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PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO

Public Document

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

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Detention Section

Victims Participation and Reparations Section

Other

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PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court"), to which the situation in the Central African Republic (the "CAR") was assigned,[1] issues the present decision pursuant to article 61(7)(a) and (b) of the Rome Statute (the "Statute") on the charges brought by the Prosecutor in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the "Case").

I. THE PERSON CHARGED

1. The Prosecutor presents the charges against Mr Jean-Pierre Bemba Gombo ("Mr Jean-Pierre Bemba") a national of the Democratic Republic of the Congo (the "DRC"), born on 4 November 1962 in Bokada, Équateur Province, in the DRC,[2] son of Jeannot Bemba Saolana, married to Lilia Teixeira and currently member of the Senate of the DRC.[3]

II. PROCEDURAL HISTORY

2. On 23 May 2008 the Chamber issued a "Warrant of arrest for Mr. Jean-Pierre Bemba Gombo",[4] pursuant to which Mr Jean-Pierre Bemba was arrested in the Kingdom of Belgium on 24 May 2008.

3. On 10 June 2008 the Chamber issued the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo" (the

[1] Presidency, ICC-01/05-22.
[2] Pre-Trial Chamber III, ICC-01/05-01/08-T-3-ENG ET, p. 2, lines 19-25.
[3] Pre-Trial Chamber III, ICC-01/05-01/08-1-tEN-Corr, p. 8.
[4] Pre-Trial Chamber III, ICC-01/05-01/08-1-tENG-Corr.

"Decision of 10 June 2008"),[5] as well as a new warrant of arrest entirely replacing the one issued on 23 May 2008.[6]

4. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered and transferred to the seat of the Court. He made his first appearance before the Chamber on 4 July 2008.[7]

5. On 31 July 2008 the Chamber issued the "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" (the "Disclosure Decision").[8]

6. On 12 September,[9] 23 October,[10] 17 November,[11] 12 and 16 December 2008,[12] as well as on 8 January 2009,[13] the Chamber issued six decisions on victims' participation, pursuant to which 54 applicants were recognised as victims in the Case.[14]

7. On 19 November 2008 the Prosecutor filed the "Prosecution's Communication of Amended Document Containing the Charges and an Amended List of Evidence pursuant to the Third Decision on the Prosecutor's Request for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo".[15]

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[5] Pre-Trial Chamber III, ICC-01/05-01/08-14-tENG.
[6] "Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008", ICC-01/05-01/08-15-tENG.
[7] Pre-Trial Chamber III, ICC-01/05-01/08-T-3-ENG.
[8] Pre-Trial Chamber III, ICC-01/05-01/08-55.
[9] Pre-Trial Chamber III, "Decision on Victim Participation", ICC-01/05-01/08-103-tENG.
[10] Pre-Trial Chamber III, "Second Decision on the question of victims' participation requesting observations from the parties", ICC-01/05-01/08-184.
[11] Pre-Trial Chamber III, "Third Decision on the Question of Victims' Participation Requesting Observations from the Parties", ICC-01/05-01/08-253.
[12] Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320; "Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims", ICC-01/05-01/08-322.
[13] Pre-Trial Chamber III, "Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims", ICC-01/05-01/08-349.
[14] Pre-Trial Chamber III, ICC-01/05-01/08-320, pp. 36-37.
[15] ICC-01/05-01/08-264.

8. On 21 November 2008 the Prosecutor filed the "Prosecution's Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence" (the "In-Depth Analysis").[16]

9. On 15 December 2008 the Defence filed a list of evidence and an in-depth analysis chart[17] in compliance with the "Decision on the Disclosure of Evidence by the Defence".[18]

10. On 19 December 2008 the Prosecutor filed the "Prosecution's Submission of Updated List of Evidence".[19]

11. On 29 December 2008 the Single Judge[20] issued the "Decision Setting the Date of the Confirmation Hearing",[21] as well as the "Decision on the Schedule for the Confirmation of Charges Hearing".[22]

12. From 12 to 15 January 2009 the Chamber held the confirmation of charges hearing (the "Hearing").

13. On 15 January 2009 the Presiding Judge specified that "the five-day's period for leave to appeal [the present decision] does not begin to run until Mr [Jean-Pierre] Bemba is notified of a French translation of the decision".[23]

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[16] ICC-01/05-01/08-278. It was undertaken pursuant to the Chamber's "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-232.

[17] "Communication par la Défense de la Liste de ses Eléments de preuve ainsi que du 'Chart Model of In-depth Analysis of defence evidences' conformément à la décision de la Chambre Préliminaire III du 5 Décembre 2008 intitulée 'Decision on the Disclosure of Evidence by the Defence'", ICC-01/05-01/08-319.

[18] ICC-01/05-01/08-311.

[19] ICC-01/05-01/08-330.

[20] Pre-Trial Chamber III, "Decision Designating a Single Judge", ICC-01/05-01/08-293.

[21] Pre-Trial Chamber III, ICC-01/05-01/08-335.

[22] Pre-Trial Chamber III, ICC-01/05-01/08-336.

[23] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 142, lines 4-9.

14. On the same day the Chamber granted leave to the parties as well as to the legal representatives of the victims to file supplementary written submissions.[24] On 26 January 2009, the Prosecutor,[25] the legal representatives of the victims,[26] and the Defence[27] filed their written submissions accordingly.

15. On 3 March 2009 the Chamber issued the "Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute" (the "Adjournment Decision"), in which it found that the evidence submitted appeared to establish a different crime within the jurisdiction of the Court and requested the Prosecutor to consider submitting to the Chamber an amended document containing the charges addressing article 28 of the Statute as a possible mode of criminal responsibility.[28]

16. On 19 March 2009 the Presidency decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the CAR to Pre-Trial Chamber II.[29]

17. On 30 March 2009 the Prosecutor filed an amended document containing the charges (the "Amended DCC"), an amended list of evidence (the "Amended List of Evidence") as well as an amended related in-depth analysis chart of the evidence (the "Amended In-Depth Analysis").[30]

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[24] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG, p. 141, lines 9-15.

[25] "Prosecution's Written Submissions Regarding The Confirmation Hearing Held On 12-15 January 2009", ICC-01/05-01/08-377.

[26] "Déclarations écrites du Représentant légal des victimes a/0278/08, a/0279/08,a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08,a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08,a/0466/08 et a/0467/08 suite à l'audience de confirmation des charges", ICC-01/05-01/08-376; "Déclarations écrites", ICC-01/05-01/08-380-Conf. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[27] "Conclusions de la Défense de Mr. Jean-Pierre Bemba Gombo dans le cadre de l'audience de confirmation des charges", ICC-01/05-01/08-379; ICC-01/05-01/08-379-Corr.

[28] Pre-Trial Chamber III, ICC-01/05-01/08-388.

[29] Presidency, "Decision on the constitution of Pre-trial Chambers and on the assignment of the Central African Republic situation", ICC-Pres-01-09.

[30] "Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence" and its related Annexes, ICC-01/05-01/08-395.

18. On 9 April 2009 the legal representatives of the victims jointly filed their written observations in response to the Amended DCC.[31]

19. On the same date the Single Judge issued a decision granting leave to Amnesty International (the "AI") to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence (the "Rules")[32] as it had requested on 6 April 2009.[33] On 20 April 2009 AI submitted its observations.[34]

20. On 24 April 2009 the Defence filed its final written submissions on the Amended DCC.[35]

21. On 27 April 2009 the Prosecutor and the Defence submitted their response to the *amicus curiae* observations.[36]

III. JURISDICTION AND ADMISSIBILITY

22. Article 19(1) of the Statute provides that:

> The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

[31] "Observations conjointes des Représentants légaux des victimes sur le Document amendé contenant les charges déposé le 30 mars 2009", ICC-01/05-01/08-400.
[32] ICC-01/05-01/08-401, p. 6.
[33] Pre-Trial Chamber II, ICC-01/05-01/08-399.
[34] "Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence", ICC-01/05-01/08-406.
[35] "Conclusions de la Défense en réponse à l'acte d'accusation amendé du 30 mars 2009", ICC-01/05-01/08-413.
[36] "Prosecution's Position Statement re: Amnesty International's Amicus Curiae Observations on Superior Responsibility filed on 20 April 2009", ICC-01/05-01/08-412; "Corrigendum Observations de la Défense en réponse du document soumis à la Cour par Amnesty International en date du 20 Avril 2009 intitulé 'Amicus Curiae Observations on superior responsibility submitted pursuant to rule 103 of the rules of procedure and evidence'", ICC-01/05-01/08-411-Corr.

23. The Chamber considers that, notwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognised principle of *"la compétence de la competence"*.[37]

24. The Chamber considers that the phrase "satisfy itself that it has jurisdiction" also 'implies' that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met. Thus, the Chamber's determination as to whether it has jurisdiction over the case against Mr Jean-Pierre Bemba is certainly a prerequisite for the issuance of the present decision under article 61(7)(a) and (b) of the Statute.

25. By contrast, the Chamber is of the view that the word "may" used in the second sentence of article 19(1) of the Statute shows that, in the absence of a challenge by any of the entities referred to under article 19(2) of the Statute, the determination of the admissibility of a case is a matter of discretion, subject to article 17(1) of the Statute. Nonetheless, the Chamber recalls the Decision of 10 June 2008 in which it determined that, on the basis of the evidence and information submitted by the Prosecutor, the Case falls within the jurisdiction of the Court and is admissible.[38]

26. Since the issuance of the 10 June 2008 Decision there has not been any change in the circumstances that negates its earlier findings on either jurisdiction or

[37] The ICTY Appeals Chamber in the *Tadić* case stated that the power of the ICTY to determine its own competence "is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial (...) tribunal", see ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 18; see also the statement in the *Nicaragua* case of the International Court of Justice (the "ICJ") that the "Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case", ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, "Jurisdiction of the Court and Admissibility of the Application", 26 November 1984, ICJ Reports (1984), para. 80.
[38] Pre-Trial Chamber III, Decision of 10 June 2008, ICC-01/05-01/08-14-tENG, paras 11-22.

admissibility of the Case. Thus, the Chamber determines that the Case continues to fall within the jurisdiction of the Court and is admissible.

IV. PROCEDURAL MATTERS

A. Evidentiary Threshold Applicable Under Article 61(7) of the Statute

27. The drafters of the Statute established three different, progressively higher evidentiary thresholds for each stage of the proceedings under articles 58(1), 61(7) and 66(3) of the Statute. The nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged.

28. At the present stage of the proceedings, the Chamber shall apply the evidentiary threshold set out in article 61(7) of the Statute, namely "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". This threshold is higher than the one required for the issuance of a warrant of arrest or summons to appear, thus protecting the suspect against wrongful prosecution[39] and ensuring judicial economy by allowing to distinguish between cases that should go to trial from those that should not.[40]

29. According to the Oxford Dictionary,[41] the term "substantial" can be understood as "significant", "solid", "material", "well built", "real" and rather than "imaginary". The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that "for the Prosecut[or] to meet [the] evidentiary burden, [he]

[39] Pre-Trial Chamber I, "Decision on the confirmation of charges" (the "*Katanga* decision"), ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber I, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", ICC-01/04-01/07-428-Corr, para. 5; Pre-Trial Chamber I, "Decision on the confirmation of charges" (the "*Lubanga* decision"), ICC-01/04-01/06-803-tEN, para. 37.

[40] Pre-Trial Chamber III, Disclosure Decision, ICC-02/05-01/08-55, paras 15 and 19; Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG-ET, p. 6, lines 8-12.

[41] OUP, *Shorter Oxford English Dictionary*, (OUP, 5th ed., 2002), p. 3091.

must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations".[42]

30. In light of the above, the Chamber shall determine whether there is sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba committed each of the crimes alleged in the Amended DCC. Based on this determination, the Chamber shall either confirm the charges against Mr Jean-Pierre Bemba pursuant to article 61(7)(a) of the Statute or decline to confirm them pursuant to article 61(7)(b) of the Statute.

31. Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage.

B. The Chamber's Approach to the Evidence

1. Preliminary issues

32. The Chamber recalls paragraph 51 of its Disclosure Decision requesting the parties to disclose different types of evidence in accordance with article 67(2) of the Statute and rules 76 to 79 of the Rules,[43] and further notes that they disclosed their evidence in due time before the Hearing in accordance with rule 121(3), (4) and (6) of the Rules.

33. In order to perform its functions under article 61(7) of the Statute, the Chamber relies primarily on the evidence disclosed between the parties and further

[42] See Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 37 to 39; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717-tEN, para. 65.
[43] Pre-Trial Chamber III, Disclosure Decision, ICC-01/04-01/08-55, para. 51.

communicated to the Chamber in compliance with rule 121(2)(c) of the Rules and the Chamber's Disclosure Decision.[44] Pursuant to that decision, disclosed evidence is part of the record of the Case regardless of whether or not it was presented by the parties at the Hearing (the "Disclosed Evidence").

34. The Chamber also takes into account the following supporting documents related to the Disclosed Evidence (the "Supporting Documents"), such as the Amended DCC,[45] the In-Depth Analysis,[46] the Amended List of Evidence and the Amended In-Depth Analysis[47] filed by the Prosecutor on 30 March 2009, the written submissions filed by the Prosecutor on 26 January 2009,[48] the written submissions filed by the legal representatives of the victims on 26 January and 9 April 2009,[49] the written observations filed by the Defence on 26 January[50] and 24 April 2009,[51] the *amicus curiae* observations filed by AI on 20 April 2009[52] and the related observations submitted by the Defence[53] and the Prosecutor on 27 April 2009.[54]

35. The Chamber, in making its final determination pursuant to article 61(7) of the Statute, will equally consider, in addition to the Disclosed Evidence and Supporting Documents, the arguments presented by the participants at the Hearing, such as by

[44] Pre-Trial Chamber III, Disclosure Decision, ICC-01/04-01/08-55, paras 43-44.
[45] ICC-01/05-01/08-395-Anx3.
[46] ICC-01/05-01/08-278.
[47] Amended In-Depth Analysis, ICC-01/05-01/08-395-Anx4.
[48] ICC-01/05-01/08-377.
[49] ICC-01/05-01/08-376; ICC-01/05-01/08-380-Conf; ICC-01/05-01/08-400. The Chamber, being aware of the confidential nature of the filing ICC-01/05-01/08-380, does not consider its mention to be inconsistent with the confidential nature of the document as such.
[50] ICC-01/05-01/08-379; ICC-01/05-01/08-379-Corr.
[51] ICC-01/05-01/08-413.
[52] ICC-01/05-01/08-406.
[53] ICC-01/05-01/08-411.
[54] ICC-01/05-01/08-412.

means of flash presentations[55] presented by the Prosecutor or the table presented by the Defence.[56]

36. In sum, to make its determination under article 61(7) of the Statute, the Chamber's consideration of evidence will take account of all Disclosed Evidence between the parties, including the evidence presented at the Hearing and referred to in the Supporting Documents.[57]

37. In the next section, the Chamber will set out general evidentiary principles and refrain from assessing any specific piece of evidence. Accordingly, the Chamber will analyse the relevance and probative value of the Disclosed Evidence in parts V and VI.

38. In laying down the evidentiary principles underpinning this decision the Chamber is guided by articles 21, 64, 67, 69 of the Statute, and rules 63, 64, 68, 70, 71, 76 to 78, 121 and 122 of the Rules.

39. The Chamber also takes into consideration the evidentiary principles as interpreted in previous decisions of the Court,[58] as well as internationally recognised human rights standards as provided for in article 21(2) and (3) of the Statute.

2. Assessment of the Disclosed Evidence

[55] Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 102, line 18 to p. 103, line 2; p. 103, line 24 to p. 104, line 2; p. 105, lines 7-10. Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 2, line 24 to p. 3, line 21; and Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 7, lines 21-23.
[56] ICC-01/05-01/08-373-Conf-Anx. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the document as such.
[57] Similarly, Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 66.
[58] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717; Pre-Trial Chamber I, *Lubanga* decision", ICC-01/04-01/06-803-tEN.

40. In light of the above-mentioned provisions, in assessing the Disclosed Evidence, the Chamber will consider its relevance to the present case, its probative value and admissibility.

a) Relevance and probative value of the Disclosed Evidence

41. Relevance requires nexus between the specific piece of evidence and a charge or a fact of the case to be proven. The Chamber holds the view that evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of an issue in a case more or less probable than it would be without that evidence.[59] In other words, relevance is the relationship between a piece of evidence and a fact that is sought to be proven. The existence of such piece of evidence tends to increase or decrease the probability of the existence of the fact. In assessing the relevance of the evidence, the Chamber makes a determination on the extent to which it is rationally linked to the fact in question.[60]

42. The Chamber shares the view that evidence is relevant only if it has probative value.[61] Probative value is the weight to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence.[62] Each piece of evidence has to provide a certain degree of probative value in order to be constructive and decisive

[59] R. May, *International Criminal Evidence*, (Transnational Publishers, 2002), p. 102; ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 36; See also ICTY, *Prosecutor v Galić*, Case No. IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92*bis*", 7 June 2002, para. 35 ("evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C)"); ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, "Order on Procedure and Evidence", 11 July 2006 (as modified by the "Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence," 16 August 1997).

[60] D. Piragoff in: O. Triffterer (ed.), *Commentary on the Rome Statute. Observers' Notes, Article by Article*, (Nomos Verlag, 2nd ed., 2008), p. 1322, MN 37; ICTY, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21, "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to provide a Handwriting Sample", 19 January 1998, paras 17 and 30.

[61] D. Piragoff in: O. Triffterer (ed.), *Commentary on the Rome Statute Observers' Notes, Article by Article*, (Nomos Verlag, 2nd ed., 2008), p. 1307, MN 9.

[62] ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 36.

for the Chamber in making its determination pursuant to article 61(7) of the Statute. The general principle of discretion as set out in paragraphs 61 and 62 of the present decision, is applied broadly in assessing the relevance of evidence.[63] Accordingly, the Chamber gives each piece of evidence the weight that it considers appropriate. The Chamber reiterates that in making its assessment, it is not bound by the parties' characterisation of the Disclosed Evidence, but makes its own assessment of each piece of evidence.[64] In doing so, the Chamber is guided by the various factors specified in the present decision.

43. The Chamber recalls that its decision to confirm or decline to confirm the charges based on the Disclosed Evidence is made in light of the evidentiary threshold applicable at the pre-trial stage, which is lower than the threshold applicable at the trial stage.

44. The Chamber assesses both the relevance and the probative value of the evidence regardless of its type (direct or indirect), and which party has disclosed it. It then determines to what extent the pieces of the Disclosed Evidence contribute to the findings of the Chamber in accordance with article 61(7) of the Statute.

b) Admissibility of the Disclosed Evidence

45. The Chamber notes that, although related, relevance and probative value on the one hand, and admissibility on the other, are distinct concepts dealt with under article 69(4) and (7) of the Statute.

46. Concerning admissibility, the Chamber recalls that neither the Statute nor the Rules provide that a certain type of evidence is *per se* inadmissible. The Chamber *may*, pursuant to article 69(4) of the Statute, and *shall*, pursuant to article 69(7) of the

[63] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, para. 100; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 76 and 77.
[64] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 6, line 8 to p. 7, line 3.

Statute and rule 63(3) of the Rules, rule on the admissibility of the evidence on an application of a party or on its own motion if grounds for inadmissibility set out in the aforesaid provisions appear to exist. The Chamber observes that neither party challenged the admissibility of any piece of evidence when it was submitted, and it also did not detect any of the grounds to rule out some pieces of the Disclosed Evidence as inadmissible.

c) Approach to direct and indirect Disclosed Evidence

47. The Chamber identifies the Disclosed Evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of the United Nations (the "UN"), Non-Governmental Organisations (the "NGO" or "NGOs") and media reports. Pursuant to rule 76 of the Rules, evidence may also be oral, in particular when it is rendered by witnesses called to testify, or written, such as copies of witness statements, material covered by rule 77 of the Rules, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and/or audio recorded evidence. In this regard, the Chamber notes that neither party relied on live witnesses during the Hearing.

48. With regard to direct evidence, the Chamber observes that in the present case the parties adduced, *inter alia*, eye-witness testimonies emanating from known or anonymous witnesses or presented in summary witness statements.

49. Direct evidence provides first-hand information, which has an impact on how it is used by the Chamber. A careful review of direct evidence (written statement of an eye-witness, for example) to ensure that it is both relevant and trustworthy is sufficient for the Chamber to give it high probative value, regardless of the party which presented it. For the purposes of this decision, the Chamber may, subject to article 69(7) of the Statute, rely on a single piece of direct evidence to a decisive extent by reason of its relevance and high probative value.

50. However, with regard to direct evidence emanating from an anonymous source, the Chamber shares the view, adopted in other pre-trial decisions[65], that it may cause difficulties to the Defence because it is deprived of the opportunity to challenge its probative value. This also holds true for summaries of witness statements. The Chamber is fully aware that the use of anonymous witness statements and summaries is permitted at the pre-trial stage, particularly because the evidentiary threshold is lower than the threshold applicable at the trial stage.[66] However, to counterbalance the disadvantage that it might cause to the Defence, such evidence is considered as having a rather low probative value. More specifically, the probative value of anonymous witness statements and summaries is lower than the probative value attached to the statements of witnesses whose identity is known to the Defence.

51. As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it, but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence,[67] the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence.

52. The Chamber approaches direct and indirect evidence differently and finds it necessary to lay down its approach with regard to indirect evidence. The Chamber adopts and follows a two-step approach. First, it assesses the relevance, probative value and admissibility of indirect evidence, as it would undertake with respect to

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[65] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, para. 106; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 119.

[66] See also article 61(5) of the Statute providing for the acceptance of summary evidence at pre-trial stage; further reference is made to Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-774, para. 47.

[67] See for example the approach taken in ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, para. 28.

direct evidence. Once this assessment is made, it then turns to the second step, namely whether there exists corroborating evidence, regardless of its type or source. Thus, the Chamber is able to verify whether the piece of evidence in question, considered together with other evidence, acquires high probative value as a whole.[68]

53. This approach allows the Chamber to ensure that the information contained in indirect evidence is corroborated by other evidence of higher or lower probative value.[69] The Chamber is aware of rule 63(4) of the Rules which provides that the "Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence",[70] but finds that more than one piece of indirect evidence having low probative value is required to prove an allegation made.

54. In sum, this approach enables the Chamber to make its determination pursuant to article 61(7) of the Statute even if the evidence as a whole relating to one charge lacks direct evidence, and is only supported by pieces of indirect evidence, provided that their probative value allows the Chamber to determine that the threshold established in that article is met.

d) Other evidentiary issues

55. The Chamber is aware of possible inconsistencies contained either within one or amongst several pieces of evidence.[71] Consequently, the Chamber carefully assesses each and every potential inconsistency and factors it into its assessment of the

[68] In the same line, see ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 37.
[69] For a similar approach, see Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, para. 121; ICTR, *The Prosecutor v Kayishema and Ruzindanda*, Case No. ICTR-95-I, "Trial Judgment", 21 May 1999, para. 80.
[70] See for a similar approach in ICTY, *Prosecutor v Tadić*, Case No. IT-97-1-T, "Opinion and Judgment", 7 May 1997, para. 539; ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-A, "Appeals Chamber Judgment", 15 July 1999, paras 63 and 65.
[71] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 116.

probative value of the evidence for each issue to be proven. It should be noted that inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it.[72] Rather, in order to define its probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence.[73]

56. The Chamber also examines the intrinsic coherence of each piece of evidence.[74] As stated above, one piece of evidence may be used to prove more than one issue at stake. Therefore, inconsistencies contained within one piece of evidence have to be assessed in relation to a specific issue. Thus, inconsistencies in such a piece of evidence might be so significant as to bar the Chamber from using it to prove one specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it.

57. With regard to the testimony of witnesses who, due to, *inter alia*, possible political or other underlying motives, may cast doubt on their reliability, the Chamber considers that an evaluation must be made for each individual witness.[75] Accordingly, the Chamber does not automatically reject evidence solely because the witness might be politically or otherwise motivated, but assesses the witness's credibility on each issue to be decided upon and in light of the evidence as a whole.[76]

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[72] This approach is followed as well in Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 116; see also ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 49.

[73] See for a similar approach ICTR, *The Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95-1, "Trial Judgment", 21 May 1999, paras 135 and 323.

[74] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 77.

[75] See for example ICTY, *Prosecutor v. Tadić*, Case No. IT-97-1-T, "Opinion and Judgment", 7 May 1997, para. 541; see also ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, "Judgment", 30 November 2005, para. 15; ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 61.

[76] Similar approach taken in Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 121, 122, 219-232; see also ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 61.

e) Case-by-case approach to the Disclosed Evidence

58. In assessing the Disclosed Evidence, the Chamber considers the unique nature of every single piece of evidence, the specificities of the different charges, the constituent elements of the counts, the facts of the Case as well as the distinctive relations between them and the relevant piece of evidence. Thus, the Chamber takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence.[77]

59. The Chamber gives the evidence the weight that it considers appropriate. Therefore, the Chamber is not bound by the parties' characterisation of the Disclosed Evidence, but makes its own assessment thereof.[78] In doing so, the Chamber is guided by various factors, such as the nature of the Disclosed Evidence, the credibility, the reliability, the source from which the evidence originates, the context in which it was obtained, and its nexus to the charges of the Case or the alleged perpetrator.[79] Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are taken into consideration, especially for witness statements.[80] The Chamber also assesses to what extent each piece of evidence contributes to its findings on the charges contained in the Amended DCC.

60. The Chamber further acknowledges that one and the same piece of evidence may be relevant to prove several issues or may, on the contrary, be relevant only to clarify one single question. In making its determination pursuant to article 61(7) of the Statute, the Chamber independently considers each such possible combination of

[77] Along the same line, see Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 106; ICTY, *Prosecutor v Tadić*, Case No. IT-97-1-T, "Opinion and Judgment", 7 May 1997, paras 537 and 538.

[78] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 6, line 18 until p. 7, line 3.

[79] D. Pigaroff in: O. Triffterer (ed.), *Commentary on the Rome Statute· Observers' Notes, Article by Article*, (Nomos Verlag, 2nd ed., 2008), pp. 1322 and 1323, MN 41.

[80] Trial Chamber I, "Decision on the admissibility of four documents", ICC-01/04-01/06-1399, paras 28-29; See also ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, "Decision on Defence Motion on Hearsay", 5 August 1996, para. 16.

pieces of evidence and their relation to the facts, the elements of the crimes and of the charges. It should be pointed out that not the amount of Disclosed Evidence but its probative value will prove essential and decisive for the Chamber when taking a decision on the Prosecutor's charges.

f) Discretionary power of the Chamber and its limitations

61. The Chamber recalls rule 63(2) of the Rules providing for its broad discretion to freely assess all the evidence submitted.

62. However, this broad discretion of the Chamber should not be exercised arbitrarily or without limitations. Consequently, in accordance with article 69(4) and (7) of the Statute, the Chamber's discretion is limited by the relevance, probative value, and admissibility of each piece of evidence.

C. Issues Raised by the Defence as to the Form of the Amended DCC

63. The Chamber recalls rule 121(3) of the Rules, which reads:

> The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

64. The Chamber also recalls that regulation 52 of the Regulations of the Court (the "Regulations") states that the document containing the charges shall include, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".

65. The Chamber notes that the Defence challenges the substantiation of the counts set out by the Prosecutor in the Amended DCC in which he uses the expression "include, but (...) not limited to" when listing the pertinent incidents.[81]

66. The Chamber takes the view that the Defence's challenge cannot be upheld. The Chamber finds that, at the pre-trial stage, the Prosecutor needs to provide not all but only *sufficient* evidence which allows the Chamber to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged. Therefore, the Chamber is of the view that the expression "include, but (...) not limited to" does not infringe the rights of the Defence at this stage.

67. The Chamber further notes that in paragraphs 32, 33 and 35 of its written submission responding to the Amended DCC[82] the Defence alleges that the terms "from on or about 26 October 2002 to 15 March 2003" used by the Prosecutor in reference to each count are imprecise and confusing, and that a precise date should be specified for each specific crime.

68. The Chamber agrees that, in accordance with regulation 52 of the Regulations, each specific incident should be dated as precisely as possible. However, the Chamber notes that the Prosecutor did provide the Defence with specific dates for each specific incident under each count.[83] Therefore, the Chamber finds the Defence's argument irrelevant in the present case.

69. The Chamber further notes the Defence's submission of 24 April 2009[84] in which it alleges that the Prosecutor in the Amended DCC[85] reopened the debate on Mr Jean-Pierre Bemba's individual criminal responsibility under article 25(3)(a) of the Statute contrary to the Chamber's Adjournment Decision, requesting the Prosecutor

[81] ICC-01/05-01/08-413, para. 16.
[82] ICC-01/05-01/08-413.
[83] ICC-01/05-01/08-395-Anx3, pp. 33-37.
[84] ICC-01/05-01/08-413.
[85] ICC-01/05-01/08-395-Anx3.

to elaborate on article 28 of the Statute.[86] It thus requests the Chamber to reject the part of the Amended DCC relating to article 25(3)(a) of the Statute.[87] In the alternative, if the Chamber were to take into consideration the Prosecutor's elaboration on article 25(3)(a) of the Statute contained in the Amended DCC, the Defence reiterates the arguments presented in its written submissions filed on 26 January 2009,[88] the oral arguments presented at the Hearing,[89] and the elaboration on article 25(3)(a) contained in the written submissions filed on 24 April 2009.[90]

70. After a careful review of the Amended DCC and in comparison with the initial document containing the charges of 17 October 2008,[91] the Chamber finds that the Amended DCC is consistent with the Chamber's Adjournment Decision,[92] since it does not contain any substantive change under article 25(3)(a) of the Statute. In light of the above, the Chamber finds that the Defence's request is unfounded. Nevertheless, the Chamber may take into consideration the arguments submitted by the Defence in the written submissions filed on 24 April 2009,[93] if necessary.

[86] Pre-Trial Chamber III, ICC-01/05-01/08-388, para. 48: "In this respect, the Chamber [...] clarifies that any further evidence submitted by the Prosecutor will not be considered."
[87] ICC-01/05-01/08-413, para. 99.
[88] ICC-01/05-01/08-379.
[89] ICC-01/05-01/08-413, para. 100; Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET. The Defence challenged, *inter alia*, the form of the amended charges.
[90] ICC-01/05-01/08-413, paras 102-127.
[91] ICC-01/05-01/08-169-Anx3A.
[92] Pre-Trial Chamber III, ICC-01/05-01/08-388, para. 48.
[93] ICC-01/05-01/08-413, paras 102-127.

V. CRIMES CHARGED BY THE PROSECUTOR

A. Crimes Against Humanity

71. In the Amended DCC, the Prosecutor charges Mr Jean-Pierre Bemba with murder (article 7(1)(a) of the Statute), rape (article 7(1)(g) of the Statute) and torture (article 7(1)(f) of the Statute) as crimes against humanity falling within the jurisdiction of the Court.

72. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of murder and rape constituting crimes against humanity within the meaning of articles 7(1)(a) and 7(1)(g) of the Statute were committed as part of a widespread attack directed against the civilian population carried out in the CAR from on or about 26 October 2002 to 15 March 2003. However, the Chamber rejects the cumulative charging approach of the Prosecutor and declines to confirm count 3 of torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute. The Chamber bases this finding on the following considerations.

1. Contextual elements of crimes against humanity

a) The law and its interpretation

73. At the outset, the Chamber recalls that the *chapeau* of article 7 of the Statute reads as follows:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)

74. Any of the acts enumerated in article 7(1)(a) to (k) of the Statute will thus constitute a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population with the perpetrator having knowledge of the attack.

(i) Existence of an "attack directed against any civilian population"

75. Concerning the definition of the term "attack", the Elements of Crimes clarify that it does not necessarily equate with a "military attack".[94] Rather, the term refers to a campaign or operation carried out against the civilian population, the appropriate terminology used in article 7(2)(a) of the Statute being a "course of conduct".[95] The commission of the acts referred to in article 7(1) of the Statute constitute the "attack" itself and, beside the commission of the acts, no additional requirement for the existence of an "attack" should be proven.[96]

76. As specified in the *chapeau* of article 7 of the Statute, the underlying offences defined in article 7(1) of the Statute must be directed against "any civilian population" to constitute crimes against humanity. Although not defined in the Statute, this requirement is not novel. The Chamber concurs with Pre-Trial Chamber I which has stated that the potential civilian victims under article 7 of the Statute could be of any nationality, ethnicity or other distinguishing features.[97] Furthermore, this requirement means that the civilian population must be the *primary object* of the attack and not just an incidental victim of the attack.[98]

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[94] Elements of Crimes, Introduction to article 7 of the Statute, para. 3.

[95] R. Dixon in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (Nomos Verlag, 2nd ed., 2008), p. 175.

[96] As seen in ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, "Judgment", 2 September 1998, para. 581.

[97] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 399; see also O. Triffterer (ed.), *Commentary on the Rome Statute· Observers' Notes, Article by Article*, (1999), p. 381; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, "Trial Judgment", 7 May 1997, para. 635; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, "Trial Judgment", 22 February 2001, para. 423.

[98] ICTY, *Prosecutor v Kunarac et al* , Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, paras 91 and 92; ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, "Trial Judgment", 31

77. Therefore, the Chamber is of the view that the Prosecutor must demonstrate that the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals.[99] However, the Prosecutor need not prove that the *entire* population of the geographical area, when the attack is taking place, was being targeted.[100]

78. The Chamber observes that the term "civilians" or "civilian population" is not defined in the Statute. However, according to the well-established principle of international humanitarian law, "[t]he civilian population (...) comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants".[101]

79. The Chamber notes that the phrase "attack directed against any civilian population" is further developed in the definition provided for in article 7(2)(a) of the Statute, which reads:

> "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

July 2003, para. 624; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, "Trial Judgment", 29 November 2003, para. 33.

[99] For a similar approach, see ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, "Trial Judgment", 31 July 2003, para. 627; ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, para. 90.

[100] For a similar approach, see ICTR, *The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, "Trial Judgment", 7 June 2001, para. 80; ICTR, *The Prosecutor v Semanza*, Case No. ICTR-97-20-T, "Trial Judgment", 15 May 2003, para. 330; ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, para. 90.

[101] As summarized in ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, "Trial Judgment", 22 February 2001, para. 425; see also pertinent provisions in other international instruments reflecting this differentiation, such as article 3 common to the 1949 Geneva Conventions; article 4 of the Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, United Nations Treaty Series ("UNTS"), vol. 75, p. 135; and articles 43 and 50 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (the "Additional Protocol I"), UNTS, vol. 1125, p. 3.

80. This article specifies that the two cumulative elements, i.e. the multiple commission of acts and the attack being pursuant to or in furtherance of a State or organizational policy to commit such attack, should also be present. Thus, the Chamber has to explore these additional legal requirements.

