is the proposition that it may be legally permissible to do so ‘with the least possible expenditure of time, life and money.’ There is no doubt that such concerns of economy are for the benefit of the belligerents engaged in the military operation in aid of which the necessity is pleaded.

326. Perhaps, all that is needed to demonstrate the deficiencies of the foregoing suggestions as composing a principle of international law is to consider the fate of casualties of war waged for ends otherwise forbidden by international law. Here, we may consider colonial domination; or a flagrant violation of the territorial or sovereign integrity of a weaker State. There must be an obvious absurdity to the proposition that, in relation to their civilian casualties, the plea of ‘military necessity’ would avail the expeditionary military force that wages such a war: specifically permitting them to apply ‘any amount and kind of force’ to compel the complete submission of ‘the enemy’, with the least possible expenditure of their own time, life and money.

327. The confusion of ‘military objective’ with ‘military necessity’ persists even in modern jurisprudence. Consider, here, the definition offered by an ICTY Trial Chamber in the *Strugar* case concerning the crime of ‘devastation not justified by military necessity.’ The Chamber’s reasoning commenced with the view that the first element of the crime required that there be a ‘large scale’ destruction in the manner of damaging a considerable number of objects; this does not require laying waste an entire settlement.<sup>260</sup> But, next came the troublesome definition of military necessity in the following words:

The second requirement is that the act is “not justified by military necessity”. The Chamber is of the view that *military necessity may be usefully defined* for present purposes *with reference to* the widely acknowledged *definition of military objectives* in Article 52 of Additional Protocol I as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. Whether a *military advantage* can be achieved *must be decided*, as the Trial Chamber in the *Gali* case held, *from the perspective of the “person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”*<sup>261</sup>

<sup>259</sup> *Ibid* p 66, emphasis added.

<sup>260</sup> *Prosecutor v Strugar* (Judgment) dated 31 January 2005 [ICTY Trial Chamber II] para 294.

<sup>261</sup> *Ibid*, para 295. See also paras 310 and 328.

328. The difficulty with the above quote is certainly not in the explanation of ‘military objective’ in relation to objects that by their *use* (which according to article 52 of API) make an ‘effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’ We may put aside, for now, that the *nature* or the *location*—or even the *purpose*—of the object may warrant a view of it as a legitimate military objective. And, it is noted that there is no requirement of exhaustion of lesser options of attack (from capture or neutralisation to partial or total destruction) prior to progressing to the more severe means.

329. Now, the trouble with the *Strugar* definition is two-fold. It begins with reprising the frequent association of ‘military necessity’ with ‘military objective’. But more profound is the resort to the insistence in *Gali* that military advantage must be assessed from the point of view of ‘the person contemplating the attack’. The worry comes in the manner of saying that it is from that perspective that the correct legal assessment must be made as to whether the *nature* or the *location*—or even the *purpose*—of the object is to be viewed as a legitimate military objective. Is the complete destruction of the family homestead on the hill (possibly with its civilian occupants) to be absolved by the idea of military necessity, merely because its ‘location’ or ‘nature’ alone somehow offers a ‘military advantage’—to the person contemplating the attack? And it is in that sense that the *Strugar* definition effectively ends up with the troubling tendency to invert ‘military necessity’ into ‘military objective’; when that definition posits that ‘the military necessity may be usefully defined ... with reference to the widely acknowledged definition of military objectives’ in article 52 of API.

330. Remarkably, the confusion about the meaning of military necessity, particularly as was done in the *Hostages Case*, troubles even the ideation of legitimate military objective itself for purposes of international humanitarian law.<sup>262</sup> The better view remains, it seems, the explanation of the idea initially offered in the St Petersburg Declaration of 1868. According to that explanation, ‘the *only legitimate object* which States should endeavour to accomplish during war is to weaken the military forces of the enemy’. [Emphasis added.] And ‘for this purpose it is sufficient to disable the greatest possible number of men.’ No doubt, the reference to ‘the greatest possible number of men’ is a reference to the greatest possible number of armed soldiers. The idea does not require the application of ‘any amount and kind of force’ to compel ‘the complete submission’ of the enemy, with the greatest husbandry of ‘time, life and money’ of the protagonist belligerents, as was the suggestion in the *Hostages Case*.

