SEPARATE OPINION OF JUDGE SYLVIA STEINER

1. I fully agree with the final decision of the Chamber with regards to the individual criminal responsibility of Mr Jean-Pierre Bemba Gombo. However, I write separately, to further elaborate my views on three discrete legal issues related to the interpretation of Article 28(a) of the Rome Statute ("Article 28").

2. Article 28(a), as applicable in the present case, establishes that a person effectively acting as a military commander shall be held criminally responsible for crimes within the jurisdiction of the Court, committed by forces under his effective authority and control *"as a result of his failure to exercise control properly over such forces"*. I believe that the Judgment could have expanded its reasoning in its consideration of: (i) the proper interpretation of the wording "as a result of" in Article 28(a); (ii) the duty to "exercise control properly"; and (iii) the causality threshold.

3. I focus only on these distinct, limited legal issues. To be clear, my views concern the reasoning and not the outcome of the Judgment.

I. The interpretation of the wording "as a result of" in Article 28(a)

4. According to the Pre-Trial Chamber in the Confirmation Decision, the language "as a result of" in the *chapeau* of Article 28(a) indicates that a link between the commander's failure to exercise control properly and the crimes committed by the subordinates is required. The Confirmation Decision reads in the relevant section as follows:[1]

> 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.

5. There is some reference in the record of the case to a different interpretation of the *chapeau* elements. In an *amicus curiae* submitted before the Pre-Trial Chamber in

[1] Confirmation Decision, para. 423 (internal citations omitted).

2009,[2] Amnesty International argued that "[t]he plain reading of [Article 28] is that the clause 'as a result of his or her failure to exercise control properly' refers to the superior's criminal responsibility, which is engaged by his or her knowing or negligent omissions."[3] According to this interpretation, the superior's criminal responsibility, and not the crimes, is to be considered the result of the commander's failure to exercise control properly.

6. In support of this interpretation, the *amicus curiae* submitted that "[n]one of the international legal instruments reflecting customary international law on the elements of superior responsibility includes a requirement that the superior's omission caused the underlying crimes in question."[4] However, I note that the language of the Article 28(1) follows Article 86(1) of the Additional Protocol I.[5] Thus, I question the assertion that international legal instruments, without exception, do not require causation between the superior's omission and the underlying crimes. In my view and pursuant to Article 21(1)(a), the Court shall apply in the first place the Statute, and therefore, whether the causality element is required in customary international law is not determinative of the issue at stake.

7. Another argument advanced by the *amicus curiae* is that "the lack of deliberation on the causation issue" during the *travaux préparatoires* of the Statute suggests that the drafters did not intend to "diverge so sharply from established customary international law."[6] I am not persuaded by this argument. First, I would not infer support or rejection of the causality requirement from the lack of deliberation. Nonetheless, in the *travaux préparatoires*, the language used in the draft proposals

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[2] Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 April 2009, ICC-01/05-01/08-406.
[3] ICC-01/05-01/08-406, para. 39.
[4] ICC-01/05-01/08-406, para. 32.
[5] Additional Protocol I, Article 86(1), "[t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol *which result from* a failure to act when under a duty to do so" (emphasis added). I note that, as to the "result" terminology, this provision is the closest to Article 28(a) as far as international legislation is concerned. The plain reading of Article 86(1) supports the interpretation that the breach must be have a causal link with the failure to act. *See also* The ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987) page 1010, para. 3538.
[6] ICC-01/05-01/08-406, para. 43.

leading to what became Article 28, tends to read more naturally when a connection is required between the omission and the crimes, and not between the crimes and the responsibility of the commander.[7] Command responsibility was in its inception conceived as a form of "participation", as "complicity", or as "aiding and abetting".[8] All forms of accessory liability require a connection between conduct and an unlawful result.[9] As articulated by the Appeals Chamber, this connection operates in the form of a "contribution to the commission of a crime".[10] Thus, the language "as a result of", present in at least three of the authentic versions of Article 28,[11] is meant to address precisely that connection between the omission and the resulting crimes.