81. The legal requisite of "multiple commission of acts" means that more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred.[102] The requirement of "a State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised.[103] Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[104]

(ii) Existence of a "widespread or systematic attack"

82. The Chamber notes that the terms "widespread" and "systematic" appearing in the *chapeau* of article 7 of the Statute are presented in the alternative. The Chamber considers that if it finds the attack to be widespread, it needs not consider whether the attack was also systematic.[105] Therefore, the Chamber will confine itself to examining only the requirement that the attack be "widespread".

83. The Chamber considers that the term "widespread" connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with

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[102] R. Dixon in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (Nomos Verlag, 2nd ed., 2008), pp. 234-235.
[103] Similarly seen in ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, "Judgement", 7 May 1997, para. 653.
[104] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 396.
[105] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 412; see also ICTY, *Prosecutor v Kunarac et al*, Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, para. 93.

considerable seriousness and directed against a multiplicity of victims.[106] It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.[107] The underlying offences must also not be isolated.[108]

(iii) Nexus required between the acts of the perpetrator and the "attack directed against any civilian population"

84. To meet the requirement "as part of" an attack as specified in the *chapeau* of article 7(1) of the Statute, the acts referred to in article 7(1)(a) to (k) of the Statute must be committed as part of a widespread or systematic attack directed against a civilian population.[109] This requirement is commonly considered as the nexus between the acts of the perpetrator and the attack.

85. In the Elements of Crimes, the nexus element is one of the legal requirements for establishing the commission of acts such as murder and rape as crimes against humanity and is thus developed as a constituent element of each underlying offence.

86. In determining whether an act forms part of a widespread attack, the Chamber considers the characteristics, the aims, the nature or consequences of the act.[110]

(iv) Crimes against humanity committed "with knowledge of the attack"

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[106] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 395 and 398; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-40-T, "Trial Judgment", 2 September 1998, para. 580.

[107] See for a similar approach, ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-T, "Trial Judgment", 3 March 2000, para. 206; ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, "Appeals Chamber Judgment", 17 December 2004, para. 94; see also G. Werle, *Principles of International Criminal Law*, (TMC Asser Press, 2005), p. 225, para. 656.

[108] See for a similar approach, ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, para. 96; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, "Appeals Chamber Judgment", 17 December 2004, para. 94; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60 T, "Trial Judgment", 17 January 2005, paras 545-546.

[109] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 400.

[110] Similarly seen in ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, "Trial Judgment", 1 December 2003, para. 866; ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, "Trial Judgment", 15 May 2003, para. 326.

87. Under article 7(1) of the Statute, the perpetrator must act "with knowledge" of the attack directed against the civilian population. The attack is to be seen as the circumstance of the crimes against humanity and thus, the element "with knowledge" is an aspect of the mental element under article 30(3) of the Statute which states that "'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events".

88. The perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack.[111] However, the Elements of Crimes in paragraph 2 of the Introduction to article 7 of the Statute specify that the element "with knowledge" "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization."

89. The Chamber notes that the mode of responsibility concerning Mr Jean-Pierre Bemba is dealt with separately in part VI of this decision. Taking into consideration the conclusions of the Chamber in part VI, at this point, the Chamber confines its examination to the contextual element of crimes against humanity "with knowledge of the attack" which pertains to the knowledge of the attack by the alleged direct perpetrators, namely the *Mouvement pour la Libération du Congo* (the "MLC") troops in the field.

b) Findings of the Chamber

(i) Attack directed against the CAR civilian population by MLC troops from on or about 26 October 2002 to 15 March 2003

[111] For a comparable approach, see ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, "Appeals Chamber Judgment", 12 June 2002, para. 102; S. R. Lee, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, (Kluwer Law International, 1999), p. 98, FN 55; G. Werle, *Principles of International Criminal Law*, Part Four: Crimes Against Humanity, (TMC Asser Press, 2005), p. 231, para. 669.

aa) The existence of an "attack"

90. In the Amended DCC, the Prosecutor alleges that:

> The crimes against humanity alleged in Counts 1, 3 and 7 of the DCC, occurred in the context of a widespread or systematic attack against the CAR civilian population, within the meaning of Article 7(1) of the Statute.[112]

91. Having reviewed the Disclosed Evidence as a whole, the Chamber is satisfied that there is sufficient evidence with regard to the existence of an "attack" in the CAR territory from on or about 26 October 2002 to 15 March 2003.[113]

92. The Chamber notes that the Defence did not challenge the fact that CAR civilians suffered from many crimes, especially rapes, which occurred during the conflict.[114] The Chamber is satisfied that the existence of an attack, demonstrated by the commission of many criminal acts referred to in article 7(1) of the Statute, is established by numerous reliable direct and indirect pieces of evidence as further developed in part V.A.2. of the present decision dealing with the specific elements of crimes against humanity.

bb) The attack was "directed against the CAR civilian population"

93. In the Amended DCC, the Prosecutor alleges that:

> (...) the MLC troops looted, raped, and killed CAR civilians. Civilian properties were systematically looted, and civilians were forced to cook and clean for the MLC troops against their will and with no payment. Men, women and children

[112] ICC-01/05-01/08-395-Anx3, para. 38.
[113] See the statement of witnesses 6, 9, 25, 29, 31, 32, 42, 44, 46 and 80, ICC-01/05-01/08-278-Conf-AnxB, pp. 1-7. The Chamber, being aware of the confidential nature of the Prosecutor's filing, does not consider the revelation of this particular information to be inconsistent with the confidential nature of the document as such.
[114] Pre-Trial Chamber III, ICC-01/05-01/08-T-10 ENG ET, p. 49, lines 16-17.

> were raped by multiple MLC perpetrators (...). Civilians that were killed included those who tried to prevent or resist rapes, attacks or lootings.[115]

94. Having reviewed the Disclosed Evidence as a whole, the Chamber believes that there is sufficient evidence, in particular, statements of witnesses victimised by MLC soldiers' criminal acts while not taking active part in the hostilities, establishing that civilians have been attacked often inside their houses or in their courtyards[116] by armed MLC soldiers.[117] Indirect evidence also shows that the attack was directed against the CAR civilian population.[118]

95. In making this determination, the Chamber examined the Disclosed Evidence relevant to the means and methods used in the course of the attack, the status of the victims, their number, the nature of the crimes committed and the resistance to the assailants at the time. Considering these criteria, the Chamber is of the view that MLC soldiers were aware that the victims of the crimes, committed during the attack, were civilians. Further, the Chamber concludes that the attack cannot be

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[115] ICC-01/05-01/08-395-Anx3, para. 39.

[116] Statement of witness 23, EVD-P-00121 at 00045, EVD-P-00122 at 0069; statement of witness 22, EVD-P-02269 at 0495; statement of witness 29, EVD-P-0144 at 0018; statement of witness 42, EVD-P-02355 at 0834; statement of witness 80, EVD-P-02394 at 0172 and 0173; statement of witness 81, EVD-P-02398 at 0290; statement of witness 87, EVD-P-02413 at 0185.

[117] Statement of witness 22, EVD-P-00104 at 0506 and 514 ("kala" for kalashnikovs), EVD-P-00108 at 0539; statement of witness 23, EVD-P-02364 at 0095, EVD-P-00122 at 0058 and 0077 ("heavy weapon"); statement of witness 29, EVD-P-00145 at 0045 ("fusil"); statement of witness 38, EVD-P-0030-0164 at 0165 ("AK47"); statement of witness 42, EVD-P-02393 at 0802 ("Kalashnikov") and 0801; statement of witness 68, EVD-P-02388 at 0398; statement of witness 80, EVD-P-02394 at 0167 and 0168 ("arm"), EVD-P-02395 at 0202 ("gun"), 0206 and 0209; statement of witness 81, EVD-P-02397 at 0248 ("armed" and "kala"), EVD-P-02398 at 0283; statement of witness 87, EVD-P-02413 at 0185, 0186 and 0189 ("armed"), EVD-P-02414 at 0203, EVD-P-02415 at 0226; Fédération Internationale des Ligues des Droits de l'Homme ("FIDH") report, *"Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes"*, 1 October 2006, EVD-P-00014 at 0425; media report, EVD-P-00018 at 0656.

[118] EVD-P-02165 ; EVD-P-02258 ; radio broadcast, EVD-P-02259, track01 7:53 to 11:00; track02 0:50 to 4:20; see also In-Depth Analysis, ICC-01/05-01/08-278-Conf-Exp-AnxB, pp. 21-28 referring to the United Nations Development Programme ("UNDP") project, United Nations Resident Coordinator ("UNRC") weekly reports, AI and FIDH reports, British Broadcasting Corporation ("BBC") press articles, press articles of *"Le Quotidien"* and *"Jeune Afrique"*, and Radio France International ("RFI") radio broadcasts. The Chamber, being aware of the confidential nature of the annexes to the Prosecutor's filing ICC-01/05-01/08-278, does not consider the disclosure of this particular information to be inconsistent with the confidential nature of the document as such.

characterised as having been directed against a limited and randomly selected group of individuals but was effectively directed against the CAR civilian population.

96. The Chamber notes that the Defence did not disclose evidence to challenge the fact that the attack was directed against the CAR civilian population.[119] Referring to the statement of witness 22, the Defence maintained that the house-to-house search was justified only because the MLC troops were looking for rebels who could potentially hide among the civilian population.[120] Thus, the Defence argued that the attack was not *primarily* targeting the CAR civilian population.

97. The Chamber is not convinced by the Defence's argument that MLC soldiers were chasing only the troops of Mr François Bozizé ("Mr Bozizé"), who were considered at that time as rebels. The Chamber notes that, in order to substantiate its contention, the Defence relied on the sole statement of witness 22, which is insufficient to refute the crimes committed against other witnesses who provide direct evidence to the contrary.

98. Indeed, the Chamber considers that during the attack, MLC soldiers targeted *primarily* the CAR civilian population. This is particularly true regarding the attack at PK 12 since the evidence shows that MLC troops did not find any military opposition while entering PK 12 and that, at the time of the arrival of the MLC troops in this locality, Mr Bozizé's troops had already withdrawn to PK 22.[121]

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[119] "Liste des éléments de preuve de la Défense", ICC-01/05-01/08-319-Conf-AnxA. The Chamber is aware of the confidential nature of this filing, but does not consider the disclosure of this particular information to be inconsistent with the confidential nature of the document as such.

[120] ICC-01/05-01/08-379, pp. 20-21, fn 49; statement of witness 22, EVD-P-02359 at 0510.

[121] Statement of witness 80, EVD-P-02395 at 0187; statement of witness 23 reporting of his conversation "He said: 'when we came, we did not see any rebels'. And I confirmed to him that all the rebels had left already the place", EVD-P-02363 at 0071; letter of referral of the CAR government, "*Mémoire, Saisine de la Cour pénale internationale par l'État Centrafricain d'un renvoi en application des articles 13 et 14 du Statut de Rome*", EVD-P-00003 at 0147.

99. The Chamber considers that there is sufficient evidence to establish that the attack was also directed against the civilian population when MLC troops withdrew back to the DRC. The Chamber observes that, although no fighting occurred in Mongoumba between the MLC troops and Mr Bozizé's troops, criminal acts such as rapes were reported by direct victims at the end of the conflict. In addition, a witness stated that the MLC troops, while retreating back to the DRC, were not allowed to cross with goods looted from the civilian population.[122] As a result, the MLC troops crossed the Oubangui river from the CAR to the DRC and then returned shortly afterwards to Mongoumba to seek revenge *primarily* against the civilian population of Mongoumba.[123]

cc) Attack directed against the civilian population conducted by MLC troops

100. In the Amended DCC, the Prosecutor alleges that:

> MLC soldiers are directly responsible for physically committing, through direct means, crimes against humanity (...).[124]

101. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient direct and indirect evidence establishing that the attack of CAR civilians in Boy-Rabé, PK 12, PK 22 and Mongoumba was perpetrated by MLC troops in the period from on or about 26 October 2002, when they entered the territory of the CAR, until 15 March 2003, when they retreated from the CAR.[125]

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[122] EVD-P-02367 at 0038.

[123] Statement of witness 29, EVD-P-02367 at 0032, 0044 and 0048.

[124] ICC-01/05-01/08-395-Anx3, para. 87.

[125] Statement of witness 22, EVD-P-00104 at 0503-0504, 0512 and 0518; statement of witness 38, EVD-P-00150 at 0164; statement of witness 42, EVD-P-02393 at 0797 and 0802; EVD-P-02355 at 0827 and 0828, EVD-P-02356 at 0849; statement of witness 68, EVD-P-02388 at 0402; statement of witness 80, EVD-P-02394 at 0172 and 0173; statement of witness 81, EVD-P-02398 at 0290; AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045 at 0511; statement of witness 29, EVD-P-02367 at 0031-0033. Attack of civilians at PK 22 as MLC soldiers advanced in the territory of CAR (statement of witness 80 at EVD-P-02394 at 0173; statement of witness 42 at EVD-P-02355 at 0841; RFI broadcast reporting the killing of the interviewee's brother-in-law in PK22 at EVD-P-02258, track01, 07:51 to 08:55); attack of civilians in Damara, Bossembélé, Bossangoa as MLC progressed in CAR (statement of witness 42 at EVD-P-02355 at 0841); attack of Mongoumba as MLC

102. The Chamber is mindful of the Defence's contention that MLC soldiers were responsible for the crimes committed in the CAR, especially since other armed forces were involved in the fighting.[126] The Defence also argues that the criteria used by the Prosecutor to distinguish MLC troops from other troops engaged in the fighting were incorrect.[127] In addition, in its closing statements at the Hearing, the Defence screened a video of persons interviewed in Sibut who claimed that the MLC troops were freeing the CAR population from Bozizé's troops. By showing this video, the Defence intended to demonstrate that if the alleged crimes occurred during the attack in the CAR, they were not committed by MLC troops.[128]

103. The Chamber deems necessary to assess the probative value of the said video which is challenged by one of the legal representatives of the victims.[129] The legal representative of the victims asserted that this video-based evidence emanated from MLC supporters of Mr Jean-Pierre Bemba and that the interviewees, being local representatives of the city of Sibut appointed by Ange-Felix Patassé (Mr Patassé"), were not in a position to testify otherwise than in favour of the MLC troops who came to support Mr Patassé's regime.

104. The Chamber notes that the video is part of the MLC archives and was produced by MLC members in the town of Sibut in early 2003, at a time when the CAR was still under attack. The Chamber is also of the view that the interviewees' statements taken by a party to the conflict in time of war may be driven by fear and

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soldiers retreated (statement of witness 42 at EVD-P-02355 at 0841; FIDH report, *"Central African Republic, Forgotten, stigmatized: the double suffering of victims of international crimes"*, 1 October 2006, EVD-P-00014 at 0419).

[126] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 79, lines 7-25 and p. 80, lines 1-10.

[127] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 80, line 17; EVD-D01-00031 at 0486; EVD-P-00033; EVD-P-02336 at 0370.

[128] EVD-D01-00042.

[129] ICC-01/05-01/08-380-Conf, p. 5. The Chamber, being aware of the confidential nature of this filing, does not consider the revelation of this particular information to be inconsistent with the confidential nature of the documents as such.

therefore may not be objective and reliable. Hence, the Chamber concludes that a low probative value should be attached to this video-based evidence.

105. The Chamber therefore considers that the arguments of the Defence do not impact on the Chamber's finding that MLC troops were the direct identified perpetrators carrying out the attack in the CAR from on or about 26 October 2002 to 15 March 2003.

106. This finding of the Chamber is, in particular, substantiated by several witnesses who testified that their villages or towns were attacked throughout the said period by soldiers constantly identified as MLC soldiers and commonly called by the CAR population "Banyamulengue", regardless of their ethnic affiliation.[130] Further, the Chamber considers that MLC soldiers could be identified as the perpetrators of the crimes committed during the attack against the CAR based on such criteria as their military uniforms[131] and the use of the language Lingala, often mixed with a "little bit of French".[132] As noted by one of the legal representative of the victims,[133] even

[130] Criteria of origin: statement of witness 80, EVD-P-02395 at 0207; statement of witness 81, EVD-P-02398 at 0276. ("Je suis le commandant des rebelles de Bemba"); statement of witness 87, EVD-P-02413 at 0186, EVD-P-02415 at 0224; RFI broadcast dating 5 December 2002, EVD-P-02258, track01 from 02:29 to 03:12 (identified as "Banyamulengue" in Gobongo), FIDH report, "*Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0428; press article, EVD-P-00013 at 0344; Pre-Trial Chamber III, ICC-01/05-01/08-10-T-ENG ET, p. 16, lines 6-7; Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 68, lines 16-18.

[131] Criteria of military uniforms worn by MLC soldiers: statement of witness 23, EVD-P-02363 at 0056, 0057, 0058 and 0077; statement of witness 29, EVD-P-02367 at 0044, 0045, 0046 ; statement of witness 68, EVD-P-02388 at 0395; statement of witness 80, EVD-P-02394 at 0168, EVD-P-02395 at 0207; statement of witness 81, EVD-P-02398 at 0276; statement of witness 87, EVD-P-02413 at 0185, 0187, EVD-P-02414 at 0202 and at 0210; statement of witness 22, EVD-P-02359 at 0505, 0506, 0508 and at 0514, EVD-P-02360 at 0544 , 0545; statement of witness 38, EVD-P-00150 at 0165; statement of witness 42, EVD-P-02393 at 0801, 0802; Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 36, lines 3-6.

[132] Lingala as language used by MLC soldiers: statement of witness 23, EVD-P-02363 at 0057 and 0078; statement of witness 29, EVD-P-02367 at 0044, at 0048; statement of witness 42, EVD-P-02355 at 0817, 0836 and 0837, EVD-P-02393 at 0802; statement of witness 68, EVD-P-02388 at 0397-0398 , EVD-P-02389 at 0431; statement of witness 80, EVD-P-02394 at 0168 and 0169, EVD-P-02395 at 0193; statement of witness 81, EVD-P-02397 at 0248, EVD-P-02398 at 0276-0277; statement of witness 87, EVD-P-02413 at 0186, 0187, EVD-P-02414 at 0201, 0203; statement of witness 87, EVD-P-02414 at 0203, 0210; statement of witness 22, EVD-P-02359 at 0505, 0508 and 0514, EVD-P-02360 at 0544 , 0545; statement of witness 38, EVD-P-00150 at 0165; Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 16, lines 17-19 ; p. 36, lines 5 -9; Pre-Trial Chamber III,ICC-01/05-01/08-T-12-ENG ET, p. 68, lines 16-18.

though Lingala is different from the language spoken in the CAR (Sango) the CAR population could still recognise the language since the CAR and the DRC are neighbouring countries.

dd) The attack involved multiple commission of acts

107. In the Amended DCC, the Prosecutor alleges that "(...) the MLC troops committed crimes alleged in Counts 1, 3, and 7 by targeting a large number of civilian victims (...)".[134]

108. Having reviewed the Disclosed Evidence as a whole, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that a large number of CAR civilians were victims of crimes specified in the Amended DCC, including murder and that a majority were victims of rapes over a five-month period.[135] The Chamber notes that a witness also stated that, at the time when MLC troops were based at PK 12, six crimes a day on average were reported to him.[136] Therefore, the Chamber concurs on this point with the Prosecutor's submission that the said attack in the CAR resulted in a large number of victims.

ee) Attack pursuant to or in furtherance of an organizational policy

109. In the Amended DCC, the Prosecutor alleges that:

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[133] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 97, lines 9-25 and p. 98, lines 1-10.
[134] ICC-01/05-01/08-395-Anx3, para. 40.
[135] Witness 22 states that "many people" were killed in Bossangoa at EVD-P-02359 at 0512; EVD-P-00098 0103, para. 21; report of the CAR Ministry of Social Affairs, indicating 293 reported raped victims and 64 reported cases of murder, EVD-P-00078 at 0018 and 0048; CAR Ministry of Social Affairs, "*Synthèse des fiches d'identification des victimes de violences sexuelles au cours des événements du 25 au 31 Octobre 2002*", indicating 44 victims aged 12 to 65 years old reported to having been raped by MLC soldiers from 29 October to 8 November 2002 mainly at the locations PK 12 and PK 22, EVD-P-00067; media report indicating 248 identified victims of rape by MLC soldiers, EVD-P-00018 at 0655.
[136] EVD-P-00150 at 0165.

> (...) crimes against the CAR civilian population took place in the aftermath of military clashes between the MLC and Bozizé's rebels. Once the MLC troops established control over former rebel held territories, they systematically targeted the civilian population by conducting house to house searches, (...). (...) MLC troops sought to punish perceived rebel sympathizers. Women were raped on the pretext that they were rebel sympathizers. (...) Many of the women and girls who were raped feared being shot by combatants.
>
> By subjecting the CAR civilian population to cruel, inhuman and humiliating attacks, the MLC troops instilled a general climate of fear in the CAR population, with the hope of effectively destabilizing the opposing army.[137]

110. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that the attack perpetrated by MLC troops against the CAR civilian population was conducted pursuant to an organizational policy.

111. The Chamber recalls that the Defence pointed out inconsistencies in twelve pieces of evidence presented by the Prosecutor[138] to demonstrate that the crimes committed were only isolated acts and could not be considered as part of a widespread or systematic attack directed against the CAR civilian population.

112. The Chamber observes that, at the Hearing, the Defence quoted excerpts of witness statements showing that the attack directed against CAR civilians was neither organized nor planned.[139] For instance, the Defence referred to the statements of three witnesses to assert that the reported crimes were mainly sporadic pillaging rather than systematic rapes or murders of civilians.[140]

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[137] ICC-01/05-01/08-395-Anx3, paras 41 and 42.

[138] EVD-P-00001; EVD-P-00104; EVD-P-00148; EVD-P-00100; EVD-P-00098; EVD-P-00143; EVD-P-00149; EVD-P-00138; EVD-P-00100; EVD-P-00098; EVD-P-00148; EVD-P-00098.

[139] Statements of witnesses 31, 6 and 9, see Pre-Trial Chamber III, ICC-01/05-01/08-T-10-CONF-ENG ET, p. 53, The Chamber notes that this particular reference to the confidential version of the transcript of the Hearing, does not prejudice the confidentiality and content of the proceedings conducted in closed session; See also, Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 92, lines 7-10.

[140] Statements of witnesses 36, 31 and 40, Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 102, lines 8-12, p. 107, lines 13-20, p. 108, lines 2-3, p. 112, lines 3-10.

113.Finally, the Defence challenged the probative value of the statement of witness 47,[141] emphasizing that the reported statements of this witness[142] were contradicted by the testimonies of witnesses 6 and 9, since witness 9 denied the organised or planned nature of the attack. The Defence also maintained that the statements of six other witnesses never confirmed that the order to kill was allegedly given by Mr Jean-Pierre Bemba.[143]

114.In making its determination on the existence or not of an organizational policy and taking into account the arguments of both parties, the Chamber analysed the statement of witness 47 as a whole and attaches a low probative value to this piece of evidence since the witness is anonymous and the statement is not corroborated.

115. Having reviewed the Disclosed Evidence as a whole, the Chamber finds the Defence's challenge with regard to the lack of organizational policy untenable. The Chamber finds that MLC soldiers, when taking control of former rebel-held CAR territories, carried out attacks following the same pattern. They regularly threatened civilians for hiding rebels in their houses or committed crimes against civilians considered as rebels by MLC soldiers,[144] they followed an established house-to-house

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[141] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-CONF-ENG ET, p. 52, line 9 and p. 59, lines 19-25. The Chamber notes that this particular reference to the confidential version of the transcript of the Hearing does not prejudice the confidentiality and content of the proceedings conducted in closed session.

[142] Pre-Trial Chamber III, ICC-01/001/08-T-9-ENG ET, p. 96, lines 9 to 22; witness 47 states: "Jean-Pierre Bemba sent you to kill and not to have fun. (...) In Central African Republic, you don't have parents, wives and children. You go to war, kill all people you find, you destroy! We are in period of war" or "Thanks to Bemba we were lucky to have sexual relations with Central African women".

[143] Statements of witnesses 15, 36, 37, 40, 44 and 45; Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 75, lines 4-25, p. 76, lines 1-6.

[144] Statement of witness 22, EVD-P-00104 at 0510 and 0512 ("(...) we were pointed by people that we were protecting some rebels. That's why they came and they assaulted us."); statement of witness 23, EVD-P-00122 at 0070 ("you are the kind of person we are looking for"), EVD-P-00131 at 0101; statement of witness 29, EVD-P-00145 at 0037; statement of witness 38, EVD-P-0030-0164 at 0164 and 0166 (organised attack); witness 42, EVD-P-02355 at 0841, EVD-P-02356 at 0849; statement of witness 80, EVD-P-02394 at 0166, 0167, 0171and 0172; statement of witness 87, EVD-P-02413 at 0185; AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045 at 0509 and 511.

system of attack aimed at creating a climate of fear,[145] they broke into houses, looted goods and committed other crimes such as rape if the civilians resisted the troops.[146] Furthermore, they acted in groups often targeting the same houses several times a day.[147]

(ii) The "attack" was "widespread"

116. In the Amended DCC, the Prosecutor alleges that:

> (...) the MLC troops perpetrated mass rapes, mass looting and killings against the CAR civilian population in specific locations as they advanced in, and retreated out of the CAR. These locations include but are not limited to Bangui - PK 12, Boy-Rabé, Fou (also written as Fouh) - Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossemptélé. (...) The MLC troops committed the crimes alleged in Counts 1, 3 and 7 by targeting a large number of civilian victims. [148]

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[145] Statement of witness 22, EVD-P-02359 at 0517, EVD-P-00104 at 0507 (idea to terrorise the population); statement of witness 23, EVD-P-00131 at 0095 (idea to terrorise the population); statement of witness 23, EVD-P-00131 at 0096 ("They were many to commit the abuses. We were not the only victims. They abused all the population, Muslims and Christians."); statement of witness 26, EVD-P-00136 at 0180 and 0181 ("ils ratissaient les quartiers"); statement of witness 29, EVD-P-00145 at 0037 ("Ils sont allés de ville en ville, de village en village et ils ont créé la panique."); statement of witness 29, EVD-P-00145 at 0052 ("Ce sont des gens qui nous ont envahis et ils ont voulu nous humilier et ils nous ont humiliés."), EVD-P-02367 at 0037and 0044; statement of witness 38, EVD-P-00151 at 0168; statement of witness 80, EVD-P-02394 at 0168; statement of witness 68, EVD-2388 at 0399, FIDH report, *"Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes"*, 1 October 2006, EVD-P-00014 at 0422 and 0424; FIDH report, *"Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'"*, 1 February 2003, EVD-P-00001 at 0048; AI report, *"Central African Republic, Five months of war against women"*, 10 November 2004, EVD-P-00045 at 0511.

[146] Statement of witness 29, EVD-P-02367 at 0031; statement of witness 81, EVD-P-0028-0183 at 0200 and 0202; statement of witness 25, EVD-P-00138 at 0314; AI report, *"Central African Republic, Five months of war against women"*, 10 November 2004, EVD-P-00045 at 0510, 0513 and 0514; RFI broadcast, dating 5 December 2002, EVD-P-02258, track01 from 04:37 to 05:33; FIDH report, *"Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes"*, 1 October 2006, EVD-P-00014 at 0425.

[147] Statement of witness 22, EVD-P-02359 at 514; statement of witness 87, EVD-P-02413 at 0181 (seven MLC soldiers); statement of witness 81, EVD-P-02397 at 0254 (a group of MLC soldiers); statement of witness 81, EVD-P-0028-0183 at 0200 (second group); statement of witness 29, EVD-P-02367 at 0044 ("ils étaient par groupe par deux, ou trois"); FIDH report, *"Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes"*, 1 October 2006, EVD-P-00014 at 0422.

[148] ICC-01/05-01/08-395-Anx3, paras 38 and 40.

117.Having reviewed the Disclosed Evidence as a whole, the Chamber concurs with the Prosecutor's submission[149] and finds that there is sufficient evidence to establish that the attack directed against the CAR civilian population was widespread. The Chamber is satisfied that several direct witnesses suffered from MLC attacks in various locations such as Bangui (districts of Boy-Rabé and Fouh), PK 12 and Mongoumba.[150] The direct evidence establishing the attack on those locations is corroborated by indirect evidence relevant to a period of approximately five months. CAR towns like Bossangoa, Damara, Bossembélé, Sibut, Bozoum, Bossemptélé, PK 22, and Bangui were the numerous locations attacked.[151] In addition, the Chamber notes that the victims of rapes and sexual violence represented by one of the legal

[149] Mongoumba: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET , p. 27, lines 5-7; p. 84, lines 9-11; p. 85, lines 1-6; p. 91, lines 19-21; p. 94, lines 13-15; ICC-01-05-01-08-T-10-ENG ET , p. 21, lines 17-22; p. 126, lines 4-6; p. 133, lines 22-25; Bossangoa: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET , p. 90, lines 17-23; p. 94, lines 8-11 ; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 38, lines 3-10 ; Damara: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 27, lines 5-7; p. 90, lines 17-23; p. 94, lines 8-11; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 126, lines 4-6 ; Bossembélé: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 27, lines 5-7; p. 90, lines 17-23; p. 94, lines 8-11 ; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 126, lines 4-6 ; Sibut: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 27, lines 5-7; p. 90, lines 17-23 ; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 128, lines 5-7 ; Bozoum: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 27, lines 5-7; p. 90, lines 17-23; p. 94, lines 8-11 ; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 128, lines 5-7 ; Bossemptélé: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 27, lines 5-7; p. 90, lines 17-23 ; Fouh: Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 94, lines 16-17 ; Pre-Trial Chamber III, ICC-01-05-01-08-T-10-ENG ET, p. 16, lines 13-17.

[150] Statement of witness 22, EVD-P-00104 at 0503-0504, 0512 and 0518; statement of witness 38, EVD-P-00150 at 0164; statement of witness 42, EVD-P-02393 at 0797 and 0802, EVD-P-02355 at 0827 and 0828, EVD-P-02356 at 0849; statement of witness 68, EVD-P-02388 at 0402; statement of witness 80, EVD-P-02394 at 0172 and 0173; statement of witness 81, EVD-P-02398 at 0290; statement of witness 29, EVD-P-02367 at 0031-0033.

[151] Statement of witness 42, EVD-P-02356 at 0849; statement of witness 68, EVD-P-02388 at 0400, 0401 and 0404; statement of witness 80, EVD-P-02395 at 0187 and 0188; statement of witness 22, EVD-P-00104 at 0511, 0512 and 0513; statement of witness 80 at EVD-P-02394 at 0173 (the witness saw corpses in the street while fleeing from PK12 to PK22); statement of witness 9, EVD-P-02173 at 0157, who heard of raped victims from Bangui, Damara, Bossembélé, Bossemptélé, Bossangoa and Sibut; statement of witness 22, EVD-P-02359 at 0512 reports of killings in Bossangoa; statement of witness 42 at EVD-P-02393 at 0803, reports the killings in PK22; EVD-P-00145 at 0032, 0033, 0037, killings in Mongoumba and Bossangoa; statement of witness 26, EVD-P-00136 at 0175 and 0176, who reports the killings at PK12 and Bossembélé; FIDH report, "*Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0422; Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 69, lines 13 and 14; Pre-Trial Chamber III, ICC-01/05-01/08-T-9-ENG ET, p. 89, lines 9-20; p. 90, line 25; p. 91, lines 1-3, 7-9, and 23-25; p. 92, line 1.

representatives[152] are mainly from Bangui, Damara, Sibut, Bozoum, and Mongoumba[153] which strengthens the argument that the attack was widespread since it occurred within a large geographical area.

118. The Chamber notes that the Defence did not disclose evidence to challenge the widespread or systematic nature of the attack,[154] but even mentioned the numbers of "300, 400, 2000 rapes".[155] As noticed by one of the legal representatives[156] of the victims,[157] the Defence rather focused its demonstration on the lack of knowledge by Mr Jean-Pierre Bemba of the widespread or systematic attack directed against CAR civilians.[158] The Chamber further deals with this specific challenge of the Defence in part VI which addresses the criminal responsibility of Mr Jean-Pierre Bemba.

119. Furthermore, the Chamber recalls that the Defence mainly challenged the reliability of the statements of witnesses 6 and 9 presented as key witnesses by the Prosecutor,[159] arguing that the commission of crimes alleged by those witnesses could not be verified *in situ* and was mainly inferred from reported cases of rape collected by the Ministry of Social Affairs of the CAR which allegedly provided

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[152] Victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08.

[153] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 82, line 7; ICC-01/05-01/08-376, p. 12.

[154] "Liste des éléments de preuve de la Défense", ICC-01/05-01/08-319-Conf-AnxA. The Chamber is aware of the confidential nature of this filing, but does not consider the disclosure of this particular information to be inconsistent with the confidential nature of the document as such.

[155] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-CONF-ENG ET, p. 49 lines 16 and 17. The Chamber notes that this particular reference to the confidential version of the transcript of the Hearing, does not prejudice the confidentiality and content of the proceedings conducted in closed session.

[156] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 96, lines 6-8; ICC-01/05-01/08-380-Conf, p. 4. The Chamber, being aware of the confidential nature of this filing, does not consider it to be inconsistent with the confidential nature of the documents as such.

[157] Victims a/0271/08, a/0272/08, a/0273/08, a/0275/08, a/0277/08, a/0283/08, a/0284/08, a/0285/08, a/0286/08, a/0287/08, a/0288/08,a/0289/08, a/0290/08, a/0294/08, a/0390/08, a/0391/08, a/0393/08, a/0394/08, a/0395/08, a/0396/08,a/0468/08, a/0469/08, a/0470/08, a/0471/08, a/0472/08, a/0473/08, a/0474/08 , a/0475/08, a/0476/08, a/0477/08, a/0478/08, a/0479/08, a/0480/08, a/0481/08.

[158] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 91, lines 11-14, p. 103, lines 8-9 referring to the knowledge by Mr Jean-Pierre Bemba of "minor incidents, isolated incidents" and ICC-01/05-01/08-413, paras 215-224 and para. 281.

[159] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 103, lines 8-19, p. 112, lines 11-16, p. 114, lines 16-19.

medical reports to victims of rape.[160] The Chamber understands that the Defence alleged that these statements have low probative value because they are biased and that the two witnesses could not visit the alleged mass graves to verify their existence.

