# CHAPTER 17: MODES OF PARTICIPATION AND *MENS REA*

**Summary of subject-matter of updates:**

**1. Modes provision for the Crime of Aggression**
**2. Charging the correct "mode" in the Charging Document**
**3. *Mens Rea* in the ICC: Article 30**
**4. "Control Test" for Principal Liability**
**6. Command Responsibility in the ICC: Article 28**

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## *1. Modes provision for the Crime of Aggression*

Chapter 17, page 861, at the end of the indented paragraph setting forth the text of ICC Article 25(3), insert the following after ICC Article 25(3):

> **3 bis.** In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

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## *2. Charging the correct "mode" in the Charging Document*

Chapter 17, page 862, 1st full paragraph:

Although the Ad Hoc Tribunals were not, at least initially, terribly stringent in demanding that the prosecution charge a particular mode of participation, the rule is otherwise in the ICC. Rule 121(c) of the Rules of Procedure and Evidence provides that the "Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he or she intends to present at the hearing." Regulation 52 of the Regulations of the Court further states that the document containing the charges subject to a confirmation hearing under ICC Article 61 "shall include," *inter alia*,

> (b) A Statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons

to trial, including relevant facts for the exercise of jurisdiction by the Court; [and]

(c) *A legal characterization of the facts to accord* both the crimes under articles 6, 7 or 8 and *the precise form of participation under articles 25 and 28*.

Regulations of the Court, Reg. 52 (emphasis added).

In some cases, the Prosecutor has charged the appropriate "mode" in the alternative and the PTC has determined the appropriate mode upon which the case would go forward. *See Prosecutor v. Bemba*, [Confirmation of charges], Case. No. ICC-01/05-01/-08-424, paras. 402-403, 444 (2009); *Prosecutor v. Katanga*, Confirmation of charges, ICC-01/04-01/07-717, paras. 468-471, 573-582 (2008).

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## *3. Mens Rea in the ICC: Article 30*

Chapter 17, pages 871-872: Omit the *Prosecutor v. Lubanga* opinion and substitute the following:

### Prosecutor v. Jean-Pierre Bemba Gombo, [Decision Confirming Charges Pursuant to Article 61] ICC-01/05-01/08-424 (2009) (Pre-Trial Chamber II)

**a) Notion of intent and knowledge of the perpetrator under article 30 of the Statute**

352. The Chamber recalls article 30 of the Statute which stipulates:

> 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 [objective) 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.

353. The Chamber recalls that article 30 of the Statute codifies the general mental (subjective) element required for the crimes that fall within the jurisdiction of the Court. It defines the requisite state of mind for establishing the suspect's criminal responsibility

for any of the crimes set out in articles 6 to 8 of the Statute. The express language of its first paragraph denotes that the provision is meant to function as a default rule for all crimes within the jurisdiction of the Court, "unless otherwise provided." Consequently, it must be established that the material elements[444] of the respective crime were committed with "intent and knowledge," unless the Statute or the Elements of Crimes require a different standard of fault. This conclusion finds support in paragraph 2 of the General Introduction to the Elements of Crimes which reads: "[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element (...) intent, knowledge or both, set out in article 30, applies."

354. For instance, the application of the "should have known" standard pursuant to article 28(a) of the Statute justifies a deviation from the default rule as it requires a lower fault element than that required under article 30 of the Statute. Moreover, there are certain crimes that are committed with a specific purpose or intent, and thus, requiring that the suspect not only fulfil their subjective elements, but also an additional one—known as specific intent or *dolus specialis.*[445]

355. In the opinion of the Chamber, article 30(2) and (3) of the Statute is constructed on the basis of an element analysis approach—as opposed to—a crime analysis approach, according to which different degrees of mental element are assigned to each of the material elements of the specific crime under consideration.

356. The Chamber recalls that, according to article 30 of the Statute, the general mental element of a crime is fulfilled (a) where the suspect means to engage in the particular conduct with the will (intent) of causing the desired consequence, or is at least aware that a consequence (undesired) "will occur in the ordinary course of events" (article 30(2) of the Statute); and (b) where the suspect is aware "that a circumstance exists or a consequence will occur in the ordinary course of events" (article 30(3) of the Statute).

