

International Criminal Court, Trial Judgment in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo

***INTRODUCTORY TEXT:** Trial Chamber III found Jean-Pierre Bemba Gombo, the President and founder of the political party Mouvement de libération du Congo (“MLC”), and Commander-in-Chief of its military branch, the Armée de libération du Congo (“ALC”) guilty, as military commander, of the war crimes of murder, rape and pillage. Furthermore, he was found guilty for failing to take all necessary and reasonable measures to prevent or repress the commission of the crimes, or to submit the matter to competent authorities for investigation and prosecution. The Chamber found the crimes to have taken place in the context of the non-international armed conflict on the territory of the Central African Republic (“CAR”) between the Forces armées centrafricaines (“FACA”) and other forces supporting President Patassé on the one hand, and General Bozizé’s rebels on the other.*

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Case prepared by Silvia Scozia, LL.M student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

[**Source:** International Criminal Court, Trial Chamber III, No.: ICC-01/05-01/08, Situation in the Central African Republic *in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF (footnotes omitted)]

[...]

I. OVERVIEW

A. THE ACCUSED

1. Mr Jean-Pierre Bemba Gombo (“Mr Bemba” or “Accused”) [is] a national of the Democratic Republic of the Congo (“DRC”) [...]. During the temporal period relevant to the charges, it is undisputed that Mr Bemba was President of the *Mouvement de libération* du Congo (“MLC”), a political party founded by him, and Commander-in-Chief of its military branch, the *Armée de libération du Congo* (“ALC”). At the time of his arrest on 24 May 2008, he was a member of the Senate of the DRC.

B. THE CHARGES

2. On 15 June 2009, Pre-Trial Chamber II (“Pre-Trial Chamber”) confirmed that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba is responsible as a person effectively acting as a military commander within the meaning of Article 28(a) [of the Rome Statute] for the crimes against humanity of murder, Article 7(1)(a), and rape, Article 7(1)(g), and the war crimes of murder, Article 8(2)(c)(i), rape, Article 8(2)(e)(vi), and pillaging, Article 8(2)(e)(v), allegedly committed on the territory of the Central African Republic (“CAR”) from on or about 26 October 2002 to 15 March 2003.

[...]

III. APPLICABLE LAW

[...]

C. MURDER AS A WAR CRIME (ARTICLE 8(2)(C)(I) OF THE STATUTE)

1. Material elements (*actus reus*)

91. The Chamber considers that, like the *actus reus* for the crime against humanity of murder, the *actus reus* of the war crime of murder requires that a perpetrator killed or caused the death of one or more persons. [...]

92. [...] [T]he definition of the war crime of murder contains a materially distinct element from the corresponding crime against humanity in that, pursuant to Article 8(2)(c)(i), the murder must be committed against “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”. Similarly, Article 8(2)(c)(i)-1 of the Elements of Crimes requires that the person or persons killed by the perpetrator “were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities”.

93. In light of the confirmed charges, the Chamber confines its consideration here to the law applicable to the murder of civilians. The Chamber notes that the Third Geneva Convention and Additional Protocols I and II

assist in the definition of civilians.

94. Article 50(1) of Additional Protocol I provides, in relation to the expected conduct of a member of the military, that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian”. [...] In determining whether victims were taking an active part in hostilities, the Chamber shall consider the relevant facts and specific situation of the victims at the relevant time, including the location of the murders, whether the victims were carrying weapons, and the clothing, age, and gender of the victims.

[...]

D. RAPE AS A CRIME AGAINST HUMANITY AND A WAR CRIME (ARTICLES 7(1)(G) AND 8(2)(E)(VI) OF THE STATUTE)

[...]

1. Material elements (*actus reus*)

[...]

b) Circumstances in which rape occurs

[...]

104. The Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape. Further, the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, the Chamber emphasizes that, in relation to the requirement of the existence of a “coercive environment”, it must be proven that the perpetrator’s conduct involved “taking advantage” of such a coercive environment.

[...]

E. PILLAGING AS A WAR CRIME (ARTICLE 8(2)(E)(V) OF THE STATUTE)

113. The Chamber notes that Article 8(2)(e)(v) mirrors the provision in Article 8(2)(b)(xvi) on pillaging as a war crime in international armed conflict.

[...]

1. Material elements (*actus reus*)

115. Pursuant to Article 8(2)(e)(v), paragraph 1 of the Elements of Crimes, pillaging as a war crime requires

the appropriation of certain property by an individual. The act of “appropriation” has been held to imply that “property has come under the control of the perpetrator”. The Chamber concurs with other chambers of the Court that pillaging extends to the appropriation of all types of property, private or public, movable or immovable.

116. Article 8(2)(e)(v), paragraph 3 of the Elements of Crimes requires that the appropriation occur without the consent of the owner. The Chamber notes that the Court’s legal framework does not include any requirement of violence as an element of the appropriation. In this respect, the Chamber is of the view that in certain circumstances lack of consent can be inferred from the absence of the rightful owner from the place from where property was taken. Lack of consent may be further inferred by the existence of coercion.

117. In line with the Pre-Trial Chamber, the Chamber considers that pillaging, pursuant to Article 8(2)(e)(v), goes beyond “mere sporadic acts of violation of property rights” and involves the appropriation of property on a “large scale”. Article 8(2)(e)(v) relates to “pillaging a town or place”, and therefore the pillaging of a single house would not suffice. In the Chamber’s view, this is, however, compatible with the stance that the prohibition of pillaging covers both individual acts of pillage and organized pillage. The Chamber adopts the Pre-Trial Chamber’s approach that determination of the seriousness of the violation is to be made in light of the particular circumstances of the case. For instance, a Chamber may consider whether the acts of pillaging involved grave consequences for the victims, even if these consequences are not of the same seriousness for all victims involved; if a large number of persons have been deprived of their property; and/or the context in which the pillaging occurred.

2. Mental elements (*mens rea*)

118. Article 8(2)(e)(v), paragraph 2 of the Elements of Crimes requires, in addition to the mental elements set out in Article 30, a special intent or *dolus specialis* in the sense that “[t]he perpetrator [must have] intended to deprive the owner of the property and to appropriate it for private or personal use”.

[...]

120. In relation to the concept of the appropriation of property for private or personal use, the Chamber notes that this requirement is not explicitly expressed in customary or conventional international humanitarian law and has not been established, as such, in the jurisprudence of other international criminal tribunals. However, given the explicit inclusion of this concept in the Elements of Crimes, the Chamber considers that this requirement must be met for the appropriation of property to amount to pillaging as a war crime under Article 8(2)(e)(v). [...] The Chamber therefore finds that the “special intent” requirement, resulting from the “private or personal use” element, allows it to better distinguish pillage from seizure or booty, or any other type of appropriation of property which may in certain circumstances be carried out lawfully.

[...]

3. Military necessity

122. The Defence argues that the property allegedly seized was not in fact “pillaged”, but rather “required for military necessity”, with reference to The Hague Regulations 1907, and that “[t]he Prosecution has [...] failed to fulfil [...] its obligation to establish, beyond reasonable doubt, that the allegedly seized items were not appropriated for military necessity.” According to the Defence, “[t]his burden falls on the Prosecution, given that ‘international humanitarian law allows the taking of war booty without the need for justification’”.