120. Having reviewed the arguments of both parties and the statements of these two particular witnesses, the Chamber recalls that these witnesses knew about the alleged facts not only through victims' cases they heard themselves, but also through their cooperation with an NGO, which was carrying out a humanitarian project to assist victims of rape. The Chamber notes that the evidence shows that this project was initiated at the end of November 2002, approximately one month after the first offences occurred in the CAR, at a time when Mr Patassé was still in power.[161]

121. The Chamber also notes that this project was partly funded by the United Nations Development Programme ("UNDP") which remains a neutral international agency assisting local governments regardless of their political orientation. The Chamber further observes that *in situ* visits were carried out by CAR ushers within the framework of this project.[162] In addition, the Chamber notes that witness 9, who was in contact with various victims, asserted several times that they freely told their story, uninfluenced by anyone, and that they did not receive any compensation for testifying.[163] The Chamber finds that the Defence did not demonstrate the contrary.

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[160] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-CONF-ENG ET, p .49 lines 24-25, p. 52 lines 3-8. The Chamber notes that this particular reference to the confidential version of the transcript of the Hearing, does not prejudice the confidentiality and content of the proceedings conducted in closed session.

[161] Report of the CAR Ministry of Social Affairs, Annex dated 25 November 2002, "*Arrêté portant création d'un Comité de Pilotage du Projet 'Assistance humanitaire aux filles et femmes victimes de viols et de violences inhérents aux événements du 25 Octobre 2002'*", EVD-P-00078, at 0076; statement of witness 9, EVD-P-00147 at 0114, para. 37; CAR Ministry of Social Affairs, "*Synthèse des fiches d'identification des victimes de violences sexuelles au cours des événements du 25 au 31 Octobre 2002*", EVD-P-00067.

[162] Report of the CAR Ministry of Social Affairs, Annex IX, EVD-P-00078.

[163] EVD-P- 00147 at 0112, para. 28 and at 0114, paras 38-40.

122. The Chamber also wishes to clarify that witness 6 stated that he did see some mass graves at PK 12 and PK 15 because he went to see them in person.[164] Witness 6 also stated that, although he did not gather precise information with regard to mass murders, he heard from several victims, who constantly reported to him, that, in case victims resisted rape during the attack by MLC soldiers, they were killed.[165]

123. In addition, the Chamber finds that witnesses 6 and 9 are not the sole witnesses who testified about the existence of an attack of a widespread nature since an important number of direct and indirect pieces of evidence corroborate the aforementioned evidence. In particular, the Prosecutor presented direct evidence by using statements of witnesses, who were personally victims of a crime.[166] Indirect evidence of the widespread nature of the crimes committed includes hearsay evidence, such as that provided in reports by the UN, the *Fédération Internationale des ligues des droits de l'homme* (the "FIDH"), AI, the *Organisation pour la Compassion et le Développement des Familles en Détresse* (the "OCODEFAD") and various media sources including the BBC, *Jeune Afrique* (the "JA") press articles and several extracts of *Radio France Internationale* (the "RFI") programmes, broadcasted at different dates during the alleged five-month attack.[167]

124. In sum, since the statements of witnesses 6 and 9 are thus corroborated, the Chamber considers them reliable and attaches probative value to them, and, as such, uses them in making its determination under article 61(7) of the Statute.

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[164] EVD-P-00098 at 0102.

[165] EVD-P-00098 at 0110.

[166] Statements of witnesses 22, 23, 29, 38, 42, 68, 80, 81 and 87.

[167] FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001, at 0048; EVD-P-00006, at 0082 and 0084, providing information on killings in Damara and Bossembélé; FIDH report, "*Central African Republic, Forgotten stigmatised. the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0424 and 0425; EVD-P-00017 and EVD-P-00019, at 0686 and 0689, killings of civilians mid-February 2003 during the re-capture of Bozoum, Sibut and Bossangoa; EVD-P-00169, killings in Bossembélé; RFI broadcast dating 5 December 2002, reporting the killing of the interviewee's brother-in-law in PK22, EVD-P-02258.

(iii) MLC troops acted "with knowledge" of the attack directed against the CAR civilian population

125. In the Amended DCC, the Prosecutor alleges that:

> MLC soldiers are directly responsible for physically committing, through direct means, crimes against humanity under article 7 of the Statute". (...) "MLC troops committed those crimes in the context of a military operation authorized by BEMBA, which involved acts to terrorise the CAR population and annihilate their ability to support the rebels.[168]

126. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that MLC troops had the knowledge that their individual acts were part of a broader attack directed against the civilian population which took place in the CAR for approximately five months. It is not contested by the parties that the MLC troops knew that they were called to help Mr Patassé to remain in power and were thus controlling parts of the CAR for approximately five months. The Chamber finds that the knowledge of the attack by MLC troops can be inferred from the methods of the attack they followed, as demonstrated above.[169]

2. Specific elements constituting crimes against humanity

127. The Prosecutor has charged Mr Jean-Pierre Bemba in the Amended DCC with the following acts constituting crimes against humanity.

a) Specific elements of murder (count 7)

128. In the Amended DCC, the Prosecutor alleges that:

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[168] ICC-01/05-01/08-395-Anx3, para. 87.
[169] See paragraph 115 of the decision.

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, crimes against humanity, by the killing of men, women and children civilians in the Central African Republic, in violation of [article] 7(1)(a) (...) of the Rome Statute.[170]

129. The Chamber concludes that there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of murder of CAR civilians was committed by MLC soldiers as part of the widespread attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with MLC soldiers having knowledge of such attack. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

130. The Chamber recalls that for a crime to be committed, two essential and distinct elements must be established: the *actus reus* element (material or objective element) and the *mens rea* element (mental or subjective element).

aa) *Actus reus*

131. The act of murder as a crime against humanity within the meaning of article 7(1)(a) of the Statute is not defined as such in the Statute. However, the Elements of Crimes offer limited guidance as to the *actus reus* in that they stipulate that "the perpetrator killed[171] one or more persons".

132. As recognised by the Court's jurisprudence, for the act of murder to be committed the victim has to be dead and the death must result form the act of murder.[172] The act itself may be committed by action or omission.[173] The Chamber

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[170] ICC-01/05-01/08-395-Anx3, p. 37.

[171] The Elements of Crimes clarify in fn 7 to article 7(1)(a) of the Statute that the term 'killed' is interchangeable with the term 'caused death'.

[172] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 421; see also ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, "Judgment", 2 September 1998, para. 589; ICTR, *The Prosecutor v*

stresses that the death of the victim can be inferred from factual circumstances, [174] and that the Prosecutor must prove the causal link between the act of murder and the victim's death.[175]

133. In determining whether the legal requirements of the act of murder as a crime against humanity are met, the Chamber points out the Prosecutor's obligation to provide the particulars in the charging document when seeking to prove that the perpetrator killed specific individuals.[176] While the Chamber concedes that there is no need to find and/or identify the corpse, the Prosecutor is still expected to specify, to the extent possible, *inter alia*, the location of the alleged murder, its approximate date, the means by which the act was committed with enough precision, the circumstances of the incident and the perpetrator's link to the crime.

134. However, the Chamber bears in mind the evidentiary threshold to be met at the pre-trial stage - "substantial grounds" threshold -[177] and the fact that in case of mass crimes, it may be impractical to insist on a high degree of specificity.[178] In this respect, it is not necessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator. Nor is it necessary that the precise number of victims be known.[179] This allows the Chamber to consider

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Rutaganda, Case No. ICTR-96-3-T, "Judgment", 6 December 1999, para. 80; ICTY, *Prosecutor v. Blaskić*, Case No. IT-35-14, "Judgment", 3 March 2000, paras 216-217; ICTY, *Prosecutor v Delalić, et al.*, Case No. IT-96-21, "Judgment", 16 November 1998, para. 424.

[173] See also for the same finding in Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 287.

[174] Similarly seen in ICTY, *Prosecutor v Knojelac*, Case No. IT-97-25, "Judgment", 15 March 2002, paras 326-327.

[175] P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, (Bruylant, 2006), p. 146; ICTY, *Prosecutor v Krnojelac*, Case No. IT-97-25, "Judgment", 15 March 2002, para. 329.

[176] ICTR, *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, "Judgment and Sentence", 21 February 2003, para. 49; see also W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, (CUP, 2006), pp. 360-361.

[177] See paragraphs 28 to 30 of the decision.

[178] As seen in ICTY, *Prosecutor v Kvočka et al*, Case No. IT-98-30/1, "Decision on Defence Preliminary Motions on the Form of the Indictment", 12 April 1999, para. 17.

[179] For a similar approach, see ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, "Judgment", 31 July 2003, para. 201.

evidence referring to "many" killings or "hundreds" of killings without indicating a specific number. [180]

bb) *Mens rea* required pursuant to article 30 of the Statute

135. The Chamber takes the view that article 30 of the Statute encompasses two forms of *dolus*, namely *dolus directus* in the first degree and *dolus directus* in the second degree.[181] This interpretation applies to all specific acts as crimes against humanity as referred to in article 7 of the Statute, as well as to all specific acts of war crimes listed under article 8 of the Statute.

136. The express language of article 30(1) of the Statute denotes that the provision is meant to function as a default rule for all crimes within the jurisdiction of the Court, "unless otherwise provided". Consequently, it must be established that the material elements[182] of the respective crime were committed with "intent and knowledge", unless the Statute or the Elements of Crimes require a different standard of fault. This conclusion finds support in paragraph 2 of the General Introduction to the Elements of Crimes which reads:

> 2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstances listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30

[180] This approach was also taken in ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-40-T, "Judgment", 2 September 1998, para. 282: Pursuant to a question from the Chamber as to the killing of teachers, witness K stated she was unsure how many were killed, but that she knew the names of some of them; ICTR, *The Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, "Judgment", 22 January 2004, para. 345: "Prosecution Witness GEA testified that he could not say how many people had died at that location, because "that day there were very many." (...)"; ICTR, *The Prosecutor v Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, "Judgment and Sentence", 21 February 2003, para. 631: the witness specified that "many people were killed as a result of this attack".

[181] See the elaboration on the forms of dolus in part VI of the decision, paragraphs 357 to 359.

[182] The general objective (material) elements of a crime are referred to in article 30(2) and (3) of the Statute as conduct, consequence and circumstance.

> applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

137. The Chamber further notes that paragraph 3 of the General Introduction of the Elements of Crimes stipulates that the "existence of intent and knowledge can be inferred from relevant facts and circumstances".

138. Taking into account that no mental element is specified in article 7(1)(a) of the Statute, the Chamber applies article 30 of the Statute.[183] The legal requirements to be proven are thus "intent and knowledge". The Chamber has to be satisfied that the perpetrator meant to cause death or was aware that death "will occur in the ordinary course of events" required by article 30(2)(b) of the Statute. In the case of murder as a crime against humanity, the intent can be inferred from the use of a firearm against unarmed persons.[184]

cc) Nexus requirement

139. The Prosecutor must demonstrate the nexus existing between the acts of murder and the attack,[185] thus proving that the acts of murder were committed by MLC troops as part of a widespread or systematic attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.

(ii) Findings of the Chamber

140. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that MLC soldiers killed civilians during the attack directed against the CAR civilian

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[183] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 423.

[184] ICTY, *Prosecutor v. Delalić et al* , Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 903: "In the instant case it is established that Miroslav Vujicic was shot and killed by one of the individuals participating in the collective beating, as described above, in the Čelebići prison-camp. The Trial Chamber finds that, under these circumstances, the use of a firearm against an unarmed individual demonstrates an intent to kill (...)".

[185] Elements of Crimes, article 7(1)(a) of the Statute, para. 2.

population carried out from on or about 26 October 2002 until 15 March 2003, thus committing crimes against humanity within the meaning of article 7(1)(a) of the Statute. The Chamber relies on the evidence related to the death of two civilians, in particular the murder of the cousin of witness 22 in Bossangoa, and the murder of the brother of witness 87 in Boy-Rabe. The Chamber does not rely on the other two incidents of deceased victims presented by the Prosecutor for its finding.

141. The Chamber notes that the Defence mainly challenged the probative value of the statements of witnesses 6, 9 and 47 providing information about the commission of the murders. As stated above, while the Chamber attaches a low probative value to the statement of the anonymous witness 47, the Chamber considers that the statements given by witnesses 6 and 9 have sufficient probative value since they are corroborated. More specifically, the Defence refers to the statement of witness 6 who says that he has no information that the "Banyamulenge" committed murder. The Chamber notes, however, that witness 6 simply states that he had no information regarding possible killings by MLC soldiers. In the Chamber's view, this personal assessment of the witness does not frustrate the evidence provided by other witnesses who have stated facts to the contrary. The Chamber, in particular, refers to pieces of indirect evidence establishing the occurrence of murders as part of the widespread attack directed against the CAR civilian population by MLC soldiers.[186]

[186] Statement of witness 80, EVD-P-02394 at 0173 ("We could see corpses in the streets" while fleeing from PK 12 to PK 22); statement of witness 22, EVD-P-02359 at 0513 (reported that many people were killed in Bossangoa); statement of witness 42, EVD-P-02393 at 0803 and 0841 (reported killings in PK22, and along the axes to Damara, Bossembélé, Bossangoa and Mongoumba); EVD-P-002356 at 0849 and 0850 (reporting killings in Mongoumba); statement of witness 38, EVD-P-00150 at 0165 (about six crimes a day were committed, including killings); EVD-P-00145 at 0032, 0033, and 0037 (killings in Mogoumba and Bossangoa); statement of witness 26, EVD-P-00136 at 0175 and 0176 (reporting killings at PK 12); FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001 at 0048; EVD-P-00006 at 0082 and 0084 (killings in Damara and Bossembélé); FIDH report, "*Central African Republic, Forgotten stigmatised: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0423 and 0424; EVD-P-00017; EVD-P-00019 at 0686 and 0689 (killings of civilians mid-February 2003 during the re-capture of Bozoum, Sibut, Bossangoa); EVD-P-00169 (killings in Bossembélé); RFI broadcast dating 5 December 2002, EVD-P-02258, track01 from 8:39 to 8:57 (radio broadcast reporting the killing of the interviewee's brother-in-law in PK 22).

142. Referring to the statements of witnesses 44 and 80, the Defence also maintained that the alleged acts of murder cannot be linked to Mr Jean-Pierre Bemba who, above all, was not aware of the commission of murders.[187]

143. The argument of the Defence, namely that Mr Jean-Pierre Bemba was not aware of the commission of murders, cannot be sustained. The reference to the particular statement of witness 44 concerns the question of individual criminal responsibility rather than the issue of whether acts of murder were committed by MLC soldiers in the CAR. The same applies to the argument of the Defence - based on a statement of witness 80 - that any act of murder was ordered by the then CAR President Mr Patassé. The Chamber holds the view that this argument is irrelevant as it pertains to the question of the possible individual criminal responsibility of Mr Patassé and does not concern the issue of whether MLC soldiers have murdered civilians.

aa) Murders of the cousin of witness 22 and the brother of witness 87

144. Having reviewed the relevant evidence related to, *inter alia*, two acts of murder, the Chamber has established that MLC soldiers killed the cousin of witness 22 by gunshot in the Bossangoa attack from on or about 26 October 2002 to 15 March 2003 and killed the brother of witness 87 by gunshot in the Boy-Rabé attack by MLC troops on 30 October 2002.

145. The Chamber, in particular, draws attention to the following events and the evidence related thereto:

146. The Chamber notes that witness 22 stated that the son of her aunt[188] was killed by gunshot by an MLC soldier in Bossangoa because he resisted the theft of goats as the "Banyamulengue" looted the farm of witness 22's uncle. The murder was

[187] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 55, lines 17-25; p. 56, lines 1-6.
[188] Contrary to the Prosecutor's submission, the Chamber notes that this incident concerned witness 22's cousin and not her nephew, see EVD-P-02359 at 0513 ("the son of my little mother").

reported to the witness by her family members who had eye-witnessed the crime. Witness 22 saw the grave in which her cousin was buried in Bossangoa.[189] In addition, the witness was told by the local population that "many many many people" were killed by the "Banyamulengue" in the Bossangoa attack.[190]

147. Even though witness 22 did not eye-witness the murder of her cousin, the Chamber finds that this hearsay evidence is sufficiently corroborated by indirect evidence referring to the commission of murders of CAR civilians in Bossangoa from on or about 26 October 2002 to 15 March 2003, especially when Bossangoa was recaptured by MLC troops backing the *Forces Armées Centrafricaines* (the "FACA") in mid-February 2003.[191]

148. The Chamber also notes the statement of witness 87 who directly observed the murder of her brother by an MLC soldier on 30 October 2002. The witness stated that she could see and hear what happened at the crime scene from a house where she took refuge, located 15 steps away from the crime scene.[192] She heard an argument between an MLC soldier and her brother who resisted the theft of his father's motorbike.[193] Witness 87 heard three gunshots and after the shooting, she saw "the Banyamulengue who was with [my brother] in the room where [the family] parked the motorbike going out". She also heard her brother saying "thank you, thank you, you have already killed me, you can go".[194] A few hours later, after the MLC soldiers had left the house, the witness discovered her brother's dead body. Together with other family members, she washed her brother's corpse and discovered three bullet

[189] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 38, lines 3-12.
[190] EVD-P-02359 at 0512 and 0513; EVD-P-02360 at 0547.
[191] Statement of witness 9, EVD-P-00147 at 0116 (heard about killings in Bossangoa); statement of witness 42, EVD-P-02355 at 0841 (killings in Bossangoa); statement of witness 29, EVD-P-00145 at 0037 (heard about killings in Bossangoa); UNRC, "*Humanitarian Update: Central African Republic 07 March 2003*", EVD-P-00017 at 0645 and 0647 (re-capture of Bossangoa by MLC troops mid-February 2003); press articles, EVD-P-00019 at 0686 and 0689 (killings of civilians mid-February 2003 during the re-capture of Bossangoa).
[192] EVD-P-02414 at 0213 and 0214.
[193] EVD-P-02415 at 0229.
[194] EVD-P-02414 at 0211 and 0212.

wounds in the chest and the back. The deceased was buried next to the house in Boy-Rabé.[195]

149. The Chamber considers that the *actus reus* of murder as a crime against humanity and the *mens rea*, namely intent and knowledge, of MLC soldiers for the killing of witness 22's cousin and witness 87's brother can be inferred from the factual circumstances.[196] In particular, the Chamber took into account the following facts: the death of both victims, the discovery of the corpses and the location of the graves, the fact that witness 22's cousin was said to have been killed during the Bossangoa attack by MLC troops, the presence of MLC soldiers at the crime scene, the presence at the crime scene of family members of both deceased victims, the fact that the soldier who killed witness 87's brother was identified as being a "Banyamulengue", speaking Lingala and not Sango, the fact that the death was caused by gunshot against the two unarmed civilian victims.

150. Finally, as to the nexus required between the two acts of murder by the MLC soldiers and the attack, the Chamber concurs with the Prosecutor[197] and finds that there is sufficient evidence to establish substantial grounds to believe that these murders were part of a widespread attack directed against the CAR civilian population. The two murders occurred during the Boy-Rabé attack on 30 October 2002 and the Bossangoa attack, and there is sufficient evidence showing that crimes against humanity, including murders, were committed in these localities from on or about 26 October 2002 until 15 March 2003.[198] The Chamber also finds that MLC soldiers acted in groups and created a climate of fear among civilians, as was the

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[195] EVD-P-02415 at 0222-0225.

[196] See for a similar approach, ICTY, *Prosecutor v Delalić et al.*, Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 903.

[197] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 65, lines 5-13.

[198] EVD-P-02414 at 0213 and 214; statement of witness 26, EVD-P-00136 at 0164; statement of witness 25, EVD-P-00138 at 0307; statement of witness 68, EVD-P-02388 at 0399; statement of witness 87, EVD-P-02413 at 0181; letter of referral of the CAR government, "*Mémoire, Saisine de la Cour pénale internationale par l'État Centrafricain d'un renvoi en application des articles 13 et 14 du Statut de Rome*", EVD-P-00003 at 0147; AI, "*Central African Republic, Five months of war against women*", November 2004, EVD-P-00015 at 0516.

case with witness 87 who was visited three times by groups of MLC soldiers in just one day.[199] Furthermore, witness 22's cousin and witness 87's brother both resisted the looting of their property and were killed as a result thereof, thus showing the pattern of crimes that MLC soldiers consistently followed during the attack against the CAR civilian population.

151. As to the multiplicity of acts, the Chamber is aware that the evidence shows with certainty the occurrence of two murders as specified in the Amended DCC. However, the Chamber highlights that the jurisprudence and legal doctrine are consistent about the fact that an individual may be held responsible of crimes against humanity even if he or she perpetrates one or two offences, or engages in one such offence against only a small number of civilians, provided that those offences are part of the attack.[200] Therefore, only the attack and not the individual acts of the perpetrator must be widespread or systematic. A single act of murder by a perpetrator may constitute a crime against humanity as long as the legal requirements with regard to the contextual element of crimes against humanity, including the nexus element, are met.[201]

bb) The death of the baby of witness 80

[199] EVD-P-02413 at 0191; EVD-P-02414 at 0200.

[200] A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, vol. 1, (OUP, 2002), pp. 360-361 and 367; See also ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, "Judgment", 7 May 1997, paras 653-654; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, "Judgment", 26 February 2001, para. 181.

[201] A similar approach has also been taken in ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, "Judgment", 7 May 1997, para. 649; ICTR, *The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, "Judgment", 7 June 2001, para. 82; ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, "Judgment", 14 January 2000, para. 550; and ICTY, *Prosecutor v Mrkšić, Radić, and Šljivančanin*, Case No. IT-95-13-R61, "Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", 3 April 1996, para. 30 – the latter judicial reference being endorsed by O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, (Nomos Verlag, 2nd ed., 2008), p. 176.

152. The Chamber is not satisfied by the evidence presented by the Prosecutor and hence does not rely on the evidence related to the death of witness 80's baby on 8 November 2002 at PK 12[202] for its determination regarding the count of murder.

153. The Chamber carefully examined the statement of witness 80 who stated that an MLC soldier threw her baby on the ground before he raped her. The witness further states that she had breast-feeding problems as a result of the medical treatment she underwent after the rape. Witness 80 states that she contracted staphylococcus. The witness believes that the baby probably got infected and subsequently died as a result of her rape.[203] Witness 80 thus maintained that her baby died of diarrhoea and anaemia because it could not be breast-fed properly.[204]

154. The Chamber firstly notes that there is no indication in the witness statement that the baby died as a direct result of having been thrown to the ground. Secondly, the Chamber does not find any further clear evidence which would establish a causal link between the act of rape committed by the MLC soldiers and the death of the baby.

cc) The death of Unidentified Victim 36

155. The Chamber is not convinced by the evidence presented by the Prosecutor and hence does not rely on the evidence related to the death of an unidentified woman reported by witness 47 ("Unidentified Victim 36") which occurred, according to the Prosecutor, in Bangui, for its determination regarding the count of murder.[205]

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[202] ICC-01/05-01/08-395-Anx3, p. 37; ICC-01/05-01/08-278-Conf-AnxB, pp. 49-50. The Chamber, being aware of the confidential nature of the Prosecutor's filing, does not consider the mention of this particular information to be inconsistent with the confidential nature of the documents as such.
[203] EVD-P-02396 at 0222.
[204] EVD-P-02395 at 0202 and 0203.
[205] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p 39, lines 11-15.

156. Witness 47 stated that he saw five MLC soldiers brutalising women next to the naval base, in an empty place near the SODECA pump station along the Oubangui river. Three of these women fell into the water and one MLC soldier shot one of them dead, namely Unidentified Victim 36.[206] With regard to this victim, at the Hearing, the Prosecutor referred to the jurisprudence of the Court relating to unidentified victims as reliable evidence of murder.[207]

157. The Defence challenged the date of this incident as indicated by the Prosecutor, namely "between October 2002 and 31 December 2002" as being imprecise.[208]

158. The Chamber, in principle, concurs with the Prosecutor that although the victim is unidentified, this incident may be taken into consideration as evidence of murder. The Chamber further specifies that such evidence may be accepted to substantiate its finding if corroborated by other pieces of evidence.[209] The Chamber, however, recalls that witness 47 is anonymous and his statement is not corroborated. For these reasons, the Chamber considers that there is not sufficient evidence to establish substantial grounds to believe that MLC soldiers killed Unidentified Victim 36 by gunshot between October 2002 and 31 December 2002 near Bangui. Accordingly, the Chamber does not deem necessary to address the challenge raised by the Defence on the lack of specificity of the dates of the alleged murder of Unidentified Victim 36.[210]

b) Specific elements of the act of rape as a crime against humanity (count 1)

159. In the Amended DCC, the Prosecutor alleges that:

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[206] EVD-P-02412 at 0139.
[207] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 39, lines 16-21.
[208] ICC-01/05-01/08-413, para. 34.
[209] See for similar cases where crimes were partly committed against unidentified victims, ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-T, "Judgment", 3 March 2000, paras 415-416; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, "Judgment", 26 February 2001, paras 568 and 570; ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, "Judgment", 27 January 2000, para. 362.
[210] ICC-01/05-01/08-413, para. 34.

> [f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed, jointly with another, Ange-Félix Pattasé, crimes against humanity through acts of rape upon civilian men, women and children in the Central African Republic, in violation of [article] 7(1)(g) (...) of the Rome Statute.

160. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity directed against CAR civilians were committed by MLC soldiers as part of the widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with the knowledge of the attack by MLC soldiers. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

aa) *Actus reus*

161. The Elements of Crimes with regard to article 7(1)(g) of the Statute require that:

> (1) The perpetrator invaded[211] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
>
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[212]

162. With regard to the term "coercion", the Chamber notes that it does not require physical force. Rather, "threats, intimidation, extortion and other forms of duress

[211] The Elements of Crimes clarify in fn 15 to article 7(1)(g) of the Statute that the concept of 'invasion' is intended to be broad enough to be gender-neutral.

[212] The Elements of Crimes clarify in fn 16 to article 7(1)(a) of the Statute that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence."[213]

bb) *Mens rea*

163. With regard to the mental element, the perpetrator must have committed the act of rape with intent and knowledge within the meaning of article 30 of the Statute.

cc) Nexus requirement

164. The Prosecutor must demonstrate the nexus between the acts of rape and the attack,[214] thus proving that acts of rape were committed by MLC troops as part of a widespread or systematic attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.

(ii) Findings of the Chamber

165. Having reviewed the Disclosed Evidence, and in particular, the statements of direct witnesses 23, 29, 42, 68, 80, 81, 87 and 22, the Chamber finds that they consistently describe the multiple acts of rape they directly suffered from and detail the invasion of their body by the sexual organ of MLC soldiers, resulting in vaginal or anal penetration. The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members. The element of force, threat of force or coercion was thus a prevailing factor.

[213] See for a similar interpretation, ICTR, *The Prosecutor v Akayesu*, Case No. IT-96-4-T, "Judgment", 2 September 1998, para. 688.
[214] Elements of Crimes, article 7(1)(g) of the Statute, para. 4.

166. The evidence also shows that the perpetrators of the said acts of rape were identified as MLC soldiers.[215] All witnesses who were either victims of rape or witnessed the rape of others, indicate distinguishing features of MLC perpetrators, such as the language spoken by the MLC soldiers, Lingala, often mixed with a "little bit of French", their inability to communicate properly with the witnesses and/or their families in Sango, and their military clothing, which allows the Chamber to conclude that the perpetrators were MLC soldiers.

167. Before resorting to the separate cases of rape, the Chamber finds it necessary to set out its view on some issues raised by the Defence. More specifically, the Chamber is mindful that at the Hearing the Defence, by reference to the statement of witness 9, contended that certain victims of rape had sexual relations with soldiers on a voluntary basis, thus challenging the requirement of force.[216] The Defence further challenged the Prosecutor's Amended DCC by maintaining that alleged rapes of unidentified victims 1 to 35 (the "Unidentified Victims 1 to 35") as reported by witness 47 occurred at dates either not specified or contradictory.[217] In the same line, the Defence underlined inconsistencies in witness 22's statement as to the alleged date of her rape by MLC soldiers.[218]

168. As to the first challenge by the Defence that CAR women entered into sexual relations with soldiers on a voluntary basis, the Chamber considers it untenable. The Chamber reiterates that the statement of witness 9, considered in light of the corroborating evidence, has sufficient probative value to be taken into account in the Chamber's determination. However, with regard to the witness's assertion that a number of CAR women had voluntarily engaged in sexual relations with soldiers on the ground, the Chamber notes that the witness himself clarified that this concerned a small number of women and that a large number of CAR civilian women had been

[215] See paragraph 106 of the decision.
[216] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 54, lines 12-20.
[217] See also ICC-01/05-01/08-413, paras 15, 18, 24-29 and 32.
[218] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 51, lines 7-12.

indeed raped during the relevant period, namely from on or about 26 October 2002 to 15 March 2003. Witness 9 also provides information that, as a consequence of the rapes, many women became pregnant - a fact which the witness did not dispute.[219] The Chamber notes that the victims freely reported their stories to witness 9.[220] Moreover, the Chamber notes that with regard to other witnesses presented by the Prosecutor, who were allegedly raped,[221] the Defence has neither raised any such challenge nor has it demonstrated that they voluntary had sexual relations with MLC soldiers on a voluntary basis.

169. As to the argument based on the lack of specificity of the dates of the alleged rapes of Unidentified Victims 1 to 35, the Chamber recalls that it attached a low probative value to the uncorroborated statement of anonymous witness 47.[222] As the Chamber does not rely on this particular statement to confirm the charge of rape as a crime against humanity, it does not deem necessary to entertain this challenge.[223]

170. Therefore, the Chamber does not find that the challenges raised by the Defence impact on the facts as established by the Chamber in the present decision. The Chamber draws attention to the following events and the evidence related thereto.

171. Witness 23 was ordered to lie down in the position of a horse and was raped in succession by three MLC soldiers in the garden of his house in PK 12 on 8 November 2002 in the presence of his three wives and children.[224] The evidence shows that the rapes of witness 23 were committed by threat of force and by coercion: eight MLC soldiers had entered his house with guns and accused the witness of protecting rebels. Upon the witness's denial, the witness heard a gunshot. An MLC soldier

[219] EVD-P-02173 at 0157-0162.
[220] Statement of witness 9, EVD-P-00147 at 0114, paras 39 and 40.
[221] Statement of witnesses 22, 23, 29, 42's daughter, 68, 80, 81 and 87.
[222] See paragraph 114 of the decision.
[223] By analogy of reasoning, see above paragraph 158 at which the Chamber addresses the same challenge of imprecision of dates pertaining to the killing of Unidentified Victim 36.
[224] EVD-P-02363 at 0070-0074.

threatened the witness with death and further stated "Ok, you will live but we will have to fuck your anus".[225]

172. Witness 23 further provides information that at least two of his daughters[226] were raped by MLC soldiers on the same day, namely on 8 November 2002, at his house in PK 12 in his presence. This information is corroborated by the statement of witness 80.[227] The Chamber notes that the acts suffered by witness 23 occurred in the presence of his three wives and children. In addition, the Chamber notes the reactions of fear of the family members, thus demonstrating the coercion element: his children were crying and one of the witness's wives collapsed because of the shootings.[228] The Chamber therefore concludes that its findings regarding the element of force and identity of perpetrators equally apply in the present cases of the rapes of the two daughters of witness 23.

173. Witness 29 was vaginally raped in succession by three MLC soldiers on 5 March 2003 in her father's house in Mongoumba.[229] The witness states that she was ordered to lie down on the ground and that she initially refused to comply with that order. Thereafter, the first MLC soldier to rape witness 29 ripped off her clothes and pushed her to the ground.[230] The witness cried while she was being raped.[231] As the third MLC soldier was raping witness 29, gunshots were heard and the three assailants left the house of the witness.

174. The 10 year-old daughter of witness 42 was raped in succession by two MLC soldiers in Begoa (PK 12) at the "end of November 2002" as established by the

[225] EVD-P-02363 at 0070, 0071 and 0073.
[226] EVD-P-02364 at 0095 and 0096; EVD-P-02363 at 0070.
[227] EVD-P-02394 at 0170.
[228] EVD-P-02363 at 0070.
[229] EVD-P-02367 at 0030; 0032; 0060 and 0067-0078.
[230] EVD-P-02367 at 0032.
[231] EVD-P-02367 at 0072.

Chamber.[232] The rape occurred behind witness 42's house in a small shelter.[233] The witness states that a group of MLC soldiers entered his house and forced him, his wife and children to lie facedown on the ground.[234] His daughter was taken by force outside the house by the MLC soldiers.[235] Afterwards, the witness saw blood on his daughter's dress; she later confided in her mother who told witness 42 what happened to their daughter.[236]

175. Witness 68 was vaginally raped on 27 October 2002 by two MLC soldiers near Miskine high school in Fouh. The witness states that during the rape, a third MLC soldier forced her to the ground by standing on her arms with his feet.[237] The witness explains that she and her sister-in-law were fleeing from home when they met a group of MLC soldiers on their way.[238]

176. Witness 68 also reported the rape of her sister-in-law on 27 October 2002 near Miskine high school in Fouh by three MLC soldiers.[239] Witness 68 states that her sister-in-law was taken by three MLC soldiers when they both encountered the group of MLC soldiers;[240] she heard her sister-in-law scream when raped.[241]

177. Witness 80 was vaginally raped by three MLC soldiers in front of her family.[242] The MLC soldiers entered the house with guns thus exerting coercion on the witness.[243] They threatened[244] and slapped her in the face when she resisted.[245]

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[232] EVD-P-02355 at 0837. The Chamber notes that the Prosecutor asserts in the Amended DCC that the rape occurred on 8 November 2002, ICC-01/05-01/08-395-Anx3, p. 35.
[233] EVD-P-02355 at 0834, 0835, 0838.
[234] EVD-P-02355 at 0834.
[235] EVD-P-02355 at 0834; The daughter of witness 42 cried out "Papa, ils sont entrain de me tirer pour m'emmener" before taken away.
[236] EVD-P-02355 at 0835 and 0836.
[237] EVD-P-02388 at 0404-0408.
[238] EVD-P-02388 at 0395.
[239] EVD-P-02338 at 0410.
[240] EVD-P-02388 at 0395.
[241] EVD-P-02388 at 0410.
[242] EVD-P-02394 at 0170; EVD-P-02395 at 0203-0206 and 0212.
[243] EVD-P-02395 at 0202.
[244] EVD-P-02394 at 0169.

Witness 80's husband tried to intervene but was beaten and threatened with rape himself.[246]

178. The Chamber observes that witness 80 does not provide and seems not to be able to provide reliable information on precise dates.[247] However, the Chamber reviewed her statement in light of her husband's statement, witness 23. As earlier stated, witness 23 was raped in the presence of his wife; his wife was also raped on the same day. The Chamber takes into consideration the conclusiveness of the statement of witness 23, and bases its finding regarding the date of witness 80's rape on the information in witness 23's statement. The Chamber thus concludes that the acts of rape described by witness 80 occurred on 8 November 2002.