331. The opinion of Judge Pocar in a recent judgment of the Appeals Chamber of the ICTY offers a better modern judicial sign-post to the correct understanding of the difference between military necessity and military objective. He observed, among other things, that ‘military necessity is distinct from and more stringent than that of a military objective.’<sup>263</sup>

<sup>262</sup> *The Hostages Case*, *supra*, p 35-36.

<sup>263</sup> See *Prosecutor v Prli & Ors (Judgment)* vol III, dated 29 November 2017 [ICTY Appeals Chamber], Dissenting Opinions of Judge Pocar, para 8.

332. In the final analysis, it must be said that the general thesis that any life and property standing in the way ‘*may be destroyed if necessary for military operations*’ is, indeed, a most peculiar rendition of the intended paradigm of criminal law. Its side-effects may include the mistaken view that modern international law—specifically in its aspects concerning international crimes—involves ‘a *compromise* between military and humanitarian requirements’;<sup>264</sup> even if it does not go so far as the odder view heard in the past (though now roundly discredited) that ‘the necessities of war prevailed over legal considerations.’<sup>265</sup> Whatever might have been the view as to humanitarian law in the past, there has been a palpable paradigm shift in modern international law, in the era of international criminal law, in aid of better and clearer alignment of the concerned norms. This, simply put, is to the effect that the law *always* controls the conduct of belligerents in warfare. There need be no equivocation about that proposition.

333. Such an acceptance of the rule of law over war was all too clear in the definition of military necessity even in article 14 of the *Lieber Code*, stated as follows:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war.* [Emphasis added.]

334. That definition has now been incorporated into the jurisprudence of the ICTY Appeals Chamber on the meaning of military necessity.<sup>266</sup>

335. There is, thus, no competition whatsoever between the law and the accomplishment of military objectives, even on a semi-equal footing: certainly none that invites uncertainty or tentativeness in the matter, by indulging the view of a delicate ‘balance’ between—or co-habitation ‘alongside’—law and war. To accept such a view of ‘balance’ between law and war is to accept that there are areas of conduct of belligerents in warfare which are beyond the superintendence of the law.

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336. Viewed in the light of either modern international criminal law or of general principles of law recognised by modern States, the correct legal paradigm which explains ‘military necessity’ compels the pride of place for the general prohibition of intentional violence. Yet, within that legal framework, there is the exceptional recognition of the defence of *necessity*, usually understood as justification for even illegal acts of violence on grounds that the pressure of the circumstances or emergency (not created or contributed to by the defendant) compelled him to commit the illegal act. Such better realignment of the norms would thus truly mark the exceptional circumstance, which any legitimate objectives of an armed conflict must constitute to the general prohibition of violence. It does not assume the

<sup>264</sup> See Dieter Fleck (ed), *The Handbook of Humanitarian law in Armed Conflicts* (1995) p 32, emphasis added.

<sup>265</sup> *Ibid*; see also Von Clausewitz, *supra*, p 2.

<sup>266</sup> See *Prosecutor v Kordić and Čerkez* (Judgment) dated 17 December 2004, para 686 [ICTY Appeals Chamber].

normalisation of violence upon the excuse of war. Here, again, one recalls the ultimate caveat registered in article 15 of the *Lieber Code*, in relation to military necessity, stated as follows: ‘Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.’ Leaving God out of it: it is enough that humans are moral beings responsible to one another during armed conflicts. That is the very essence of the humanitarian imperatives that must temper war.

337. Hence, the realignment thus makes accountability for the violence the rule rather than the exception. The ultimate outcome of that realignment of norms is that ‘military necessity’ retains a place in the general scheme of legal norms: but only as a species of the general idea of necessity in criminal law, which may justify the commission of acts otherwise deemed illegal according to criminal law.

338. In this connection, it must be kept in mind that the killing of another human being would ordinarily be a criminal offence in a civilised society. So, too, the destruction of property. And there is ancillary criminality in training, arming and deploying people in order that they may kill or destroy or plan such killing or destruction. As these would ordinarily constitute criminal conducts, it is only proper that nothing short of the dictates of necessity would make them justifiable during armed conflict: hence ‘military necessity’.