357. The Chamber stresses that the terms "intent" and "knowledge" as referred to in article 30(2) and (3) of the Statute reflect the concept of *dolus,* which requires the existence of a volitional as well as a cognitive element. Generally, *dolus* can take one of three forms depending on the strength of the volitional element *vis-à-vis* the cognitive element—namely, (1) *dolus directus in the first degree* or direct intent, (2) *dolus directus in the second degree*—also known as oblique intention, and (3) *dolus eventualis*—commonly referred to as subjective or advertent recklessness.

358. In the view of the Chamber, article 30(2) and (3) of the Statute embraces two degrees of *dolus. Dolus directus in the first degree* (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the

[444] The general objective (material) elements of a crime are referred to in article 30(2) and (3) of the Statute as conduct, consequences and circumstances.
[445] In this regard the Chamber recalls that the war crime of torture and pillaging call for a specific intent in addition to the intent and knowledge requirement of article 30 of the Statute, see paragraphs 294 and 320 of this opinion.

crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. According to the *dolus directus in the first degree,* the volitional element is prevalent as the suspect purposefully wills or desires to attain the prohibited result.

359. *Dolus directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, *i.e.,* the suspect "is aware that [...] [the consequence] will occur in the ordinary course of events" (article 30(2)(b) of the Statute). In this context, the volitional element decreases substantially and is overridden by the cognitive element, *i.e.* the awareness that his or her acts or omissions "will" cause the *undesired* proscribed consequence.

360. With respect to *dolus eventualis* as the third form of *dolus,* recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute. This conclusion is supported by the express language of the phrase "will occur in the ordinary course of events," which does not accommodate a lower standard than the one required by *dolts directus in the second degree* (oblique intention). The Chamber bases this finding on the following considerations.

361. The Statute, being a multilateral treaty, is governed by the principles of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT").

362. Thus, the Chamber considers that, by way of a literal (textual) interpretation, the words "[a consequence] will occur" serve as an expression for an event that is "inevitably" expected. Nonetheless, the words "will occur," read together with the phrase "in the ordinary course of events," clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as "virtual certainty" or "practical certainty," namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.

363. This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis*—namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words "may occur" or "might occur in the ordinary course of events" to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.

364. The Chamber's interpretation is also confirmed by way of review of the *travaux préparatoires* of the Statute. The Chamber notes that according to article 32 of the VCLT "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31[...]." Thus, in order to confirm its finding reached on the basis of a textual interpretation of article 30(2) (b) of the Statute, the Chamber will look to the *travaux préparatoires*.

365. The Chamber examined carefully the *travaux préparatoires* and found that the first reference to the different degrees of culpability including *dolus eventualis* and recklessness appeared in an annex appended to the report of the 1995 *Ad hoc* Committee as concepts subject to considerations in future sessions, These concepts appeared once more in a compilation of proposals prepared by the Preparatory Committee in 1996. Article H, which covered the issue of *mens rea* stated:

> [...] 2. For the purposes of this Statute and unless otherwise provided, a person has intent where: [...] (b) in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. [...]
> [4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: [...]
>
> [Note. The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered, Therefore, paragraph 4 would provide a definition of "recklessness," to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly. It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex [...]].

366. The Chamber observed that although the drafters explicitly stated that the concepts of "recklessness and dolus eventualis should be further considered," the reference to *dolus eventualis* disappeared altogether from subsequent draft proposals and there is no record that such concept was meant to be included in article 30 of the Statute. This observation suggests that the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations. As to advertent recklessness, which is viewed as the common law counterpart of *dolus eventualis,* there was a paragraph on this concept that remained throughout the negotiations, until it was finally deleted by the Working Group on General Principles of Criminal Law in Rome.

367. Thus, even assuming that the drafters made no further reference to *dolus eventualis* as it had been part of the discussion on recklessness, the fact that the draft provision was deleted in Rome makes it even more obvious that both concepts were not meant to be captured by article 30 of the Statute.