8. Finally, the *amicus curiae* argues that if an ambiguity in the interpretation of Article 28 remains even after resorting to the application of Articles 31 and 32 of the VCLT, the interpretation that best reconciles the different versions of the Article in its six equally authentic texts should be adopted pursuant to Article 33(4) of the VCLT.[12] As set out above, the preparatory works confirm that a connection exists between the crimes and the omission. In my view, there remains no ambiguity in the interpretation of Article 28.

9. It is important to note that during the trial, neither the Defence nor the Prosecution challenged the legal interpretation adopted in the Confirmation

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[7] *See* Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996, UN Doc A/AC.249/1, 7 May 1996, page 85, Proposal submitted by the UK ('[i]n addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander is also criminally responsible (as an aider and abettor) for such crimes committed by forces under his command as a result of his failure to exercise proper control where:'); Applicable Law and General Principles of Law, Working paper submitted by Canada, UN Doc A/AC.249/L.4, 6 August 1996, p.15 (Alternative A: ('[i]n addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander [a superior] is also criminally responsible (as an aider and abettor) for such crimes committed by forces under his command [by a subordinate] as a result of the commander's [the superior's] failure to exercise proper control where:' and Alternative B: '[t]he fact that a crime under this Statute was committed by a subordinate [forces under the command of a commander] [as a result of the commander's failure to exercise proper control] does not relieve the superior [the commander] of criminal responsibility where [...]').

[8] *Ibid.*

[9] *See* Mirjan R. Damaska's analysis, in "The Shadow Side of Command Responsibility", 49 American Journal of Comparative Law (2001), page 469, rejecting the notion of "accessory after the fact as a party to the crime".

[10] *See* Lubanga Appeals Judgment, para 467 to 468.

[11] *See* the English, Russian, and Arabic versions of the Statute.

[12] ICC-01/05-01/08-406, para. 44.

Decision, and both drafted their closing briefs accordingly.[13] Simarly, the Chamber gave no indication of deviating from this understanding. The Prosecution supported a different approach only late in the proceedings, during its closing oral statements, in line with the *amicus* submissions.[14] I am of the view that the oral closing statements were not the appropriate procedural opportunity to endorse such an interpretation of the *chapeau* elements in Article 28(a). Therefore, given in particular that the interpretation provided by the Pre-Trial Chamber has not been properly challenged by the parties, and it is the one followed by the Chamber, it is unnecessary to discuss the issue any further.

II. The duty to "exercise control properly"

10. As correctly stated in the Confirmation Decision, the *chapeau* Article 28(a) requires a nexus between the commission of the underlying crimes and a superior's "failure to exercise control properly".[15] Precisely because the link is required in the *chapeau* Article 28, it is applicable whichever "specific failure" – of those referred in Article 28(a)(ii) – is attributed to the commander, *i.e.*, whether the commander failed to prevent or repress their commission, or to submit the matter to the competent authorities for investigation and prosecution. Accordingly, although these duties are clearly interrelated, they must be distinguished. I note that the Judgment has not addressed this issue explicitly.

11. In my view, only by attempting to define the content of the *duty to exercise control properly*, the complex interplay between this and the specific duties may be discerned. I consider that the reference to a "failure to exercise control properly" in Article 28(a) must be read as encompassing a duty on the part of commander, extending beyond the temporal and substantial scope of the duties outlined in Article 28(a)(ii). I base my views on the following considerations.

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[13] Defence Closing Brief, paras 1047 to 1053; and Prosecution Closing Brief, paras 765 to 769.
[14] Prosecution Closing Oral Statements, page 79, lines 20 to 22, submitting "that this language is an articulation that criminal responsibility, under the Statute, arises as a result of the accused's failure to exercise effective control and not that the crimes themselves are a result thereof".
[15] Confirmation Decision, para. 423.