339. That being the case, it will not be an excuse to unleash such homicidal or destructive forces; but then successfully claim loss of control over human agents who had gone rogue and committed excesses using the facilities of the training, arming, planning and deployment that the commander had been put at their disposal.

340. Hence, considerations of *jus ad bellum* pose no obstacle to the operation of article 28 to the effect that commanders who involve themselves in an armed conflict—by training, arming and deploying soldiers and planning and executing their operations—in circumstances where civilians may be effected, must take care to ensure that innocent victims are not subjected to undue harm, beyond what is strictly permitted by military necessity. Loss of effective control after the fact of such training, arming and deployment may not absolve the commander from liability.

### ***B. The Significance of the Principle of Pacific Settlement of International Disputes in Considering the Defence of Military Necessity***

341. To recall, military necessity is a species of the defence of necessity in criminal law, in the sense of affording an excuse or even justification for resorting to violence occasioned by the pressure of the circumstances or emergency (not created or contributed to by the defendant), compelling him to commit an act that is ordinarily illegal. In conceiving of military necessity in that way, some demurer may be anticipated to the effect that the concept presses less on military forces engaged in self-defence than on those who started the shooting war. The reason for the demurer requires no explanation. Nevertheless, the objection may readily be dispelled by insisting that even those engaged in a war of self-defence are not free from the constraints of the defence of necessity in its ordinary acceptance in criminal law. The plea of necessity does not readily avail those engaged in revenge or retaliation, nor does

it easily avail those who attack an innocent third party. What is more, the factor of proportionality must always be considered. In this connection, the standard formulation of the principle of self-defence in international law remains as it was stated in the *Caroline Case*: According to which, there must be shown ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.’ Additionally, the action taken must involve ‘nothing excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it.’<sup>267</sup> That formulation was accepted into international criminal law, in the judgment of the International Military Tribunal in Nuremberg.<sup>268</sup>

342. The need for a highly restrictive view of necessity is all the more so if the obligation of pacific settlement of disputes is taken into account, as a principle of modern international law. To contrast historical perspective, it may be recalled that Lassa Oppenheim had observed no later than 1912 that there was no essential inconsistency between war and international law. As he put it:

As States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot, under the existing conditions and circumstances of the Family of Nations, always be avoided. International Law recognises this fact, but at the same time provides regulations with which belligerents have to comply. Although with the outbreak of war peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus war is not inconsistent with, but a condition regulated by, International Law. The latter at present cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind at present live and will have to live for a long time to come, although eternal peace is certainly an ideal of civilisation which will slowly and gradually be realised.<sup>269</sup>

343. William Hall had similarly observed that international law ‘recognises war as a permitted mode of giving effect’ to the decisions of States ‘which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction,’ thus leaving them ‘to exact redress for themselves by force.’<sup>270</sup> Oppenheim and Hall were

<sup>267</sup> See Brierly’s *Law of Nations*, 7<sup>th</sup> edn (Andrew Clapham) (2012), pp 469–470.

<sup>268</sup> See *United States, France, United Kingdom, and Soviet Union v Göring & Ors* (1947) Trial of the Major War Criminals, vol I (Official Text), pp 206–207: ‘[I]t is clear that as early as October 1939 the question of invading Norway was under consideration. The defense that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive. ¶ It must be remembered that preventive action in foreign territory is justified only in case of “an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation” (The *Caroline Case*, Moore’s Digest of International Law, 11, 412)’.

<sup>269</sup> Lassa Oppenheim, *International Law*, vol II (War and Neutrality), 2nd edn, (1912) §53.