368. The Chamber's conclusion finds further support in the draft proposal of article H quoted above. It is apparent that paragraph 2(b) of the said proposal, which states that a person has intent in relation to consequence where "that person means to cause that consequence or is aware that it will occur in the ordinary course of events," is identical to the current wording of article 30(2)(b) of the Statute. This suggests that the language of

article H(2), (b) with its high required standard was not controversial from the beginning of the negotiations until it found its way in the final text of article 30(2)(b). This conclusion is further supported by the fact that the proposed text of article H(2), (b) initially appeared and remained throughout the drafting process without square brackets. Moreover, the fact that paragraph 4 on recklessness and its accompanying footnote, which stated that "recklessness and *dolus eventualis* should be further considered," came right after paragraph 2(b) in the same proposal, indicates that recklessness and *dolus eventualis* on the one hand, and the phrase "will occur in the ordinary course of events" on the other, were not meant to be the same notion or to set the same standard of culpability.

369. Consequently, the Chamber considers that the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan. The Chamber's finding that the text of article 30 of the Statute does not encompass *dolus eventualis,* recklessness or any lower form of culpability aims to *ensure* that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute. It also ensures that the Chamber is not substituting the concept of *de lege lata* with the concept of *de lege ferenda* only for the sake of widening the scope of article 30 of the Statute and capturing a broader range of perpetrators.

***Notes and Questions***

1. Pre-Trial Chamber I (PTCI) had, in January 2007, ruled that "intent" and "knowledge" within the meaning of Article 30 included *dolus eventualis*, relying only on the caselaw of the ICTY. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges ¶¶ 350-355 (Jan. 29, 2007). PTCI's decision was roundly criticized. *See, e.g.,* Thomas Weigend, Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges, 6 J. Intl. Crim. Just. 471 (2007). In its confirmation decision in *Prosecutor v. Katanga*, Confirmation of charges, ICC-01/04-01/07-717, ¶ 531 & n. 329 (2008), PTCI declined to rely on *dolus eventualis*, perhaps signaling its recognition that PTCII's decision in *Bemba* was correct.

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## *4. "Control Test" for Principal Liability*

Chapter 17, page 888, Note 1:

Recently, Pre-Trial Chamber II (PTCII) joined PTCI in adopting the control test in *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424, Decision on Confirmation of Charges ¶¶ 347-351 (2009).

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## *5. Command Responsibility in the ICC: Article 28*

Chapter 17, page 907: at the end of Section F(5) (ICC: Article 28), just prior to Section G (Case Studies) insert:

In *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424 (2009), PTCII was asked to confirm charges against Jean-Pierre Bemba Gombo primarily as a principal perpetrator under ICC Article 25(3)(a). In the alternative, the prosecutor charged on a theory of command responsibility under ICC Article 28. PTCII determined that the prosecutor had insufficient evidence of the *mens rea* necessary for principal liability and ultimately confirmed the charges on a command responsibility theory. In so doing, it discussed the elements of command responsibility under ICC Article 28 as follows:

### Prosecutor v. Jean-Pierre Bemba Gombo, [Decision Confirming Charges Pursuant to Article 61] ICC-01/05-01/08-424 (2009) (Pre-Trial Chamber II)

**B. Article 28 of the Statute**

402. The Chamber recalls … that in the Amended DCC the Prosecutor charged Mr. Jean-Pierre Bemba primarily under article 25(3)(a) of the Statute or, in the alternative, as a military commander or person effectively acting as a military commander or superior under article 28(a) or (b) of the Statute. In this regard, the Chamber made it clear that Mr. Jean-Pierre Bemba's criminal responsibility under article 28 of the Statute shall not be examined, unless there is a determination that there is not sufficient evidence to establish substantial grounds to believe that the suspect is criminally responsible as a "co-perpetrator" within the meaning of article 25(3)(a) of the Statute for the crimes set out in the Amended DCC.