123. The concept of military necessity is mentioned in footnote 62 of the Elements of Crimes, which specifies, with reference to the requirement that the perpetrator intended to appropriate the items for “private or personal use”, that “[a]s indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging.” The Chamber notes, however, that the concept is not explicitly defined in the Statute or Elements of Crimes. Trial Chamber II endorsed the definition of military necessity set out in Article 14 of the Lieber Code, which provides that “[m]ilitary 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*”. Further, in the context of the war crime of destroying or seizing the enemy’s property, Pre-Trial Chamber I, in light of the drafting history of the Elements of Crimes for Article 8(2)(b)(xiii), considered that military necessity “can only be invoked ‘if the laws of armed conflict provide for it and only to the extent that these laws provide for it’”.

124. The Chamber agrees with the findings of Pre-Trial Chamber I and Trial Chamber II. In this regard, the Chamber considers that the reference to “military necessity” in footnote 62 of the Elements of Crimes does not provide for an exception to the absolute prohibition on pillaging, but rather, as submitted by the Prosecution, clarifies that the concept of military necessity is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use. Accordingly, situations in which the perpetrator appropriated items for personal use, by himself or herself, or for private use by another person or entity, assuming all other elements have been met, constitute pillaging under Article 8(2)(e)(v). The Chamber therefore finds that if the Prosecution proves that property was appropriated for private or personal use, it is not obliged to “disprove military necessity for the purpose of a charge under Article 8(2)(e)(v) of the Statute”.

125. In assessing whether items were appropriated for private or personal use, the Chamber will consider all relevant factors, including, for example, the nature, location and purpose of the items, and the circumstances of their appropriation. Finally, considering the factual findings in this case, the Chamber does not consider it necessary to contemplate the other justifications for the appropriation of property under international humanitarian law.

F. CONTEXTUAL ELEMENTS OF WAR CRIMES (ARTICLE 8 OF THE STATUTE)

[...]

1. Existence of an “armed conflict not of an international character”

127. The Accused is charged with criminal responsibility for the commission of war crimes in the context of an armed conflict not of an international character pursuant to Articles 8(2)(c)(i) (murder), 8(2)(e)(vi) (rape)

and 8(2)(e)(v) (pillaging).

[...]

129. The Chamber further notes that while it is possible for distinct conflicts to be taking place within one territory, the mere fact of involvement of different armed groups does not mean that they are engaged in separate armed conflicts.

130. The Chamber considers that an armed conflict not of an international character, but involving the governmental authorities of one state, may become internationalised owing to a second state's participation on an opposing side of the conflict. In this regard, the Chamber notes that Trial Chambers I and II found that an armed conflict may be considered internationalised when it is established that armed groups are acting *on behalf of a foreign government*. For determining whether an armed group is acting on behalf of a state, Trial Chambers I and II endorsed the "overall control" test, as set out by the ICTY Appeals Chamber in the *Tadić* case, which requires the state to "ha[ve] a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group". The Chamber follows Trial Chambers I and II in endorsing this approach.

2. Governmental authorities and organized armed groups

131. The Accused is charged with bearing criminal responsibility for the commission of war crimes in the context of an armed conflict not of an international character between government authorities of the CAR, supported by the MLC, amongst others, on the one hand, and the organized armed group lead by General Bozizé, on the other hand.

132. Concerning the requirement of the presence of "organized armed groups", the Pre-Trial Chamber found that:

[...] even though mention of opposing parties to the conflict is made *expressis verbis* in article 8(2)(f) of the Statute but not in article 8(2)(d) of the Statute, [...] this characteristic element in the context of a [non international armed conflict] is a well-established principle in the law of armed conflict underlying the 1949 Geneva Conventions [and] also applies to article 8(2)(c) of the Statute.

133. The Chamber agrees with the Pre-Trial Chamber's approach, and addresses the requirement of "organized armed groups" in the present case, irrespective of whether the specific crimes fall under Article 8(2)(c) or (e).

134. In the absence of a definition of the concept of "organized armed groups" in the Statute or the Elements of Crimes, other Chambers of this Court found that these groups must have a sufficient degree of organization in order to enable them to carry out protracted armed violence. While mindful that Article 1(1) of Additional Protocol II requires the armed groups to exercise control over the territory and to be under responsible command, Trial Chambers I and II considered that the Statute does not include such requirements. Instead, Trial Chambers I and II held that:

[w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was "organized".

135. The Pre-Trial Chamber considered that "[t]aking into consideration the principles and rules of international armed conflict reflected in [a number of] international instruments [...] those 'organized armed groups' must be under responsible command". In this regard, the Pre-Trial Chamber found that "responsible command entails some degree of organization of those armed groups, including the possibility to impose discipline and the ability to plan and carry out military operations".

136. Regarding the issue of "responsible command", the Chamber notes that the definition of responsible command proposed by the Pre-Trial Chamber overlaps to a significant extent with the list of factors set forth by Trial Chambers I and II and only includes the additional indicator of the possibility to impose discipline. Noting further that the list set forth by Trial Chambers I and II is not exhaustive and that Trial Chambers I and II suggested applying this test with some flexibility, the Chamber finds no substantial contradiction between the two approaches. Accordingly, in determining whether the relevant groups qualify as "organized armed groups" for the purpose of Article 8(2)(f), the Chamber considers the full spectrum of factors set forth by Trial Chambers I and II, as well as the Pre-Trial Chamber.

3. Intensity threshold and protracted character of the conflict

137. The first sentence common to Article 8(2)(d) and 8(2)(f) requires the conflict to reach a level of intensity which exceeds "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". In order to assess the intensity of a conflict, Trial Chambers I and II endorsed the ICTY's finding that relevant factors include "the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations ("UN") Security Council, and, if so, whether any resolutions on the matter have been passed". The Chamber follows the approach of Trial Chambers I and II in this respect.

138. Article 8(2)(f), which is stated to apply to Article 8(2)(e), contains a second sentence additionally requiring that there be a "protracted armed conflict". This is in contrast to Article 8(2)(d), stated to apply to Article 8(2)(c), which does not include such a requirement. The Pre-Trial Chamber, while noting that this difference "may be seen to require a higher or additional threshold of intensity to be met", did "not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as 'protracted' in any event". Given that crimes under both Articles 8(2)(c) and 8(2)(e) have been charged in this case, the Chamber notes that the potential distinction would only have

significance if the Chamber were to reach a conclusion that the conflict in question was not “protracted”, and therefore finds it unnecessary to address the difference further at this point.

139. The Chamber notes that the concept of “protracted conflict” has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasised the duration of the violence as a relevant factor. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence.

140. The Chamber notes the Defence’s submission that “if the conflict devolves to the level of riots, internal disturbances or tensions, or isolated or sporadic acts of violence, or if the conflict ceases to be between organized armed groups”, the threshold for the existence of a “protracted armed conflict” would cease to be met. The Chamber considers that the intensity and “protracted armed conflict” criteria do not require the violence to be continuous and uninterrupted. Rather, as set out in the first sentence common to Article 8(2) (d) and 8(2)(f), the essential criterion is that it go beyond “isolated or sporadic acts of violence”. In the view of the Chamber, this conclusion is further supported by the drafting history of Article 8(2)(f).