<sup>270</sup> William Hall, *A Treatise on International Law*, 8<sup>th</sup> edn (1924), Part I, ch III, §16.

restating the views of earlier commentators including Grotius.<sup>271</sup> But Hall would go on to articulate the premise for the view: in the terms that international law was—in his time—‘destitute of any judicial or administrative machinery’.<sup>272</sup>

344. Although Oppenheim and Hall (and their forerunners) were commenting on the conditions of international law predating the Charter of the United Nations, the old idea that war and international law are not inconsistent have continued to influence intellectual reflexes in modern international law. The primary evidence of that phenomenon is in the enduring orthodoxy that *jus ad bellum* centrally eschews inquiries into the legality of an armed conflict. But proper reflection on the question should render that orthodoxy untenable on many grounds. For one thing, its effect is to afford an enduring rampart for the perpetuation of the hegemony of the mightier States over the weaker. And that is bad enough for the lasting legitimacy of the idea itself. For, the law’s promise is to protect all—especially the weak from the mighty.

345. More than that, the idea is truly wrong as a matter of law; for, it is an idea that fails to reflect general international law in the fullness of its modernity. A critical development in that regard is the creation of the United Nations in 1945, which now supplies much by way of both the administrative and judicial machineries that Hall rightly observed as absent in his time and earlier. And just as critical are certain principles and contexts that now prevail in international law. Key among them is the crystallisation of the *requirement* of pacific settlement of disputes, evident in article 2 of the UN Charter.<sup>273</sup> It is provided as follows in

<sup>271</sup> See Grotius, [Kelsey trans], *supra*, Bk I, ch II generally, especially at §IV (‘It is sufficiently well established, therefore, that not all wars are at variance with the law of nature; and this may also be said to be true of the law of nations.’) See also Vattel, *supra*, p 507; and Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688) [Oldfather & Oldfather translation, 1934] Bk VIII, p 1293.

<sup>272</sup> Hall, *supra*.

<sup>273</sup> It may be noted that although the idea of pacific settlement of disputes crystallised as a requirement in article 2 of the UN Charter, it is an idea that had evolved over time, along the following lines. The evolution began tentatively in The Hague Convention for the Pacific Settlement of International Disputes (1899). It imposed no requirement, rather with the view to obviating ‘as far as possible’ recourse to force in relations between States, the parties agreed ‘to use their best efforts’ to ensure pacific settlement of international disputes (art 1). The preferred methods were good offices and mediation (article 2), international commissions of inquiry (article 9), and international arbitration (article 16). For purposes of arbitration, the parties agreed to set up a Permanent Court of Arbitration (art 20). Next after The Hague Convention came the Covenant of the League of Nations. Again it did not impose an obligation of pacific settlement of international disputes. Its best effort was to provide that bellicose States ‘will submit’ their disputes to arbitration, judicial settlement or inquiry by the League Council, and observe a three-month cooling off period after an arbitral award or judicial decision or report of inquiry undertaken by the League Council (article 12). Given the failure of the United States to ratify the Covenant and join the League of Nations, the French foreign Minister, Mr Aristide Briand proposed a pact between the United States and France, culminating in the eventual adoption of the multilateral General Treaty for Renunciation of War as an Instrument of National Policy also known as the Kellogg-Briand Pact in 1928. A very short treaty, with only two very short operating articles, the pact was the earliest instance of unequivocal effort to (i) condemn recourse to war as a means of settlement of any international dispute (article I); (ii) renounce war as an instrument of national policy (article I); and agree that ‘the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin’ arising among the signatory parties ‘shall never be sought except by pacific means’ (article II). Notably, it is significant that the pact was predicated on the following considerations stated in the preamble: (a) the parties’ deep sensibility to ‘their solemn duty to promote the welfare of mankind; (b) the parties’ conviction ‘that the time has, come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated’; (c) the parties’ conviction that ‘all changes’ in their relations should

article 2(3): ‘All Members *shall* settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ [Emphasis added.] And in a necessary follow up, article 2(4) provides as follows: ‘All Members *shall* refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ [Emphasis added.]