179. Witness 81 was vaginally raped by four MLC soldiers in her house at PK 12 in the presence of her husband and children, her mother and brother; the first assailant, "Leopard", beat her with his gun on her thigh and forced her to undress before raping her. The witness stated that she had recently given birth, thus expressing lack of any consent.[248] After the first rape, three other MLC soldiers raped her in succession. The witness was bleeding.[249] While the witness was raped, her brother was lashed 50 times with a rope.[250]

180. The Chamber notes that the witness does not provide information on the date of the rape but refers to an event, namely the visit of Mr Jean-Pierre Bemba to Begoa school in PK 12, from which the date of the rape may be inferred.[251] The Chamber makes the further general observation that the witness fails to provide information

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[245] EVD-P-02395 at 0204.
[246] EVD-P-02394 at 0170; EVD-P-02395 at 0196.
[247] EVD-P-02394 at 0167 (See for instance the information provided by the witness as to when the "Banyamulenge" arrived in PK12); EVD-P-02395 at 0187 and 0195 (The witness asserts that the MLC soldiers arrived on 27 November 2002 and later asserts that they arrived on 17 November 2002).
[248] EVD-P-02398 at 0278.
[249] EVD-P-02398 at 0280.
[250] EVD-P-02398 at 0281.
[251] EVD-P-02397 at 0254.

on periods or dates on several occasions throughout her statement. The Chamber further notes the witness's young age at the time the events in question took place.[252] Reviewing the Disclosed Evidence as a whole, the Chamber takes into consideration other corroborating evidence which contains relevant information as to the date in question. The Chamber observes that witness 23's house neighboured witness 80's house and relies on witness 23's statement who gave an indication as to the date of the rape of witness 80 to conclude that their respective rapes occurred on the same day, namely 8 November 2002.[253]

181. Witness 87 was vaginally raped by three MLC soldiers outside her home in Boy-Rabe on 30 October 2002.[254] Even though the witness is not clear in her statement as to whether she was threatened with death by the MLC soldiers entering her house,[255] the Chamber finds sufficient evidence to establish that the MLC soldiers entered the house of witness 87 with their arms, witness 87 was undressed by the first MLC soldier, she was forced on the ground throughout all acts performed by the three MLC soldiers[256] and raped. When raped, the MLC soldiers had their guns next to the witness and the witness was not in a position to move freely.[257]

182. Witness 22 was vaginally raped consecutively by three MLC soldiers in her uncle's house near PK 12.[258] The witness states that these events occurred on 26 October 2002.[259] The witness states that she was pushed into the bedroom and threatened with a knife.[260] The witness was ordered to undress but she refused. She was then pushed on to the bed and her tights were cut with a knife. While raping

[252] EVD-P-02397 at 0241.
[253] EVD-P-02363 at 0070.
[254] EVD-P-02414 at 0201, 0204-0208, EVD-P-02413 at 0181 and 0187.
[255] EVD-P-02414 at 0202: the witness states that MLC soldiers entering her house ordered "donne l'argent pas tuer". However, the witness later states that the MLC soldiers "(...) asked me to give them money and if I did not do it they would kill us", EVD-P-02414 at 0204.
[256] The witness also states that the second MLC soldier, when calling the third MLC soldier to rape the witness, was standing on her, EVD-P-02414 at 0207.
[257] EVD-P-02414 at 0204-0208.
[258] EVD-P-02269 at 0495; EVD-P-02170 at 0507; EVD-P-02359 at 0514, 0522; EVD-P-02360 at 0534-0542.
[259] EVD-P-02269 at 0495.
[260] EVD-P-02359 at 0507 and 0509.

her, the first MLC soldier directed his gun at the witness's throat. After the first rape, the witness wanted to leave but was ordered to stay.[261] When the other two MLC soldiers raped witness 22, the gun was still pointed at her throat.

183.The Chamber is aware of the specific challenge raised by the Defence with regard to the exact date of witness 22's rape. The witness asserts to have been raped on 26 October 2002 in PK12 but, according to the Defence, MLC troops only arrived at this location on 30 October 2002.

184.However, the Chamber is of the view that, due to the traumatic events the witnesses suffered and the time that has elapsed since the rapes and the collection of their testimonies (approximately six years), imprecision in dates may occur. In this regard, as for witness 80 and 81's statements, the Chamber shall instead assess the reliability of the witnesses' statements as a whole and pay particular attention to the description of the acts of rape and the information given by the witnesses which would allow the Chamber to identify with certainty the perpetrators.

185.The Chamber underlines that it has no doubts as to the accuracy of the information provided by witness 22. The witness gives precise and conclusive information demonstrating that she has been raped. She is also able to distinguish between the different parties in the conflict[262] and clearly identifies the perpetrators as MLC soldiers. The Chamber considers that regardless of the exact date of her rape, the acts of rape suffered by witness 22 can be attributed to MLC soldiers. Based on the evidence, the Chamber concludes that witness 22's rape occurred at the end of October 2002 during the attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003. Accordingly, the Chamber rejects the challenge of the Defence in this regard.

[261] EVD-P-02360 at 0541.
[262] EVD-P-02359 at 0514.

186. In addition to direct evidence, the Chamber takes note that indirect evidence, such as hearsay evidence[263] and several NGO[264] and UN reports,[265] is of a corroborating nature and reflects the large number of acts of rape which occurred in the same locations referred to by direct witnesses during the same period, namely from on or about 26 October 2002 to 15 March 2003.

187. With regard to the MLC soldiers' requisite *mens rea*, the Chamber is of the view that the MLC soldiers' intent and knowledge to rape the above-mentioned CAR civilians can be inferred from the factual circumstances described above. The Chamber is satisfied that the MLC soldiers, consistently identified as direct perpetrators by the above-mentioned seven direct witnesses who were raped, threatened the civilian population with rape, used force, including guns against unarmed civilians, and thus intended the rapes of CAR civilians.

188. Finally, as to the nexus requirement, the Chamber finds that the acts of rape were committed as part of the widespread attack directed against the CAR population from on or about 26 October 2002 to 15 March 2003. Rapes occurred when civilians resisted the looting of their goods by MLC soldiers. Repeated acts of

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[263] Statement of witness 6, EVD-P-00098 at 0110 and 0112 (according to the Ministry of Social Affairs, approximately 1,000 CAR civilians had been victims of rape).

[264] AI report, "*Central African Republic, Five months of war against women*", 10 November 2004: AI reports of an international medical charity which had received 316 victims of rape for emergency assistance at that time, EVD-P-00045 at 0510; AI further provides summaries of testimonies of rape victims it collected at 0512 to 0516; AI also provides information on 300 reported complaints of rape by CAR civilians, at 0519; FIDH report, "*Crimes de Guerre en République Centrafricaine Quand les éléphants se battent, c'est l'herbe qui souffre*", February 2003, EVD-P-00001 at 0051-0053: in this report FIDH provides information with reference to an NGO in the field that 79 women have been victims of sexual violence. In its report of October 2006 "*République centrafricaine, Oubliées, stigmatisées: la double peine des victimes de crimes internationaux*", FIDH provides further testimonies of civilians who have been victims of rape by MLC soldiers which it collected during its fact-findings missions in the CAR, EVD-P-02152 at 0898-0902; see also an FIDH press release dated 5 November 2002, EVD-P-02099, at 0975.

[265] UNRC, "*Central African Republic Weekly Humanitarian Update 17 December 2002*", EVD-P-00018 at 0656-0657. It is reported that the UNDP project had identified 248 women and girls that fell victim to rape and other forms of physical violence and humiliations in the hands of the MLC troops. AI confirms that the UNDP project started on 28 November 2002 with the aim to provide emergency medical care to survivors of rape, AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-00045 at 0520-0521.

rape were used as a method to terrorise the population.[266] The evidence shows that rapes occurred as MLC troops advanced into CAR territory or withdrew from the CAR. In addition, the Disclosed Evidence shows that rapes occurred in localities, such as PK 12, Fouh, Boy-Rabe and Mongoumba, which were localities under attack by MLC soldiers at the said period.

c) Specific elements of the act of torture as a crime against humanity (count 3)

189. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, crimes against humanity by inflicting severe physical or mental pain or suffering *through acts of rape or other forms of sexual violence*, upon civilian men, women and children in the Central African Republic, in violation of Articles 7(1)(f) (...) of the Rome Statute" (emphasis added).[267]

190. The Chamber rejects the cumulative charging approach of the Prosecutor and therefore declines to confirm count 3 of torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

aa) *Actus reus*

191. Article 7(2)(e) of the Statute defines torture as:

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[266] Statement of witness 29, EVD-P-02367 at 0037 and 0084; statement of witness 42, EVD-P-02355 at 0825; statement of witness 38, EVD-P-00150 at 0165; see also statement of witness 25, EVD-P-00138 at 0306 (the witness met with the population and discerned a climate of fear when asked if MLC troops were committing rapes); press article, EVD-P-00181; AI report, "*Central African Republic, Five months of war against women*", November 2004, EVD-P-00015 at 0514 and 0522; FIDH report, "*Central African Republic, Forgotten, stigmatized: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0422, 0428 and 0475.

[267] ICC-01/05-01/08-395-Anx3, p. 35.

> (...) the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

192. The Elements of Crimes add with regard to article 7(1)(f) of the Statute that:

> (1) [t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
> (2) [s]uch person or persons were in the custody or under control of the perpetrator;
> (3) [s]uch pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

193. As to the objective element, the *actus reus*, the Chamber is of the view that, although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.[268]

bb) *Mens rea*

194. The subjective element, the *mens rea*, is the intent as expressly mentioned in article 7(2)(e) of the Statute. Bearing in mind that article 30(1) of the Statute is applicable "unless otherwise provided", and taking into account that the infliction of pain or suffering must be "intentional", the Chamber finds that this excludes the separate requirement of knowledge as set out in article 30(3) of the Statute. In this respect, the Chamber believes that it is not necessary to demonstrate that the

[268] See in this respect, article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46: "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."; see also N. S. Rodley, *The Treatment of Prisoners under International Law*, (OUP, 2nd ed., 2000), p. 86; For a complete review of the jurisprudence of the European Court of Human Rights (the "ECtHR") and the Inter-American Court of Human Rights on the severity issue, see for example, P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, (Bruylant, 2006), pp. 337-341.

perpetrator knew that the harm inflicted was severe. This interpretation is consistent with paragraph 4 of the General Introduction to the Elements of Crimes.[269] To prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering.[270]

195. The Chamber notes that under the Statute, the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose. This is also clarified in the Elements of Crimes.[271]

cc) Nexus requirement

196. The Prosecutor must demonstrate the nexus between the acts of torture and the attack,[272] thus proving that acts of torture were committed by MLC troops as part of a widespread or systematic attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.

(ii) Findings of the Chamber

197. The Chamber recalls that the Prosecutor framed count 3 of the Amended DCC as torture "through acts of rape or other forms of sexual violence". At the Hearing, the Prosecutor presented evidence showing not only (aa) acts of rape that would allegedly amount to torture, but also (bb) material facts other than acts of rape which

[269] Paragraph 4 of the General Introduction to the Elements of Crimes provides: "With respect to mental elements associated with elements involving value judgment, such as those using the terms (...) 'severe', it is not necessary that the perpetrator personally completed a particular value judgment unless otherwise indicated."

[270] C. K. Hall in: O. Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 2nd ed., 2008), pp. 251 and 252.

[271] The Elements of Crimes provide in fn 14 to article 7(1)(f) of the Statute that it is understood that no specific purpose need be proved for this crime. The Chamber, however, is well aware that other international instruments establish a different legal framework than the one before the Court.

[272] Elements of Crimes, article 7(1)(f) of the Statute, para. 4.

he legally characterised as acts of torture.[273] In his closing statement, the Prosecutor highlighted that "[t]he main physical acts underpinning the charges of rape, torture and outrages upon personal dignity is rape in this case".[274]

198. The Chamber, in particular, draws the attention to the following events and the evidence related thereto:

aa) Alleged acts of torture through acts of rape or other forms of sexual violence

199. The Prosecutor used a cumulative charging approach by characterising count 3 of the Amended DCC as "[torture] *through acts of rape or other forms of sexual violence*" (emphasis added). He avers that the same criminal conduct can be prosecuted under two different counts, namely the count of torture as well as the count of rape, the acts of rape being the instrument of torture.

200. The Chamber acknowledges that the cumulative charging approach is followed by national courts,[275] and international tribunals under certain conditions.[276]

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[273] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 30, lines 4-11.

[274] Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 63, lines 14-15.

[275] See in civil law systems: "*Arrêt de la grenade*", C. Cass. 3 March 1960, B.crim.nº 138, confirmed in the arrêt Laurent, C. Cass. 19 May 1983, B. nº 149, infra nº 910 (Examples of real occurrence of facts where cumulative charging was allowed because the different protected interests at stake were on the one hand, the protection of persons and the protection of goods on the other.); see in common law system: *Blockburger v. United States*, 284 U.S. 299, 304 (1931) (Blockburger test); see also K. Kittichaisaree, *International Criminal Law*, (OUP, 2001), p. 311 *et seq.*

[276] For example, ICTY, *Prosecutor v Delalić et al.*, Case No. IT-96-21-A, "Appeals Chamber Judgment", 20 February 2001; ICTY, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, "Decision on the Defence Challenges to Form of Indictment", 15 May 1998: "the Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others". See the inconsistencies in jurisprudence. ICTR, *The Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95-I, "Trial Judgment", 21 May 1999, paras 625-650 (where crime against humanity was subsumed in the crime of genocide and cumulative charges were rejected. Cumulative charging is acceptable only where the offences have differing elements or where laws in question protect differing social interests); For a different approach where cumulative charges were accepted, see ICTY, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, "Decision on the Defence Challenges to Form of Indictment", 15 May 1998 ("the Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others"); For a different test applied the "Kupreškić test": see ICTR,

201. The Chamber deems it necessary to recall paragraph 25 of the Decision of 10 June 2008 in which the following was clearly stated:

> (...) the Prosecutor appears on occasion to have presented the same facts under different legal characterizations. [The Chamber] wishes to make it clear that the Prosecutor should choose the most appropriate characterization. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterize the facts put forward by the Prosecutor. The Chamber will revisit this issue in light of the evidence submitted to it by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure the fair and expeditious conduct of the proceedings.

202. By its decision, the Chamber intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.[277]

203. In addition, the Chamber further recalls that the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to

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The Prosecutor v. Akayesu, Case No. ICTR-96-40-T, "Trial Judgment", 2 September 1998 (case establishing a test where cumulative charging is accepted). This approach was followed in the ICTR, *The Prosecutor v Rutaganda*, Case No. ICTR-96-3, "Judgment", 6 December 1999; ICTR, *The Prosecutor v Musema*, Case No. ICTR-96-13-A, "Judgment and Sentence", 27 January 2000, as well as in the dissenting opinion of Judge T. H. Khan in ICTR, *The Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95-I, "Trial Judgment", 21 May 1999.

[277] Along the same reasoning, see ICTY, *Prosecutor v Delalić et al.*, Case No. IT-96-21-A, "Appeals Chamber Judgment", 20 February 2001, para. 412.

adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.[278]

204. The Chamber considers that in this particular case, the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person,[279] are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this particular case.[280]

205. The Chamber, after having carefully reviewed the factual circumstances submitted by the Prosecutor,[281] concludes that the evidence he presented reflects the same conduct which underlies the count of rape, as identified in the statements of witnesses 22, 23, 29, 68, 80, 81, 87 and Unidentified Victims 1 to 35. The Chamber therefore considers that the act of torture is fully subsumed by the count of rape.[282]

bb) Other alleged acts of torture, other than acts of rape

206. Having reviewed the Disclosed Evidence pertaining to other alleged acts of torture, other than acts of rape, the Chamber finds that the Amended DCC fails to specify as to which other facts of torture the Prosecutor relies upon.

207. The Chamber notes that the Prosecutor presented evidence pertaining to other acts of torture, other than acts of rape, but did not specify so in the Amended DCC. To the contrary, without any information in the Amended DCC on the link between

[278] W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, (CUP, 2006), p. 367.
[279] Article 7(1)(f) of the Statute, paras 1 and 2 of the Elements of Crimes.
[280] Article 7(1)(g) of the Statute, paras 1 and 2 of the Elements of Crimes.
[281] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 27, line 25 until p. 28, line 2.
[282] See for a similar approach in ICTR, *The Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95-I, "Trial Judgment", 21 May 1999, paras 577 and 625-650; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment", 28 June 2002.

the facts underpinning the act of torture and the individual concerned, the Chamber resorted to the Disclosed Evidence in order to properly interpret the Amended DCC. The Prosecutor presented only at the Hearing some material facts parenthetically.[283] However, the Chamber clarifies that the presentation of partially relevant material facts at the Hearing to support the submission that some acts of torture are different from acts of rape does not cure the deficiencies and imprecision of the Amended DCC.

208. The Chamber notes article 61(3) of the Statute and regulation 52(b) of the Regulations and highlights the basic principles on framing a document containing the charges (the "DCC"). These principles establish, *inter alia*, that a DCC must state the material facts underpinning the charges[284] and that the material facts underpinning the charges shall be specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her defence.[285] The Chamber believes that it is the duty of the Prosecutor to furnish all facts underpinning the charges. Any deficiencies cannot be compensated by the Chamber. In addition, the Chamber considers that, where the Prosecutor is able to do so, he should identify the method of commission of the crime or the manner in which it was committed.[286]

209. Applying these principles, the Chamber is of the view that in the Amended DCC, the Prosecutor neither detailed the material facts of torture other than acts of

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[283] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 29, lines 9-11; Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 30, lines 4-11.

[284] See also in this vein, ICTY, *The Prosecutor v Kupreškić et al.*, Case No. IT-95-16-A, "Appeals Chamber Judgment", 23 October 2001, paras 88, 92 and 98: "The Prosecution is expected to know its case before it goes to trial. It is not acceptable for the prosecution to omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds"; see also W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, (CUP, 2006), pp. 361 and 362.

[285] See also for a similar approach taken at SCSL, *The Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT (1602-1619), "Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003; ICTR, *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, "Judgment and Sentence", 2 February 2003.

[286] Similarly, ICTY, *Prosecutor v Kvočka et al*, Case No. IT-98-30/1, "Decision on the Defence Preliminary Motions on the Form of the Indictment", 12 April 1999, paras 18 and 24.

rape nor the method of commission of the alleged acts of torture. As a consequence, Mr Jean-Pierre Bemba was not in a position to properly identify the facts underpinning the act of torture and adequately prepare his defence. Therefore, the Chamber declines to confirm count 3 of torture as a crime against humanity through other acts of torture, other than acts of rape.

B. War Crimes

210. In the Amended DCC the Prosecutor charges Mr Jean-Pierre Bemba with murder (article 8(2)(c)(i) of the Statute), rape (article 8(2)(e)(vi) of the Statute), torture (article 8(2)(c)(i) of the Statute), outrages upon personal dignity (article 8(2)(c)(ii) of the Statute) and pillaging (article 8(2)(e)(v) of the Statute), constituting war crimes falling within the jurisdiction of the Court.

211. At the outset, the Chamber notes article 8(1) of the Statute which stipulates that the Court "shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (emphasis added). In the view of the Chamber, the term "in particular" makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court.[287]

212. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is 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 *Unité de Sécurité Présidentielle* (the "USP") and the FACA, a group of 500 predominantly

[287] K. Dörmann in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (Nomos Verlag, 2nd ed., 2008), pp. 299-300.

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 and 15 March 2003 on the territory of the CAR. The Chamber further finds that there is sufficient evidence to establish substantial grounds to believe that in the context of this armed conflict acts of murder, rape and pillaging constituting war crimes according to articles 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v) of the Statute were committed by MLC soldiers. However, the Chamber declines to confirm count 4 of torture and count 5 of outrage upon personal dignity as war crimes in violation of article 8(2)(c)(i) and (ii) of the Statute. The Chamber bases this finding on the following considerations.

1. Contextual elements of war crimes

a) The law and its interpretation

(i) Existence of an armed conflict not of an international character

213. The Prosecutor alleges that during the period from on or about 26 October 2002 to 15 March 2003 a protracted armed conflict existed on the territory of the CAR "between Bozizé troops and Pro-Patassé troops, including the MLC".[288] However, the Prosecutor states in the Amended DCC that:

> (...) it is immaterial whether the conflict that involved Bozizé and Pro-Patassé forces be characterized as international or non-international. Each of the proposed counts specifying war crimes arise from conduct which consists of a war crime regardless of characterization.[289]

[288] ICC-01/05-01/08-395-Anx3, para. 44. In its decision issued on 4 November 2008, the Chamber requested the Prosecutor to clarify the nature of the armed conflict, ICC-01/05-01/08-207; the Prosecutor clarified on 6 November 2008 that he was able to establish that the conduct occurred as part of a non-international armed conflict, ICC-01/05-01/08-214-Conf, para. 5. The Chamber, being aware of the confidential nature of the Prosecutor's filing of 6 November 2008, does not consider the revelation of this particular information to be inconsistent with the confidential nature of the document as such.

[289] ICC-01/05-01/08-395-Anx3, para. 44.

214. The Chamber observes that in the Amended DCC, the Prosecutor charges Mr Jean-Pierre Bemba with war crimes under article 8(2)(c) and (e) of the Statute which refer to war crimes in the context of an armed conflict not of an international character.[290] During the Hearing, the Prosecutor also presented evidence on war crimes which purportedly occurred in the context of an armed conflict not of an international character.[291]

215. At the outset, the Chamber clarifies that it considers it appropriate to decide on the characterisation of the armed conflict at this stage of the proceedings based on the Disclosed Evidence communicated to the Chamber.[292]

216. Article 8(2) of the Statute enumerates those crimes which constitute war crimes under the regime of the Statute and differentiates between the contexts in which these crimes may occur. The Chamber recalls that war crimes may arise either in the context of an international armed conflict (article 8(2)(a) and (b) of the Statute) or an armed conflict not of an international character (article 8(2)(c) and (e) of the Statute), and in association with such conflict.[293]

217. The Chamber observes that neither the Statute nor the Elements of Crimes[294] provide a definition of "armed conflict" for the purposes of article 8(2) of the Statute. In addition, these legal texts do not provide a general definition of when an armed conflict may be regarded as "international" or "of a non-international character".

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[290] ICC-01/05-01/08-395-Anx3, pp. 34-37.

[291] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 120, lines 23-24 and p. 121, line 1.

[292] See also the finding of Pre-Trial Chamber III in its Decision of 10 June 2008 reserving its right to revisit this issue at a later stage, ICC-01/05-01/08-14-tEN, para. 47.

[293] Pre-Trial Chamber III, Decision of 10 June 2008, ICC-01/05-01/08-14-tEN, para. 46.

[294] The Elements of Crimes clarify in the Introduction to article 8 of the Statute that "[t]he elements for war crimes under article 8, paragraph 2(c) and (e), are subject to the limitations addressed in article 8, paragraph 2(d) and (f), which are not elements of crimes. The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea."

218. The Chamber therefore applies, where appropriate, principles and rules of law as interpreted in previous decisions of the Court in accordance with article 21(2) of the Statute. Furthermore, as set forth in article 21(1)(b) of the Statute, the Chamber refers to principles and rules of international law, including the established principles of international law of armed conflict. Reference is also made to applicable treaties as well as relevant jurisprudence of other tribunals which echo principles of the international law of armed conflict.

219. The Chamber considers it necessary to first address the concept of international armed conflict in order to substantiate its finding in relation to the nature of the armed conflict in the CAR during the relevant period.

aa) The concept of international armed conflict

220. As stated above, the Chamber observes that there is no general definition of "international armed conflict" in the Court's legal texts or international humanitarian law. The Chamber, however, notes the decision on the confirmation of charges in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (the "*Lubanga* decision") in which Pre-Trial Chamber I, relying on common article 2 of the 1949 Geneva Conventions and the relevant ICTY jurisprudence, stated:

> The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).[295]

221. The Chamber also notes common article 2(1) of the 1949 Geneva Conventions, which stipulates that:

[295] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, para. 209.

> (...) the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

222. Concerning the concept of international armed conflict, the International Committee of the Red Cross (ICRC) commentary on common article 2 of the 1949 Geneva Conventions adds:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[296]

223. Therefore, the Chamber concludes that an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.

bb) The concept of armed conflict not of an international character

224. The Chamber further observes that there is no general definition of "armed conflict not of an international character" in the Court's legal texts or international humanitarian law. Article 8(2)(c) of the Statute enumerates serious violations of article 3 common to the 1949 Geneva Conventions. Article 8(2)(e) of the Statute enumerates other violations of the laws and customs applicable to armed conflict not of an international character.

225. However, the Chamber is mindful of the limitation put on articles 8(2)(c) and 8(2)(e) of the Statute by articles 8(2)(d) and (f) of the Statute, respectively. The

[296] J. Pictet, (ed.), ICRC Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (ICRC, 1958), p. 20. The convention mentioned is further referred to as the "Fourth Geneva Convention", see UNTS, vol. 75, p. 287.

threshold enshrined in the first sentence of article 8(2)(d) and (f), first sentence, of the Statute requires any armed conflict not of an international character to reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. In the view of the Chamber, this is ultimately a limitation on the jurisdiction of the Court itself, since if the required level of intensity is not reached, crimes committed in such a context would not be within the jurisdiction of the Court.

226. With respect to the contextual element of the crimes enumerated in article 8(2)(e) of the Statute, article 8(2)(f), second sentence, of the Statute further adds that:

> It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

227. The Chamber further notes that article 3 common to the 1949 Geneva Conventions, to which article 8(2)(c) of the Statute refers, specifies that the armed conflict not of an international character occurs within the territory of a State.[297]

228. The Chamber also takes cognizance of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, (the "Additional Protocol II")[298] which expands on and supplements article 3 common to the 1949 Geneva Conventions. Its article 1 further specifies:

> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which,

[297] The provision reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (...)".
[298] UNTS, vol. 1125, p. 609.

> under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

229. The Chamber also takes note of the interpretation of the concept of armed conflict not of an international character in the jurisprudence of other tribunals reflecting established principles of the international law of armed conflict. To this end, reference is made to the *Tadić* case in which the ICTY Appeals Chamber held that:

> (...) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[299]

230. The Chamber further recalls the relevant ICTR jurisprudence, namely the *Akayesu* judgement which stated that:

> The term, 'armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions.[300]

231. Therefore, in interpreting the concept of armed conflict not of an international character under the regime of the Statute, the Chamber concludes that an "armed conflict not of an international character" is characterised by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar

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[299] ICTY, *Prosecutor v Tadić*, Case No. IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 70.
[300] ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, "Judgment", 2 September 1998, para. 620.

nature, and which takes place within the confines of a State territory. The hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups.

232. 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, the Chamber holds that this characteristic element in the context of an armed conflict not of an international character is a well established principle in the law of armed conflict underlying the 1949 Geneva Conventions to which the Statute refers in article 8(2)(c) and (d) of the Statute.[301] Therefore, the Chamber holds that this element also applies to article 8(2)(c) of the Statute.

233. The Chamber further notes that the Statute and the Elements of Crimes do not provide for the definition of "organized armed groups". The Chamber concurs with Pre-Trial Chamber I which, in the *Lubanga* decision concerning the concept of "organized armed groups", stated that:

> (...) article 8(2)(f) of the Statute makes reference to " protracted armed conflict between [...] [organized armed groups]". In the opinion of the Chamber, this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.[302]

234. Taking into consideration the principles and rules of international armed conflict reflected in the international instruments above-mentioned, the Chamber adds that those "organized armed groups" must be under responsible command. In this regard, responsible command entails some degree of organization of those armed

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[301] See also J. Pictet, (ed.), *ICRC Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (ICRC, 1958), pp. 35-36; Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (ICRC, 1987), MN 4460-4462.

[302] Pre-Trial Chamber I, *Lubanga* decision ICC-01/04-01/06-803-tEN, para. 234.

groups, including the possibility to impose discipline and the ability to plan and carry out military operations.[303]

235. The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a "protracted armed conflict" and thus may be seen to require a higher or additional threshold to be met – a necessity which is not set out in article 8(2)(d) of the Statute. The argument can be raised as to whether this requirement may nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretative approach, the Chamber does 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.

236. In addition, the Chamber wishes to clarify that the legal requirement contained in article 1(1) of Additional Protocol II for the organized armed group(s) to exert control over a part of the territory is not a requirement under the Statute.[304]

237. The Chamber notes that in accordance with article 8(2)(c) of the Statute, only crimes committed against persons taking no active part in hostilities are covered by that provision. This element will be dealt with by the Chamber as a constituent element of the particular offences.

(ii) Awareness of the existence of an armed conflict

238. The Chamber takes cognizance of the Elements of Crimes which establish that the perpetrator of a war crime must have been aware of the factual circumstances that established the existence of an armed conflict. The Introduction to article 8 of the Elements of Crimes clarifies that:

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[303] See also Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, para. 232.

[304] This interpretation appears to be also taken by Pre-Trial Chamber I in its *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 233 *et seq.*

> With respect to the last two elements listed for each crime:
>
> - There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
> - In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
> - There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

239. The Chamber notes that the mode of criminal responsibility concerning Mr Jean-Pierre Bemba will be dealt with separately in the present decision (part VI). Taking into consideration the conclusions of the Chamber in that part, the Chamber will therefore only examine at this stage the contextual element of war crimes concerning the "awareness of the existence of an armed conflict not of an international character" in relation to the alleged direct perpetrators, namely the MLC troops acting in the field.

b) Findings of the Chamber

(i) Existence of an armed conflict not of an international character

aa) Existence of an armed conflict

240. The Prosecutor alleges that on 25 October 2002 Mr Bozizé, the former Army Chief of Staff of the CAR armed forces, the FACA, led mainly dissident FACA forces towards Bangui in an effort to unseat the then CAR President Mr Patassé. In response to Mr Bozizé's attack, Mr Patassé brought together the remaining FACA, the USP, supplemented by a group of 500 predominantly Chadian mercenaries led by Mr Abdoulayé Miskine ("Mr Miskine") and 100 Libyan troops, to launch a counter-offensive. As support, Mr Patassé requested that Mr Jean-Pierre Bemba

provide MLC troops to assist in defending him. On or about 26 October 2002, MLC troops entered the CAR territory to intervene in the conflict.[305]

241. Firstly, the Chamber notes at the outset that it is not disputed by either party, and is even common knowledge, that Mr Bozizé carried out an attempted coup and attacked Bangui on 25 October 2002 with the objective to unseat the then President, Mr Patassé.[306]

242. Likewise, the fact that 1,000 to 1,500 MLC soldiers were sent to the CAR by Mr Jean-Pierre Bemba upon request of the then President of the CAR, Mr Patassé,[307] to assist the CAR government forces in repelling the troops of Mr Bozizé and defending the then presidency of Mr Patassé, is expressly admitted by the Defence,[308] who also admits that, to this end, three battalions, namely "Poudrier B", the "28th battalion and the "5th battalion" were sent to the CAR.[309] It is also not contested by either party and supported by the Disclosed Evidence[310] that there existed some form of collaboration between and coordination of operations of the MLC forces and the CAR government forces.[311] Furthermore, it is also not disputed and is public knowledge that MLC soldiers present in the CAR were withdrawn from the CAR on 15 March 2003 and that on that date Mr Bozizé came to power.[312]

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[305] ICC-01/05-01/08-395-Anx 3, paras 13 and 44. During the Hearing, the Prosecutor elaborated on the presence of MLC soldiers in the CAR throughout the period in question, Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 126, line 11 until p. 127, line 17.

[306] See also the written submissions of the Defence, ICC-01/05-01/08-379-Corr, para. 33; and ICC-01/05-01/08-413, para. 45.

[307] See also the written submissions of the Defence, ICC-01/05-01/08-379-Corr, paras 34 and 35; and ICC-01/05-01/08-413, paras 8, 46 – 48; Defence submissions during the Hearing at Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 59, lines 18-19.

[308] See also the written submissions of the Defence, ICC-01/05-01/08-379-Corr, para. 39.

[309] Written submissions of the Defence, ICC-01/05-01/08-413, para. 8.

[310] Statement of witness 9, EVD-P-00148 at 0154-0155; statement of witness 26, EVD-P-00136 at 0156-0158.

[311] See the written submissions of the Defence, ICC-01/05-01/08-413, para. 51. The question of whether the MLC troops were fully incorporated in the CAR hierarchy and structure and who exerted authority over those troops is to be dealt with later in the decision concerning the issue of individual criminal responsibility.

[312] See the written submissions of the Defence, ICC-01/05-01/08-413, para. 8.

243.Given the concurring views of the parties and its own assessment of the Disclosed Evidence,[313] the Chamber therefore finds that armed hostilities broke out on the territory of the CAR, following the attack launched by the troops of Mr Bozizé on the city of Bangui on 25 October 2002. The Chamber finds that these armed hostilities were of a certain intensity, exceeding the level of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Armed hostilities occurred throughout the country, in cities and areas such as Bangui, PK 12, Damara, Sibut, Bossembélé, Bossangoa and Bozoum, with MLC soldiers engaging in combat and establishing their strategic bases. Witness 40 provides reliable information on the movements of MLC troops and their successes in their military campaign.[314] Witnesses 6 and 9 also give credible accounts of the establishment of MLC strategic bases in the CAR.[315] Information to this effect is also given by witness 46.[316]

244.The Chamber further notes the reports of NGOs, such as AI and FIDH,[317] and the Weekly Humanitarian Updates of the UN Resident Coordinator[318] which corroborate

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[313] See for example, statement of witness 25, EVD-P-00138 at 0308; statement of witness 46, EVD-P-02333 at 0278, 0282-0283 and EVD-P-02334 at 0312-0313; statement of witness 31, EVD-P-02169 at 0280; statement of witness 6, EVD-P-00098 at 0111; statement of witness 40, EVD-P-02297 at 0246-0248 and EVD-P-02346 at 0598, 0602 and 0605; the direct evidence referred to above is further corroborated by indirect evidence, such as FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les elephants se batten, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001 at 0041; FIDH report, "*Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0418 and 0428; RFI broadcast, EVD-P-02258, track01 from 00:28 to 01:16; RFI press release, "*Government to investigate "executions of Chadians*" dated 5 November 2002, EVD-P-00019 at 0670, 0672, 0674 and 0677; AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045 at 0504, 0510 and 0530; letter of referral of the CAR government, "*Mémoire, Saisine de la Cour pénale internationale par l'État Centrafricain d'un renvoi en application des articles 13 et 14 du Statut de Rome*", EVD-P-00003 at 0145-0147; UNRC, "*Humanitarian Update: Central African Republic 07 March 2003*", EVD-P-00017 at 0645.

[314] Statement of witness 40, EVD-P-02295 at 0207 and 0208.

[315] Statement of witness 6, EVD-P-00098 at 0108; statement of Witness 9, EVD-P-02173 at 0157.

[316] Statement of witness 46, EVD-P-02332 at 0248 - 0256.