141. The Chamber additionally recalls that following the initiation of an armed conflict, international humanitarian law continues to apply to the whole territory under the control of a party, until a “peaceful settlement” is achieved. The Chamber finds that, contrary to the Defence’s allegation, the meaning of a “peaceful settlement” does not reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire.

4. The “nexus” requirement

142. In order to qualify as war crimes, the alleged crimes must have been committed “in the context of and [...] associated with an armed conflict not of an international character”. In this regard, the Chamber endorses the approach of Trial Chamber II, which held that:

[the conduct] must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator’s decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed.

143. In determining whether the crimes are sufficiently linked to the armed conflict, the Trial Chamber may take into account factors including: the status of the perpetrator and victim; whether the act may be said to serve the ultimate goal of a military campaign; and whether the crime is committed as part of, or in the context of, the perpetrator’s official duties. It is noted in this regard that, although there is likely to be some relationship between a perpetrator and a party to the conflict, it is not necessarily the case that a perpetrator must him/herself be a member of a party to the conflict; rather, the emphasis is on the nexus between the crime and the armed conflict.

144. The Chamber additionally finds that the alleged crimes may be considered to have been committed

“within the context” of an armed conflict irrespective of whether they took place contemporaneously with or proximate to intense fighting.

[...]

H. COMMAND RESPONSIBILITY (ARTICLE 28(A) OF THE STATUTE)

170. Article 28(a) codifies the responsibility of military commanders and persons effectively acting as military commanders. [...] [T]he following elements must be fulfilled:

- a. crimes within the jurisdiction of the Court must have been committed by forces;
- b. the accused must have been either a military commander or a person effectively acting as a military commander;
- c. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;
- d. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;
- e. the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and
- f. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.

[...]

172. The Chamber considers that Article 28 is designed to reflect the responsibility of superiors by virtue of the powers of control they exercise over their subordinates. These responsibilities of control aim, *inter alia*, at ensuring the effective enforcement of fundamental principles of international humanitarian law, including the protection of protected persons and objects during armed conflict. [...]. Historically, this is most clearly seen in the context of military commanders, whose individual criminal responsibility has been recognised in domestic law, in jurisprudence since at least the aftermath of the Second World War, and was subsequently reflected in Article 86 of Additional Protocol I to the Geneva Conventions.

[...]

2. The accused must have been either a military commander or a person effectively acting as a military commander

176. The term “military commander” refers to a person who is formally or legally appointed to carry out a military command function. Commonly, military commanders and their forces will be part of the regular armed forces of a state; such commanders will be appointed and operate according to a state’s domestic laws, procedures, or practices (*de jure* commanders). In addition, the term “military commander” in Article 28(a) also extends to individuals appointed as military commanders in non-governmental irregular forces, in accordance with their internal practices or regulations, whether written or unwritten.

177. Article 28(a) not only provides for the liability of military commanders, but also extends to “person[s] effectively acting as military commander[s]” - the latter being, in the submission of the Prosecution, the appropriate characterisation of Mr Bemba’s position in the case. These individuals are not formally or legally appointed as military commanders, but they will effectively act as commanders over the forces that committed the crimes. In addition, the phrase “military commander or person effectively acting as a military commander” includes individuals who do not perform exclusively military functions.

[...]

3. The accused must have had effective command and control, or effective authority and control, over the forces who committed the crimes

180. [...] As noted by the Pre-Trial Chamber, the term “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”.

181. The Chamber concurs with the Pre-Trial Chamber that the terms “command” and “authority” have “no substantial effect on the required level or standard of ‘control’”, but rather denote the modalities, manner, or nature in which a military commander or person acting as such exercises control over his or her forces. Regardless of whether an accused is a military commander or a person effectively acting as such, and regardless of whether he exercises “effective command” or “effective authority”, the required level of control remains the same.

[...]

183. For the purpose of Article 28(a), following consistent international criminal jurisprudence, the Chamber finds that “effective control” requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities. Any lower degree of control, such as the ability to exercise influence – even substantial influence – over the forces who committed the crimes, would be insufficient to establish command responsibility.

184. The Chamber concurs with the Pre-Trial Chamber’s view that “effective control” is “generally a manifestation of a superior-subordinate relationship between the [commander] and the forces or subordinates in a *de jure* or *de facto* hierarchical relationship (chain of command)”. By virtue of his position, the commander must be senior in some sort of formal or informal hierarchy to those who commit the crimes. Whether or not there are intermediary subordinates between the commander and the forces which committed

the crimes is immaterial; the question is simply whether or not the commander had effective control over the relevant forces.

[...]

187. [...] [T]here is no minimum number of subordinates that are required to be involved to trigger command responsibility.

188. The Chamber considers that the question of whether a commander had effective control over particular forces is case specific. There are a number of factors that may indicate the existence of “effective control”, which requires the material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities; these have been properly considered as “more a matter of evidence than of substantive law”. These factors may include: (i) the official position of the commander within the military structure and the actual tasks that he carried out; (ii) his power to issue orders, including his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities; (iii) his capacity to ensure compliance with orders including consideration of whether the orders were actually followed; (iv) his capacity to re-subordinate units or make changes to command structure; (v) his power to promote, replace, remove, or discipline any member of the forces, and to initiate investigations; (vi) his authority to send forces to locations where hostilities take place and withdraw them at any given moment; (vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons; (viii) his control over finances; (ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and (x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.

[...]

190. Conversely, some factors may indicate a lack of effective control over forces, such as (i) the existence of a different exclusive authority over the forces in question; (ii) disregard or non-compliance with orders or instructions of the accused; or (iii) a weak or malfunctioning chain of command.

[...]

5. The commander failed to take all necessary and reasonable measures within his power

[...]

198. In the Chamber's view, and taking guidance from the jurisprudence of the *ad hoc* tribunals, “necessary” measures are those appropriate for the commander to discharge his obligation, and “reasonable” measures are those reasonably falling within the commander's material power.

199. The duty of the commander to take all necessary and reasonable measures to prevent or repress the crimes committed by his forces, or to submit the matter to the competent authorities for investigation and prosecution, rests upon his possession of effective authority and control. It is not determinative that the

commander had the “explicit legal capacity” to take such measures; what matters is his material ability to act. [...]

[...]

201. Under Article 28(a)(ii), three distinct duties are imposed upon commanders: (i) preventing the commission of crimes; (ii) repressing the commission of crimes; or (iii) submitting the matter to the competent authorities for investigation and prosecution. Although the Statute uses alternative language (“or”) it is clear that failure to discharge any of these duties may attract criminal liability. For example, a failure to prevent the crimes, when the commander was under a duty to do so, cannot be remedied by subsequently punishing the perpetrators.

a) Failure to *prevent* the commission of crimes

[...]

203. The scope of the duty to prevent depends on the material power of the commander to intervene in a specific situation. This is dependent on the circumstances at the relevant time. The Pre-Trial Chamber identified relevant measures which include: (i) ensuring that the forces are adequately trained in international humanitarian law; (ii) securing reports that military actions were carried out in accordance with international law; (iii) issuing orders aiming at bringing the relevant practices into accord with the rules of war; and (iv) taking disciplinary measures to prevent the commission of atrocities by the forces under the commander's command.

[...]

b) Failure to *repress* the commission of crimes or *submit* the matter to the competent authorities for investigation and prosecution

[...]