346. It may be noted at this juncture that Oppenheim, for instance, did not opine in 1912 that the principle of pacific settlement of disputes was essentially beyond the doctrinal ken of international law as it continued to evolve. He was only noting realistically in his time that international law had not developed sufficiently in that regard at that time. But, it now has—most notably by virtue of article 2(3) and (4) of the UN Charter, in relation to the obligation of pacific settlement of disputes. In elaborating upon the requirements of that obligation, the UN General Assembly has resolved that States have ‘a duty to refrain from acts of reprisal involving the use of force.’<sup>274</sup> In consequence, ‘States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.’<sup>275</sup>

347. The normative dimensions of the principles laid down in article 2(3) and (4) of the UN Charter go deep indeed. To appreciate those dimensions, it is sufficient to have regard to the pacific themes that resonate as the dominant purposes of the UN, as indicated in the preamble and stipulated in article 1 of the Charter. The first mission statement indicated in the preamble is the *determination* of the peoples of the UN ‘to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind’. Also to be noted is the determination ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. And in relation to those ends, amongst others ends, the UN member states stated their resolve to, among other things, ‘practice tolerance and live together in peace with one another ...’; ‘unite ... strength to maintain international peace and security’; and ‘ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest’. It is against that background that the following is stipulated in article 1(1) as the first purpose of the UN: ‘To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and

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be sought ‘only by pacific means and be the result of a peaceful and orderly process’; and, (d) that any party that seeks to promote its national interests by resort to war should be denied the benefits furnished by the pact. The norm laid down in the Kellogg-Briand Pact has now been crystallised into article 2 of the UN Charter.

<sup>274</sup> See UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, Doc No GA Res 2625 (XXV) of 24 October 1970, in Resolutions adopted on the Reports of the Sixth Committee, General Assembly—Twenty-fifth Session, p 122.

<sup>275</sup> *Ibid*, p 123.



international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’.

348. In the circumstances, it becomes important to highlight a nugget of critical observation that Westlake made in passing to the effect that little or nothing is to be gained by drawing distinctions between measures during war in order to determine which is more deserving of proper characterisation as military necessity. For, according to him, ‘even the mildest means employed in war are based on some necessity, *for war itself has no other rightful foundation.*’<sup>276</sup> He is not to be taken as saying that necessity justifies use of force in war, it is rather that only necessity can justify use of force in war as a matter of first principles.

349. Indeed, the obligation of pacific settlement of disputes gives that view an active modern value, succinctly captured in the following observation appearing in the current edition of *Brierly’s Law of Nations*: ‘Today, war and the use of force are not permitted as responses to violations of international law.’<sup>277</sup> The noted exceptions are when a State responds to an attack in self-defence or when the UN Security Council authorises the use of force.<sup>278</sup> The guiding principle derives from article 2(3) and (4) of the UN Charter imposing upon States an obligation of pacific settlement of disputes. Notably, in the current edition of *Oppenheim’s*, it is stated that ‘[t]he illegality of resort to the threat or use of force against the territorial integrity or political independence of any state ... now has the character of *ius cogens*.’<sup>279</sup>

350. The principle of pacific settlement of disputes thus becomes a valid consideration of international law in reviewing the plea of military necessity in any modern context, and especially as a species of the defence of necessity in international criminal law. That consideration is fully borne out by the correct insistence that the plea of ‘necessity must be judged according to the lawful purpose which the defendant was trying to pursue.’<sup>280</sup>

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351. The foregoing review thus makes it proper to inquire whether commanders should—as a matter of military necessity—expose innocent civilians to the notorious mortal dangers of war, which portend ‘untold sorrow to mankind’—and even more so to womankind—without exhausting the standard facilities afforded in international law for pacific settlement of disputes such as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means.<sup>281</sup> The

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<sup>276</sup> John Westlake, *Chapters on the Principles of International Law* (1894) p 241, emphasis added.

<sup>277</sup> *Brierly’s Law of Nations*, *supra*, p 392.

<sup>278</sup> *Ibid*, p 392, n1.

<sup>279</sup> *Oppenheim’s International Law*, 9<sup>th</sup> edn (1996), vol 1 (Peace), p 186.

<sup>280</sup> See Ashworth, *supra* p 119.

<sup>281</sup> Vattel’s lamentation may be noted in this regard—even in his own era of permissive wars, long before the imperatives of pacific settlement of disputes by article 2 of the UN Charter. As he wrote: ‘Whoever entertains a true idea of war—whoever considers its terrible effects, its destructive and unhappy consequences—will readily agree that it should never be undertaken without the most cogent reasons. Humanity revolts against a sovereign,

answer to that question should assist in resolving the inquiry whether any belligerent—whether or not engaged in a war of self-defence—may properly claim the protection of the defence of military necessity. It may be that the defence is ultimately available, but the initial question must be asked.