[317] AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045 at 0507; FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001 at 0041; FIDH report, "*Central African Republic, Forgotten, stigmatized: the double suffering of victims of international crimes*", 1 October 2006, EVD-P-00014 at 0418.

the direct evidence provided by the aforesaid witnesses and endorse the fact that the conflict was of a certain intensity.

bb) Nature of the armed conflict

245. As set out above,[319] the Prosecutor alleges that the armed conflict was not of an international character.[320]

246. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that the armed conflict on the CAR territory was not of an international character. Throughout the time period in question, the conflict remained within the confines of the CAR. No information on the involvement of foreign States, which would characterise the conflict as international, is available in the Disclosed Evidence. The presence of a limited number of foreign troops on the CAR territory, such as the MLC soldiers, Chadian mercenaries and the Libyan troops, was intended to support the CAR government authorities to counter the organized armed group led by Mr Bozizé, and was not directed against the State of the CAR and its authorities.

cc) Duration of the armed conflict

247. The Prosecutor alleges that, following the attack on Bangui led by Mr Bozizé on 25 October 2002, MLC troops entered the CAR on or about 26 October 2002 and remained in the country until 15 March 2003.[321]

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[318] UNRC, "*Central African Republic Weekly Humanitarian Update 17 November 2002*", EVD-P-02093 at 0658; UNRC, "*Humanitarian Update Central African Republic - 17 December 2002*", EVD-P-00018 at 0654; UNRC, "*Humanitarian Update Central African Republic 07 March 2003*", EVD-P-00017 at 0645.

[319] The Chamber refers to paragraph 214 of the decision and recalls that the Prosecutor has referred to this characterisation during the Hearing and presented evidence to this effect.

[320] See ICC-01/05-01/08-214-Conf; ICC-01/05-01/08-278-Conf-Exp-AnxB, pp. 67–72; Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 119, lines 13-18; p. 121, line 1. The Chamber, being aware of the confidential nature of the Prosecutor's filings, does not consider reference thereto and the disclosure of this particular information contained therein to be inconsistent with the confidential nature of the documents as such.

[321] ICC-01/05-01/08-395-Anx3, para. 14.

248. At the Hearing, the Defence challenged the date of arrival of MLC troops in the CAR as maintained by the Prosecutor,[322] and alleged that the first MLC troops arrived in the Bangui region only on 30 October 2002.[323] In addition, the Defence challenged the statement of witness 22, who claims to have been raped in PK 12 on 26 October 2002 by MLC soldiers.

249. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that armed hostilities broke out on the territory of the CAR on 25 October 2002 and lasted until 15 March 2003. It further finds that MLC troops arrived on or about 26 October 2002 on CAR territory.

250. The Chamber observes that indeed, witness 40 and witness 6 provide information substantiating the challenge of the Defence to this effect. In particular, witness 40 states that "the day the war started, that was on 29 October".[324] Witness 6 equally avers that MLC soldiers arrived in the CAR on 29 October 2002.[325]

251. However, the Chamber takes into consideration other pieces of evidence, *inter alia*, the statement of witness 31 indicating that large parts of the MLC troops were on the CAR territory on 27 October 2002.[326] The evidence that MLC troops were present and engaging in armed combat before 30 October 2002 is further corroborated by a report of the FIDH which gives an account of the fact that heavy fighting took place in Bangui as of 27 October 2002 between the troops of Mr Bozizé

[322] See chronology of the events in the Prosecutor's written observations submitted after the Hearing, ICC-01/05-01/08-377, para. 43.
[323] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 50, lines 17-23; p. 52, lines 2-4. This was further reiterated in the written submissions after the Hearing, ICC-01/05-01/08-379-Corr, para. 13. See also the written submissions of the Defence, ICC-01/05-01/08-413, para. 8.
[324] Statement of witness 40, EVD-P-02295 at 0203.
[325] Statement of witness 6, EVD-P-00098 at 0108.
[326] Statement of witness 31, EVD-P-02169 at 0280.

and the CAR government authorities, alongside around 1,000 MLC soldiers.[327] Another press article by "Le Citoyen", which provides a chronology of events as of 25 October 2002, submits that on 26 October 2002, MLC troops were present on the territory of the CAR.[328]

252. The Defence challenged the statement of witness 22 and purported that the witness could not have been raped by MLC soldiers on 26 October 2002 in PK 12,[329] as the MLC had arrived in PK 12 only on 7 November 2003. The Chamber notes that PK 12 is a locality 12 kilometres away from the city centre of Bangui. The Chamber considers that the Defence's allegation cannot serve as an argument to reject the fact that MLC soldiers were already present on the CAR territory on 26 October 2002.

253. The Chamber has taken into consideration the evidence of the Defence relating to judicial proceedings in the DRC to which MLC perpetrators were subject on account of alleged acts of pillaging. In these proceedings, one of the MLC perpetrators stated that he had arrived in the CAR one day after the operations had started. He indicated the start of the operations to be 25 October 2002, which means that this MLC soldier had arrived in the CAR on 26 October 2002.[330]

254. The Chamber further highlights its awareness that, in times of armed conflicts, information as to exact dates may be difficult to ascertain. In sum, based on the Disclosed Evidence, the Chamber finds that MLC soldiers arrived on the CAR territory on or about 26 October 2002, following the attempted coup of Mr Bozizé on 25 October 2002.

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[327] FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001 at 0041; this report indicates that the arrival of MLC troops occurred in two steps: approximately 1,000 soldiers were present when heavy armed hostilities broke out first in Bangui. Thereafter, on 30 October 2002 the fighting increased with another 500 MLC troops having arrived in the CAR. The sending of troops in a successive manner is also corroborated by witness 36, EVD-P-00142 at 0397.

[328] Press article of "*Le Citoyen*" dated 5 November 2002, EVD-P-00049 at 0083.

[329] See statement of witness 22, EVD-P-02269 at 0495.

[330] "*Actes de procédure contre les militaires impliqués dans les pillages à Bangui*", EVD-D01-00043 at 0003.

255. Given the concurring views of the parties on the time-frame of approximately five months during which those armed hostilities lasted, and its own assessment of the Disclosed Evidence, the Chamber finds that the armed conflict is to be characterised as "protracted" within the meaning of article 8(2)(f) of the Statute.

dd) Opposing parties

256. In the Amended DCC, the Prosecutor alleges that the armed conflict:

> [existed] between Bozizé troops and Pro-Patassé troops, including the MLC. (...) Between approximately the 25 October 2002 and 15 March 2003, Patassé gathered troops from multiple countries including the MLC, a mostly Chadian mercenary force of five hundred (500) troops, led by Miskine known as the *Batallion de Securité Frontalière* or the *Anti-Zaraguina Brigade*, and at least one hundred (100) Libyan troops to supplement his national forces.[331]

257. The Prosecutor further contends that "Bozizé, as a party to the conflict, was commanding approximately six hundred (600) troops, including troops who defected from FACA".[332]

258. Having reviewed the Disclosed Evidence as a whole, and paying due regard to the submissions of the Defence,[333] the Chamber finds that MLC troops in the CAR consisted of three battalions, namely "Poudrier B"[334] the "28th battalion"[335] and the "5th battalion"[336]. Further, the Chamber finds that during the armed conflict in the CAR up to 1,500 MLC soldiers were present. The three battalions were headed by a commander of operations in the field who stayed in contact with his hierarchy in Gbadolite, DRC. It is uncontested by the Defence that Mr Jean-Pierre Bemba received

[331] ICC-01/05-01/08-395-Anx3, para. 44.
[332] ICC-01/05-01/08-395-Anx3, para. 45.
[333] See para. 242 of the decision.
[334] Statement of witness 40, EVD-P-02295 at 0199 and 0207.
[335] Statement of witness 40, EVD-P-02295 at 0199 and 0207.
[336] Statement of witness 40, EVD-P-02295 at 0208.

reports about the military situation in the field.[337] The evidence shows that the MLC was structured like a conventional army under responsible command. Witnesses 36[338] and 40[339] provide credible information as to the hierarchy, discipline and command structure of the MLC.

259. The Disclosed Evidence also shows that MLC soldiers in the CAR fought alongside the CAR governmental forces of Mr Patassé, which consisted of the governmental authorities, the USP, the FACA, and further foreign supporting troops, such as 500 Chadian mercenaries led by Mr Miskine and about 100 Libyan forces[340]. It is not contested by the parties, and supported by evidence, that a coordination centre was established by the CAR government to coordinate the operations of the different actors supporting Mr Patassé in the field.[341]

260. The evidence further shows that Mr Bozizé had attempted the coup against Bangui on 25 October 2002 with the support of an organized armed group, consisting of defected former FACA members and Chadians.[342]

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[337] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 45, lines 8-9 : "(...) [Jean-Pierre Bemba] was informed of the military situation, and this we agree about".

[338] Statement of witness 36, EVD-P-00142 at 0361 – 0389.

[339] Statement of witness 40, EVD-P-02292; EVD-P-02293, EVD-P-02294.

[340] Statement of witness 36, EVD-P-00143 at 0410; UNRC, "*Central African Republic Weekly Humanitarian Update - 17 November 2002*", EVD-P-02093 at 0658; UNRC, "*Humanitarian Update. Central African Republic - 17 December 2002*", EVD-P-00018 at 0654; letter of referral of the CAR government, "*Mémoire, Saisine de la Cour pénale internationale par l'État Centrafricain d'un renvoi en application des articles 13 et 14 du Statut de Rome*", EVD-P-00003 at 0145; FIDH report, "*Crimes de Guerre en République Centrafricaine, Quand les éléphants se battent, c'est l'herbe qui souffre*", 1 February 2003, EVD-P-00001 at 0041.

[341] See also the written submissions of the Defence, ICC-01/05-01/08-379-Corr, para. 40. For the Prosecutor's submission, see ICC-01/05-01/08-T-11-ENG ET, p. 92, lines 5-10; see also statement of witness 9, EVD-P-00148 at 0154-0155; statement of witness 26, EVD-P-00136 at 0156-158.

[342] Statement of witness 40, EVD-P-02295 at 0205; statement of witness 22, EVD-P-02395 at 0503-0504; letter of referral of the CAR government, "*Mémoire, Saisine de la Cour pénale internationale par l'État Centrafricain d'un renvoi en application des articles 13 et 14 du Statut de Rome*", EVD-P-00003 at 0145; press article of "*Le Citoyen*", dating 24 February 2003, EVD-P-02122 at 0006; FIDH report, "*Crimes de Guerre en République Centrafricaine Quand les éléphants se battent, c'est l'herbe qui souffre*", 1 February 2003, EVD-P-00001 at 0040.

261. The Chamber concludes that, due to Mr Bozizé's former position as Chief of Staff of the FACA and the fact that his dissident armed group mostly consisted of defected former FACA members, this armed group was hierarchically organized, formerly trained in the CAR military and acquainted with military operations and codes. The fact that Mr Bozizé had launched an attempted coup against the city of Bangui on 25 October 2002 and that the fighting occurred on a large scale for approximately five months further clearly shows that Mr Bozizé's troops had the ability to plan and carry out military operations. This is evidenced by the statement of witness 40, who provides information on the operations against Mr Bozizé's troops.[343] The evidence concerning these facts is further corroborated by numerous public reports of NGOs[344] and the UN Resident Coordinator[345].

262. The Chamber therefore finds sufficient evidence to establish substantial grounds to believe that MLC troops were sent to the CAR to support the CAR governmental authorities at the time in combating the organized armed group led by Mr Bozizé.

(ii) The perpetrators' awareness of the existence of an armed conflict not of an international character

263. The Chamber recalls that any perpetrator committing a war crime must be aware of factual circumstances that established the existence of an armed conflict.[346]

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[343] Statement of witness 40, EVD-P-02295 at 0208-0209.

[344] AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045; FIDH report, "*Crimes de Guerre en République Centrafricaine, 'Quand les 'éléphants se battent, c'est l'herbe qui souffre'*", 1 February 2003, EVD-P-00001; Human Rights Watch, "*State of Anarchy - Rebellion and abuses against civilians*", 1 September 2007, EVD-P-00031.

[345] UNRC, "*Central African Republic Weekly Humanitarian Update 17 November 2002*", EVD-P-02093 at 0658; UNRC, "*Humanitarian Update: Central African Republic - 17 December 2002*", EVD-P-00018 at 0654; UNRC, "*Humanitarian Update: Central African Republic 07 March 2003*", EVD-P-00017 at 0645.

[346] This requirement is reflected in the Elements of Crimes. For the war crimes under judicial consideration, see the pertinent text in the Elements of Crimes at article 8(2)(c)(i) of the Statute, para. 5; article 8(2)(e)(vi) of the Statute, para. 4; article 8(2)(c)(i) of the Statute, para. 6 ; article 8(2)(c)(ii) of the Statute, para. 6 ; article 8(2)(e)(v) of the Statute, para. 5.

264.The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that MLC soldiers present on the CAR territory in support of the CAR government authorities from on or about 26 October 2002 until 15 March 2003 were fully aware of the existence of the armed conflict not of an international character. It is uncontested that they had been sent to the CAR upon the request of the then CAR President, Mr Patassé, in order to defend his presidency against the attempted coup carried out by the organized armed group led by Mr Bozizé. The objective of their mission to the CAR was to engage in armed combat and to counter the attacks of the opposing party.

2. Specific elements constituting war crimes

265.During the Hearing, the Defence raised at the outset several issues concerning the Prosecutor's submission on the alleged commission of war crimes. It referred to the statement of witness 36, who had stated that the incidents of war crimes "were only minor incidents".[347] The Defence continued to say that "[t]hey were never important or of much significance".[348]

266.The Chamber underlines that crimes need not be committed on a large-scale in order to be characterised as war crimes. A single and isolated act by a single perpetrator can amount to a war crime. Article 8 of the Statute does not limit the Court's jurisdiction, but serves as a practical guideline for the Court. In addition, the Disclosed Evidence as a whole shows that the "incidents" were not isolated acts.

267.The Defence further averred that MLC soldiers were not sent to commit war crimes in the CAR, that it was questionable whether the perpetrators were indeed

[347] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 41, lines 20-25.
[348] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 41, lines 21-23.

MLC soldiers and that MLC soldiers received their orders from the then President of the CAR, Mr Patassé, thus excluding any link to Mr Jean-Pierre Bemba.[349]

268. Addressing the general arguments of the Defence, the Chamber stresses that any allegation and attribution of facts must be based on the evidence. The arguments raised by the Defence mainly concern either the issue of identification of the perpetrators, which the Chamber has already addressed, or the question of the individual criminal responsibility of Mr Jean-Pierre Bemba. The Chamber addresses the latter issue in part VI of the decision. Hence, the Chamber finds the general arguments raised by the Defence immaterial.

269. The Prosecutor has charged Mr Jean-Pierre Bemba in the Amended DCC with the following acts constituting war crimes.

a) Specific elements of murder as a war crime (count 6)

270. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed jointly with another, Ange-Félix Patassé, war crimes, by killing of men, women and children civilians in the Central African Republic, in violation of [article] 8(2)(c)(i) (...) of the Rome Statute.[350]

271. The Prosecutor alleges that the facts characterised as acts of murder constituting crimes against humanity occurred also in the context of the armed conflict not of an international character.[351]

[349] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 45, lines 20-21; p. 46, lines 7-9; p. 47, lines 12-17 ; p. 48, lines 9-10 and 18-20; p. 49, lines 14-21; p. 50, lines 1-6; p. 52, lines 9-11 and 16-23. The argument was later raised again in ICC-01/05-01/08-379-Corr, para. 84.
[350] ICC-01/05-01/08-395-Anx3, p. 37.
[351] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 33, lines 2-4 ; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 7, lines 5-14.

272.The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of murder of civilians constituting war crimes pursuant to article 8(2)(c)(i) of the Statute were committed by MLC soldiers in the context of the armed conflict not of an international character on the territory of the CAR from on or about 26 October 2002 to 15 March 2003. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

(aa) *Actus reus*

273.With regard to article 8(2)(c)(i) of the Statute, the Elements of Crimes require that:

> (1) The perpetrator killed one or more persons;
> (2) Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel[352] taking no active part in the hostilities.

274.The Chamber reiterates its previous finding whereby the crime of murder pursuant to article 8(2)(c)(i) of the Statute may be committed by action or omission.[353] It further recalls its previous findings that the death of the victim must result from the perpetrator's conduct, thus establishing a causal link between the conduct and the result.

bb) *Mens rea*

275.With regard to the mental element the perpetrator (1) must have committed the crime of murder with intent and knowledge pursuant to article 30 of the Statute, and

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[352] The Elements of Crimes clarify in fn 56 to article 8(2)(c)(i) of the Statute that the term 'religious personnel' includes those non-confessional non-combatant military personnel carrying out a similar function.

[353] See paragraph 132 of the decision; see also Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 287.

(2) must have been aware of the factual circumstances that established the status of the persons concerned.

cc) Nexus requirement

276. The Prosecutor must demonstrate that acts of murder took place in the context of and were associated with an armed conflict not of an international character.[354]

(ii) Findings of the Chamber

277. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that, as MLC soldiers moved in battle throughout the CAR, they killed civilians thus committing war crimes according to article 8(2)(c)(i) of the Statute. As established above,[355] the Chamber relies on evidence related to the death of two civilians, the cousin of witness 22 and the brother of witness 87. The Chamber is further satisfied that these acts of murder occurred in the context of the armed conflict not of an international character in the CAR which existed from on or about 26 October 2002 until 15 March 2003.[356]

278. As analysed above,[357] the Chamber is further satisfied that the MLC soldiers acted with intent and knwoledge.

279. The Chamber finds that the MLC soldiers were aware of the civilian status of the persons concerned. As the evidence shows, both victims were unarmed at their residence, protecting their family's goods from being taken by MLC soldiers. Both deceased had not been taking active part in the hostilities.[358]

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[354] Elements of Crimes, article 8(2)(c)(i) of the Statute, para. 4.
[355] See paragraph 144 of the decision.
[356] See paragraphs 144 and 147 of the decision.
[357] See paragraph 149 of the decision.
[358] It is recalled that both victims resisted the looting of their family's property, see paragraphs 146 and 148 of the decision.

b) Specific elements of rape as a war crime (count 2)

280. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, war crimes through acts of rape upon civilian men, women and children in the Central African Republic, in violation of [article] 8(2)(e)(vi) (...) of the Rome Statute.[359]

281. The Prosecutor alleges that the facts characterized as acts of rape constituting crimes against humanity occurred also in the context of the armed conflict not of an international character which existed on the territory of the CAR between 26 October 2002 and 15 March 2003.[360]

282. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that in the context of and in association with the armed conflict not of an international character on the territory of the CAR, acts of rape constituting war crimes pursuant to article 8(2)(e)(vi) of the Statute were committed on civilians by MLC soldiers from on or about 26 October 2002 to 15 March 2003. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

aa) *Actus reus*

283. With regard to article 8(2)(e)(vi) of the Statute, the Elements of Crimes require that:

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[359] ICC-01/05-01/08-395-Anx3, p. 36.

[360] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 8, lines 22-23 ; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 7, lines 7-8.

> (1) The perpetrator invaded[361] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[362]

bb) *Mens rea*

284. With regard to the mental element, the perpetrator must have committed the act of rape with intent and knowledge pursuant to article 30 of the Statute.

cc) Nexus requirement

285. The Prosecutor must demonstrate that acts of rape took place in the context of and were associated with an armed conflict not of an international character.[363]

(ii) Findings of the Chamber

286. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that civilian women and men were raped from on or about 26 October 2002 to 15 March 2003 by MLC soldiers on the CAR territory. More specifically, the evidence shows that as MLC soldiers moved in battle throughout the CAR territory civilians were raped by force, or by threat of force or coercion. To this end, the Chamber refers to its previous findings and the analysis of the evidence completed in paragraphs 171 to 186 above.

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[361] The Elements of Crimes clarify in fn 62 to article 8(2)(e)(vi) of the Statute that the concept of 'invasion' is intended to be broad enough to be gender-neutral.
[362] The Elements of Crimes clarify in fn 63 to article 8(2)(e)(vi) of the Statute that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.
[363] Elements of Crimes, article 8(2)(e)(vi) of the Statute, para. 3.

287. As analysed above,[364] the Chamber is satisfied that the MLC soldiers acted with intent and knowledge.

288. The Chamber is also satisfied that these acts of rape took place in the context of and were associated with the armed conflict not of an international character in the CAR which existed from on or about 26 October 2002 to 15 March 2003. The evidence shows that acts of rape occurred at the time when MLC soldiers were moving in battle through the CAR territory.

c) Specific elements of torture as a war crime (count 4)

289. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, war crimes by inflicting severe physical or mental pain or suffering through acts of rape or other forms of sexual violence, upon civilian men, women and children in the Central African Republic, in violation of [article] 8(2)(c)(i) (...) of the Rome Statute.[365]

290. The Prosecutor alleges that the facts characterised as acts of torture constituting crimes against humanity occurred also in the context of the armed conflict not of an international character.[366]

291. Lacking precision in the Amended DCC as to the specific purpose required for the commission of torture within the meaning of article 8(2)(c)(i) of the Statute, the Chamber declines to confirm count 4 of torture as a war crime. The Chamber bases this finding on the following considerations.

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[364] See paragraph 187 of the decision.
[365] ICC-01/05-01/08-395-Anx3, p. 36.
[366] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 25, lines 1-3; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 7, lines 5-14.

(i) The law and its interpretation

aa) *Actus reus*

292. The Elements of Crimes with regard to article 8(2)(c)(i) of the Statute require that:

> (1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
> (2) Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

bb) *Mens rea*

293. With regard to the mental element the perpetrator (1) must have committed the crime of torture with intent and knowledge pursuant to article 30 of the Statute, (2) must have inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; and (3) must have been aware of the factual circumstances that established the status of the persons concerned.

294. The Chamber stresses that the perpetrator's intent to inflict the pain or suffering for a purposes such as set out above, constitutes a specific intent, which has to be proven by the Prosecutor.[367]

295. The General Introduction to the Elements of Crimes provides that:

> 4. With respect to mental elements associated with elements involving value judgment, such as those using the terms 'inhumane' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated.

[367] Similarly, ICTY, *Prosecutor v Krnojelac*, Case No. IT-97-25-T, "Judgment", 15 March 2002, para. 188.

cc) Nexus requirement

296. The Prosecutor must demonstrate that acts of torture took place in the context of and were associated with an armed conflict not of an international character.[368]

(ii) Findings of the Chamber

297. Given the identical submission of the Prosecutor in the Amended DCC with regard to the act of torture and the underlying criminal conduct pertaining to acts of rape, the Chamber refers to the Prosecutor's submission at the Hearing that MLC troops "used torture through acts of sexual violence for the purpose of punishing and intimidating the civilian population for allegedly sympathizing with Bozizé's rebels, as well as for the purpose of discriminating against their victims.[369]

298. At the Hearing, the Defence questioned in a general fashion whether the instances of mistreatment purported by the witnesses were serving a specific purpose as envisaged in the Elements of Crimes for article 8(2)(c)(i) of the Statute.[370]

299. The Chamber observes that indeed the Prosecutor failed to provide the factual basis in the Amended DCC underpinning the charge of torture as a war crime. Even at the Hearing, the Prosecutor only recalled a selection of factual circumstances pertaining to acts of rape in order to substantiate the count of torture as a war crime. However, he did not elaborate on the specific intent of alleged MLC soldiers which would have clearly characterised the alleged acts as acts of torture as a war crime.

[368] Elements of Crimes, article 8(2)(c)(i) of the Statute, para. 5.

[369] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG-ET, p. 31, lines 19-21.

[370] The Defence argued « Est-ce que vous pensez, Madame la Présidente, Messieurs les juges, que ce deuxième élément constitutif de torture est établi au regard de tous les témoins — de toutes les parties qui se sont présentées comme victimes, au regard bien entendu des témoins... des témoignages que le Procureur nous apporte ? Voici en tout cas le problème qui se pose à cet égard. », Pre-Trial Chamber III, ICC-01/05-01/08-T-11-FRA ET, p. 51, lines 10-14.

The Defence rightly pointed out that the Prosecutor failed to substantiate the specific intent of MLC perpetrators, thus not allowing the Defence to identify all relevant facts underpinning the charge of torture as a war crime.

300. Therefore, the Chamber considers that the Prosecutor did not discharge properly his duty under article 61(3) of the Statute and regulation 52(b) of the Regulations.[371] The duty to present evidence in relation to each legal requirement of the crime cannot be compensated by the Chamber.

d) Specific elements of outrage upon personal dignity as a war crime (count 5)

301. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, war crimes by humiliating, degrading or otherwise violating the dignity of civilian men, women and children in the Central African Republic, in violation of [article] 8(2)(c)(ii) (...) of the Rome Statute.[372]

302. The Chamber rejects the cumulative charging approach of the Prosecutor and therefore declines to confirm count 5 of outrage upon personal dignity as war crime in violation of article 8(2)(c)(ii) of the Statute. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

aa) *Actus reus*

303. With regard to article 8(2)(c)(ii) of the Statute, the Elements of Crimes require that:

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[371] See paragraph 208 of the decision.
[372] ICC-01/05-01/08-395-Anx3, p. 36.

(1) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons;[373]
(2) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity;
(3) Such person or persons were either *hors de combat,* or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

bb) *Mens rea*

304. With regard to the mental element the perpetrator (1) must have committed the crime of outrage upon personal dignity with intent and knowledge pursuant to article 30 of the Statute, and (2) must have been aware of the factual circumstances that established the status of the persons concerned.

305. Reference is made to paragraph 4 of the General Introduction of the Elements of Crimes as set out above in paragraph 295.

cc) Nexus requirement

306. The Prosecutor must demonstrate that acts of outrage upon personal dignity took place in the context of and were associated with an armed conflict not of an international character.[374]

(ii) Findings of the Chamber

307. The Chamber observes that the Prosecutor in the Amended DCC did not specify the facts upon which he bases the charge of outrage upon personal dignity under article 8(2)(c)(ii) of the Statute. In the Amended DCC, the Prosecutor refers to the

[373] The Elements of Crimes clarify in fn 57 to article 8(2)(c)(ii) of the Statute that for this crime, 'person' can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.
[374] Elements of Crimes, article 8(2)(c)(ii) of the Statute, para. 5.

commission of the crime "by humiliating, degrading or otherwise violating the dignity of civilian men, women and children in the [CAR]",[375] thus reflecting merely one of the legal requirements contained in article 8(2)(c)(ii) of the Statute. Without information in the Amended DCC on the link existing between the specific facts underpinning the act of outrage upon personal dignity and the individual victim or witness concerned, the Defence and the Chamber are obliged to resort to the Disclosed Evidence in order to properly interpret the Amended DCC.

308. The Chamber further notes that, only at the Hearing, the Defence was in a position to properly identify the factual basis pertaining to count 5 when the Prosecutor clarified that "any act of rape is humiliating, degrading and a violation of a person's dignity. Therefore, any act of rape constitutes an outrage upon personal dignity".[376] Albeit acknowledging the different nature of both crimes,[377] the Prosecutor maintained at the Hearing that the crime of outrage upon personal dignity is fulfilled because MLC soldiers humiliated, degraded and violated the dignity of civilians by (1) gang-raping them,[378] (2) raping them at gunpoint,[379] (3) ripping off their clothes before the rape,[380] (4) raping them in front of their families or in public,[381] and (5) because of the powerlessness of the families witnessing the rapes,[382] (6) the severity of the rapes[383] and (7) the impact of the rapes on the families of rape victims and the CAR population in general[384].

309. By reference to the statement of witness 36, the Defence contended during the Hearing, in a general fashion, that incidents of outrages upon personal dignity were

[375] ICC-01/05-01/08-395-Anx3, p. 37.
[376] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG, p. 9, lines 17-19.
[377] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 9, lines 19-21.
[378] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 10, lines 4-6.
[379] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 10, lines 17-19.
[380] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 11, lines 13-15.
[381] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 12, lines 2-5.
[382] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 12, lines 19-20.
[383] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 13, lines 11-13.
[384] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 14, lines 11-13.

isolated incidents, never very significant, and were punished locally in Bangui.[385] The Defence further challenged the Prosecutor's Amended DCC as it did not contain precise dates with regard to the incidents related to the count of outrages upon personal dignity.[386]

310. As identified above in the context of the count of torture as a crime against humanity,[387] the Chamber notes that also in the context of outrages upon personal dignity the Prosecutor presented the same conduct, related mainly to acts of rape, under different legal characterisations, namely articles 8(2)(c)(ii) and 8(2)(e)(vi) of the Statute. In the opinion of the Chamber, most of the facts presented by the Prosecutor at the Hearing reflect in essence the constitutive elements of force or coercion in the crime of rape, characterising this conduct, in the first place, as an act of rape. In the opinion of the Chamber, the essence of the violation of the law underlying these facts is fully encompassed in the count of rape.

311. The Prosecutor presented at the Hearing other alleged acts of outrage upon personal dignity, different from the act of rape itself, such as the powerlessness of the family members and the impact on the family members and the CAR population. Bearing in mind that these distinct facts underpinning the charge were not clearly set out in the Amended DCC, which forms the basis for the Hearing, for the preparation of the Defence and for the present decision, the Chamber wishes to recall the basic principles to be observed when framing a DCC as set out in paragraph 208 above. It can therefore not consider these facts properly reflected in the Amended DCC, which thus infringes upon the rights of the Defence.

312. With reference to the Chamber's previous findings concerning cumulative charging, it therefore holds that in this particular case the count of outrage upon

[385] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG-ET, p. 57, lines 1-3.
[386] See the written submissions of the Defence, ICC-01/05-01/08-413, para. 32.
[387] See paragraphs 204 and 205 of the decision.

personal dignity is fully subsumed by the count of rape, which is the most appropriate legal characterisation of the conduct presented.

313. In light of the Chamber's finding to decline to confirm count 5, the Chamber will not entertain the arguments raised by the Defence.

e) Specific elements of pillaging as a war crime (count 8)

314. In the Amended DCC, the Prosecutor alleges that:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, war crimes through the pillaging of villages and towns in the Central African Republic, in violation of [article] 8(2)(e)(v) (...) of the Rome Statute. [388]

315. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of pillaging constituting war crimes pursuant to article 8(2)(e)(v) of the Statute were committed by MLC soldiers in the context of the armed conflict not of an international character on the territory of the CAR from on or about 26 October 2002 to 15 March 2003. The Chamber bases this finding on the following considerations.

(i) The law and its interpretation

aa) *Actus reus*

316. With regard to article 8(2)(e)(v) of the Statute, the Elements of Crimes require that:

> (1) The perpetrator appropriated certain property;
> (2) The appropriation was without the consent of the owner.

[388] ICC-01/05-01/08-395-Anx3, p. 38.

317.The Chamber observes that pillaging a town or place[389] pursuant to article 8(2)(e)(v) of the Statute entails a somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property,[390] which goes beyond mere sporadic acts of violation of property rights. Further, noting the wording of the Elements of Crimes, the Chamber observes that the Elements of Crimes do not require the property to be of a certain monetary value. However, bearing in mind the mandate of the Court as set out in article 1 of the Statute, the Chamber recalls that article 8(2)(e)(v) of the Statute is introduced as "[an]other *serious* [violation] of the laws and customs applicable in armed conflict not of an international character" (emphasis added). In the opinion of the Chamber, this means that cases of petty property expropriation may not fall under the scope of article 8(2)(e)(v) of the Statute. A determination on the seriousness of the violation is made by the Chamber in light of the particular circumstances of the case.

318.Lastly, the Chamber finds that, to the extent possible, a description of the "expropriated" property is required in order to ascertain whether indeed "certain property" was appropriated without the consent of the rightful owner.

bb) *Mens rea*

319.With regard to the mental element the perpetrator must have removed certain property from the possession of another rightful owner without his or her consent with intent and knowledge pursuant to article 30 of the Statute.[391]

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[389] The prohibition of pillaging goes back to article 28 of the "Regulations Concerning the Laws and Customs of War on Land" annexed to the Convention (IV) Respecting the Laws and Customs of War on Land, dated 18 October 1907 (the "Hague Regulations"), Martens, *Nouveau Recueil Général* (3e série), vol. 3, p. 461; the prohibition of pillaging is further established in article 47 of the Hague Regulations; article 33 of the Fourth Geneva Convention; and article 4(2)(g) of the Additional Protocol II to the 1949 Geneva Conventions.

[390] Pre-Trial Chamber I, *Katanga* decision, ICC-1/04-01/07-717, para. 329.

[391] Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 331.

320. The Chamber highlights that in addition to the intent pursuant to article 30 of the Statute, the perpetrator must have specifically intended to deprive the owner of the property and to appropriate it for private or personal use.[392]

cc) Nexus requirement

321. The Prosecutor must demonstrate that acts of pillaging took place in the context of and were associated with an armed conflict not of an international character.[393]

(ii) Findings of the Chamber

322. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that the evidence shows that, as MLC soldiers moved in battle from on or about 26 October 2002 to 15 March 2003 throughout the CAR territory, they appropriated for their own private or personal use belongings of civilians, such as their livestock, vehicles, televisions, radios, clothing, furniture and money, without the consent of the rightful owners. The evidence shows that MLC soldiers went through the neighbourhoods in groups and searched for money and other valuable items. The deprivation was not justified by military necessity and was often accompanied by punishments for those who resisted. The evidence also shows that, in the cases of pillaging presented by the Prosecutor, the perpetrators were MLC soldiers. To this end, the Chamber refers to its previous findings set out in paragraph 106 above. MLC soldiers stored the stolen goods in their bases before they transported them to the DRC.

323. The Chamber draws attention, in particular, to the following events and the evidence related thereto:

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[392] The Elements of Crimes clarify in fn 61 to article 8(2)(e)(v) of the Statute that as indicated in the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

[393] Elements of Crimes, article 8(2)(e)(v) of the Statute, para. 3.

324. Witness 22 states that about 30 armed MLC soldiers entered her uncle's house near PK 12 on 26 October 2002[394] and appropriated the witness's and her uncle's clothing, the witness's shoes and iron, the family's animals, food reserves, cell phones and paintings without the witness's and the family's consent.[395] The armed MLC soldiers entered the house saying "Don't move. We will not hurt you. All we want is money".[396] Although the Chamber is aware of the Defence's challenge regarding the date of the crime, it is satisfied that the witness and her family have been deprived of their property and that the perpetrators were indeed MLC soldiers.[397] Taking into consideration that the witness provides coherent and credible information with regard to the events described, the Chamber is also satisfied that the events took place in the period under judicial examination, *i.e.* when MLC soldiers were on CAR territory.