403. Since the Chamber found, in light of the required standard at the pre-trial stage, that Mr. Jean-Pierre Bemba's criminal responsibility cannot be established under article 25(3)(a) of the Statute for the crimes against humanity and war crimes …, it will consider his alternative alleged criminal responsibility under article 28 of the Statute.

**1. The law and its interpretation**

404. Article 28 of the Statute reads:

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.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior 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.

405. The Chamber notes that article 28 of the Statute reflects a different form of criminal responsibility than that found under article 25(3)(a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. This sort of responsibility can be better understood "when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act."

406. Article 28 of the Statute is drafted in a manner that distinguishes between two main categories of superiors and their relationships—namely, a military or military-like commander (paragraph (a)) and those who fall short of this category such as civilians occupying *de jure* and *de facto* positions of authority (paragraph (b)). For the purpose of this decision, the Chamber is satisfied that the suspect in the case under consideration falls within the ambit of the first category as discussed later, and, accordingly, it will confine its analysis to article 28(a) of the Statute.

407. The Chamber considers that, in order to prove criminal responsibility within the meaning of article 28(a) of the Statute for any of the crimes set out in articles 6 to 8 of the

Statute, the following elements must be fulfilled:

a. The suspect must be either a military commander or a person effectively acting as such;
b. The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;
c. The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;
d. The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and
e. The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

**a) The suspect must be either a military commander or a person effectively acting as such (military-like commander)**

408. The Chamber is of the view that the term "military commander" refers to a category of persons who are formally or legally appointed to carry out a military commanding function *(i.e., de jure* commanders). The concept embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command. The notion of a military commander under this provision also captures those situations where the superior does not exclusively perform a military function.[522]

409. With respect to a "person effectively acting as a military commander," the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command. This concept was also acknowledged in several cases before the ICTY and the ICTR. In the *Čelebići* case, the first leading case on the doctrine of command responsibility before the *ad hoc* tribunals, the ICTY Trial Chamber stated that:

> [I]ndividuals in positions of authority, (...) within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of *formal legal authority* to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility (emphasis added).

[522] This is the case in some countries where a head of state is the commander in chief of the armed forces (*de jure* commander), and although the person does not carry out a military duty in an exclusive manner (also a sort of quasi *de facto* commander), that person may be responsible for crimes committed by his forces (*i.e.,* members of the armed forces).

410. Thus, the Chamber finds that this category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, *inter alia,* armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.

**b) The suspect must have effective command and control, or effective authority and control over his forces (subordinates)**

411. The second element required for the application of the doctrine of command responsibility is the existence of "effective control" over the forces which committed one or more of the crimes under articles 6 to 8 of the Statute.

412. The Chamber observes that article 28(a) of the Statute refers to the terms "effective command and control" or "effective authority and control" as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words "command" and "authority" under the two expressions has no substantial effect on the required level or standard of "control." This is apparent from the express language of the two terms, which uses the words "effective" and "control" as a common denominator under both alternatives. This conclusion is also supported by a review of the *travaux préparatoires* of the Statute, in which it was acknowledged by some delegations that the addition of the term "effective authority and control" as an alternative to the existing text was "unnecessary and possibly confusing." This suggests that some of the drafters believed that the insertion of this expression did not add or provide a different meaning to the text.

413. In this context, the Chamber underlines that the term "effective command" certainly reveals or reflects "effective authority." Indeed, in the English language the word "command" is defined as "authority, especially over armed forces," and the expression "authority" refers to the "power or right to give orders and enforce obedience." However, the usage of the disjunctive "or" between the expressions "effective command" and "effective authority" calls the Chamber to interpret them as having close, but distinct meanings in order to remedy the appearance of redundancy in the text. Thus, the Chamber is of the view that although the degree of "control" required under both expressions is the same as argued in paragraph 412 above, the term "effective authority" may refer to the modality, manner or nature, according to which, a military or military-like commander exercise "control" over his forces or subordinates.[529]

414. The Chamber wishes to point out that "effective control" is generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a *de jure* or *de facto* hierarchal relationship (chain of command). As the ICTY Appeals Chamber stated in the *Čelebići* case: "[t]he ability to exercise effective control [...] will almost invariably not be satisfied unless such a relationship of subordination exists."