352. In answering that question, due regard should be given to the principle usually expressed in the Latin maxim *ex iniuria ius non oritur*, which has been observed as ‘well established in international law.’<sup>282</sup> The principle states, as a general proposition, that ‘acts which are contrary to international law cannot become a source of legal rights for a wrongdoer.’<sup>283</sup> Though not exclusively so, it is significant that the application of this principle resounds as a matter of ‘the policy of not giving legitimacy to the illegal use of force in international affairs.’<sup>284</sup>

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353. It is often observed that the principle *ex iniuria ius non oritur* is in conflict with the idea captured in the maxim *ex facto oritur ius*.<sup>285</sup> But, such conflict is not inevitable. This is because the meaning of the maxim *ex facto oritur ius* is not settled in a manner that inevitably puts it at odds with the former principle. The point hinges primarily on the consideration that the word *ius* or *jus* in Latin can mean ‘justice,’ ‘law’ or ‘right,’<sup>286</sup> depending on the context. That being the case, the *ex facto oritur ius* maxim can bear any of the following meanings: (i) the law applicable in a given case will depend on the facts, (ii) justice in a given case results from the facts, and, (iii) right results from the facts. The first and second propositions are roughly equivalent and have been suggested as the meaning of the maxim.<sup>287</sup> To the extent that this is the meaning of the maxim, there is no contradiction then with the maxim *ex iniuria ius non oritur*. But, even to the extent that the *ex facto oritur ius* maxim has the third meaning indicated above—i.e. that right results from the facts—there is still no inevitable conflict between the two maxims. This is because the right that results from the facts need not involve an initial violation of the law. The proposition may be demonstrated by the example

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who, without necessity or without very powerful reasons, lavished the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honourable and salutary peace. And if to this imprudence, this want of love for his people, he moreover adds injustice towards those he attacks—of how great a crime, or rather, of what a frightful series of crimes, does he not become guilty!’: Vattel, *supra*, p 482.

<sup>282</sup> *Oppenheim’s International Law*, 9<sup>th</sup> edn (1996), vol 1 (Peace), *supra*, pp 183—184.

<sup>283</sup> *Ibid*, p 184.

<sup>284</sup> See Ian Brownlie, ‘Recognition in Theory and Practice’ (1983) 53 *British Yearbook of International Law* 197, 204. A famous instance of the principle’s expression is what is known in international law as the Stimson doctrine, after the US Secretary of State (Henry Stimson) in 1932 wrote to Japan and China to say that the US did not and would not legitimate by recognition either Japan’s invasion of the Chinese Province of Manchuria or the purported creation of a separate State of Manchuko as resulting from that invasion, which invasion the US viewed as violating the Kellogg-Briand Pact: See *Oppenheim’s International Law*, 9<sup>th</sup> edn (1996), vol 1 (Peace), *supra*, p 184.

<sup>285</sup> See *ibid*, p 186, and Brownlie, ‘Recognition in Theory and Practice’, *supra*, p 204.

<sup>286</sup> See Lewis & Short, *A New Latin Dictionary* (1891) p 1019. See also Joseph Riddle, *A Complete English-Latin Dictionary: for use of Colleges and Schools* (1838) pp 174, 177 and 238; and *Collins Latin-English*.

<sup>287</sup> See, for example, Eugene Gerhart, ‘The Fountainhead of the Law: *Ex Facto Oritur Jus*’ 36 *American Bar Association Journal* (July 1950) p 533. See also Ho Hock Lai, *A Philosophy of Evidence Law* (2008) p 2 and footnote 4.

of possession of property. It is said that possession is nine-tenths of the law. The third suggested meaning of the *ex facto oritur ius* maxim engages that scenario. So, the maxim may operate to confer a legal right upon the claimant in possession, to the disadvantage of a competing claimant, when none of the two had an original greater legal right to the property. But, the maxim need not mean that the mere fact of possession would generate for a thief a legal right to the property he stole and retained in his own possession.