12. According to Article 87(2) of the Additional Protocol I, commanders are required to "ensure that members of the armed forces under their command are aware of their obligations" under international humanitarian law. The commander's duty to ensure that the soldiers are aware of their own "obligations" is of a permanent nature, and arises before combat or even before the outbreak of war.[16] Moreover, commanders have the means to ensure respect for the rules of international humanitarian law, and "more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline".[17] Examples of measures that could be taken in the exercise of control properly include: (i) maintaining order;[18] (ii) ensuring that an effective reporting system is established, in order for the superior to be informed of incidents when they occur; and (iii) monitoring the reporting system to ensure its effectiveness.[19] It is illustrative to note that the jurisprudence of the *ad hoc* tribunals also supports the existence of a "general duty" imposed on commanders to maintain order and to control his troops, which has been found well rooted in customary international law and stems from the commander's position of authority.[20] Some of these measures are known as "prior preventive measures"[21] or "general obligations".[22]

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[16] ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), page 1023, para. 3563, "first, the preventive stage, which consists of instructing members of the armed forces and inculcating habits and reflexes which are reconcilable with the requirements of the Conventions, does not take place during combat, but before – even before war has broken out. Secondly it is appropriate to point out that orders are not only given during combat, but mostly beforehand. All orders given before combat should always and at every level include a reminder of the provisions of the Conventions that are relevant in the particular situation".

[17] ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), page 1022, para. 3560.

[18] *See, for example*, ICTY, *Halilović* Trial Judgment, paras 82 and 84.

[19] Otto Triffterer and Roberta Arnold, "Article 28" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), pages 1094 to 1095, para. 104; Chantal Meloni, *Command Responsibility in International Criminal Law*, pages 169 to 170, and footnote 140; and Darryl Robinson, "How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation and a Simple Solution", 13 Melbourne Journal of International Law (2012), page 44.

[20] *See, inter alia*, ICTY, *Halilović* Appeal Judgment, para. 63; and ICTY, *Orić* Appeal Judgment, para. 177. Although the partial overlap between the measures discharge the general duty and the specific measures to prevent the crime may create confusion, it needs to be addressed in the framework of the Rome Statute given the explicit requirement that the commander failed in his duty to "exercise control properly".

[21] ICTY, *Halilović* Trial Judgment, paras 79 to 81, and 86.

[22] ICTY, *Halilović* Trial Judgment, paras 79 to 81, and 88.

13. It should be noted that the *duty to prevent* arises before the commission of the crimes,[23] and unlike the general duty, it usually reflects a degree of situational specificity.[24] When it is established that a commander failed to prevent a crime, whether he knew or should have known that his subordinates were committing or about to commit it, usually – although not automatically – there will also be evidence that the same commander failed to exercise control properly over his subordinates.

14. The *duties to repress the commission of the crimes* – when understood as "punish" – and the duty *to submit the matter to the competent autho*rities are more easily distinguishable from the duty to exercise control properly, since they arise after the commission of a crime. Accordingly, I agree with the Pre-Trial Chamber that a failure of these duties cannot "cause" the crimes, as a crime cannot be "caused" retroactively.[25] Nonetheless, the causality requirement between the failure of the general duty to exercise control properly and the crimes still persists in circumstances where the attribution of liability rests solely on the commander's failure to repress the crimes – when understood as "punish" – or to submit the matter to the competent authorities.[26]

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[23] Judgment para. 203; and Confirmation Decision, para. 437. *See also* ICTR, *Ndahimana* Appeal Judgment, para. 79.

[24] Otto Triffterer, "'Command Responsibility' – *crimen sui generis* or participation as "otherwise provided" in Article 28 Rome Statute?" in Jörg Arnold *et al.* (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70. Geburtstag* (2005), pages 910 to 911. As referred to in the Judgment, some of the example measures that carry the said degree of specificity are: securing reports that military actions were carried out in accordance with international law; issuing orders specifically meant to prevent the crimes, as opposed to merely issuing routine orders; protesting against or criticising criminal conduct; insisting before a superior authority that immediate action be taken; and postponing military operations; and/or suspending, excluding or redeploying violent subordinates, *see* Judgment paras 204 to 205.