206. The Chamber concurs with the Pre-Trial Chamber that the duty to repress also encompasses an obligation to punish forces after the commission of crimes. [...] The term “repress” is used in [...] Article 86 of Additional Protocol I where, as in the Rome Statute, this notion is distinguished from “prevention”. The International Committee of the Red Cross (“ICRC”) Commentary to Article 86 of Additional Protocol I indicates that the purpose of the requirement that commanders repress crimes is to ensure that military commanders fulfil their obligation to search for the perpetrators and either bring them before the courts or hand them over to another state for trial.

207. A commander's lack of formal competence to take certain measures does not relieve the commander of the duty to take all necessary and reasonable measures within his power to repress the crimes. In the event the commander holds disciplinary power, he is required to exercise it, within the limits of his competence. [...] The duty to punish includes, at least, the obligation to investigate possible crimes in order to establish the

facts. The commander is required to take an “important step in the disciplinary process”.

208. If the commander has no power to sanction those who committed the crimes, he has an obligation to submit the matter to the competent authorities. [...]

[...]

V. FACTS

379. General François Bozizé, the former FACA Chief of Staff, was dismissed from military service in October 2001; thereafter, various FACA troops deserted with him (“General Bozizé’s rebels”), and retreated behind the Chadian border, where they remained until October 2002. After regrouping, and while General Bozizé was in Paris, his forces advanced through the CAR, engaging FACA troops and capturing various towns before entering Bangui on 25 October 2002. [...] The FACA soldiers and other troops supporting President Patassé, the CAR President at the time, responded with armed force, including a bombing campaign beginning on 25 October 2002.

380. [...] [O]n 25 October 2002, President Patassé requested from Mr Bemba the assistance of the MLC, in particular, the ALC, its military wing, in defending his government against General Bozizé’s rebels. In response, Mr Bemba, the MLC President and Commander-in-Chief of the ALC, deployed ALC troops from the DRC to the CAR to intervene in support of President Patassé. [...] Over the course of approximately four and a half months, beginning on 26 October 2002, the MLC troops advanced through Bangui, [...] and along the Damara-Sibut and Bossembélé-Bossangoa axes, attacked Mongoumba, and, on 15 March 2003, withdrew back to the DRC (“2002-2003 CAR Operation”). Throughout the 2002-2003 CAR Operation, the MLC troops allegedly committed crimes of murder, rape, and pillaging against the civilian population.

[...]

A. GENERAL STRUCTURE OF THE MLC

[...]

1. Mr Bemba

384. Mr Bemba was the President of the MLC, the leader of the political branch, and the Commander-in-Chief of the ALC from its creation and throughout the period of the charges. He also held the military rank of Divisional General, or *Général de Division*. Mr Bemba founded the MLC and was the organization’s figurehead and source of its funding, goals, and aims. Under Article 12 of the MLC Statute, Mr Bemba held broad functions and powers, including over internal organization and policy in the MLC’s military and political wings.

[...]

4. Military operations and strategy

398. In considering Mr Bemba's authority over military operations and strategy in the MLC generally, the Chamber first notes that MLC troops were involved in military operations in the CAR in 2001 and in the DRC before and during the 2002-2003 CAR Operation. [...]

399. As President of the MLC and Commander-in-Chief of the ALC, Mr Bemba had authority over strategic military decisions, such as commencing military operations. Mr Bemba also commanded military operations, issuing orders to the units in the field, such as to attack or to progress to a certain location, and followed the progress of operations closely. Mr Bemba could, and often did, communicate orders or instructions directly to commanders in the field without going through the hierarchy, with the General Staff usually being informed and following-up afterwards, if required. Generally, however, Mr Bemba did not direct operations at the tactical level or issue orders regarding the specific manoeuvres of the various units in the field.

[...]

5. Discipline

[...]

403. Mr Bemba held ultimate authority over sanctioning, arresting, and dismissing senior political leaders and military officers, as well as soldiers, in the MLC and the ALC. [...]

[...]

VI. LEGAL FINDINGS

[...]

A. MURDER

[...]

625. In respect of murder as a war crime, the Chamber notes that these victims, who were not armed and were not taking part in hostilities, were killed in their homes, in the absence of armed groups other than the perpetrators. The killings were part of larger events targeting other members of their families, including both women and men, and/or accompanied by acts of pillaging and/or rape. [...]

[...]

630. Accordingly, [...] the Chamber finds beyond reasonable doubt that MLC soldiers committed the war

crime of murder [...] in the CAR between on or about 26 October 2002 and 15 March 2003.

B. RAPE

[...]

638. [...] [T]he Chamber finds beyond reasonable doubt that MLC soldiers committed the war crime of rape [...] in the CAR between on or about 26 October 2002 and 15 March 2003.

C. PILLAGING

[...]

640. The Chamber has found that perpetrator(s) appropriated items of property [...] without [...] consent [...].

[...]

643. Regarding the requirement that the appropriated items are intended for personal or private use, the Chamber recalls that MLC soldiers personally used pillaged goods, in particular, food, beverages, and livestock, as well as furniture, and other wooden items, that could be burned as firewood. The Chamber has further found that MLC troops traded certain pillaged goods for other items, such as alcohol, or forced civilians to buy back goods taken from them or their neighbours. [...] The uses noted above, when considered in conjunction with the nature of the items appropriated – namely, personal effects, household items (including appliances and furniture), business supplies, tools, money, vehicles and/or livestock – indicate that the perpetrators intended to deprive civilians of their property for their own personal use and that of other MLC soldiers and commanders, or the private use of the MLC entity.

[...]

645. In light of the foregoing considerations, taken together, the Chamber finds beyond reasonable doubt that the perpetrators of the acts identified above intended to appropriate the property for private or personal use.

646. Concerning the scale and consequences of the pillaging, the Chamber notes its findings that MLC soldiers appropriated property from, *inter alia*, individual victims, their families, a church, nuns' and priests' residences, and a gendarmerie. [...] The consequences on victims were far-reaching, impacting various aspects of their personal and professional lives. Further, the Chamber notes the consistent evidence that MLC soldiers committed many acts of pillaging throughout the 2002-2003 CAR Operation and throughout the areas in which they were present. In light of the above considerations, taken together, the Chamber finds beyond reasonable doubt that the appropriation of civilian property by MLC soldiers in the CAR was on a large scale with grave consequences for the victims.

[...]

648. Accordingly, noting its findings below on the contextual elements of war crimes, the Chamber finds

beyond reasonable doubt that MLC soldiers committed the war crime of pillaging a town or place in the CAR between on or about 26 October 2002 and 15 March 2003.

D. CONTEXTUAL ELEMENTS OF WAR CRIMES

649. In the Confirmation Decision, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that “an armed conflict not of an international character existed between the organized armed group of Mr Bozizé on the one hand, and troops supporting Mr Patassé, including the USP and the FACA, a group of 500 predominantly Chadian mercenaries, 100 Libyan troops, together with approximately 1,500 MLC soldiers on the other hand, in the period from on or about 26 October 2002 to 15 March 2003, on the territory of the CAR”.

1. Existence of an “armed conflict not of an international character”

650. By 25 October 2002, there was a resort to armed force in the CAR between the FACA and other forces supporting President Patassé, and General Bozizé’s rebels. Hostilities continued after the MLC’s arrival in support of President Patassé on 26 October 2002, with a large-scale offensive commencing on 30 October 2002 [...]. Afterwards, as highlighted by the Defence and as found by the Chamber, there were breaks in hostilities and, at various points, General Bozizé’s rebels fled as the MLC approached. Nevertheless, these breaks were not the result of “a peaceful settlement” and were merely temporary lulls in active engagements between the parties.