325. Eight armed MLC soldiers entered the house of witness 23 on 8 November 2002 at PK 12.[398] The MLC soldiers appropriated the witness's belongings, such as the vehicle and machines he used for his profession, without his consent. He states that he was left only with small plates and old pots.[399] The witness states that, on this occasion, MLC soldiers also appropriated the mattresses and the bed frame of his deceased wife.[400] Witness 23 states that he saw MLC soldiers loading their cars with stolen items and taking the road to the city centre, heading towards the river which forms the international border with the DRC. He also saw loaded vehicles taking the road to Boali and Damara.[401] The statement of witness 23 is corroborated by the statement of witness 80.[402]

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394 EVD-P-02269 at 0495; EVD-P-02359 at 0506.
395 EVD-P-02269 at 0495; EVD-P-02359 at 0505, 0507 and 0516.
396 EVD-P-02359 at 0504.
397 The Chamber recalls its findings in paragraphs 184 and 185 of the decision.
398 EVD-P-02362 at 0040; EVD-P-02363 at 0069 - 0070; and 0077.
399 EVD-P-02363 at 0071; EVD-P-2364 at 0095 and 0100.
400 EVD-P-02364 at 0095.
401 EVD-P-02364 at 0100 and 0101.
402 EVD-P-02394 at 0171; EVD-P-02395 at 0212.

326. Witness 42 states that at the end of November 2002 a group of about ten MLC soldiers beat his son when he resisted giving them food supplies in his house in Begoa. Witness 42 intervened, but was called an old man by the MLC soldiers who also called his son a rebel. The MLC soldiers forced him and his family to lie down on the ground. One of them put his foot on the witness's head, while other MLC soldiers appropriated his radio, parts of his car and 90,000 Central African Francs without his consent.[403]

327. Witness 80 states that three MLC soldiers, who came to her house in PK 12 on 8 November 2002,[404] appropriated her bed, the mattresses, furniture, about 90,000 Central African Francs and her cart without her consent.[405] The MLC soldiers were armed and had raped the witness.

328. Witness 81 states that she was preparing breakfast in the morning of 8 November 2002 in her house in PK 12 when a group of 15 MLC soldiers came to her house and asked her husband for clothes and money. The MLC soldiers went into the house and appropriated belongings of the witness's family, such as mattresses, a suitcase and clothing, without her consent. The MLC soldiers brought the stolen goods to an abandoned house which was their base.[406] This incident occurred on the same day the witness was raped.[407]

329. Witness 87 states that two groups of MLC soldiers appropriated her television set, radio, her furniture, the mattress and 65,000 Central African Francs without her consent, on or around 30 October 2002 in Boy-Rabe.[408] The MLC soldiers were armed

[403] EVD-P-02355 at 0832 - 0834.
[404] EVD-P-02395 at 0195; see also the Chamber's previous finding concerning the date of crime in paragraph 178 of the decision.
[405] EVD-P-02394 at 0170; EVD-P-02395 at 0206, 0210 and 0212.
[406] EVD-P-02397 at 0257 - 0260.
[407] See the Chamber's previous finding regarding the date of crime in paragraph 180 of the decision.
[408] EVD-P-02413 at 0191 and 0192; EVD-P-02414, at 0200 and 0201.

and demanded "donne l'argent pas tuer" when entering the witness's house.[409] After the witness had been raped, she saw two MLC soldiers coming out of her mother's bedroom with money.[410] The witness also states that, after she was raped, her brother was killed by a member of another group of MLC soldiers while defending their father's motorbike from being taken.[411]

330. Having established the material elements of the crime of pillaging, the Chamber also finds that the MLC perpetrators committed the *actus reus* of pillaging against CAR civilians with intent and knowledge. MLC soldiers entered the houses by force, demanding and taking money and other valuable goods from CAR civilians.

331. Furthermore, the Chamber is satisfied that MLC perpetrators committed these acts of pillaging with the additional special intent to deprive the rightful owner of his or her property and to appropriate it for private or personal use. As set out above, the evidence shows that MLC soldiers invaded the houses of CAR civilians, expropriated their belongings from them by coercion, brought the stolen items to their bases and subsequently transported them to the DRC. The rightful owners were no longer in a position to rightfully dispose of their goods.

332. Finally, the Chamber is satisfied that the acts of pillaging took place in the context of and were associated with an armed conflict not of an international character. The evidence shows that MLC soldiers appropriated belongings of CAR civilians while moving through the country in battle. Having reviewed the Disclosed Evidence as a whole, the Chamber is satisfied that all instances of pillaging occurred at the occasion of the armed conflict not of an international character in the CAR.

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[409] EVD-P-02413 at 0193. It is unclear to the Chamber whether the witness was threatened with death. However, the Chamber is satisfied that the witness felt threatened in case she did not give money to the MLC soldiers, EVD-P-02414 at 0204.
[410] EVD-P-02414 at 0209.
[411] EVD-P-02414 at 0201, 0211, 0212, 0216 and 0217.

333. The statements of direct witnesses are further corroborated by other evidence. The Chamber further takes note of the statements of witnesses 6,[412] 9,[413] 22,[414] 29,[415] 42,[416] 68,[417] 80[418] and 87[419] who give accounts of large-scale pillaging by MLC troops in their surroundings. They provide evidence to the effect that MLC soldiers went from house-to-house and deprived rightful owners of their property without their consent. The witnesses provide information whereby MLC soldiers carried those belongings either on vehicles, on their heads or on their backs to their bases established in the CAR, and subsequently transported them over the Oubangui river

[412] The witness states that pillaging occurred on a systematic basis. The witness states that MLC soldiers pillaged Bangui systematically while advancing towards PK 12. The MLC soldiers loaded looted goods onto vehicles and transported them subsequently to the DRC, EVD-P-00098 at 0112; the witness believes that MLC soldiers pillaged due to the fact that Mr Jean-Pierre Bemba did not pay his troops intervening in the CAR, EVD-P-00098 at 0109. The witness states that he was himself a victim of pillaging by MLC soldiers himself; amongst the stolen goods were his computer, cell phone, clothing, shoes, television, radio and his car, EVD-P-00098 at 0103.

[413] The witness states that he had heard of pillaging from the civilians in Bangui and the city of Mongoumba during the armed conflict in the CAR. To the knowledge of the witness, MLC soldiers pillaged the places where they were based, in particular in Bangui and PK 12. The witness claims to know that MLC soldiers transported stolen goods through Zongo to the DRC, EVD-P-02173 at 0165 - 0167.

[414] The witness states that MLC soldiers looted one house after another. She had heard news circulated by members of the CAR presidential security that MLC soldiers crossed the river "Bali" with those items, EVD-P-02359 at 0517.

[415] The witness states that MLC soldiers pillaged Mongoumba on 5 March 2003. Early in the morning, the fishermen warned the population to flee from the arriving "Banyamulenge". The MLC soldiers went from house to house. They broke the entrance doors, entered the houses, and appropriated belongings of the local population, EVD-P-02367 at 0031, 0033, 0035 and 0044.

[416] The witness states that, while some MLC soldiers were engaged in combat against the opposing rebels, others stayed behind and were going through the neighbourhoods in an organized fashion, taking away items from the civilian population, such as animals, radios, clothing and mattresses, EVD-P-02393 at 0802; EVD-P-02355 at 0830; the witness also states that on 8 November 2002 he saw MLC soldiers forcing a man to abandon his car, EVD-P-02355 at 0815. The witness further provides information that stolen goods were stored in houses, EVD-P-02355 at 0830; MLC soldiers entering the houses demanded money from the residents, EVD-P-02355 at 0830.

[417] The witness provides information whereby she saw MLC soldiers carrying looted goods, such as suitcases and mattresses, on their heads and bringing them to their bases. However, the witness states that she does not know from where these goods were taken. The witness states that the region between Cite Makpayen to Dengue II was looted and that residents of this region were complaining, EVD-P-02388 at 0401.

[418] The witness states that she saw and heard of lootings committed by MLC soldiers, EVD-P-02394 at 0171 and 0172; EVD-P-02395 at 0188; EVD-P-02395 at 0195. The witness also reports that one of her daughters had told her that MLC soldiers were looking for civilians to take their money away, EVD-P-02395 at 0188; the witness also maintains that the "Banyamulenge" were selling stolen items, EVD-P-02395 at 0191.

[419] Witness 87 states that she saw armed "Banyamulenge" moving along the roads carrying stolen goods on their heads, such as television sets, radios, dishes and mattresses, see EVD-P-02413 at 0188 and 0189.

to the DRC. Witnesses 22 and 42 state that, if they resisted, CAR civilians were either beaten or killed.[420]

334. The large-scale pillaging of goods, their storage in camps and subsequent transfer to the DRC is further corroborated by the statements of witnesses 25[421] and 26[422]. Corroborating evidence is also to be found in the summary statements of anonymous witnesses 38[423] and 47[424].

335. Lastly, the Chamber takes cognizance of the reports of AI,[425] FIDH[426] and the UN Resident Coordinator[427] indicating about large-scale pillaging committed by MLC soldiers in the CAR during the period from on or about 26 October 2002 until 15 March 2003 .

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[420] Witness 22 provides information whereby her little cousin was killed in Bossangoa after he prevented MLC soldiers from taking his family's goats, EVD-P-02359 at 0513. Witness 42 describes that his son was called a rebel and beaten when he refused to give food supplies to MLC soldiers, EVD-P-02355 at 0832.

[421] EVD-P-00138 at 0304. The witness states that MLC soldiers, whom he identified as being dressed differently from the CAR military, pillaged on a large-scale items, such as vehicles, photo cameras, radios, television and clothing, EVD-P-00138 at 0302, 0312, 0316 and 0317. The witness also states that MLC soldiers had pillaged a military camp in Bangui, EVD-P-0138 at 0316. However, this information is not corroborated by any other evidence. The witness also states having received information by the CAR Intelligence Services that the MLC soldiers left the CAR with the stolen goods to Zongo, DRC, EVD-P-00138 at 0312 and 0313.

[422] The witness states that as MLC soldiers moved in battle, they pillaged civilian households and appropriated items, such as mattresses, telephones, radios and television sets ad stored them at their base, EVD-P-00137 at 0198 and 0199 and 0202.

[423] EVD-P-00150 at 0165 and 0166. The witness states that MLC soldiers had stolen his radio, television and video and DVD player. The witness also provides information that MLC soldiers were storing pillaged items in a house next to the Begoa football field.

[424] EVD-P-02412 at 0138 and 0139. The witness states that MLC soldiers appropriated items, such as televisions, parabolic antennas, household items and mattresses, stored them at the naval base in Bangui and transferred them to Zongo, DRC. He purports to have seen about 50 MLC soldiers entering with four vehicles in the naval base of Bangui with stolen goods.

[425] AI report, "*Central African Republic, Five months of war against women*", 10 November 2004, EVD-P-00045 at 0507.

[426] FIDH report, "*Crimes de Guerre en République Centrafricaine, Quand les éléphants se battent, c'est l'herbe qui souffre*", 1 February 2003, EVD-P-00001 at 0048.

[427] UNRC, "*Central African Republic Weekly Humanitarian Update – 17 December 2002*", EVD-P-00018 at 0655 and 0656; UNRC, "*Central African Republic Weekly Humanitarian Update 07 March 2003*", EVD-P-00017 at 0645 and 0646.

336. The Chamber has further analysed the following pieces of evidence but does not rely on the statement of witnesses 29 and 68 concerning the looting of their personal belongings by MLC soldiers for the reasons set out below.

337. Witness 29 alleges that her parents' clothing was appropriated by MLC soldiers without her consent in Mongoumba after she had been raped on 5 March 2003. However, the Chamber observes that the witness states that after the MLC soldiers raped her they left in a hurry as gunshots were heard.[428] The witness left her parents' house and hid in the forest for several days. After her return to her parents' house, the witness noticed that the entrance door was broken and her parents' clothing had been taken.[429] The Chamber finds that this statement does not evidence clearly that MLC soldiers appropriated certain property of the witness's parents and therefore cannot be relied upon.

338. Witness 68 states that on 27 October 2002, while fleeing the fighting with her sister-in-law, she met a group of three MLC soldiers on her way in the neighbourhood of Fouh, near Miskine high school. One of the MLC soldiers appropriated the bundle she was carrying on her head as well as that of her sister-in-law.[430] The Chamber notes that the witness does not specify the content of the bundles. Given the imprecision of this information, the Chamber cannot ascertain whether the appropriation would fall under the scope of article 8(2)(e)(v) of the Statute. The Chamber therefore does not rely on this particular statement of the witness.

339. At the Hearing, the Defence argued that MLC soldiers who had pillaged were put on trial and punished in the DRC.[431] To this end the Defence relied on the records of proceedings which took place in the DRC to which MLC perpetrators

[428] EVD-P-02367 at 0078.
[429] EVD-P-02367 at 0083.
[430] EVD-P-02388 at 0395.
[431] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 56, lines 8-19.

were subject, on account of alleged acts of pillaging. The Defence further relied on a letter by Mr Jean-Pierre Bemba addressed to the Special Representative of the UN in Kinshasa.

340. The argument of the Defence cannot be sustained. It is irrelevant for the Chamber's determination as regards the crime of pillaging whether Mr Jean-Pierre Bemba took measures to punish MLC perpetrators, as this relates to the question of his possible criminal responsibility. The Defence has not challenged the statements of the witnesses who have stated facts related to the crime of pillaging.

VI. INDIVIDUAL CRIMINAL RESPONSIBILITY

341. In the Adjournment Decision, the Chamber, after having reviewed the evidence and the arguments of the parties and participants, requested the Prosecutor to consider submitting an amended document containing the charges addressing article 28 of the Statute as a possible mode of criminal liability.[432] It "appear[ed] to the Chamber that the legal characterization of the facts of the case [might] amount to a different mode of liability under article 28 of the Statute".[433] The Chamber's request was "without any predetermination on the possible application of the form of participation invoked by the Prosecutor (article 25(3)(a) of the Statute)".[434] Accordingly, in the Amended DCC and pursuant to regulation 52(c) of the Regulations, the Prosecutor charged Mr Jean-Pierre Bemba with criminal responsibility as a "co-perpetrator" under article 25(3)(a) of the Statute or, in the alternative, as a military commander or person effectively acting as a military commander or superior under article 28(a) or (b) of the Statute,[435] for the crimes

[432] Pre-Trial Chamber III, ICC-01/05-01/08-388, letter a) of the operative part.
[433] Pre-Trial Chamber III, ICC-01/05-01/08-388, para. 46.
[434] Pre-Trial Chamber III, ICC-01/05-01/08-388, para. 46.
[435] ICC-01/05-01/08-395-Anx3, paras 57-59.

against humanity and war crimes referred to in counts 1 to 8[436] and discussed in part V of the present decision.

342. At the outset, the Chamber wishes to point out that an examination of Mr Jean-Pierre Bemba's alleged criminal responsibility under article 28 of the Statute, would only be required if there was a determination that there were no substantial grounds to believe that the suspect was, as the Prosecutor submitted, criminally responsible as a "co-perpetrator" within the meaning of article 25(3)(a) of the Statute for the crimes set out in the Amended DCC.

A. Article 25(3)(a) of the Statute

343. With respect to the alleged responsibility under article 25(3)(a) of the Statute, the Prosecutor submitted that Mr Jean-Pierre Bemba's criminal responsibility resulted from the crimes committed as a result of the common plan agreed upon with Mr Patassé, which "focused on the primary goal to defend Patassé". In support of this contention, he listed the elements required for the theory of co-perpetration based on control over the crime.[437] He argued that Mr Jean-Pierre Bemba's role within the MLC as well as his essential contribution to the common plan provided him with "control over the crimes committed pursuant to this plan". The Prosecutor further asserted that Mr Jean-Pierre Bemba had the requisite *mens rea* to commit the crimes against humanity and war crimes examined under part V of the present decision, since he "intentionally engaged in the conduct" and was "aware" together with his co-perpetrator that "the implementation of the common plan would, in the ordinary course of events, lead to the commission of [these] crimes; or [...] accepted the risks involved in implementing their common plan".[438]

[436] ICC-01/05-01/08-395-Anx3, pp. 34-38.
[437] ICC-01/05-01/08-395-Anx3, pp. 17-19.
[438] ICC-01/05-01/08-395-Anx3, paras 58-59.

344. The Chamber finds that there is not sufficient evidence to establish substantial grounds to believe that from on or about 26 October 2002 to 15 March 2003 Mr Jean-Pierre Bemba committed, jointly with Mr Patassé, the crimes against humanity of murder (article 7(1)(a) of the Statute) and rape (Article 7(1)(g) of the Statute) and the war crimes of murder (8(2)(c)(i) of the Statute), rape (article 8(2)(e)(vi) of the Statute) and pillaging (article 8(2)(e)(v) of the Statute) within the meaning of article 25(3)(a) of the Statute, and with the knowledge that they would occur in the ordinary course of events. The Chamber bases this finding on the following considerations.

345. In its written submission of 24 April 2009, the Defence complained of the imprecision and deficiency of the Amended DCC with respect to, *inter alia,* the suspect's form of participation – namely whether he is charged as a co-perpetrator, indirect perpetrator or indirect co-perpetrator.[439] In this regard, the Chamber points out that since the Prosecutor has put forward the precise elements of co-perpetration based on control over the crime, the Defence's contention becomes immaterial and accordingly, the Chamber will proceed with its examination on the basis of this mode of participation.

1. The law and its interpretation

346. According to article 25(3)(a) of the Statute, "[...] a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".

347. The Chamber takes note of the *Lubanga* decision where Pre-Trial Chamber I found that the concept of co-perpetration enshrined in article 25(3) (a) of the Statute

[439] ICC-01/05-01/08-413, paras 102-103.

and reflected in the words "[committing] jointly with another" must go together with the notion of "control over the crime".[440]

348. In the present case, the Chamber finds no reason to deviate from the approach and line of reasoning embraced by Pre-Trial Chamber I, as it is consistent with the letter and spirit of article 25(3) of the Statute. Accordingly, the Chamber considers that a determination on the criminal responsibility of a person within the meaning of article 25(3)(a) of the Statute concerning co-perpetrators or indirect perpetrators should be examined in light of the concept of "control over the crime".

349. The Chamber wishes to point out that the concept of co-perpetration or joint commission based on joint control over the crime as submitted in the Prosecutor's Amended DCC encompasses objective as well as subjective elements. Thus, in order to hold Mr Jean-Pierre Bemba criminally responsible as a "co-perpetrator" under the notion of control over the crime within the meaning of article 25(3)(a) of the Statute, the Chamber must be satisfied, on the basis of the evidence submitted, that both elements are fulfilled.

350. In the view of the Chamber, criminal responsibility under the concept of co-perpetration requires the proof of two objective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime.[441] For the purpose of the present decision, the Chamber does not deem it necessary to examine the objective elements in light of the Disclosed Evidence, as the

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[440] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 326-341; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 480-486; Pre-Trial Chamber I, *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, para. 210.

[441] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 343-348; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 522-526; see also ICTY, *Prosecutor v Stakić*, "Judgment", Case No. IT-97-24-T, 31 July 2003, paras 440, and 470-491.

Chamber has established that the requisite *mens rea* has not been satisfied as elaborated below. It follows that the Chamber will focus only on the subjective elements.

351. As highlighted in the previous paragraph, in order to hold a person criminally responsible for crimes against humanity and war crimes, it is not sufficient that the objective elements are met. In this respect, the Statute does not permit attribution of criminal responsibility on the basis of strict liability. Rather, it requires also the existence of a certain state of guilty mind (*actus non facit reum nisi mens rea*) – commonly known as the *mens rea*. The latter is reflected in what may be defined as the subjective elements. In the present context, there are three cumulative subjective elements that must be satisfied alongside the objective elements in order to make a finding on the suspect's criminal responsibility as a co-perpetrator within the framework of the evidentiary standard required at the pre-trial stage as provided for in article 61(7) of the Statute. In particular, the suspect must (a) fulfil the subjective elements of the crimes charged, namely intent and knowledge as required under article 30 of the Statute; (b) be aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (c) be aware of the factual circumstances enabling him to control the crimes jointly with the other co-perpetrator.[442]

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

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

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material [objective] elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;

[442] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, pp. 118, 123-124; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, pp. 178, 180-181.

> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

353. The Chamber recalls that article 30 of the Statute codifies the general mental (subjective) element required for the crimes that fall within the jurisdiction of the Court. It defines the requisite state of mind for establishing the suspect's criminal responsibility for any of the crimes set out in articles 6 to 8 of the Statute. The express language of its first paragraph denotes that the provision is meant to function as a default rule for all crimes within the jurisdiction of the Court, "unless otherwise provided".[443] Consequently, it must be established that the material elements[444] of the respective crime were committed with "intent and knowledge", unless the Statute or the Elements of Crimes require a different standard of fault. This conclusion finds support in paragraph 2 of the General Introduction to the Elements of Crimes which reads: "[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element (...) intent, knowledge or both, set out in article 30, applies".

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

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[443] See paragraph 136 of the decision.

[444] The general objective (material) elements of a crime are referred to in article 30(2) and (3) of the Statute as conduct, consequence and circumstance.

[445] In this regard the Chamber recalls that the war crime of torture and pillaging call for a specific intent in addition to the intent and knowledge requirement of article 30 of the Statute, see paragraphs 294 and 320 of the decision.

355. In the opinion of the Chamber, article 30(2) and (3) of the Statute is constructed on the basis of an element analysis approach - as opposed to - a crime analysis approach, according to which different degrees of mental element are assigned to each of the material elements of the specific crime under consideration.[446]

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

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

[446] The Chamber's conclusion also finds support in literature, see for example, M. Kelt/H. von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in: R. S. Lee et al. (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, 2001), p. 28; M. E. Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Law Perspective', 19 *Criminal Law Forum* p. 473, at pp. 475-476 (2008); R. S. Clark, 'Drafting A General Part to A Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the *Lubanga Dyilo* Confirmation Proceedings', 19 *Criminal Law Forum* p. 519, at p. 530 (2008).

dolus directus in the second degree – also known as oblique intention,[447] and (3) *dolus eventualis* – commonly referred to as subjective or advertent recklessness.[448]

358. In the view of the Chamber, article 30(2) and (3) of the Statute embraces two degrees of *dolus*. *Dolus directus in the first degree* (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime.[449] According to the *dolus directus in the first degree*, the volitional element is prevalent as the suspect purposefully wills or desires to attain the prohibited result.

359. *Dolus directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, *i.e.*, the suspect "is aware that [...] [the consequence] will occur in the ordinary course of events" (article 30(2)(b) of the Statute).[450] In this context, the volitional element decreases substantially and is overridden by the cognitive element, *i.e.* the awareness that his or her acts or omissions "will" cause the *undesired* proscribed consequence.

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[447] English law adopts the concept of oblique intention that is equivalent to the notion of *dolus directus in the second degree* in continental law systems. See for example., D. Ormerod/A. Hooper, *Blackstone's Criminal Practice*, (OUP, 2009), p. 19; I. Kugler, 'The Definition of Oblique Intention', 68 *The Journal of Criminal Law* p. 79(2004); G. Williams, 'Oblique Intention', 46 *Cambridge Law Journal* p. 417, at p. 422 (1987).

[448] The concept of subjective or advertent recklessness known in common law systems is generally treated as equivalent to the notion of *dolus eventualis* in the continental law systems. See for example, ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 587; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, "Judgment", 22 March 2006, para. 101; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, "Judgment", 1 September 2004, para. 265 n. 702; ICTY, *Prosecutor v Vidoje Blagojević et al.*, Case No. IT-02-60-T, "Judgment on Motions for Acquittal Pursuant to Rule 98*Bis*", 5 April 2004, para. 50; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, "Judgment", 15 July 1999, para. 220.

[449] Pre-Trial Chamber I, *Lubanga* decision, para. 351; Pre-Trial Chamber I, *Katanga* decision, para. 529.

[450] Pre-Trial Chamber I, *Lubanga* decisión, ICC-01/04-01/06-803-tEN, para. 351; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, para. 530.

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

361. The Statute, being a multilateral treaty, is governed by the principles of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT").[451]

362. Thus, the Chamber considers that, by way of a literal (textual) interpretation, the words "[a consequence] will occur" serve as an expression for an event that is "inevitably" expected.[452] Nonetheless, the words "will occur", read together with the phrase "in the ordinary course of events", clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as "virtual certainty" or "practical certainty", namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.[453]

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[451] UNTS, vol. 1155, p. 331; this approach has been confirmed by the Appeals Chamber, "Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 33.

[452] C. Soanes/A. Stevenson (eds.), *Concise Oxford English Dictionary*, (OUP, 11th ed., 2004), pp. 1650-1651; *Shorter Oxford English Dictionary On Historical Principles*, vol. 2, (OUP, 5th ed.), p. 3641.

[453] See in the same vein, England and Wales Court of Appeal, (Children), Re [2000] EWCA Civ 254 (22 September 2000); House of Lords, R v. Woolin (H.L.(E.)) [1998] 3 W.L.R., pp. 392 G-H, 393 A; Nedrick [1986] 1 W.L.R., p. 1028; Federal Supreme Court of Justice (Bundesgerichtshof), BGHSt Bd. 21, S. 283 (Vol. 21, p. 283). The Chamber's finding is also supported in legal doctrine, see D. Ormerod, *Smith and Hogan Criminal* Law, (OUP, 12th ed.), pp. 97 – 107; I. Kugler, 'The Definition of Oblique Intention', 68 *The Journal of Criminal Law* p. 79 (2004); G. Williams, 'Oblique Intention', 46 *Cambridge Law Journal* p. 417, at p. 422 (1987); *Cf.* A. Esser, "Mental Element – Mistake of Fact and Mistake of Law", in A. Cassesse/P. Gatea/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (OUP, 2002), pp. 914-915; J. D. Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' 12 *University of Miami International & Comparative Law Review* p. 57, at p. 63 (2004).

363. This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* – namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility.[454] Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words "may occur" or "might occur in the ordinary course of events"[455] to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.

364. The Chamber's interpretation is also confirmed by way of review of the *travaux préparatoires* of the Statute. The Chamber notes that according to article 32 of the VCLT "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31[...]". Thus, in order to confirm its finding reached on the basis of a textual interpretation of article 30(2) (b) of the Statute, the Chamber will look to the *travaux préparatoires*.[456]

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[454] See ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, "Judgment", 15 July 1999, para. 220 ("In order for responsibility for the deaths to be imputable to the others [...]. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were *most likely* to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventalis* is required" (emphasis added)); ICTY, *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, "Decision on form of further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para. 29 ("'most likely' means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to possibility"); ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, "Judgment", 31 July 2003, para. 587 ("The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or 'makes peace' with the likelihood of death. Thus, if the killing is committed with 'manifest indifference of the value of human life', even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*; ICTY, *Prosecutor v Hadžihasanović et al*, Case No. IT-01-47-T, "Decision on Motions for Acquittal Pursuant to Rule 98*Bis* of the Rules of Procedure and Evidence", 27 September 2004, para. 37 (adopting the same standard established in the cases *Tadić and Stakić*).

[455] See also O. Triffterer, "The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility", in: K. Koufa (ed.), *The New International Criminal Law*, (Sakkoulas, 2003), p. 706.

[456] See also ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports (2004), paras 94-95; ICJ, *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 17 December 2002, ICJ Reports (2002), paras 53-58; ICJ, *Territorial Dispute (Libyan Arab Jamahiryah/ Chad)*, Judgment of 3 February 1994, ICJ Reports

365. The Chamber examined carefully the *travaux préparatoires* and found that the first reference to the different degrees of culpability including *dolus eventualis* and recklessness appeared in an annex appended to the report of the 1995 *Ad hoc* Committee as concepts subject to considerations in future sessions.[457] These concepts appeared once more in a compilation of proposals prepared by the Preparatory Committee in 1996.[458] Article H, which covered the issue of *mens rea* stated:

> [...] 2. For the purposes of this Statute and unless otherwise provided, a person has intent where: [...] (b) in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. [...]
> [4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: [...]
> [Note. The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered. Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly. It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex [...]].[459]

366. The Chamber observed that although the drafters explicitly stated that the concepts of "recklessness and dolus eventualis should be further considered", the reference to *dolus eventualis* disappeared altogether from subsequent draft proposals and there is no record that such concept was meant to be included in article 30 of the Statute. This observation suggests that the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations. As to advertent recklessness, which

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(1994), para. 55; ECtHR, *Feldbrugge v The Netherlands (Merits)*, App. No. 8562/79, Judgment of 29 May 1996, (joint dissenting opinion of Judges Ryssdal, Robert, Lagergren, Matscher, Evans, Bernhardt and Gersing), paras 19-22.

[457] *Report of the Ad hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), Annex II, pp. 58-59.

[458] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 51st Sess., Vol. 2, Supp. No. 22, UN Doc. A/51/22 (1996), Article H, Proposal 1, p. 92.

[459] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 51st Sess., Vol. 2, Supp. No. 22, UN Doc. A/51/22 (1996), Article H, Proposal 1, pp. 92-93.

is viewed as the common law counterpart of *dolus eventualis*, there was a paragraph on this concept that remained throughout the negotiations,[460] until it was finally deleted by the Working Group on General Principles of Criminal Law in Rome.[461]

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

368. The Chamber's conclusion finds further support in the draft proposal of article H quoted above. It is apparent that paragraph 2(b) of the said proposal, which states that a person has intent in relation to consequence where "that person means to cause that consequence or is aware that it will occur in the ordinary course of events", is identical to the current wording of article 30(2)(b) of the Statute. This suggests that the language of article H(2), (b) with its high required standard was not controversial from the beginning of the negotiations until it found its way in the final text of article 30(2)(b). This conclusion is further supported by the fact that the proposed text of article H(2), (b) initially appeared and remained throughout the drafting process without square brackets. Moreover, the fact that paragraph 4 on recklessness and its accompanying footnote, which stated that "recklessness and dolus eventualis should be further considered", came right after paragraph 2(b) in the same proposal, indicates that recklessness and *dolus eventualis* on the one hand, and the phrase "will occur in the ordinary course of events" on the other, were not meant to be the same notion or to set the same standard of culpability.

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[460] *Decisions Taken By the Preparatory Committee At Its Session Held in New York 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5(1997), Annex II, *Report of the Working Group on General Principles of Criminal Law and Penalties*, Article H, para. 4, pp. 27-28; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, UN Doc. A/Conf.183/2/Add.1 (1998), Article 29, para. 4, p. 66; *Summary Records of the Meetings of the Committee of the Whole, 1st meeting*, UN Doc. A/CONF.183/C.1/SR.1, para. 24.

[461] *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 255.

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

b) The co-perpetrator's awareness and acceptance that implementing the common plan will result in the fulfillment of the material elements of the crimes

370. The second subjective element that needs to be satisfied under the theory of co-perpetration is the (1) co-perpetrators' mutual awareness that implementing the common plan will result in the fulfillment of the material elements of the crimes; and yet (2) they carry out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions.

c) The suspect's awareness of the factual circumstances enabling him or her to control the crime with the other co-perpetrator

371. The final subjective element that must be met under the theory of co-perpetration based on control over the crime is the suspect's awareness of the factual

circumstances enabling him or her to control the crime with the other co-perpetrator. This criterion requires be aware of his essential role in the implementation of the crime; and (2) due to such essential role, to be capable of frustrating its implementation and accordingly the commission of the crime.[462]

2. Findings of the Chamber

372. The Chamber has clarified in paragraph 351 above that there exist three cumulative subjective elements to be demonstrated in order for Mr Jean-Pierre Bemba to be held criminally responsible as a co-perpetrator under article 25(3)(a) and 30 of the Statute. The Chamber has examined the Disclosed Evidence to verify whether the first component of the three required subjective elements, namely the intent and knowledge of Mr Jean-Pierre Bemba in relation to the crimes as specified in the Amended DCC, is met. It reached the conclusion that Mr Jean-Pierre Bemba lacked the requisite intent to commit the crimes set out in the Amended DCC as explained below. In this respect, the Chamber does not deem it necessary to examine the two remaining subjective elements for the concept of co-perpetration.

373. The Chamber recalls that the Prosecutor infers Mr Jean-Pierre Bemba' s *mens rea* by referring to nine elements as follows: (i) prior behaviour of MLC troops in the CAR in 2001 and in the DRC (Mambasa) in 2002 prior to the 2002 intervention in the CAR under consideration;[463] (ii) possession and distribution of cars pillaged during the interventions in the CAR in 2001 and 2002;[464] (iii) MLC troops were placed in a "permissive environment with *carte blanche*" by Mr Jean-Pierre Bemba when he sent them to the CAR in 2002;[465] (iv) MLC commanders' statements to their troops while

[462] Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 366-367; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 538-539.
[463] ICC-01/05-01/08-395-Anx3, paras 74-76; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 93, line 21 to p. 108, line 10.
[464] ICC-01/05-01/08-395-Anx3, para.83; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 108, line 11 to p. 109, line 2.
[465] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, lines 3-10.

crossing the Oubangui river to enter the CAR in 2002;[466] (v) MLC troops' statements to their victims in the CAR during the 2002-2003 intervention;[467] (vi) Mr Jean-Pierre Bemba's direct and regular contacts with Mr Patassé;[468] (vii) Mr Jean-Pierre Bemba's continuation of the implementation of the common plan despite media broadcasts reporting about the commission of crimes by the MLC in the CAR;[469] (viii) Mr Jean-Pierre Bemba's continuation of the implementation of the common plan despite having been informed of the commission of crimes by the MLC in the CAR;[470] and (ix) Mr Jean-Pierre Bemba's continuation of the implementation of the common plan after having acknowledged the commission of crimes by the MLC in the CAR.[471] Since elements (vii) to (ix) are closely related, the Chamber will examine them collectively in sub-section (vii).

374. Having reviewed the Disclosed Evidence as a whole in light of the nine elements presented by the Prosecutor, the Chamber has established that, even assuming the existence of a "common plan" (first objective element for co-perpetration) as asserted by the Prosecutor, Mr Jean-Pierre Bemba's intent to commit crimes as specified in the Amended DCC has not been established. Consequently, the Chamber holds that, since the Disclosed Evidence does not satisfy the first subjective element for the concept of co-perpetration based on control over the crime, it is not necessary to examine the remaining two subjective elements, as set out in paragraph 351. The Chamber has based this finding on the following considerations.

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[466] ICC-01/05-01/08-395-Anx3, para. 80; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, lines 11-16.
[467] ICC-01/05-01/08-395-Anx3, para. 79; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, lines 17-19.
[468] ICC-01/05-01/08-395-Anx3, para. 85; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, line 20-p. 110, line 3.
[469] ICC-01/05-01/08-395-Anx3, para. 84; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 110, lines 4-24.
[470] ICC-01/05-01/08-395-Anx3, paras 81-82; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 110, line 25-p. 111, line 17.
[471] ICC-01/05-01/08-395-Anx3, para. 81; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 111, line 18-p. 112, line 10.