[25] Confirmation Decision, para. 424.

[26] *See* Mirjan R. Damaska, "The Shadow Side of Command Responsibility", 49 American Journal of Comparative Law (2001), page 468, "[i]n this second form, failure to punish marks the most conspicuous departure of the ICTY Statute from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability. For this departure is precisely what must happen when a superior is convicted of a war crime of his subordinates on the sole ground that he omitted to punish them: the opprobrium attaches to him for heinous conduct to which he has in no way contributed, and he is also subject to punishment within the same sentencing framework as the 'hands-on' perpetrators of the criminal deed". *See also* Christopher Greenwood, "Command Responsibility and the *Hadžihasanović* Decision", 2 Journal of International Criminal Justice (2004), page 603.

15. It is critical to underline that adherence to this general obligation does not suffice by itself to avoid liability in the event the commander fails to take the necessary appropriate measure under his specific obligations.[27] Similarly, the failure to discharge the duty to exercise control properly does not suffice by itself for a commander to incur liability pursuant to Article 28(a).[28] For such responsibility to attach, a commander must additionally fail to discharge the specific duty to take all necessary and reasonable measures within his powers to prevent or repress the commission of the crimes, or to submit the matter to the competent authorities.[29]

III. The causality threshold

16. As found in the Judgment, "[i]t 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".[30] Under Article 28, the crimes for which the commander is made responsible are those committed by his subordinates. In order for the commander to be held responsible, his omission must be linked to and have an impact on those crimes. As indicated above,[31] the language "as a result of" in Article 28 addresses precisely that connection.

17. I also agree with the analysis in the Confirmation Decision, that the nature of the required nexus is properly interpreted as including "an element of causality". The Pre-Trial Chamber found:[32]

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[27] ICTY, *Halilović* Trial Judgment, paras 79 to 81, and 88.
[28] Otto Triffterer and Roberta Arnold, "Article 28" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), page 1088, para. 91.
[29] Chantal Meloni, *Command Responsibility in International Criminal Law* (2010), pages 165 to 167, 174, and 203.
[30] Judgment, para. 211.
[31] See above, paragraph 7.
[32] Confirmation Decision, para. 423 (emphasis added and internal citations omitted). *See also* Additional Protocol I, Article 86(1), "[t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol *which result from* a failure to act when under a duty to do so" (emphasis added). I note that, as to the "result" terminology, this provision is the closest to Article 28(a) as far as international legislation is concerned. Article 86(1) supports the interpretation that the breach must be have a causal link with the failure to act. The ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987) page 1010, para. 3538 also supports this linkage.

> The Chamber therefore considers that the chapeau of article 28(a) of the Statute **includes an element of causality** between a superior's dereliction of duty and the underlying crimes.

Accordingly, under the legal framework of the Statute, and unlike those of the *ad hoc* tribunals,[33] a causal link between the commander's failure to exercise control properly and the crimes committed by the subordinates is required.[34]

18. It is important to stress that there are certain particularities in the determination of causality by omissions. From a naturalistic perspective, nothing can *result* from the absence of action, *ex nihilo nihil fit*.[35] Omissions do not display "causal energy", and the relationship between an omission and a result must be construed with recourse to a *normative concept* of causation.[36] For instance, when an act that was expected from a person in the guarantor position[37] was not carried

[33] *See, inter alia*, ICTY, *Delalić et al.* Trial Judgment, para. 398, finding that "[n]otwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject"; ICTY, *Blaškić* Appeal Judgment, paras 75 to 77, considering the *Čelebići* Trial Judgment and concluding that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes is not an element of command responsibility that requires proof by the Prosecution in all circumstances of a case, but is more a question of fact to be established on a case-by-case basis, rather than a question of law; ICTY, *Kordić and Čerkez* Appeal Judgment, para. 832; and ICTY, *Hadžihasanović and Kubura* Appeal Judgment, para. 40.