[529] This may refer to superiors who are not in "direct" chain of command with the forces.

415. The concept of "effective control" is mainly perceived as "the material ability [or power] to prevent and punish" the commission of offences, and, as such, failure to exercise such abilities of control gives rise to criminal responsibility if other requirements are met. In the context of article 28(a) of the Statute, "effective control" also refers to the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities. To this end, this notion does not seem to accommodate any lower standard of control such as the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial. As the ICTY Trial Chamber stated in the *Hadžihasanović* case:

> Since command responsibility is predicated on a superior's power to control the acts of his subordinates, a superior may only be held criminally responsible if he has the necessary powers of control, i.e. if he exercises effective control over his subordinates. The simple exercise of powers of influence over subordinates does not suffice.

416. That said, the Chamber concurs with the view adopted by the *ad hoc* tribunals that *indicia* for the existence of effective control are "more a matter of evidence than of substantive law," depending on the circumstances of each case, and that those *indicia* are confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation.

417. The Chamber takes the view that there are nonetheless several factors which may indicate the existence of a superior's position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued *(i.e.,* ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.

418. The Chamber also wishes to stress that it is not sufficient to demonstrate that the suspect had effective control without specifying the time frame required for its existence. In particular, there is a question of temporal coincidence between the "effective control" and the criminal conduct. In this respect, the Chamber takes note of the common position upheld by the *ad hoc* tribunals, according to which effective control must have existed at the time of the commission of the crime. The Chamber is also aware of the different view embraced by a minority of the ICTY Judges, which was later upheld by Trial Chamber I of the SCSL, according to which the "superior must have had effective control over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent or to punish."

419. Having considered the above, the Chamber is of the view that according to article

28(a) of the Statute, the suspect must have had effective control *at least* when the crimes were about to be committed. This finding is supported by the language of the chapeau of article 28(a) of the Statute, which states in the relevant part that a military commander or a person effectively acting as such shall be criminally responsible for the crimes committed by forces under his effective control "as a result of his or her failure to exercise control properly over such forces [...]." The reference to the phrase "failure to exercise control properly" suggests that the superior was already in control over the forces before the crimes were committed.

**c) The crimes committed resulted from the suspect's failure to exercise control properly over the forces (subordinates)**

420. The third element to be satisfied for the purpose of article 28(a) of the Statute is to prove that crimes committed by the suspect's forces resulted from his failure to exercise control properly over them.

421. The Chamber recalls the chapeau of article 28(a) of the Statute, which stipulates that:

> 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 failure to exercise control properly over such forces, where: (...)
>
> > (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.

422. The Chamber now turns to the two expressions, namely "effective control" and "exercise control properly." In this respect, the Chamber considers that it cannot be said that a superior failed to "exercise control properly," without showing that he had "effective control" over his forces. Since effective control is actually the "material ability" to prevent, repress or submit the matter to the competent authorities, then a failure to "exercise control properly" is, in fact, a scenario of noncompliance with such duties. This suggests that the reference to the phrase "failure to exercise control properly" must be read and understood in light of article 28(a)(ii) of the Statute.

423. The Chamber also observes that the chapeau of article 28(a) of the Statute establishes a link between the commission of the underlying crimes and a superior's "failure to exercise control properly." This is reflected in the words "as a result of," which indicates such relationship.[550] The Chamber therefore considers that the chapeau of

[550] The Chamber acknowledges that the ad hoc tribunals do not recognise causality as an element of superior responsibility. However, unlike article 28(a) of the Statute, the relevant provisions on superior responsibility in the Statutes of the *ad hoc* tribunals do not expressly require such an element.

article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes.[551] This interpretation is consistent with the principle of strict construction mirrored in article 22(2) of the Statute which, as a part of the principle *nullum crimen sine lege,* compels the Chamber to interpret this provision strictly.