[...]

652. [...] [T]he Chamber emphasises that the conflict was between the forces supporting President Patassé and General Bozizé’s rebels. The MLC, with a limited number of CAR forces frequently accompanying them, operated independently of other armed forces in the field. However, it is irrelevant that, for example, before the arrival of the MLC troops in the CAR, forces other than the MLC were engaged, in support of President Patassé, in hostilities with General Bozizé’s rebels. At all times relevant to the charges, there was a resort to armed force and protracted violence between the forces supporting President Patassé and General Bozizé’s rebels. At no time during the period of the charges was a peaceful settlement reached between the parties to the conflict. In light of the above, the Chamber finds beyond reasonable doubt that during the time period relevant to the charges – namely, from on or about 26 October 2002 to 15 March 2003 – and regardless of whether the armed conflict started before 25 October 2002, there was an armed conflict on the territory of the CAR.

[...]

654. Recalling that a conflict will only be transformed to an international armed conflict where a second state is involved, directly or indirectly, on an *opposing* side of the conflict, the Chamber focuses its analysis on whether General Bozizé’s rebels, or any aligned forces, were acting on behalf of a foreign government.

655. The Chamber notes that General Bozizé’s rebels included some Chadian nationals, comprising a limited number of the troops acting on General Bozizé’s behalf. Recalling, however, the relevant test set out in

Section III(F)(1), the Chamber rejects the Defence submission that the mere involvement of non-CAR nationals would be sufficient in itself to transform the conflict into an international armed conflict. The Chamber notes that many of General Bozizé's rebels' resources were captured from the FACA. While the Chadian government also provided some troops, arms, ammunition, and vehicles, there is no evidence that the Chadian government had any role in organizing, coordinating, or planning the military actions of General Bozizé's rebels. Accordingly, the Chamber finds that General Bozizé's rebels were not acting on behalf, i.e. under the "overall control", of any foreign government.

656. In light of the above, the armed conflict, which was confined to the territory of the CAR, cannot be viewed as one in which two or more states opposed each other, or one in which territory was occupied by a hostile, foreign state. The Chamber thus finds beyond reasonable doubt that the armed conflict in the context of the 2002-2003 CAR Operation was not of an international character.

2. Governmental authorities and organized armed groups

657. The parties to the armed conflict consisted of the forces supporting President Patassé [...] – on the one hand, and, on the other, General Bozizé's rebels.

658. The MLC contingent in the CAR, invited by and acting in support of President Patassé, had an internal hierarchy, command structure, rules, and available military equipment, including means of transport, communications devices, and weapons. The MLC had the ability to impose discipline, and plan and carry out military operations. As to the extent, seriousness, and intensity of its military involvement, the MLC troops, and the limited number of CAR troops frequently accompanying them, conducted military operations, which lasted approximately four and a half months, involved regular periods of active hostilities, and covered a large geographical area. The MLC forces in the CAR, as an organized armed group, and other aligned troops and militias as identified above, fought in support of the governmental authorities of the CAR, headed by President Patassé.

659. General Bozizé's rebels acted in opposition to the CAR governmental authorities and supporting forces. General Bozizé's rebels had a command structure and available military equipment, including communications devices and weapons. Further, although General Bozizé's rebels were not paid, were undisciplined, and received minimal, if any, training, the Chamber finds that the ability to plan and carry out military operations is the only reasonable conclusion to be drawn from the extent, seriousness, and intensity of the military involvement of General Bozizé's rebels in the conflict.

660. Indeed, General Bozizé's rebels were able to, by 25 October 2002, take control of sizeable territory in the CAR, including large areas of Bangui. [...] The Chamber [...] finds that General Bozizé's rebels had a sufficient degree of organization in order to enable it to carry out protracted armed violence, and thus constituted an organized armed group within the meaning of Article 8(2)(f).

661. In light of the above, the Chamber finds beyond reasonable doubt that the armed conflict was between the CAR governmental authorities, supported by forces including the MLC, an organized armed group, on the one hand, and, on the other, the organized armed group of General Bozizé's rebels.

3. Intensity threshold and protracted character of the conflict

662. [...] [T]he armed conflict commenced with hostilities between General Bozizé's rebels and the forces supporting President Patassé. President Patassé's forces responded with a bombing campaign against General Bozizé's rebels, before the phased deployment of MLC troops to the CAR, in support of President Patassé, beginning on 26 October 2002. More MLC reinforcements were sent to the CAR in late January or early February 2003. Throughout the armed conflict, the forces supporting President Patassé, including the MLC, mobilised and distributed weapons and other logistics. The armed conflict covered a large geographical area of the CAR, lasted more than four and a half months, and was characterised by regular hostilities, resulting in numerous casualties, including hundreds killed and wounded in action. The armed conflict attracted the attention of the UN, local and international media, and NGOs, such as FIDH [International Federation for Human Rights].

663. In light of the above, the Chamber finds beyond reasonable doubt that the armed conflict reached a sufficient level of intensity for purposes of Articles 8(2)(d) and 8(2)(f), namely, one exceeding "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". On the basis of the length of the armed conflict, namely more than four and a half months, and the regular hostilities, the Chamber also finds beyond reasonable doubt that the armed conflict was "protracted" within the meaning of Article 8(2)(f).

4. The "nexus" requirement

664. MLC soldiers committed the underlying acts of murder, rape, and pillaging against civilians in the CAR after their arrival in a given area in the context of the MLC's military campaign against General Bozizé's rebels. The armed conflict therefore played a major part in the perpetrators' ability to commit the crimes insofar as their presence and their control in those areas can be attributed to their involvement in the armed conflict. Moreover, the Chamber notes the evidence that MLC perpetrators targeted their victims in order to self-compensate absent adequate payment and rations from the MLC organization, and/or to destabilise, humiliate, or punish suspected rebels, rebel sympathisers, or those who resisted pillaging and rape. In the Chamber's view, the armed conflict played a major part in the perpetrators' decision to commit the crimes and the manner in which the crimes were committed.

[...]

F. INDIVIDUAL CRIMINAL RESPONSIBILITY

693. In the Confirmation Decision, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that, from on or about 26 October 2002 to 15 March 2003, (i) MLC forces committed crimes within the jurisdiction of the Court; (ii) Mr Bemba effectively acted as a military commander and had effective authority and control over the MLC troops in the CAR; (iii) Mr Bemba knew that MLC troops were committing or about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape, and pillaging in the CAR; (iv) Mr Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes by MLC troops in the CAR;

and (v) Mr Bemba's failure to fulfil his duties to prevent crimes increased the risk of their commission by the MLC troops in the CAR.

[...]

2. The Accused was a person effectively acting as a military commander and had effective authority and control over the MLC forces that committed the crimes

[...]