[34] Confirmation Decision, para. 423; *see also* ICC-01/04-02/06-309, footnote 687. This seems to be the predominant position in academia; *see inter alia* Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute", 5 Journal of International Criminal Justice (2007), pages 672 to 673; Otto Triffterer, "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?", 15 Leiden Journal of International Law (2002), page 203; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), page 199; and Héctor Olásolo, *Tratado de autoría y participación derecho penal intenracional* (2013), page. 809.

[35] Jorge de Figeiredo Diaz, *Diritto Penal: Parte Geral, Tomo 1* (2007), page 930; and Günther Jakobs, *Derecho Penal: Parte Genera:, Fundamentos y teoría de la* imputación (1997), page 959. S*ee also* Armin Kaufmann, *Dogmática de los delitos de omisión* (2006), page 76 *et seq.*

[36] Kai Ambos, *Treatise on International Criminal Law, Vol. I: Foundation and General Part* (2013), page 216; Kai Ambos, "Superior Responsibility" in Antonio Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), page 860; and Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute", 5 Journal of International Criminal Justice (2007), page 673, and footnote 33. This is without prejudice to the inclusion of normative considerations also with respect to the relationship between positive acts and results, meaning with regard to the "commission" – as opposed to an omission – of the relevant act.

[37] Hans-Heinrich Jescheck, *Tratado de Derecho Penal Parte General* (2002), page 668 *et seq*; and Luis Greco and Adriano Teizeira, "Autoria como realização do tipo: uma introdução à ideia de domínio do fato como o fundamento central da autoria no direito penal Brasileiro" in Luís Greco *et al.* (eds), *Autoria como domíno do fato: Estudos introdutórios sobre o concurso de pessoas no direito penal brasileiro* (2014), page 61 *et seq.*

out, this omission is conceived as encompassing a potential or hypothetical causal force.[38]

19. Regarding the threshold of causality, the Pre-Trial Chamber found:[39]

> 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 fulfil 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.

20. I note that the Defence challenges the "increased the risk" standard and cites jurisprudence suggesting that the threshold should be set higher.[40] In particular, the Defence cites jurisprudence allegedly supporting its submission that "the nature and intensity of the necessary connection between the accused's failure and the underlying crime" must be such that the crimes be: (i) the "certain" consequence of the omission;[41] or (ii) "a direct and reasonably foreseeable" consequence of the omission.[42]

21. I am not persuaded that the underlying test encompassed in the phrase "as a result of" in Article 28(a), should require that the crime is the *certain* consequence of the commander's omission. As noted in the Judgment, the "nexus requirement would be clearly satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would

[38] Jorge de Figeiredo Diaz, *Diritto Penal: Parte Geral, Tomo 1* (2007), page 930.
[39] Confirmation Decision, para. 425 (emphasis added and internal citations omitted).
[40] Defence Closing Brief, paras 1048 to 1051.
[41] Defence Closing Brief, para. 1050.
[42] Defence Closing Brief, para. 1050.

have prevented the crimes".[43] However, "such a standard is higher than that required by law",[44] bearing in mind the "hypothetical assessment required in cases of omission".[45]

22. I am equally unpersuaded that *foreseeability* could be considered the appropriate test, as I conceive foreseeability as part of the *mens rea* requirements,[46] unless the term is interpreted to refer to no more than what is "adequate" to produce a result of the relevant kind based on the rules of experience.[47] In its former meaning, *foreseeability* can be informative of the scope of liability, usually by negligence, but still not to the remit of causality.