424. Although the Chamber finds that causality is a requirement under article 28 of the Statute, its actual scope needs to be further clarified by the Chamber. As stated above, article 28(a)(ii) of the Statute refers to three different duties: the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution. The Chamber considers that a failure to comply with the duties to repress or submit the matter to the competent authorities arise during or after the commission of crimes.[552] Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed.[553] Accordingly, the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes. Nonetheless, the Chamber notes that the failure of a superior to fulfill his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.

425. The Chamber also considers that since article 28(a) of the Statute does not elaborate on the level of causality required, a possible way to determine the level of causality would be to apply a "but for test," in the sense that, but for the superior's failure to fulfill his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces. However, contrary to the visible and material effect of a positive act, the effect of an omission cannot be empirically determined with certainty In other words, it would not be practical to predict exactly what would have happened if a commander had fulfilled his obligation to prevent crimes. There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute.

426. Accordingly, to find a military commander or a person acting as a military commander responsible for the crimes committed by his forces, the Prosecutor must demonstrate that his failure to exercise his duty to prevent crimes increased the risk that the forces would commit these crimes.

**d) The suspect either knew or should have known**

427. The Chamber, reiterates what it has stated earlier in this decision, that the Rome

[552] As explained below under element (e), the duty to repress also may arise during the commission of crimes in the form of a duty to prevent the continuation of the commission of crimes.
[553] This reasoning was used by the ICTY to reject causality altogether.

Statute does not endorse the concept of strict liability. To this end, attribution of criminal responsibility for any of the crimes that fall within the jurisdiction of the Court depends on the existence of the relevant state of mind or degree of fault. This is also the case with respect to criminal responsibility arising under article 28 of the Statute.

428. Thus, in order to hold the suspect criminally responsible under article 28(a) of the Statute for a crime committed by forces (subordinates) under his control, it must be proven *inter alia* that the suspect "either knew or, owing to the circumstances at the time, should have known that his subordinates were committing or about to commit" one or more of the crimes embodied in articles 6 to 8 of the Statute. This means that the suspect must have knowledge or should have known that his forces were about to engage or were engaging or had engaged in a conduct constituting the crimes referred to above.

429. In this regard, the Chamber considers that article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term "knew," requires the existence of actual knowledge. The second, which is covered by the term "should have known," is in fact a form of negligence. The Chamber will discuss each of these elements in the following paragraphs.

430. With respect to the suspect's actual knowledge that the forces or subordinates were committing or about to commit a crime, it is the view of the Chamber that such knowledge cannot be "presumed." Rather, the suspect's knowledge must be obtained by way of direct or circumstantial evidence. In this regard, the Chamber takes note of the relevant jurisprudence of the *ad hoc* tribunals which considered several factors or *indicia* to reach a finding on a superior's actual knowledge.

431. These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts. Actual knowledge may be also proven if, "*a priori,* [a military commander] is part of an organised structure with established reporting and monitoring systems." Thus, the Chamber considers that these factors are instructive in making a determination on a superior's knowledge within the context of article 28 of the Statute.

432. The "should have known" standard requires the superior to "ha[ve] merely been negligent in failing to acquire knowledge" of his subordinates' illegal conduct. In the *Blaškic* case, the ICTY Trial Chamber, after having reviewed some post-Second World War jurisprudence and articles 86(2) and 87 of Additional Protocol I to the Geneva Conventions, supported the inclusion of the "should have known" standard into article 7(3) of the ICTY Statute. In defining this standard, the Chamber stated:

> In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about

> to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties (…)

433. Thus, it is the Chamber's view that the "should have known" standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime. The drafting history of this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors.

434. The Chamber is mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SCSL sets a different standard to the "should have known" standard under article 28 (a) of the Statute. However, despite such a difference, which the Chamber does not deem necessary to address in the present decision, the criteria or *indicia* developed by the *ad hoc* tribunals to meet the standard of "had reason to know" may also be useful when applying the "should have known" requirement. Moreover, the factors referred to above in relation to the determination of actual knowledge are also relevant in the Chamber's final assessment of whether a superior "should have known" of the commission of the crimes or the risk of their occurrence. In this respect, the suspect may be considered to have known, if *inter alia,* and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation. The Chamber also believes that failure to punish past crimes committed by the same group of subordinates may be an indication of future risk.