697. Mr Bemba was the President of the MLC and Commander-in-Chief of the ALC throughout the period relevant to the charges, and held the rank of Divisional General. The Chamber has found that, in these capacities, Mr Bemba had broad formal powers, ultimate decision-making authority, and powers of appointment, promotion, and dismissal. Mr Bemba additionally controlled the MLC's funding, had direct lines of communication to commanders in the field, had well-established reporting systems, received operational and technical advice from the MLC General Staff, and both could, and did, issue operational orders. The Chamber has found that Mr Bemba had disciplinary powers over MLC members, including the power to initiate inquiries and establish courts-martial, and had the ability to send or withdraw troops from the CAR. These findings establish that Mr Bemba effectively acted as a military commander and had effective authority and control over the MLC, including ALC troops, during the time period of the charges.

698. [...] [I]t is, however, necessary for it to be established that this effective control extended over the specific MLC forces operating in the CAR. In this regard, the Chamber considers that it is important to distinguish the military principle of "unity of command" from the assessment of effective control. The principle of "unity of command" or "singleness of command" suggests that, "[f]or the proper functioning of an army, there can be only one individual in command of any particular unit at one time." However, the determination of whether a person has effective authority and control rests on that person's material power to prevent or repress the commission of crimes or to submit the matter to a competent authority. This need not be an exclusive power and multiple superiors can be held concurrently responsible for their subordinates' actions.

[...]

700. From the entirety of the evidentiary record, the Chamber is satisfied that Mr Bemba exercised effective control over the MLC contingent in the CAR at all relevant times of the 2002-2003 CAR Operation. Mr Bemba ordered the initial deployment of the MLC troops to the CAR, including, in consultation with the General Staff, selecting the units and commanders to be deployed. Following deployment, Mr Bemba maintained regular, direct contact with senior commanders in the field on the state of operations, and additionally received numerous detailed operations and intelligence reports. Further the MLC hierarchy in the DRC, controlled by Mr Bemba, continued to provide logistical support and equipment to the MLC troops in the CAR. [...]

701. The Chamber recalls that the MLC's General Staff played a significant role in (i) implementing Mr Bemba's orders, (ii) providing Mr Bemba with military advice and suggestions, (iii) reporting to Mr Bemba on the progress of operations, and (iv) providing him with military intelligence. However, the Chamber does not find this to diminish Mr Bemba's ultimate authority over the military operations. Indeed, the Chamber notes

that Mr Bemba, at times, bypassed the MLC's General Staff and contacted commanders in the field directly to issue instructions or order and receive reports.

[...]

703. Further, significantly, the Chamber has found that Mr Bemba retained primary disciplinary authority over the MLC troops in the CAR, including through the establishment of commissions of inquiry, powers of arrest, and the convening of courts-martial. [...]

[...]

705. In light of the above and the evidence as a whole, the Chamber finds beyond reasonable doubt that Mr Bemba was both a person effectively acting as a military commander and had effective authority and control over the contingent of MLC troops in the CAR throughout the 2002-2003 CAR Operation.

[...]

4. The Accused failed to take all necessary and reasonable measures to prevent or repress the commission of the crimes or to submit the matter to competent authorities for investigation and prosecution

[...]

726. [...] [D]espite consistent information – as reported internally within the MLC organization and externally in the media - of acts of murder, rape, and pillaging attributed to MLC soldiers throughout the 2002-2003 CAR Operation, Mr Bemba's reactions were limited to general, public warnings to his troops not to mistreat the civilian population, the creation of two investigative commissions, the trial of seven low-ranking soldiers on charges of pillaging of goods of limited value, and the Sibut Mission, which was not an investigation. The mandates of the two investigative commissions were limited to the allegations of pillaging committed in the initial days of the 2002-2003 CAR Operation in Bangui and pillaged goods being transported via Zongo.

727. Further to noting indications that the measures set out above were not properly and sincerely executed, the Chamber finds that the measures Mr Bemba took were a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge. The inadequacy of the minimal measures Mr Bemba took is aggravated by indications, as set out above, that they were not genuine, the manner in which such measures were executed, and the fact that only public allegations of crimes by MLC soldiers prompted any reaction, and then only to limited extent. [...]

[...]

729. In addition to or instead of the insufficient measures Mr Bemba did take, and in light of his extensive material ability to prevent and repress the crimes, Mr Bemba could have, *inter alia*, (i) ensured that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately

supervised during the 2002-2003 CAR Operation; (ii) initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes; (iii) issued further and clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altered the deployment of the troops, for example, to minimize contact with civilian populations; (v) removed, replaced, or dismissed officers and soldiers found to have committed or condoned any crimes in the CAR; and/or (vi) shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.

[...]

733. [...] [A]s he had the ultimate disciplinary authority over the MLC contingent in the CAR, Mr Bemba was the competent authority to investigate and prosecute the crimes. In such circumstances, where he failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes, he cannot be said to have submitted the matter to the competent authorities for investigation and prosecution. He also made no effort to refer the matter to the CAR authorities, or cooperate with international efforts to investigate the crimes, despite assertions that he would do so [...].

734. Accordingly, in light of the above considerations and the evidence as a whole, the Chamber finds beyond reasonable doubt that Mr Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities.

5. The crimes were committed as a result of the Accused's failure to "exercise control properly" over the MLC forces

735. As the Chamber has found above, Mr Bemba, throughout the 2002-2003 CAR Operation, (i) had effective authority and control over the MLC troops in the CAR; (ii) knew that the forces under his authority and control were committing or about to commit the crimes of murder, rape and pillaging; and (iii) failed to take all necessary measures within his power to prevent and repress the commission of the crimes, and submit the matter to the competent authorities.

736. International humanitarian law contains a clear duty for commanders to ensure that members of armed forces are aware of their obligations under the Geneva Conventions and Additional Protocol I. This duty is expressly stated to be for the purpose of preventing and suppressing breaches of those treaties. In this regard, the Chamber recalls its finding that the training regime employed by the ALC was inconsistent, resulting in some soldiers receiving no or minimal training. Further, the Code of Conduct used during training did not, in particular, include a prohibition on pillaging. Dissemination of the Code of Conduct was also uneven and some MLC troops, including at least one high-ranking officer, who participated in the 2002-2003 CAR Operation, either did not receive training in or were not familiar with the Code of Conduct.

737. Despite Mr Bemba's effective authority and control over the ALC, including authority over disciplinary matters, he failed to take any measures to remedy such deficiencies in training, either prior to deployment of the troops or in response to the consistent reports of crimes occurring from the earliest days of the 2002-2003 CAR Operation. Additionally, the Chamber incorporates by reference its findings regarding Mr Bemba's failure to take all necessary and reasonable measures within his power to prevent and repress the

commission of the crimes, and submit the matter to the competent authorities. Such failures further demonstrate that Mr Bemba failed to exercise control properly over the forces deployed to the CAR.

738. [...] Mr Bemba could have, *inter alia*, taken measures to ensure consistent and adequate training of MLC troops, including ensuring promulgation of a clear and complete Code of Conduct which reflected the requirements of international law; ensured adequate supervision; issued clear and consistent orders to his troops not to commit the crimes; genuinely and fully investigated allegations of crimes; ensured that MLC commanders and soldiers implicated as committing or condoning such crimes were, as appropriate, tried, removed, replaced, dismissed, and punished; and/or shared relevant information with the CAR authorities or others, and supported them in any efforts to investigate criminal allegations. Such measures would have deterred the commission of crimes, and generally diminished, if not eliminated, the climate of acquiescence – which is inherent where troops have inadequate training, receive unclear orders, and/or observe their commanders committing or collaborating in crimes – surrounding and facilitating the crimes committed during the 2002-2003 CAR Operation. Mr Bemba's failures in this regard directly contributed to, *inter alia*, the continuation and further commission of crimes.