23. I therefore agree with the Pre-Trial Chamber 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".[48]

24. In relation to the *degree* of risk, I am not convinced by a wholly flexible approach, whereby a *probability* – of whatever degree, however slight – that a commander's discharge of his general duty of control may have impeded the commission of the crimes, could be sufficient to affirm causality. I note that distinct thresholds have been proposed and applied in different jurisdictions, with respect to causality by omissions.[49] In my opinion, the causality requirement would be satisfied where, at

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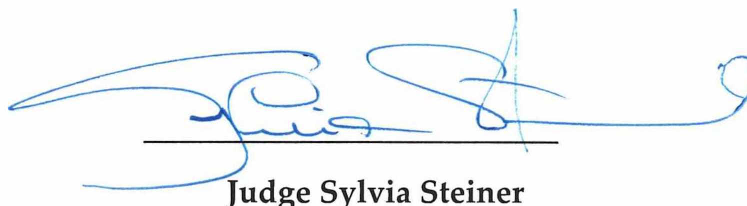
[43] Judgment, para. 213.
[44] Judgment, para. 213.
[45] Judgment, para. 212. *See also* Enrique Gimbernat Ordeig, "La causalidad en la omisión impropia y la llamada «omisión por comisión»" (2000) Anuario de Derecho Penal y Ciencias Penales, pages 50, and 64 to 65; Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute", 5 Journal of International Criminal Justice (2007), page 673; and Chantal Meloni, *Command Responsibility in International Criminal Law* (2010), pages 176 to 177.
[46] *See, inter alia*, ICTY, *Tadić* Appeal Judgment, para. 228; and ICTY, *Hadžihasanović and Kubura* Trial Judgment, para. 50. *See also* Enrique Bacigalupo, *Principios de Derecho Penal: Parte General* (1997), page 245.
[47] Günter Stratenwerth, *Derecho Penal: Parte General I: El Hecho Punible* (2000), page 131, para. 22, and page 422, para. 18; Hans Welzel, *Derecho penal alemán: parte general* (1976), page 70 *et seq*; and Johannes Wessels, *Derecho penal: parte general* (1980), page 78.
[48] Confirmation Decision, para. 425 (internal citations omitted).
[49] *See, for example*, in Brazil: ("*high degree of probability*") Superior Court of Justice Decision RHC 39627-RJ (2013/0235844-9), page 11; in Germany: ("*probability bordering on certainty*") German Supreme Court Decisions BGH 3 StR 442/99 para 27; in Italy: ("*high degree of rational credibility or logic probability*") Italian Supreme Court Decision Sentenza 30328, 11 September 2002, page 15; in Spain: ("*certainty bordering on*

least, there is a *high probability* that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed. I believe "high probability" is the appropriate threshold, reflecting a strict construction of the causality assessments relevant for both acts and omissions. In my view, the causality assessments should mirror each other as much as possible. However, I am aware that a complete match between them would not be possible in light of the hypothetical, counterfactual, assessment inherent to this determination in cases of omissions. By requiring a "high probability" threshold, it is ensured that the assessment of causality for acts and omissions do not differ from each other beyond what is inevitable.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner

Dated this 21 March 2016

At The Hague, The Netherlands

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probability") Spanish Supreme Court Decision STS 7355/2010, page 10; in Switzerland: ("*high degree of probability or probability bordering on certainty*") Swiss Supreme Court Decisions BGE 115 IV 199; BGE 101 IV 149; in France: ("a risk of particular gravity"), Cour de Cassation, Chambre criminelle, du 11 février 2003, 02-85.810. *See also* Otto Triffterer and Roberta Arnold, "Article 28" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (2016), page 1097, para. 109, arguing for a *stricter probability test*, according to which a crime can only be imputed if the intervention would *most likely* have prevented its occurrence; Otto Triffterer, "Command Responsibility, Article 28 Rome Statute, an Extension of Individual Criminal Responsibility for Crimes within the Jurisdiction of the Court – Compatible with Article 22, *nullum crimen sine lege*?" in Otto Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (2004), page 253; and Chantal Meloni, *Command Responsibility in International Criminal Law* (2010), page 178, arguing for a rigorous standard "probability bordering on certainty".