**e) The suspect failed to take all the necessary and reasonable measures**

435. In order to find the suspect responsible under command responsibility, once the mental element is satisfied, it is necessary to prove that he or she failed at least to fulfil one of the three duties listed under article 28(a)(ii) of the Statute: the duty to prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution.

436. The Chamber first wishes to underline that the three duties under article 28(a)(ii) of the Statute arise at three different stages in the commission of crimes: before, during and after. Thus, a failure to fulfill one of these duties is itself a separate crime under article 28(a) of the Statute. A military commander or a military-like commander can therefore be held criminally responsible for one or more breaches of duty under article 28(a) of the Statute in relation to the same underlying crimes. Consequently, a failure to prevent crimes which the commander knew or should have known about cannot be cured

by fulfilling the duty to repress or submit the matter to the competent authorities.

### *i. The duty to prevent*

437. The Chamber notes that the duty to prevent arises when the commander or military-like commander knew or should have known that forces under his effective control and command/authority "were committing or about to commit" crimes. Thus, such a duty is triggered at any stage prior to the commission of crimes and before it has actually been committed by the superior's forces.

438. Article 28 of the Statute does not define the specific measures required by the duty to prevent crimes. In this context, the Chamber considers it appropriate to be guided by relevant factors such as measures: (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.

### *i. The duty to repress*

439. The duty to "repress" encompasses two separate duties arising at two different stages of the commission of crimes. First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed.[582] It is the obligation to "interrupt a possible chain effect, which may lead to other similar events. Second, the duty to repress encompasses an obligation to punish forces after the commission of crimes.

440. The Chamber wishes to point out that the duty to punish requiring the superior to take the necessary measures to sanction the commission of crimes may be fulfilled in two different ways: either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish (as part of the duty to repress) constitutes an alternative to the third duty mentioned under article 28(a)(ii), namely the duty to submit the matter to the competent authorities, when the superior is not himself in a position to take necessary and reasonable measures to punish.

441. Moreover, as explained later, the power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command. Accordingly, whether the duty to punish requires exercising his power to take measures himself or to submit the matter to the competent authorities will therefore depend on the facts of the case.

### *(iii) The duty to submit the matter to the competent authorities for investigation and prosecution*

[582] In this respect, the duty to repress is equivalent to the obligation to "suppress" crimes. The latter expression is used in Article 87 of the Additional Protocol I to the Geneva Conventions.

442. The duty to submit the matter to the competent authorities, like the duty to punish, arises after the commission of the crimes. Such a duty requires that the commander takes active steps in order to ensure that the perpetrators are brought to justice. It remedies a situation where commanders do not have the ability to sanction their forces. This includes circumstances where the superior has the ability to take measures, yet those measures do not seem to be adequate.

### *(iv) Necessary and Reasonable Measures*

443. The Chamber considers that what constitutes "necessary and reasonable measures" must be addressed *in concreto.* A commander or military-like commander will only be responsible under article 28(a) of the Statute for failing to take measures "within his material possibility." The Chamber's assessment of what may be materially possible will depend on the superior's degree of effective control over his forces at the time his duty arises. This suggests that what constitutes a reasonable and necessary measure will be assessed on the basis of the commander's *de jure* power as well as his *de facto* ability to take such measures.

## 2. Findings of the Chamber

444. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba is criminally responsible pursuant to article 28(a) of the Statute for the crimes against humanity of murder (article 7(1)(a) of the Statute) and rape (article 7(1)(g) of the Statute) and the war crimes of murder (article 8(2)(c)(i) of the Statute), rape (article 8(2)(e)(vi) of the Statute) and pillaging (article 8(2)(e)(v) of the Statute) committed by MLC troops in the CAR from on or about 26 October 2002 to 15 March 2003.

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