739. Further, clear training, orders, and hierarchical examples indicating that the soldiers should respect and not mistreat the civilian population would have reduced, if not eliminated, crimes motivated by a distrust of the civilian population, as enemies or enemy sympathisers. Recalling Mr Bemba's position of high authority as President of the MLC and Commander-in-Chief of the ALC, as well as of his effective authority and control, the Chamber finds that Mr Bemba's position obligated him to take such measures, both personally and through the hierarchical chain of command. Likewise, if the soldiers had received adequate payment and rations, the risk that they would pillage or rape for self-compensation, and murder those who resisted, would have been reduced, if not eliminated. The Chamber recalls in this regard its finding in relation to Mr Bemba's control over the MLC's financial resources.

740. Moreover, consistent with evidence of a *modus operandi*, most of the crimes were committed when the MLC was the only armed group in the area. [...] The redesign of [...] military operations – for example, avoiding primarily civilian areas, not ordering military operations against areas where only civilians were present, and otherwise limiting contact with civilians – would have minimised the opportunity for the commission of the crimes. [...]

741. [...] The Chamber therefore finds beyond reasonable doubt that the [...] war crimes of murder, rape, and pillaging committed by the MLC forces in the course of the 2002-2003 CAR Operation were a result of Mr Bemba's failure to exercise control properly.

6. Conclusion

742. The Chamber finds beyond reasonable doubt that Mr Bemba is criminally responsible under Article 28(a) for the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging committed by his forces in the course of the 2002-2003 CAR Operation.

[...]

VIII. DISPOSITION

752. For the foregoing reasons [...] the Chamber finds Mr Jean-Pierre Bemba Gombo **GUILTY**, under Article 28(a) of the Statute, as a person effectively acting as a military commander, of the crimes of:

[...]

(b) Murder as a war crime under Article 8(2)(c)(i) of the Statute;

[...]

(d) Rape as a war crime under Article 8(2)(e)(vi) of the Statute; and

(e) Pillaging as a war crime under Article 8(2)(e)(v) of the Statute.

[...]

Discussion

I. Classification of the Conflict and Applicable Law

1. (*Paras 1, 379 – 380, 384, 649 - 663*)

a. How does the Court classify the conflict in the CAR between the FACA and other forces supporting President Patassé, including the MLC with its armed wing, the ALC, and General Bozizé's rebels?

b. What is the applicable law? (GC I - IV, Art. 3; P II, Art. 1)

c. Who is Mr Bemba and what is his involvement in the situation in the CAR?

2.

a. (*Para. 129*) According to the Court, does the involvement of different armed groups in an armed conflict necessarily imply the existence of separate armed conflicts? Do you agree with this position? What practical consequences can you imagine flow from this view?

b. (*Para. 650*) Was there one or were there several armed conflicts in the CAR?

c. (*Paras 130, 654 – 656*) When, according to the Court, can a NIAC become internationalized? According to Trial Chambers I and II? Is the fact that General Bozize's rebels included foreign nationals relevant to the classification of the conflict? Why? Why not? Is the fact that the Chadian Government provided some troops, arms, ammunitions, and vehicles relevant? What is the test that the Chambers have endorsed to determine whether General Bozize's rebels were acting on behalf of a foreign Government? What are the requirements of this test as set out by the ICTY Appeals Chamber in *Tadić*? In order for the test to be fulfilled in our case, what kind of relationship would need to exist between General Bozize's rebels and the Chadian Government? (ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Judgment, 1999, paras 98 – 162)

3.

a. (*Paras 131 – 132*) What thresholds need to be met to determine the existence of a NIAC? (ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Decision, 1995, para. 70; ICC Statute, Art. 8(2)(c),(d),(e),(f))

b. (*Paras 133 – 136*) What criteria does the Court adopt to assess the degree of organization of armed groups? Are these criteria considered by Trial Chambers I and II to be "individually determinative", as noted in *para. 134*? Why? Why not? Are these factors similar to those set forth in the *Haradinaj* Trial Judgment by the ICTY? (See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Judgment, Trial Chamber, 2008, para. 60)

c. (*Paras 135 – 136*) Does an armed group need to be "under responsible command" in order to be considered organized? What is the argument of the Pre-Trial Chamber in this regard? What is the

determination of the Court on the issue? Does the Court find a conflict between the approaches of the Pre-Trial Chamber and of Trial Chambers I and II? Why? Why not?

d. (*Para. 136*) Does IHL not apply to a NIAC against an armed group unable to impose discipline (with the consequence that the undisciplined acts of the members of the group cannot violate IHL and cannot constitute war crimes)?

e. (*Paras 658 – 661*) Was the MLC contingent an organized armed group? And General Bozizé's rebels? Why?

4. (*Paras 137 – 141, 650 – 652, 662 – 663*)

a. (*Paras 137 – 140*) Which factors have Trial Chambers I and II considered in assessing the criterion of intensity of the armed violence for the determination on the existence of a NIAC? How is the element of "protracted" armed violence interpreted by the Pre-Trial Chamber? Is this interpretation in line with the findings of the ICTY in the *Haradinaj* Trial Judgment? What difficulties could arise from a qualification of the conflict based on its duration rather than on its intensity? Does the duration at the time when the crimes are committed count, or the duration at the time of the trial? (See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Judgment, Trial Chamber, 2008, para. 49)

b. (*Para. 137*) What situations are excluded from the material scope of application of IHL? Do you agree with the Defence submission, noted in *para. 140*, that "if the conflict devolves to the level of riots, internal disturbances or tensions, or isolated or sporadic acts of violence, or if the conflict ceases to be between organized armed groups", the violence could not be regarded as protracted anymore? How does the Court assess the "breaks in hostilities" occurred after the large-scale offensive of 30th October 2002, in *para. 650*? What implication would the argument of the Defence have on the material and temporal scope of application of IHL? What would be, in your opinion, the law applicable to those situations of violence? On what would you base your determination?

c. (*Para. 141*) When does IHL cease to apply? What is the position of the Court in this regard? How does the Court interpret the expression "peaceful settlement"? (ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Decision, 1995, para. 70)

d. (*Paras 662 – 663*) Does the Court consider the required level of intensity to be met in the present case?

5. (*Paras 142 – 144, 664*)

a. Which elements does the Court consider when assessing the *nexus* of the alleged crimes with the armed conflict? Do you agree with the finding of Trial Chamber II, cited in *para. 142*, that "[the conduct] must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict"? Why? Why not? Is it required, according to the Court, that the perpetrator be a member of a party to the conflict, for the *nexus* requirement to be met? Can a war crime be committed by a civilian? Is a strict geographical or temporal link between the crime and the armed conflict required? Does the crime need to be one that, by its nature, can only be committed in time of armed conflict?

b. What does the Court conclude in the present case? Is the *nexus* requirement met for the crimes Mr Bemba is accused of?