(i) Prior behaviour of MLC troops in the CAR in 2001 and in the DRC (Mambasa) in 2002 prior to the 2002 intervention in the CAR under consideration

375. In the Amended DCC, the Prosecutor stated that Mr Jean-Pierre Bemba's "intent and knowledge" of the commission of the crimes charged during the 2002-2003 intervention in the CAR are "based in part" on the MLC's behaviour during the 2001 intervention in the CAR, and during [...] [their] attack on Mambasa in 2002.[472]

376. With respect to the 2001 intervention in the CAR and the 2002 Mambasa attack in the DRC, the Prosecutor contended that Mr Jean-Pierre Bemba deployed "unpaid" MLC troops under similar circumstances to those found in the present case. In his opinion, the deployment of the MLC troops in 2001 in the CAR and in 2002 in Mambasa resulted in the commission of crimes such as rapes and pillaging against the civilian population. He claimed that the crimes committed during the 2001 intervention in the CAR were never punished, while in relation to the Mambasa attack, a military tribunal was established to address the crimes committed, but the trials were a sham, because the "soldiers received light sentences and were later granted amnesty".[473]

377. The Chamber disagrees with the Prosecutor's assertion that Mr Jean-Pierre Bemba's *mens rea* under article 30 of the Statute could be generally inferred from alleged past behaviour of MLC troops. The fact that certain crimes were committed in prior events does not necessarily mean that they would certainly take place subsequently. Having expressed its opinion on this matter, the Chamber will nonetheless engage with the Prosecutor's arguments to the extent necessary.

[472] ICC-01/05-01/08-395-Anx3, para. 74; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 95, lines 10-13.
[473] ICC-01/05-01/08-395-Anx3, paras 75-77; Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, pp. 95 to106.

378. The Chamber considers that the argument of deploying "unpaid" MLC troops under similar circumstances is neither sound nor supported by the case file. The Chamber does not see the link between sending unpaid troops and the commission of the war crimes and crimes against humanity of murder and rape. Although a connection may be drawn between sending "unpaid" troops and the commission of the war crime of pillaging, the evidence before the Chamber does not support such a finding in the present case.

379. The Chamber underlines that in the Amended DCC and Amended List of Evidence, the Prosecutor, relying on several witness statements, acknowledged that the MLC troops in the 2002-2003 intervention in the CAR were "provid[ed] [with] food and PGA (*prime globale d'alimentation*) paid from the CAR Government public funds".[474] Witnesses 6 and 9 also stated that public funds were paid to MLC troops for their maintenance and collected by the commander of operation in the CAR.[475] Although the soldiers did not receive cash, the fact that their living expenses were covered and maintained by the commander of operation makes it unlikely that Mr Jean-Pierre Bemba was aware that in the ordinary course of events the war crime of pillaging would be a virtually certain consequence of sending his troops to the CAR in 2002.

380. The Chamber also observes that although the Prosecutor spoke of sending MLC troops to the CAR under "similar circumstances", he failed to explain what those circumstances may entail apart from the alleged non-payment of those troops.

381. The Defence noted that the Prosecutor made no attempt to "tie [the three MLC groups that were operating in the 2002-2003 intervention in the CAR] in to 2001 or to 2002 incidents [...] to show that the soldiers are the same, the troops are the same the

[474] ICC-01/05-01/08-395-Anx3, para. 65.
[475] EVD-P-00148 at 0139 and EVD-P-00099 at 0108, para. 40.

commanders are the same".[476] In this regard, the Chamber observes that according to witness 40, the MLC 28th battalion was indeed involved in both the 2001 and 2002-2003 interventions in the CAR.[477] Nonetheless, despite this observation, the Chamber finds that the commanders leading this battalion were not the same.[478]

382. The situation is different with respect to the 2002 Mambasa attack and the 2002-2003 interventoin in the CAR. According to the summary statement of witness 33,[479] the 28th battalion, which was involved in the 2002 Mambasa attack – known as "*Effacer le tableau*" – also participated in the 2002-2003 intervention in the CAR. The Chamber underlines that this statement, being in the form of a summary, has low probative value and is in addition not corroborated. Moreover, this information is contradicted by witness statement 36[480] as well as by a UN report.[481] Witness 36 stated that there was not any movement of troops between Bangui and Mambasa, and, accordingly, the troops involved in the 2002-2003 intervention in the CAR were different from those which participated in the 2002 Mambasa attack (that is, a different battalion).[482] This information also finds support in the *Report of the Special Investigation Team on the Events of Mambasa, 31 December 2002 to 20 January 2003*.[483] Based on the report, the battalion involved in the operation "*Effacer le tableau*" was involved in two operations in Mambasa, the first from 12-29 October 2002, and the second from 27 November 2002 until the end of January 2003.[484] It follows that the two Mambasa operations were launched during the period of the MLC intervention in the CAR from on or about 26 October 2002 until 15 March 2003. Thus, the Chamber doubts the possibility of concomitant engagement of the same battalion in the 2002-2003 intervention in the CAR and the 2002 Mambassa attack. It follows that

476 Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p.114, lines 12-18.
477 EVD-P-00151 at 0168.
478 EVD-P-02351 at 0723-0724.
479 EVD-P-00151 at 0168.
480 EVD-P-00143.
481 EVD-P-00020.
482 EVD-P-00143 at 0409-0455, see in particular 0428.
483 EVD-P-00020.
484 EVD-P-00020 at 0064-0065, paras 147-149.

neither the battalion nor the troops involved in the 2002 Mambassa attack were the same as those which participated in the 2002-2003 intervention in the CAR.

(ii) Possession and distribution of cars pillaged during the interventions in the CAR in 2001 and 2002

383. At the Hearing, the Prosecutor argued that Mr Jean-Pierre Bemba possessed "cars that were pillaged in the Central African Republic" in 2001 and 2002. He contended that Mr Jean-Pierre Bemba's "culpability is not limited to possession" since he stored the pillaged vehicles "on his property" and distributed them to MLC members[485] and that, accordingly, he knew of pillaging and intended it to take place in the 2002-2003 intervention in the CAR.

384. The Chamber considers that the Prosecutor's arguments to prove Mr Jean-Pierre Bemba's intent are again based on the idea of past events. The Chamber has underlined in relation to the previous point that past conduct is not a sufficient factor to rely upon in order to infer the suspect's intent within the meaning of article 30 of the Statute. In particular, the Chamber finds it difficult to accept the argument put forth by the Prosecutor that because Mr Jean-Pierre Bemba possessed an allegedly pillaged vehicle from the 2001 intervention in the CAR, he must have intended that the crime of pillaging would occur with certainty as a consequence of sending his MLC troops to the CAR in 2002.

385. As to Mr Jean-Pierre Bemba's possession of pillaged vehicles from the 2002-2003 intervention in the CAR, the Chamber finds that the Prosecutor has not presented sufficient evidence in support of his allegation. The Prosecutor mainly relied on witness statement 37[486] and a summary statement of witness 33.[487] Witness 37 stated that he saw vehicles coming into Gbadolite at the end of 2002, yet the witness does

[485] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 108, lines 11-23.
[486] EVD-P-00141.
[487] EVD-P-00151.

not know where these cars were coming from. Although the witness stated that he saw these vehicles parked in Mr Jean-Pierre Bemba's "parcel of land", he still added that all of the MLC vehicles were stored there.[488] The witness does not even suggest that these vehicles were pillaged or distributed.

386. With respect to the summary statement of witness 33, the Chamber finds that, although the witness confirmed the Prosecutor's allegations, he failed to specify the dates on which those vehicles were brought to Gbadolite and were allegedly distributed by Mr Jean-Pierre Bemba to his officials. A lack of precision as to the dates of pillaging is also found in the statement of witness 45.[489] Therefore, the Chamber finds that the Prosecutor cannot reasonably base his demonstration of Mr Jean-Pierre Bemba's intent to commit the crimes as specified in the Amended DCC on inconclusive statements which do not sufficiently support his allegation.

(iii) MLC troops were placed in a "permissive environment with carte blanche" by Mr Jean-Pierre Bemba when he sent them to the CAR in 2002

387. At the Hearing, the Prosecutor argued that "despite [Mr Jean-Pierre Bemba's] full knowledge of the commission of crimes in 2001, he sent the MLC troops to the CAR in 2002 and placed them in a permissive environment with *'carte blanche'*, allowing them to rape, kill, torture and pillage with impunity".[490] On reviewing the evidence presented, the Chamber realises that the Prosecutor's assertion was based on a sole witness statement – namely witness 15.[491] Although it is true that witness 15 mentioned the term *"carte blanche"*,[492] the context in which the expression was used does not support the Prosecutor's inference that Mr Jean-Pierre Bemba had the requisite intent.

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[488] EVD-P-00141 at 0524-0526 and 0538-0539.
[489] EVD-P-02340 at 0477-0481.
[490] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, lines 3-7.
[491] EVD-P-02168.
[492] EVD-P-02168 at 0542-0543 and 0550.

388. The Chamber is convinced that that expression was used to convey the witness's own assessment of the nature and extent of the MLC troops' mandate in the 2002-2003 intervention in the CAR, rather than reflecting any explicit or implicit authorisation on the part of Mr Jean-Pierre Bemba to target the CAR civilian population. The witness's assessment was *only* based on the "suppositions", to quote his words, that troops being sent to a foreign country with the "sole mandate [...] to save a president under threat"[493] would mean that they were authorised to do whatever it took to achieve their mandate. According to the witness, those troops "were probably guided by their limits alone and the boundaries of their conscience".[494] For him, this was a "*carte blanche*".[495]

389. The Chamber is not convinced that sending MLC troops to wage war in a foreign country with the "sole mandate to save a president under threat" as described within the *context* of the witness statement would necessarily mean that they were automatically authorised to commit crimes against humanity and war crimes. Nor is the Chamber convinced that by sending those troops, Mr Jean- Pierre Bemba was aware that it was virtually certain that murder, rape and pillaging would occur in the ordinary course of events.

(iv) MLC commanders' statements to their troops while crossing the Oubangui river to enter the CAR in 2002

390. In both the Hearing and the Amended DCC, the Prosecutor stated that Mr Jean-Pierre Bemba intended that crimes would occur as a result of the implementation of the alleged common plan, because, *inter alia,* MLC commanders gave clear instructions to MLC troops to kill CAR civilians.[496] In support of his argument, the Prosecutor quoted part of the summary statement of witness 47, which refers to

[493] EVD-P-02168 at 0542.
[494] EVD-P-02168 at 0550.
[495] EVD-P-02168 at 0542 and 0550.
[496] ICC-01/05-01/08-395-Anx3, para. 80 and Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET p. 91, lines 18-25 and p. 109, lines 11-16.

MLC commanders' instructions while crossing the Oubangui river to enter the CAR in 2002. The summary statement reads: "[i]n Bangui, in the Central African Republic, you have no parents, no wives, and no children. You go to war. You kill, and you destroy everything [...] Jean-Pierre Bemba sent you to kill and not to have fun".[497]

391. The Chamber underlines that the above information is extracted from a summary statement, which, as such, has a low probative value. The summary statement is not even corroborated by any other piece of evidence. Moreover, regardless of the weight to be given to its probative value, the Chamber notes that the quoted portion from the summary statement (1) is not attributed to Mr Jean-Pierre Bemba; and (2) does not reveal that it was said in his presence or on account of his instructions.

392. The Chamber also finds that the information referred to above in the summary statement is contradicted by a number of the Prosecutor's witnesses' statements. Witness 40 stated that Mr Jean-Pierre Bemba's instructions to MLC troops were confined to two main missions – namely to "destabilize all the enemies" coming from the DRC and to "defend the president [Patassé] who was democratically elected".[498] This statement is further corroborated by witness 6, who believed that the MLC troops' behaviour towards the CAR civilians deviated from the actual mission to which they were assigned – namely, to enable Mr Patassé to maintain his power.[499] In view of the above, the Chamber could not infer that Mr Jean-Pierre Bemba intended that his troops "destroy everything" in the CAR and kill the civilians.

(v) MLC troops' statements to their victims in the CAR during the 2002-2003 intervention

393. In the Amended DCC, the Prosecutor submitted that "when the civilian population was victimized, MLC perpetrators told the victims that because they

[497] EVD-P-02412 at 0137.
[498] EVD-P-02296 at 0219.
[499] EVDP-00098 at 0108-0109.

were part of the civilian population previously held by rebel troops, they were party to the Bozizé rebels" and thus they were targeted.[500] To prove his contention, the Prosecutor relied on the statements of witnesses 22[501] and 23.[502]

394. The Chamber observes that according to witnesses 22 and 23, Mr Patassé was the one who gave orders to MLC troops (referred to by the witnesses as "Banyamulenge") to kill children between the age of two and ten. This point was also raised by the Defence during the Hearing.[503] Thus, to say that Mr Jean-Pierre Bemba intended the commission of the crimes bearing these statements would be an erroneous inference, given that they do not suggest a link between the MLC troops' declarations and Mr Jean-Pierre Bemba.

395. The Prosecutor, relying on the summary statement of witness 47,[504] further contended that victims were told "thanks to Jean-Pierre Bemba, the MLC were lucky to have sexual intercourse with CAR women".[505] The Defence challenged the information contained in the summary statement. In so doing, the Defence referred to witness statements (6, 9, 15, 36, 37, 40, 44 and 45) to refute the allegation that orders were given to rape and kill in the CAR.[506]

396. The Chamber recalls that the statement of witness 47 is in a summary form and thus has low probative value. If this summary statement is not corroborated by any other piece of evidence, it is not sufficient to be relied upon. Moreover, the Chamber does not consider that the statement made by the MLC soldiers meant *per se* that they were either explicitly or implicitly authorised by Mr Jean-Pierre Bemba to rape the civilian population during the 2002-2003 intervention in the CAR. Accordingly,

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[500] ICC-01/05-01/08-395-Anx3, para. 79.
[501] EVD-P-00104 at 0505 and 0510.
[502] EVD-P-00122 at 0071.
[503] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 46, lines 13-23.
[504] EVD-P-02412 at 0138.
[505] ICC-01/05-01/08-395-Anx3, para. 79.
[506] Pre-Trial Chamber III, ICC-01/05-01/08-T-10-ENG ET, p. 75, lines 4-25, and p. 76, lines 1-6.

the Chamber cannot infer that, in sending his troops to the CAR in 2002, Mr Jean-Pierre Bemba was aware that, in the ordinary course of events, the commission of rape would be the virtually certain consequence of his action.

(vi) Mr Jean-Pierre Bemba's direct and regular contacts with Mr Patassé

397. At the Hearing[507] and in the Amended DCC,[508] the Prosecutor asserted that due to his regular contacts with Mr Patassé, who received information from different sources on crimes committed by the MLC during the 2002-2003 intervetion in the CAR, Mr Jean-Pierre Bemba knew about and intended their occurrence. The Chamber is not persuaded by the Prosecutor's argument in view of the evidence available in the case. The Chamber reviewed the statements of witnesses 15,[509] 37,[510] 46[511] and the summary statement of witness 33[512] and observed that (1) Mr Patassé, was informed of the commission of crimes of pillaging and rape through a field assessment mission and by his subordinates[513]; (2) telephone conversations took place at least twice between Mr Jean-Pierre Bemba and Mr Patassé;[514] and (3) the content of those conversations was unknown to those witnesses, with the exception of the first conversation, where witness 37 stated that Mr Ange-Felix Patassé called for Mr Jean-Pierre Bemba's assistance to send his troops.[515] Based on such review, the Chamber cannot infer that Mr Jean-Pierre Bemba received information about the commission of the crimes *through* Mr Ange-Felix Patassé, and accordingly, the Prosecutor's argument is groundless.

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[507] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 109, line 20 to p. 110, line 3.
[508] ICC-01/05-01/08-395-Anx3, paras 70 and 85.
[509] EVD-P-02168.
[510] EVD-P-00141.
[511] EVD-P-02321 to EVD-P-02339.
[512] EVD-P-00151.
[513] EVD-P-02332 at 0259-0261 and EVD-P-02335 at 0322-0329.
[514] EVD-P-02168 at 0541-0542 ; EVD-P-00141 at 0526-0527 and EVD-P-00138 at 0319.
[515] EVD-P-00141 at 0527.

(vii) Continuing the implementation of the common plan despite, being informed of the commission of the crimes from different sources and acknowledging them

398. In the Amended DCC[516] and during the Hearing,[517] the Prosecutor presented the last three related elements in order to demonstrate that Mr Jean-Pierre Bemba intended the commission of the crimes against humanity and war crimes discussed under part V of the present decision. In this regard, the Prosecutor argued that the suspect's intent could be inferred from the fact that Mr Jean-Pierre Bemba continued the implementation of the alleged common plan: (1) despite media broadcasts reporting about the commission of crimes by the MLC in the CAR; (2) despite having been informed of the commission of crimes by the MLC in the CAR; and (3) after having acknowledged the commission of crimes by the MLC in the CAR.

399. It is clear from the evidence available before the Chamber that from on or about 26 October 2002 until 15 March 2003, crimes against humanity and war crimes were committed on various dates and locations (see part V above). It is also apparent from the evidence presented that Mr Jean-Pierre Bemba was informed of these incidents after they occurred.

400. The Chamber recalls that it has rejected the first six elements presented by the Prosecutor in order to prove Mr Jean-Pierre Bemba's intent in accordance with article 30 of the Statute. With respect to the remaining three elements, the Chamber is not convinced that, in the present case, Mr Jean-Pierre Bemba's intent could be simply inferred from his continuing to implement the alleged common plan. In particular, the Chamber cannot infer that he was aware that by keeeping his troops in the CAR, it was a virtually certain consequence that these crimes would be committed in the ordinary course of events. As the Disclosed Evidence indicates, the most that can be inferred is that Mr Jean-Pierre Bemba may have foreseen the risk of

[516] ICC-01/05-01/08-395-Anx3, paras 70, 81-82 and 84.
[517] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p. 110, line 4 to p. 112, line 10.

occurrence of such crimes as a mere possibility and accepted it for the sake of achieving his ultimate goal – that is, to help Mr Patassé to retain power. In the Chamber's opinion, this does not meet the required standard for article 30 of the Statute – namely, *dolus directus in the second degree*.

401. Consequently, the Chamber finds that there is not sufficient evidence to establish substantial grounds to believe that, Mr Jean-Pierre Bemba was aware that, by sending the MLC troops from on or about 26 October 2002 to the CAR and keeping them there until their withdrawal on 15 March 2003, the crimes against humanity and war crimes committed by the MLC soldiers would occur in the ordinary course of events.

B. Article 28 of the Statute

402. The Chamber recalls, as stated in paragraph 341, that in the Amended DCC the Prosecutor charged Mr Jean-Pierre Bemba primarily under article 25(3)(a) of the Statute or, in the alternative, as a military commander or person effectively acting as a military commander or superior under article 28(a) or (b) of the Statute. In this regard, the Chamber made it clear that Mr Jean-Pierre Bemba's criminal responsibility under article 28 of the Statute shall not be examined, unless there is a determination that there is not sufficient evidence to establish substantial grounds to believe that the suspect is criminally responsible as a "co-perpetrator" within the meaning of article 25(3)(a) of the Statute for the crimes set out in the Amended DCC.

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

1. The law and its interpretation

404. Article 28 of the Statute reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

405. The Chamber notes that article 28 of the Statute reflects a different form of criminal responsibility than that found under article 25(3)(a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. This sort of responsibility can be

better understood "when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act".[518]

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

407. The Chamber considers that, in order to prove criminal responsibility within the meaning of article 28(a) of the Statute for any of the crimes set out in articles 6 to 8 of the Statute,[519] the following elements must be fulfilled:

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

(b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;

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

(d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and

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[518] Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug 1949* (ICRC, 1987), MN 3537; ICTY, *Prosecutor v Delalić et al.*, Case No. IT-04-83-T,"Judgment", 16 November 1998, para. 334.

[519] Although the crime of aggression referred to in article 5 of the Statute falls within the jurisdiction of the Court, the Court cannot exercise jurisdiction over it until a definition is adopted pursuant to articles 121 and 123 of the Statute defining the crime and outlining the conditions on the basis of which the Court shall exercise its competence with respect to this crime.

(e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

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

408. The Chamber is of the view that the term "military commander" refers to a category of persons who are formally or legally appointed to carry out a military commanding function (*i.e., de jure* commanders). The concept embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level.[520] In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command.[521] The notion of a military commander under this provision also captures those situations where the superior does not exclusively perform a military function.[522]

409. With respect to a "person effectively acting as a military commander", the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command. This concept

[520] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 87 ("Additional Protocol I"); Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949* (ICRC, 1987), MN 3553-3554.

[521] Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug 1949* (ICRC, 1987), MN 3553.

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

was also acknowledged in several cases before the ICTY and the ICTR.[523] In the *Čelebići* case, the first leading case on the doctrine of command responsibility before the *ad hoc* tribunals, the ICTY Trial Chamber stated that:

> [I]ndividuals in positions of authority, (...) within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of *formal legal authority* to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility (emphasis added).[524]

410. Thus, the Chamber finds that this category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units[525] or irregular forces (non-government forces) such as rebel groups, paramilitary units[526] including, *inter alia,* armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.

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

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

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[523] ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-T, "Judgment", 3 March 2000, para. 300; ICTY, *Prosecutor v Aleksovski*, Case No. IT-95-14/1-T, "Judgment", 25 June 1999, para. 76; ICTR, *The Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, "Appeals Chamber Judgment", 7 July 2006, para. 143; ICTR, *The Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, "Appeals Chamber Judgment", 23 May 2005, para. 85.

[524] ICTY, *Prosecutor v Delalić et al* , Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 354.

[525] W. Fenrick, "Article 28", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), pp. 517-518.

[526] *Working Group on General Principles of Criminal Law*, UN Doc. A/CONF. 183/C.1/WGGP/L.7, 22 June 1998, fn 1; W. Fenrick, "Article 28", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), p. 518.

412.The Chamber observes that article 28(a) of the Statute refers to the terms "effective command and control" or "effective authority and control" as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words "command" and "authority" under the two expressions has no substantial effect on the required level or standard of "control". This is apparent from the express language of the two terms, which uses the words "effective" and "control" as a common denominator under both alternatives. This conclusion is also supported by a review of the *travaux préparatoires* of the Statute, in which it was acknowledged by some delegations that the addition of the term "effective authority and control" as an alternative to the existing text was "unnecessary and possibly confusing".[527] This suggests that some of the drafters believed that the insertion of this expression did not add or provide a different meaning to the text.

413.In this context, the Chamber underlines that the term "effective command" certainly reveals or reflects "effective authority". Indeed, in the English language the word "command" is defined as "authority, especially over armed forces", and the expression "authority" refers to the "power or right to give orders and enforce obedience".[528] However, the usage of the disjunctive "or" between the expressions "effective command" and "effective authority" calls the Chamber to interpret them as having close, but distinct meanings in order to remedy the appearance of redundancy in the text. Thus, the Chamber is of the view that although the degree of "control" required under both expressions is the same as argued in paragraph 412 above, the term "effective authority" may refer to the modality, manner or nature,

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[527] *Working Group on General Principles of Criminal Law*, UN Doc. A/CONF. 183/C.1/WGGP/L.7, 22 June 1998, fn 2. The term "authority" appeared in square brackets for the first time during the work of the Preparatory Committee in 1997 and remained between square brackets until Rome. See *Decisions Taken By the Preparatory Committee At Its Session Held in New York 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5 (1997), Annex II, *Report of the Working Group on General Principles of Criminal Law and Penalties*, Article C, p. 23; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), Article 19[C], p. 55; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, UN Doc. A/Conf.183/2/Add.1 (1998), Article 25, p. 61.

[528] C. Soanes/A. Stevenson (eds.), *Concise Oxford English Dictionary*, (OUP, 11th ed., 2004), p. 286.

according to which, a military or military-like commander exercise "control" over his forces or subordinates.[529]

414. The Chamber wishes to point out that "effective control" is generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a *de jure* or *de facto* hierarchal relationship (chain of command).[530] As the ICTY Appeals Chamber stated in the *Čelebići* case: "[t]he ability to exercise effective control [...] will almost invariably not be satisfied unless such a relationship of subordination exists".[531]

415. The concept of "effective control" is mainly perceived as "the material ability [or power] to prevent and punish" the commission of offences,[532] and, as such, failure to exercise such abilities of control gives rise to criminal responsibility[533] if other requirements are met. In the context of article 28(a) of the Statute, "effective control" also refers to the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities. To this end, this notion does not seem to accommodate any lower standard of control such as the simple ability to

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[529] This may refer to superiors who are not in "direct" chain of command with the forces. See on this question, G. Mettraux, *The Law of Command Responsibility*, (OUP, 2009), p. 29; W. Fenrick, "Article 28", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), p. 518.

[530] See generally, ICTR, *The Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, "Judgment and Sentence", 18 December 2008, para. 2012; ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, "Judgment and Sentence", 1 December 2003, para. 773; ICTR, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, "Appeals Chamber Judgment", 23 May 2005, para. 84.

[531] ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, "Judgment", 20 February 2001, para. 303.

[532] ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, "Appeals Chamber Judgment", 20 February 2001, para. 256; ICTR, *The Prosecutor v Musema*, Case No. ICTR-96-13-A, "Judgment", 27 January 2000, para. 135; ICTR, *The Prosecutor v Bagilishema*, Case No. ICTR-95-1A-A, "Appeals Chamber Judgment", 3 July 2002, para. 51.

[533] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, "Appeals Chamber Judgment", 17 September 2003, para. 171 ("It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control"); ICTY, *Prosecutor v Delalić et al*, Case No. IT-96-21-A, "Appeals Chamber Judgment", 20 February 2001, para. 198.

exercise influence over forces or subordinates,[534] even if such influence turned out to be substantial.[535] As the ICTY Trial Chamber stated in the *Hadžihasanović* case:

> Since command responsibility is predicated on a superior's power to control the acts of his subordinates, a superior may only be held criminally responsible if he has the necessary powers of control, i.e. if he exercises effective control over his subordinates. The simple exercise of powers of influence over subordinates does not suffice.[536]

416. That said, the Chamber concurs with the view adopted by the *ad hoc* tribunals that *indicia* for the existence of effective control are "more a matter of evidence than of substantive law",[537] depending on the circumstances of each case,[538] and that those *indicia* are confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation.[539].

417. The Chamber takes the view that there are nonetheless several factors which may indicate the existence of a superior's position of authority and effective control. These factors may include: (i) the official position of the suspect;[540] (ii) his power to issue or give orders;[541] (iii) the capacity to ensure compliance with the orders issued

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[534] ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 60; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, "Appeals Chamber Judgment", 28 February 2005, para. 144.

[535] ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, paras 412-413.

[536] ICTY, *Prosecutor v Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, paras 80 and 795.

[537] ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-T, "Judgment", 16 November 2005, para. 58; ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-A, "Appeals Chamber Judgment", 29 July 2004, para. 69.

[538] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 392.

[539] See in the context of the ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Appeals Chamber Judgment, 29 July 2004, para. 69; ICTY, *Prosecutor v Aleksovski*, Case No. IT-95-14/1-A, "Appeals Chamber Judgment", 24 March 2000, para. 76 (defining the *indicia* for effective control as "the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".

[540] ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, 26 February 2001, para. 438; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, paras 91-92; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, "Appeals Chamber Judgment", 22 April 2008, para. 21 (noting that the possession of *de jure* authority provides some evidence or *prima facie* indicia of effective control).

[541] ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para. 421; ICTY, *Prosecutor v. Hadžihasanović* and *Kubura*, Case No. IT-01-47-A, "Appeals Chamber Judgment", 22 April 2008, para. 199.

(*i.e.*, ensure that they would be executed);[542] (iv) his position within the military structure and the actual tasks that he carried out;[543] (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities;[544] (vi) the capacity to re-subordinate units or make changes to command structure;[545] (vii) the power to promote, replace, remove or discipline any member of the forces;[546] and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.

418. The Chamber also wishes to stress that it is not sufficient to demonstrate that the suspect had effective control without specifying the time frame required for its existence. In particular, there is a question of temporal coincidence between the "effective control" and the criminal conduct. In this respect, the Chamber takes note of the common position upheld by the *ad hoc* tribunals, according to which effective control must have existed at the time of the commission of the crime.[547] The Chamber is also aware of the different view embraced by a minority of the ICTY Judges,[548] which was later upheld by Trial Chamber I of the SCSL, according to which the "superior must have had effective control over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent or to punish".[549]

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[542] ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-A, "Appeals Chamber Judgment", 29 July 2004, para. 69.

[543] ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, "Appeals Chamber Judgment", 16 October 2007, para. 66.

[544] ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, paras 394-396.

[545] ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 397.

[546] ICTY, *Prosecutor v Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 62; ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, paras 406 and 408; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T,"Judgment", 16 November 1998, para. 767.

[547] See for example, ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-A, "Appeals Chamber Judgment", 16 October 2007, para. 59; ICTR, *The Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, "Judgment and Sentence", 18 December 2008, para. 2012.

[548] ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, (Declaration of Judge Shahabuddeen; Partially Dissenting Opinion and Declaration of Judge Liu), pp. 65-85.

[549] SCSL, *The Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T, "Judgment", 2 March 2009, para. 299.

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

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

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

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

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his failure to exercise control properly over such forces, where: (...)
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation.

422. The Chamber now turns to the two expressions, namely "effective control" and "exercise control properly". In this respect, the Chamber considers that it cannot be said that a superior failed to "exercise control properly", without showing that he had "effective control" over his forces. Since effective control is actually the

"material ability" to prevent, repress or submit the matter to the competent authorities, then a failure to "exercise control properly" is, in fact, a scenario of non-compliance with such duties. This suggests that the reference to the phrase "failure to exercise control properly" must be read and understood in light of article 28(a)(ii) of the Statute.

423.The Chamber also observes that the chapeau of article 28(a) of the Statute establishes a link between the commission of the underlying crimes and a superior's "failure to exercise control properly". This is reflected in the words "as a result of", which indicates such relationship.[550] The Chamber therefore considers that the chapeau of article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes. [551] This interpretation is consistent with the principle of strict construction mirrored in article 22(2) of the Statute which, as a part of the principle *nullum crimen sine lege*, compels the Chamber to interpret this provision strictly.

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[550] The Chamber acknowledges that the *ad hoc* tribunals do not recognise causality as an element of superior responsibility. However, unlike article 28(a) of the Statute, the relevant provisions on superior responsibility in the Statues of the *ad hoc* tribunals do not expressly require such an element. See ICTY, *Prosecutor v. Delalić et al* , Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 398; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Appealc Chamber Judgment", 29 July 2004, para. 77, ICTY, *Prosecutor v Hadžihasanović et al* , Case No. IT-01-47-T, "Appeal Chamber Judgment", 22 April 2008, paras 38-39; ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, "Appeals Chamber Judgment", 17 December 2004, paras 830-832; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 *ILM* p. 1159, as amended by Security Council Resolution 1660 of 28 Feb. 2006, Art. 7(3); Statute of the International Criminal Tribunal for Rwanda, (1994) 33 *ILM* p. 1602, as amended by Security Council Resolution 1534 of 26 Mar. 2004, Art 6(3); Statute of the Special Court for Sierra Leone, UNTS vol. 2178, p. 138, U.N. Doc. S/2002/246, 16 Jan. 2002, Appendix II, Art. 6(3); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended on 27 Oct. 2004, Doc. No. NS/RKM/1004/006, unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised on 26 August 2007, Art. 29.

[551] O. Triffterer, 'Causality, A Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', 15 *Leiden J. Int'l L.* p. 179, at p. 197 (2002); K. Ambos in A. Cassese/P. Gaeta/J.R.W.J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, (OUP, 2002), p. 860.

424. Although the Chamber finds that causality is a requirement under article 28 of the Statute, its actual scope needs to be further clarified by the Chamber. As stated above, article 28(a)(ii) of the Statute refers to three different duties: the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution. The Chamber considers that a failure to comply with the duties to repress or submit the matter to the competent authorities arise during or after the commission of crimes.[552] Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed.[553] Accordingly, the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes. Nonetheless, the Chamber notes that the failure of a superior to fulfil his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes,[554] a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.[555]

425. The Chamber also considers that since article 28(a) of the Statute does not elaborate on the level of causality required, a possible way to determine the level of causality would be to apply a "but for test", in the sense that, but for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces.[556] However, contrary to the visible and material effect of a positive act, the effect of an omission

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[552] As explained below under element (e), the duty to repress also may arise during the commission of crimes in the form of a duty to prevent the continuation of the commission of crimes.

[553] This reasoning was used by the ICTY to reject causality altogether, see ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 400: "The very existence of the principle of superior responsibility for failure to punish demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility"; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Appeals Chamber Judgment", 29 July 2004, para. 76.

[554] ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-T, "Judgment", 16 November 2005, para. 96.

[555] ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-A, "Appeals Chamber Judgment", 22 April 2008, para. 267.

[556] ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, 16 November 1998, para. 399.

cannot be empirically determined with certainty.[557] 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.[558] 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.[559]

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

d) The suspect either knew or should have known

427. The Chamber, reiterates what it has stated earlier in this decision, that the Rome Statute does not endorse the concept of strict liability. To this end, attribution of criminal responsibility for any of the crimes that fall within the jurisdiction of the Court depends on the existence of the relevant state of mind or degree of fault. This is also the case with respect to criminal responsibility arising under article 28 of the Statute.

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[557] K. Ambos, in: A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court A Commentary*, vol. 1, (OUP, 2002), p. 860.

[558] K. Ambos, in: A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court· A Commentary*, vol. 1, (OUP, 2002), p. 860; E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, (T.M.C. Asser Press, 2003), p. 190.

[559] ICTY, *Prosecutor v Hadžihasanović et al*, Case No (IT-01-47-A), "Appeals Chamber Judgment", 22 April 2008, para. 31: "a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of *increasing the risk* of new crimes being committed." (emphasis added); K. Ambos, in: A. Cassese/P. Gaeta/J.R.W.D Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, vol. 1, (OUP, 2002), p. 860; V. Nerlich, 'Superior Responsibility Under Article 28 ICC Statute – For What Exactly Is the Superior Held Responsible?', 5 *J. Int'l Crim. Just.* p. 655, at p. 673 (2007); see also the AI *amicus curiae* submission in the Case, ICC-01/05-01/08-406, paras 45-47.

428. Thus, in order to hold the suspect criminally responsible under article 28(a) of the Statute for a crime committed by forces (subordinates) under his control, it must be proven *inter alia* that the suspect "either knew or, owing to the circumstances at the time, should have known that his subordinates were committing or about to commit" one or more of the crimes embodied in articles 6 to 8 of the Statute. This means that the suspect must have knowledge or should have known that his forces were about to engage or were engaging or had engaged in a conduct constituting the crimes referred to above.[560]

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

430. With respect to the suspect's actual knowledge that the forces or subordinates were committing or about to commit a crime, it is the view of the Chamber that such knowledge cannot be "presumed".[561] Rather, the suspect's knowledge must be obtained by way of direct or circumstantial evidence.[562] In this regard, the Chamber takes note of the relevant jurisprudence of the *ad hoc* tribunals which considered several factors or *indicia* to reach a finding on a superior's actual knowledge.