354. It may also be considered that the *ex facto oritur ius* maxim may speak to the idea that the fact of the conduct of someone may generate incidental right for someone else. For instance, strangers to a circumstance that is fraught with legal consequences can meddle themselves into liability to someone else.

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355. In the end, then, the principle that rights may not be derived from illegal conduct remains the general and dominant rule of international law. It thus engages the inquiry whether commanders prosecuting a war that is in violation of international law's obligation of pacific settlement of disputes may plead military necessity in any manner that may enable them to win that war.

### ***C. The Significance of International Human Rights Law in Considerations of Military Necessity***

356. Modern considerations of military necessity are also necessarily shaped by international human rights law. As noted earlier, international criminal law must reflect international law in the fullness of its modernity, in the light of the context and principles of international law prevailing since the end of World War II. A vital consideration in this regard is the central focus that international law has given to individuals as subjects of international law.

357. As a point of departure for the discussion in this regard, it may be observed that the general orientation of the law of armed conflict in favour of States and at the expense of the individual is traceable to the old view that the individual was not a proper subject of international law. It thus came as no surprise that the old version of international law was understood as permitting States to apply 'any amount and kind of force' to compel—with the least possible expenditure of their own time, life and money—the complete submission of 'the enemy', *even at the expense of the life and property of innocent victims*.

358. But, in the period following World War II, international law has now fully recognised the individual directly as a *bona fide* subject, whose rights and obligations are not readily deflected or overrun by the preferences of States. That recognition goes beyond the admissibility of international criminal prosecutions for violations committed against individuals.

359. The evolution of international law must, then, also be fully brought to bear when the plea of necessity is raised in those prosecutions, as a defence to violations committed against

individuals. Here, legal prescriptions and analyses in the area of human rights law must be reckoned with, since that is now part of modern international law. The interests of international human rights law in protecting the individual are not to play second fiddle to the interests of States in conducting warfare to the complete submission of ‘the enemy’.

360. In this connection, the significance of certain provisions of the International Covenant on Civil and Political Rights must be kept in mind. Among them is article 6, which enshrines the right to life as a foremost norm of international law: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ Notably, the UN Human Rights Committee has opined on the limiting effects that the right to life has on the latitude of States in the conduct of war. According to the Committee:

[W]ar and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para 1) or incitement to violence (para 2) as therein described.<sup>288</sup>

361. In relation to the plea of necessity during war, the implications of the foregoing principles and observations are further compounded by the observation that the right to life is non-derogable, even in circumstances of national emergency that threaten the life of a nation. In that regard, article 4 of the International Covenant on Civil and Political Rights provides as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

362. Of course, the idea of non-derogability of the right to life ‘does not mean that no limitations or restrictions would ever be justified’.<sup>289</sup> It means rather that the law will always recognise the right as such, without interruption for the sake of any other consideration.

<sup>288</sup> UN Human Rights Committee, CCPR General Comment No 6: Article 6 (Right to Life), 30 April 1982, para 2.

<sup>289</sup> UN Human Rights Committee, CCPR General Comment No 29: Article 4: Derogations during a State of Emergency, 31 August 2001, para 7.

Violation would always be a conduct against the law: though extreme circumstances may constitute an exceptional excuse for the violation, rather than an *a priori* entitlement to do so. But, as seen in article 4(1), violations in such extreme circumstances will require the aberrant conduct to be justified within the constraints of the strictest test of necessity and proportionality. There is thus an evident parallel between the concept of necessity and that of ‘necessity of self-defence’<sup>290</sup> as enunciated in the *Caroline* Case considered earlier.

363. These provisions and their resulting principles of international law necessarily limit the operational field of the idea that the concept of military necessity permits States engaged in war to expend the life of an innocent individual as ‘collateral casualty’ in the State’s application of ‘any amount and kind of force’ to compel the complete submission of ‘the enemy’, with the least possible expenditure of time, life and money of the State applying the force in question.

366. In conclusion, the notion of military necessity is normatively comprised within the theory of endangerment, which affords an underlying rationale for superior responsibility under article 28. However, the notion of military necessity is to be understood in light of the different considerations reviewed above.

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<sup>290</sup> Brownlie notes that there was an era in international law when statesmen ‘used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms’: Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn (2008) p734.