II. Murder as a war crime

6. (*Paras 91 – 94*)

a. According to the Court, how is murder as a war crime different from murder as a crime against humanity? Will the intentional killing of any person in an armed conflict constitute the war crime of murder? Who are the categories of persons protected by the IHL prohibition of murder? (GC I - IV, Art. 3; ICC Statute, Art. 8(2)(c))

(i))

b. How do GC IV and P I define civilians? Is there a difference between the two provisions? Why? Does GC III assist in defining civilians (as indicated in *para. 93*) or is this a typo and the Court should have instead referred to GC IV? (GC IV, Art. 4; P I, Art. 50)

c. What elements does the Court consider to determine whether the victims were directly participating in hostilities at the relevant time? Why is such a determination relevant in the context of a discussion of murder as a war crime? Does this imply that the concept of murder equally covers killings committed during the conduct of hostilities? According to the ICRC Interpretative Guidance, what are the criteria that an act needs to meet to qualify as direct participation in hostilities? (ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities, pp 43 – 64)

III. Rape as a war crime

7. (*Paras 104, 638*)

a. Is rape explicitly prohibited under IHL? Are all persons equally protected by the prohibition of rape, or is the war crime of rape similar to the war crime of murder, in that the status/conduct of the victim is relevant? Is rape prohibited only if directed against persons not directly participating in hostilities or *hors de combat*? Does the person need to be member of the enemy forces to be protected by this prohibition? Does IHL prohibit rape even if the victim has no link to a party of the armed conflict? Does the IHL prohibition of rape apply between members of the same armed force/group? (GC I - IV, Art. 3; GC III, Art. 14 (1); P I, Art. 75 (2); P II, Art. 4 (2); GC IV, Art. 27 (2); CIHL Rule 93)

b. How should the *nexus* with the armed conflict be established for rape? In your opinion, is it sufficient to establish that the perpetrator acted under the guise of the armed conflict? Or is it necessary to establish that the act of rape is carried out with the purpose to contribute to the military objectives of a party to the conflict? (See ICTY, *The Prosecutor v. Kunarać, Kovać and Vuković*, Appeals Chamber, Judgement, 2002, paras 58 – 59)

IV. Pillage as a war crime

8. (*Paras 113 – 125, 640 – 648*)

a. What are the elements of the crime of pillage? Does appropriation of property without the consent of the owner always constitute pillage? Is violence required for the act to qualify as pillage? Is it prohibited for all types of property? Does the prohibition cover both individual and collective acts? Does it need a “large-scale” element under the ICC Elements of the Crime? Under IHL, can even the appropriation of a single house constitute pillage? Does IHL address pillage in NIACs? Do you agree with the finding of the Court in *para. 120* that the requirement of special intent is not “explicitly expressed in customary or conventional international humanitarian law”? Which elements does the Court consider to assess the existence of the special intent? (ICC Statute, Art. 8(2)(e)(v); P II, Art. 4(2)(g); CIHL Rule 52; Hague Regulations, Arts 28 and 47)

b. How does pillage differ from confiscation? When is confiscation prohibited? How does pillage differ from requisition? Are requisitions possible in NIACs? Is there an exception for the obligation to return requisitioned property? Do you agree with the Defence argument cited in *para. 122*, that IHL “allows the taking of war booty without the need for justification”? (*para. 643*) Could the items appropriated by the accused’s subordinates have constituted war booty? (Hague Regulations, Arts 46 (2), 52 and 53 (2), CIHL Rule 51(c))

c. (*Paras 122 – 124*) Is there an absolute prohibition of pillage? How does the Court define “military necessity”? Does the Court consider it an exception to the crime of pillaging? Why does the Court state that,

if the Prosecutor proves the existence of the special intent, he/she does not need to prove the existence of military necessity? In what circumstances can, according to the Pre-Trial Chamber, military necessity be invoked? What is the difference between “military necessity” and “absolutely necessary for military operations”? When does IHL require such stricter threshold? (GC IV, Art. 53)

d. (Paras 640 – 648) Does the Court find that the war crime of pillaging was committed in the present case? On the basis of which elements?

V. Command Responsibility

9.

a. (Para. 170) In order to find a commander responsible for the crimes committed by his or her subordinates, what elements must be fulfilled?

b.(Paras 176 – 177, 705) How does IHL address the responsibility of commanders and other superiors for war crimes committed by their subordinates? Was Mr Bemba a military commander *de iure*? Was he effectively acting as one? According to the Court, does the fact that a commander is *de iure* or *de facto* have any impact on the level of control required to establish command responsibility? Why? Why not? Does the expression “military commander” exclude, according to the Court, individuals who do not perform solely military functions? (P I, Art. 86; CIHL Rule 153)

c.(Paras 180 – 181) How does the Court interpret the terms “command” and “authority”? (Para. 183) How does the Court interpret the requirement of “effective control”? (Paras 188 – 190) What are the factors that should be taken into consideration to make such an assessment? (Para. 184) Is the fact that there are intermediary subordinates between the commander and the forces which committed the crime relevant? Has there to be, nevertheless, a hierarchical relationship? (Para. 187) Is the number of the subordinates relevant? (Para. 698) How does the Court explain the difference between “unity of command” and the assessment of effective control? What is the relevant parameter to consider? (Para. 188) Is it a case-by-case determination, according to the Court?

10. (Paras 198 – 208, 403, 697 – 705, 726 – 741)

a. (Paras 198, 201) What is considered as a “necessary” measure by the Court? A “reasonable” measure? Are the duties imposed upon commanders by Art. 28(a)(ii) of the ICC Statute alternative? Or may even failure to comply with one of the obligations entail criminal responsibility of the commander? Can, in your opinion, dissemination of IHL be considered a duty upon the commander, insofar as it constitutes a measure in his/her material power helping prevent violations of the subordinate forces? (ICC Statute, Art. 28(a)(ii))

b. (Paras 697 – 705) What arguments does the Court make to argue that Mr. Bemba had effective authority and control over the MLC forces who committed the crimes?

c.(Paras 726 – 734) What measures is a commander obliged to adopt as part of his/her duty to prevent? Did Mr Bemba put in place appropriate measures to react to the allegations of the crimes committed by his forces? Why? Why not? (Para. 729) According to the Court, what could have Mr. Bemba done, to fulfil his duties? (Paras 738 – 740) What would have been the impact of the adoption of adequate measures on the commission of the crimes? Why would the risk that soldiers would “rape for self-compensation” (para. 739) have been reduced if soldiers had received adequate payment?

d.(Para. 726) Why was Mr Bemba found guilty although he investigated and repressed some crimes committed by his subordinates?

e. (Para. 206) Does the duty of a commander to repress include the duty to punish after the commission of a crime? Even for commanders of non-State armed groups such as Mr Bemba? (Para. 207) Does it include the

duty to investigate allegations of crimes committed by the subordinate forces? (*Para. 208*) What is the Commander required to do when he/she does not possess disciplinary powers? (*Paras 403, 697, 703, 733, 737*) Did Mr. Bemba have disciplinary powers over the MLC, including the ALC troops? (P I, Arts 86 and 87)

f. Must a commander of a non-State armed group such as Mr. Bemba establish a criminal justice system to avoid command responsibility for crimes committed by his subordinates? May he do so? Under IHL? Under IHRL? How else could he have avoided command responsibility? Is the alternative to hand suspects over to the State authorities realistic in cases in which a group fights (unlike Mr Bemba) against the State? (GC I - IV, Art. 3; CIHL Rule 99; P II, Art. 6 (2))

© International Committee of the Red Cross