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[560] ICTY, *Prosecutor v Orić*, Case No. IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, paras 57-60; ICTY, *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 120; SCSL, *The Prosecutor v Sesay et al*, Case No. SCSL-04-15-T, "Judgment", 2 March 2009, para. 309.

[561] ICTY, *Prosecutor v Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 64; ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, "Judgment", 1 September 2004, para. 278 (noting that knowledge "may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so").

[562] ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para. 427; ICTY, *Prosecutor v Hadžihasanović et al*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 94.

431.These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.[563] Actual knowledge may be also proven if, "*a priori*, [a military commander] is part of an organised structure with established reporting and monitoring systems".[564] Thus, the Chamber considers that these factors are instructive in making a determination on a superior's knowledge within the context of article 28 of the Statute.

432. The "should have known" standard requires the superior to "ha[ve] merely been negligent in failing to acquire knowledge" of his subordinates' illegal conduct.[565] In the *Blaškic* case, the ICTY Trial Chamber, after having reviewed some post-Second World War jurisprudence and articles 86(2) and 87 of Additional Protocol I to the Geneva Conventions, supported the inclusion of the "should have known" standard into article 7(3) of the ICTY Statute. In defining this standard, the Chamber stated:

> In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties (...).[566]

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[563] See Final Report of the Commission of Experts Established Pursuant of Security Council Resolution 780(1992), UN Doc. S/1994/674, p. 7; see, *inter alia*, ICTY, *Prosecutor v Delalić et al.*, Case No. IT-96-21-T,"Judgment", 16 November 1998, para. 386; ICTY, *Prosecutor v. Blaškic*, Case No. IT-95-14-T, "Judgment", 3 March 2000, para. 307; ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 368; ICTY, *Prosecutor v Orić*, Case No. IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, para. 319; ICTR, *The Prosecutor v Bagosora et al* , Case No. ICTR-98-41-T, "Judgment and Sentence", 18 December 2008, para. 2014; SCSL, *The Prosecutor v. Sesay et al* , Case No. SCSL-04-15-T, "Judgment", 2 March 2009, para. 309.

[564] ICTY, *Prosecutor v Hadžihasanović et al* , Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 94.

[565] ICC-01/05-01/08-406, paras 3 and 6.

[566] ICTY, *Prosecutor v Blaškic*, Case No. IT-95-14-T, "Judgment", 3 March 2000, para. 332.

433.Thus, it is the Chamber's view that the "should have known" standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops[567] and to inquire, regardless of the availability of information at the time on the commission of the crime.[568] The drafting history of this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors.[569]

434.The Chamber is mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SCSL[570] sets a different standard to the "should have known" standard under article 28 (a) of the Statute. However, despite such a difference, which the Chamber does not deem necessary to address in the present decision, the criteria or *indicia* developed by the *ad hoc* tribunals to meet the standard of "had reason to know" may also be useful when applying the "should have known" requirement. Moreover, the factors referred to above in relation to the determination of actual knowledge are also relevant in the Chamber's final assessment of whether a superior "should have known" of the commission of the crimes or the risk of their occurrence. In this respect, the suspect may be

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[567] ICTR, *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, "Judgment and Sentence", 21 May 1999, para. 227 (noting that article 28 (a) of the Statute "imposes a more active duty upon the superior to inform himself of the activities of his subordinates"); Fenrick, W., "Article 28", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), p. 519.

[568] See e.g., E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, (T.M.C. Asser Press, 2003), p. 186.

[569] *Summary Record of the 1 st Meeting of the Committee of the Whole*, UN Doc. A/CONF.183/C.1/SR.1, paras 67-82.

[570] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 *ILM* 1159, as amended by Security Council Resolution 1660 of 28 Feb. 2006, Art. 7(3); Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602, as amended by Security Council Resolution 1534 of 26 Mar. 2004, Art 6(3); Statute of the Special Court for Sierra Leone, UNTS vol. 2178, p. 138, U.N. Doc. S/2002/246, 16 Jan. 2002, Appendix II, Art. 6(3).

considered to have known, if *inter alia,* and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts;[571] and (ii) such available information was sufficient to justify further inquiry or investigation.[572] The Chamber also believes that failure to punish past crimes committed by the same group of subordinates may be an indication of future risk.[573]

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

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

436. The Chamber first wishes to underline that the three duties under article 28(a)(ii) of the Statute arise at three different stages in the commission of crimes: before, during and after. Thus, a failure to fulfil one of these duties is itself a separate crime under article 28(a) of the Statute.[574] A military commander or a military-like commander can therefore be held criminally responsible for one or more breaches of duty under article 28(a) of the Statute in relation to the same underlying crimes.

[571] ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, paras 65-66; ICTY *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 370; SCSL, *The Prosecutor v Fofana et al.*, Case No. SCSL-04-14-T, para. 244. This information may be obtained from, *inter alia,* the media or reports prepared by international and non- governmental organisations. ICTY, *Prosecutor v. Blaškic*, Case No. IT-95-14-A, "Appeals Chamber Judgment", 29 July 2004, para. 618; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, "Judgment and Opinion", 5 December 2003, para. 704.
[572] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, "Judgment", 30 November 2005, para. 525; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para. 437.
[573] SCSL, *The Prosecutor v Sesay et al.*, Case No. SCSL-04-15-T, "Judgment", 2 March 2009, para. 311. (noting that "while a superior's knowledge of and failure to punish his subordinates' past offences is insufficient on its own to conclude that the superior knew that future offences would be committed, such knowledge may constitute sufficiently alarming information to justify further inquiry").
[574] ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 69 (noting that "[t]he failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates").

Consequently, a failure to prevent crimes which the commander knew or should have known about cannot be cured by fulfilling the duty to repress or submit the matter to the competent authorities.[575]

(i) The duty to prevent

437. The Chamber notes that the duty to prevent arises when the commander or military-like commander knew or should have known that forces under his effective control and command/authority "were committing or about to commit" crimes. Thus, such a duty is triggered at any stage prior to the commission of crimes and before it has actually been committed by the superior's forces.[576]

438. Article 28 of the Statute does not define the specific measures required by the duty to prevent crimes. In this context, the Chamber considers it appropriate to be guided by relevant factors such as measures: (i) to ensure that superior's forces are adequately trained in international humanitarian law;[577] (ii) to secure reports that military actions were carried out in accordance with international law;[578] (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war;[579] (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.[580]

(ii) The duty to repress

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[575] ICTY, *Prosecutor v Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008; para 69, ICTY, *Prosecutor v Blaškić*, Case No. IT-95-14-T, "Judgment", 3 March 2000, para. 336. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 373; ICTY, *Prosecutor v Hadžihasanović*,and *Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 126.

[576] ICTY, *Prosecutor v Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 72.

[577] W. Fenrick, "Article 28", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), p. 520.

[578]ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 374; ICTY, *Prosecutor v Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 153.

[579] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 374; ICTY, *Prosecutor v. Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 153.

[580] ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 374; ICTY, *Prosecutor v. Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 153.

439. The duty to "repress" encompasses two seperate duties arising at two different stages of the commission of crimes.[581] First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed.[582] It is the obligation to "interrupt a possible chain effect, which may lead to other similar events".[583] Second, the duty to repress encompasses an obligation to punish forces after the commission of crimes.[584]

440.The Chamber wishes to point out that the duty to punish requiring the superior to take the necessary measures to sanction the commission of crimes[585] may be fulfiled in two different ways: either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish (as part of the duty to repress) constitutes an alternative to the third duty mentioned under article 28(a)(ii), namely the duty to submit the matter to the competent authorities, when the superior is not himself in a position to take necessary and reasonable measures to punish.[586]

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[581] O. Triffterer, "Causality, A Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?," 15 *Leiden J. Int'l L.*, p. 179, at p. 201 (2002).

[582] In this respect, the duty to repress is equivalent to the obligation to "suppress" crimes. The latter expression is used in Article 87 of the Additional Protocol I to the Geneva Conventions. See also ICTY, *Prosecutor v. Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 127, referring, *inter alia*, to ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para 446: "The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators" and that he "did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped."

[582] ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para 446.

[583] R. Arnold in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,- Observers' Notes, Article by Article*, (Nomos Verlag 2nd ed., 2008), p. 838.

[584] ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para 446

[585] W. Fenrick, "Article 28", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Baden-Baden: Nomos Verlagsgesllschaft, 1999), p. 520.

[586] ICTY, *The Prosecutor v Naser Orić*, Case No IT-03-68-A, "Appeals Chamber Judgment", 3 July 2008, para. 336: "The superior need not conduct the investigation or dispense the punishment in person, but he or she must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction." See also ICTY, *The Prosecutor v Enver Hadžihasanović, Amir Kubura*, Case No IT-01-47-T, "Judgment", 15 March 2006, para. 154.

441.Moreover, as explained later, the power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command.[587] Accordingly, whether the duty to punish requires exercising his power to take measures himself or to submit the matter to the competent authorities will therefore depend on the facts of the case.

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

442.The duty to submit the matter to the competent authorities, like the duty to punish, arises after the commission of the crimes. Such a duty requires that the commander takes active steps in order to ensure that the perpetrators are brought to justice.[588] It remedies a situation where commanders do not have the ability to sanction their forces.[589] This includes circumstances where the superior has the ability to take measures, yet those measures do not seem to be adequate.[590]

(iv) Necessary and Reasonable Measures

443.The Chamber considers that what constitutes "necessary and reasonable measures" must be addressed *in concreto*.[591] A commander or military-like commander will only be responsible under article 28(a) of the Statute for failing to

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[587] W. Fenrick, "Article 28", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Baden-Baden: Nomos Verlagsgesllschaft, 1999), p. 520.

[588] ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008; para. 74; see also article 87(3) of Additional Protocol I to the Geneva Conventions which requires a military commander, who is aware that his subordinates have committed a breach of the Geneva Conventions or the Protocol, "where appropriate, to initiate disciplinary or penal action" against them.

[589] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 376; ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, "Judgment", 26 February 2001, para 446.

[590] R. Arnold in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court-Observers' Notes, Article by Article* (Nomos Verlag, 2nd ed., 2008) p. 838.

[591] ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Appeals Chamber Judgment", 29 July 2004, para. 417; see also ICTY, *Prosecutor v. Hadžihasanović, and Kubura*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 155. For the relevant factors to be taken into account see ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 76; ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, "Judgment", 31 January 2005, para. 378.

take measures "within his material possibility".[592] The Chamber's assessment of what may be materially possible will depend on the superior's degree of effective control over his forces at the time his duty arises. This suggests that what constitutes a reasonable and necessary measure will be assessed on the basis of the commander's *de jure* power as well as his *de facto* ability to take such measures.[593]

2. Findings of the Chamber

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

445.In setting forth its reasoning in relation to the five elements required under article 28(a) of the Statute, the Chamber addresses the first two elements under one sub-heading (a) due to their co-relation. The fourth element concerning the knowledge is dealt with by the Chamber in sub-section (b). The Chamber also covers the third element of causality in the discussion of the fifth element concerning failure to prevent or to repress under sub-heading (c).

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[592] ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Appeals Chambers Judgment", 29 July 2004, para. 395.

[593] ICTY, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, "Appeals Chamber Judgment", 17 December 2004, para. 443: noting that "it is the actual ability, or effective capacity to take measures which is important. The reference to the lack of formal legal competence to take measures should be read in this context. When assessing whether a superior failed to act, the Trial Chamber will look beyond his formal competence to his actual capacity to take measures"; see also ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21, "Judgment", 16 November 1998, para. 395: noting that "for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect."

a) Mr Jean-Pierre Bemba was effectively acting as a military commander and had effective authority and control over the MLC troops who committed the crimes

446. Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba, at all times relevant to the charges, effectively acted as a military commander and had effective authority and control over the MLC troops who committed the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003.

447. In reaching the above conclusion, the Chamber was mindful of the Defence's submission which relied on witness statements 9,[594] 31,[595] 46,[596] and 80[597] to allege that in the CAR, the MLC troops were placed under the complete dependence and authority of the members of the Central African government and military hierarchy,[598] and were therefore not under the effective authority, control or command of Mr Jean-Pierre Bemba.[599]

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[594] Statement of witness 9, EVD-P-00148 at 0140, 143, 0154 and 0155. The Defence underlines that at 0140 the witness states that it was not up to Mr Jean-Pierre Bemba to feed the ALC soldiers, since they were in the service of the Central African Republic.

[595] Statement of witness 31, EVD-P-00102 at 0339. The witness states that there was only one commander of the MLC troops in the CAR. The Defence therefore concludes that witness 31 clearly excludes Mr Jean-Pierre Bemba from the chain of command.

[596] Statement of witness 46, EVD-P-02334 at 0299, 0306, 0311 and 0313; EVD-P-02336 at 0365 in which, according to the Defence, it is apparent that Mr Patassé had authority over the MLC troops. EVD-P-02328 at 0178 in relation to which the Defence states that the witness confirms that, following the rebel attack of October 2002, President Patassé had asked the CEN-SAD summit to send other troops from the CEN-SAD countries to reinforce the Libyan force which were already present in Bangui since 2001.

[597] Statement of witness 80, EVD-P-02395 at 0189, where, according to the Defence, the witness draws a clear distinction between the commander of the "Banyamulenge" on CAR territory, whom the witness designates as Mr Patassé, and the "Banyamulenge" commander on the other side of the river, on the DRC territory, Mr Jean-Pierre Bemba.

[598] ICC-01/05-01/08-413, paras. 137-148.

[599] ICC-01/05-01/08-413, para. 142.

448. Upon analysis of the evidence, the Chamber however believes that the MLC – a non-governmental force – was a hierarchically organized group over which Mr Jean-Pierre Bemba had effective authority and control. For the sake of clarity, the following paragraphs will address the different elements taken into consideration by the Chamber.

(i) Mr Jean-Pierre Bemba's official position within the MLC structure

449. In relation to the use of the statement of witness 15, the Chamber would like to underline that this witness was a member of the MLC during all times relevant to the present case, and thus privy to information related to the MLC. However, the Chamber observes that he was later excluded by Mr Jean-Pierre Bemba, and accordingly, the witness describes his relationship with Mr Jean-Pierre Bemba to be "non-existent" and "very poor".[600]

450. The Chamber is of the view that the circumstances surrounding the exclusion of witness 15 from the MLC may raise doubts as to his reliability. Nevertheless, as stated in paragraph 57 of the present decision, the existence of possible political motives does not automatically lead to a rejection of the witness statement. Rather, the Chamber assesses the witness's credibility in relation to each issue to be decided upon and in light of the evidence as a whole. Thus, the Chamber refers to the statement of witness 15 to the extent that the information relied upon is corroborated by other pieces of evidence.

451. According to the *Statuts du Mouvement de Libération du Congo* signed in Lisala on 30 June 1999 (the "MLC Statute"), a political and military movement was created and called the MLC.[601] According to the statements of witnesses 15 and 36 as well as

[600] Statement of witness 15, EVD-P-02168 at 0511-0518.
[601] Article 1 of the MLC Statute, EVD-P-00024 at 0198.

indirect evidence, the MLC headquarters were established, in or about July 1999 in Gbadolite in the DRC.[602]

452. Pursuant to article 11 of the MLC Statute as well as the statement of witness 36, the MLC is composed of four organs, namely the Presidency, the *Conseil Politico-Militaire de la Libération* (the "Political and Military Council"),[603] the *Secrétariat Général* (the "General Secretariat") and the *Armée de Libération du Congo* (the "ALC").

453.The Chamber refers to the Statute of the MLC establishing the functions of the President of the MLC as well as of the Political and Military Council assisting the President. Article 12 of the MLC Statute provides that the President of the MLC is the head of the political wing and the Commander-in-Chief of the ALC. The provision further specifies that the President of the MLC who is also the Commander-in-Chief of the ALC *inter alia*: (i) defines the operations' general policy and determines the military objectives; (ii) approves and signs defence agreements with external partners and (iii) convenes and presides over ALC General Staff meetings. The President is assisted by a Political and Military Council, which is composed of nine members appointed by him.[604] The President may appoint and dismiss members of the MLC after hearing the opinion of the Political and Military Council.[605]

454. According to article 16 of the MLC Statute and the statement of witness 36,[606] the ALC, which is the military wing of the MLC, is placed under the control of the President. Each member of the General Staff of the ALC is appointed and dismissed by the Commander in Chief of the ALC (*i.e.*, the President of the MLC) after a

[602] Statement of witness 15, EVD-P-02168 at 0521; statement of witness 36, EVD-P-00142 at 0372; see also *Memorandum "Organsiation de l'Armée de Libération du Congo"*, EVD-D01-00034 at 0637; United States Institute of Peace, Special Report - Elections in the DRC - The Bemba surprise, EVD-P-02153 at 0430.

[603] See also statement of witness 36, EVD-P-00142 at 0360.

[604] Article 13 of the MLC Statute, EVD-P-00024 at 0200.

[605] Article 12 of the MLC Statute, EVD-P-00024 at 0199-0200.

[606] Statement of witness 36, EVD-P-00142 at 0359.

positive opinion of the Political and Military Council.[607] The Chief of Staff, who is subordinated to the Commander-in-Chief (President of the MLC) coordinates the activities of the General Staff and troops, and executes the decisions of the Commander-in-Chief of the ALC. In this respect, he prepares the decisions of the Commander-in-Chief, coordinates the General Staff's activities and reports to the Commander-in-Chief on the implementations of the orders transmitted.[608]

455. The Disclosed Evidence shows that MLC members as well as the ALC soldiers chose Mr Jean-Pierre Bemba as the President of the MLC and Commander-in-Chief of its military wing (the ALC).[609] The Chamber notes, based on the evidence that, at all times relevant to the charges, Mr Jean-Pierre Bemba retained such positions: this is clearly manifested by the fact that Mr Jean-Pierre Bemba specifically signed documents as the President of the MLC and Commander-in-Chief of the ALC.[610]

456.The Chamber also notes that the ALC, which consisted of approximately 20,000 soldiers,[611] was structured like a conventional army. As stated in article 16 of the MLC Statute and corroborated by witness 36, it had an état-major which comprised (i) a commander of the army, the Chief of Staff; (ii) a G1 in charge of administration; (iii) a G2 in charge of intelligence; (iv) a G3 in charge of operations; (v) a G4 in charge of logistics; and (vi) a G5 in charge of political and civilian affairs.[612] The ALC[613] was divided into 7 brigades. Each brigade consisted of 2,500 to 3,000 men and was headed by a brigade commander.[614] A brigade was divided into battalions, each

[607] Article 16 of the MLC Statute, EVD-P-00024 at 0200.
[608] Article 16 of the MLC Statute, EVD-P-00024 at 0200-0201.
[609] Article 30 of the MLC Statute, EVD-P-00024 at 0202; see also statement of witness 36, EVD-P-00142 at 0361-0362.
[610] See for instance, Decree No. 035/PRES/MLC of 16 November 2002 on the establishment of military jurisdiction within the ALC, EVD-P-00087 at 0018.
[611] Statement of witness 36 at EVD-P-00142 at 0367; statement of witness 15 at EVD-P-02168 at 0520.
[612] Article 16 of the MLC Statute, EVD-P-00024 at 0200; statement of witness 36 at EVD-P-00142 at 0359.
[613] Hereinafter also referred to as "MLC."
[614] Statement of witness 36, EVD-P-00142 at 0362-0363.

headed by a battalion commander and comprising General Staff.[615] Finally, each battalion was sub-divided into companies and platoons.[616] The companies and platoons were also divided into sections.[617] The evidence, particularly the statements of witnesses 36 and 40,[618] shows that the brigade and battalion commanders were all appointed by Mr Jean-Pierre Bemba.

457. In sum, based on the aforementioned evidence, the Chamber considers that from the creation of the politico-military movement (MLC/ALC) in 1999[619] and at all times relevant to the present case Mr Jean-Pierre Bemba served as the *de jure* Commander-in-Chief of the ALC. He also had the *de facto* ultimate control over MLC commanders.

(ii) Mr Jean-Pierre Bemba had the power to issue orders that were complied with

458. The Chamber further considers that Mr Jean-Pierre Bemba had the power to issue or give orders. According to witnesses 15[620] and 45[621], Mr Jean-Pierre Bemba retained control over the military apparatus.[622] He signed important decisions as the MLC President and the ALC Commander-in-Chief such as those involving the nomination of commanders of operations.[623]

459. The Chamber also notes that the Disclosed Evidence, in particular the statements of witnesses 36, 45 and the summary statement of witness 33, shows that a reporting

[615] Statement of witness 40, EVD-P-02293 at 0164 (line 462), and EVD-P-02294 at 0183 (lines 406-409).
[616] Statement of witness 36, EVD-P-00143 at 0441; statement of witness 40, EVD-P-02293 at 0155 (lines 460-472).
[617] Statement of witness 36, EVD-P-00143 at 0441; statement of witness 40, EVD-P-02293 at 0155 (lines 460-472).
[618] Statement of witness 40, EVD-P-02293 at 0155 and 0164, and EVD-P-02294 at 0183; statement of witness 36, EVD-P-00143 at 0441.
[619] MLC Statute, EVD-P-00024.
[620] Statement of witness 15, EVD-P-02168.
[621] Statement of witness 45, EVD-P-02392.
[622] Statement of witness 15, EVD-P-02168 at 0508.
[623] Statement of witness 45, EVD-P-02392 at 0442-0443.

system, which was facilitated by the means of communication available,[624] was in place within the MLC. This reporting system allowed Mr Jean-Pierre Bemba to receive daily information in the form of oral or written reports, as stated by witnesses 15, 33 and 45.[625] According to witnesses 15 and 65, the reporting system in place also enabled Mr Jean-Pierre Bemba to monitor the military operations conducted by the MLC[626] and to transmit his orders. In this regard, although article 16 of the MLC Statute stated that the Chief of Staff is entrusted with the implementation of the Commander-in-Chief's orders,[627] witnesses 33, 36, 44, 45 and 65 state that Mr Jean-Pierre Bemba bypassed him and directly contacted commanders in the field and issued orders.[628] Evidence shows that these orders were complied with by the troops and cases of disobedience were punished.[629]

(iii) Mr Jean-Pierre Bemba had the power to appoint, promote, demote, dismiss as well as arrest, detain and release MLC commanders

460. It follows from the statements of witnesses 15, 32, 36, 45 and the summary statement of witness 33 that Mr Jean-Pierre Bemba not only had the power to appoint, promote, demote and dismiss MLC commanders,[630] but also the ability to unilaterally arrest as well as to detain and release those who were arrested.[631]

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[624] Statement of witness 45, EVD-P-02392 at 0420-0421 (satellite phone), at 0437 (*phonie*, wireless communication, or satellite phone); summary statement of witness 33, EVD-P-0151 (radio, satellite phones, *Thuraya*); statement of witness 36, EVD-P-00142 at 0376 (radio centre).

[625] Summary of the statement of witness 33, EVD-P-00151 at 0167; statement of witness 15, EVD-P-02168 at 0534-0536; statement of witness 45, EVD-P-02392 at 0420-0421 and 0452.

[626] Summary of the statement of witness 65, EVD-P-02416; statement of witness 15, EVD-P-02168 at 0537.

[627] Article 16 of the MLC Statute, EVD-P-00024 at 0200; see also summary of the statement of witness 65, EVD-P-02416; statement of witness 44, EVD-P-02391 at 0541; summary of the statement of witness 33, EVD-P-00151.

[628] Summary of the statement of witness 65, EVD-P-02416; statement of witness 36, EVD-P-00142 at 0375; statement of witness 44, EVD-P-02391 at 0541; statement of witness 45, EVD-P-02392 at 0437 and 0452; summary of the statement of witness 33, EVD-P-00151.

[629] Statement of witness 36, EVD-P-0142 at 0369 and 0385, and EVD-P-00143 at 0470.

[630] Statement of witness 15, EVD-P-02168 at 0510; statement of witness 36, EVD-P-00142 at 0361-0363; statement of witness 45, EVD-P-02392 at 0437-0439.

[631] Statement of witness 32, EVD-P-02370 at 0308-0309; summary of the statement of witness 33, EVD-P-00151 at 0168; statement of witness 36, EVD-P-00143 at 0470; statement of witness 45, EVD-P-02392 at 0437.

(iv) Mr Jean-Pierre Bemba had the power to prevent and repress the commission of crimes

461. The Disclosed Evidence further demonstrates that Mr Jean-Pierre Bemba had the power to prevent and to repress the commission of crimes. The Chamber refers to the existence, within the MLC structure, of a military judicial system to which Mr Jean-Pierre Bema was able to submit matters for investigation and prosecution.[632]

462. In this regard, the Chamber first notes that the MLC troops were required to comply with a Code of Conduct[633] which organised the military discipline within the MLC. The code of conduct states that the Martial Court is the third organ under the code and that its members are appointed by the High Command. In addition to the Martial Court, there is also a Disciplinary Board in each unit of the army. This Board has jurisdiction to judge any junior officer for all offences with the exception of *inter alia* murder, theft and rape.[634] In the latter complex cases, the Disciplinary Board is required to refer such matters to the Martial Court.[635] The Chamber further observes that, according to the code of conduct, the Commander of the army (*i.e.*, Mr Jean-Pierre Bemba) can also suspend any unit commander.[636]

463. Evidence also shows that Mr Jean-Pierre Bemba had the ability to issue decrees which impacted on the organization of the MLC military judicial system. For instance, Mr Jean-Pierre Bemba issued Decree No 002/PRES/MLC/2002 of 25 March 2002 on the establishment of a Court Martial within the ALC.[637] He also issued Decree No 035/PRES/MLC of 16 November 2002 on the establishment of a military

[632] Statement of witness 45, EVD-P-02392 at 0458; EVD-D01-00022 at 0156.
[633] EVD-D01-00024.
[634] EVD-D01-00024, at 0084.
[635] EVD-D01-00024, at 0084.
[636] EVD-D01-00024, at 0086.
[637] EVD-D01-00054.

jurisdiction within the ALC, which established a *Conseil de Guerre Supérieur* and a *Conseil de Guerre de Garnison*.[638]

464. The Chamber notes that, according to witnesses 15 and 45, [639] Mr Jean-Pierre Bemba imposed disciplinary measures and took some other measures in relation to the alleged crimes committed by MLC troops during the 2001 intervnetion in the CAR and the 2002 Mambasa attack.

(v) Mr Jean-Pierre Bemba retained his effective authority and control over the MLC troops throughout the 2002-2003 intervnetion in the CAR

465. The Chamber would first like to observe that the Disclosed Evidence shows that:

(1) the Central African government provided the MLC troops with governmental bases including the naval base and Régiment de Soutien/Camp Béal, and provided them with transportation, uniforms and fuel;[640]

(2) a coordination cell, from which operations were planned with the FACA, was created on Mr Patassé's instructions;[641]

(3) The transport of MLC troops was coordinated by Mr Patassé's subalterns who also relayed the MLC to an area designated for them based on Mr Patassé's instructions;[642]

(4) These activities were reported to Mr Patassé on a daily basis;[643] and

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[638] EVD-P-00087.

[639] Statement of witness 15, EVD-P-02168 at 0538; statement of witness 45, EVD-P-02392 at 0458; see also an extract from O. LEABA, *La crise centrafricaine de l'été 2001* in: Politique africaine No. 84, December 2001, EVD-P-00074 at 0481.

[640] Statement of witness 31, EVD-P-02169 at 0268, and EVD-P-02417 at 0320; statement of witness 46, EVD-P-02329 at 0187-0190.

[641] Statement of witness 9, EVD-P-00148 at 0154-0155; statement of witness 26, EVD-P-00136 at 0156-0158.

[642] Statement of witness 31, EVD-P-02169 at 0268, 0273 and 0280-0282; statement of witness 46, EVD-P-02329 at 0189-0190.

[643] Statement of witness 31, EVD-P-02169 at 0272-0276; statement of witness 40, EVD-P-02298 at 0268-0272.

(5) The FACA and USP were deployed to support the MLC troops when they were unfamiliar with the territory.[644]

466. Notwithstanding the above, the Chamber still considers that, throughout the 2002-2003 intervention in the CAR, Mr Jean-Pierre Bemba retained his effective authority and control over the MLC troops deployed in the CAR during the five-month period of intervention. He had the material ability to prevent and repress the crimes committed throughout the entire period. The Chamber reached this conclusion based on Disclosed Evidence relating to the elements developed hereafter which show that Mr Jean-Pierre Bemba notably resorted to his *de jure* and *de facto* control over the MLC.

467. According to witness 36, it was Mr Jean-Pierre Bemba who took the decision to send MLC troops to the CAR and he informed his Chief of Staff of this decision.[645] This information finds support in the statements of witnesses 45 and 32 and the summary of the statement of witness 33.[646]

468. Witness 36 stated that Mr Jean-Pierre Bemba also took the decision on the selection of the battalions to be deployed into the CAR.[647] Thus, following his orders, three battalions were deployed and were headed by an MLC Commander of Operations.[648]

469. The Chamber notes that during the 2002-2003 intervention in the CAR, Mr Jean-Pierre Bemba resorted to his powers to initiate investigation and to punish. As the Chamber previously underlined, according to a letter addressed to the President of

[644] Statement of witness 6, EVD-P-00098 at 0105.
[645] Statement of witness 36, EVD-P-00142 at 0396, and EVD-P-00143 at 0412.
[646] Statement of witness 45, EVD-P-02392 at 0444; statement of witness 32, EVD-P-02371 at 0327; summary of the statement of witness 33, EVD-P-00151 at 0168.
[647] Statement of witness 36, EVD-P-00142 at 0396-0397, and EVD-P-00143 at 0407 and 0412.
[648] Statement of witness 6, EVD-P-00098 at 0107-0108, para. 41; statement of witness 31, EVD-P-00102 at 0338-0339; summary of the statement of witness 33, EVD-P-00151; statement of witness 40, EVD-P-02295 at 0208.

the FIDH, Mr Jean-Pierre Bemba took steps to establish a commission of enquiry to verify facts relating to the commission of alleged crimes in the CAR, identify the soldiers responsible, and remit them to the military justice system. To that end, a team of five ALC soldiers travelled to Bangui on 30 October 2002. [649]

470. Moreover, RFI reported that during a telephone conversation they had had with Mr Jean-Pierre Bemba, he told them that if his men had committed "atrocities, they would [have been] arrested and undergo[ne] trial under their Movement's military laws".[650] Based on the conclusions of the report submitted by the commission of enquiry on 28 November 2002,[651] seven soldiers were charged with pillaging before the Military Court in Gbadolite[652] previously established on 25 March 2002.[653]

471.The Chamber also recalls that several witness statements, coupled with two summary statements, revealed that Mr Jean-Pierre Bemba, along with senior MLC commanders,[654] travelled to Bangui in November 2002 to address his troops.[655] In particular, witness 31 stated that Mr Jean-Pierre Bemba learned about the crimes committed by the MLC soldiers, and accordingly suspended two commanders who were suspected of pillaging.[656] Furthermore, according to witness 40, during his visit, Mr Jean-Pierre Bemba cautioned members of his army against any misconduct and stated that "the one who [...] make mistakes, [...] will respond [...] to his mistakes".[657]

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[649] EVD-D01-00020.

[650] RFI press release *"Peur sur Bangui"* dated 5 November 2002, EVD-P-02104 at 0133; RFI broadcast dated 4 November 2002, EVD-P-02162 at track 06 from 06:22 onwards; see also BBC press release *"Government to investigate 'executions of Chadians'"* dated 5 November 2002, EVD-P-00019 at 0667.

[651] EVD-D01-00020; see also statement of witness 36, EVD-P-00143 at 0423-0424.

[652] EVD-D01-00020 at 0152; see also EVD-D01-00043.

[653] EVD-D01-00054.

[654] Statement of witness 40, EVD-P-02345 at 0578-0579.

[655] Statement of witness 6, EVD-P-00098 at 0115, para. 79; statement of witness 31, EVD-P-00102 at 0367-0368; summary of the statement of witness 38, EVD-P-00150; statement of witness 40, EVD-P-02345 at 0576-0581.

[656] EVD-P-00101 at 0368-0369.

[657] EVD-P-02345 at 0580.

472.The Chamber further notes that according to a report sent by the MLC Commander of Operations in the CAR to Mr Jean-Pierre Bemba, the MLC and the FACA were each responsible for trying their own soldiers. In this respect, the MLC Commander of Operations in the CAR reported some cases of pillaging, which occurred on 7 and 8 November 2002, to Gbadolite.[658] This was followed by the commencement of an investigation and the suspected persons were transferred to Gbadolite to be tried.[659]

473. Based on the Disclosed Evidence, particularly the statements of witnesses 31 and 44, the Chamber considers that throughout the 2002-2003 intervention in the CAR, Mr Jean-Pierre Bemba had the material ability to contact his Commander of Operations in the CAR.[660] In this respect, the Chamber notes that both the Prosecutor and the Defence rely on the statement of witness 40 and draw different conclusions. Both the Prosecutor and the Defence disagree about whether Mr Jean-Pierre Bemba was in direct contact with the MLC Commander of Operations in the CAR. They also disagree about the subject-matter of such contact, if any.[661] In particular, the Defence underlines that, according to witness 40, the reports the MLC Commander of Operations in the CAR was required to make to his hierarchy were addressed to the Chief of Staff and not to Mr Jean-Pierre Bemba. Such reports were limited to three points: (1) the troops' state of discipline with no reference to any of the crimes with which Mr Jean-Pierre Bemba is charged with; (2) the names of dead soldiers and wounded soldiers who required treatment; and (3) the manpower reinforcement needed by him in December 2002.[662]

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[658] *"Rapport opération militaire à Bangui du 29 oct 2002 au 15 mars 2003"*, EVD-D01-00051.
[659] *"Rapport opération militaire à Bangui du 29 oct 2002 au 15 mars 2003"*, EVD-D01-00051.
[660] Statement of witness 31, EVD-P-00102 at 0416-0417; statement of witness 44, EVD-P-02390 at 0482.
[661] ICC-01/05-01/08-395-Anx3, para. 96 referring to the statement of witness 40, EVD-P-02298 at 0272-0276.
[662] ICC-01/08-01/05-413, para. 197 referring to the statement of witness 40, EVD-P-002298 at 0273 and 0275.

474. After a careful review of the statement of witness 40 and in light of the Disclosed Evidence as a whole, the Chamber finds that, albeit the number of contacts Mr Jean-Pierre Bemba might have had with the MLC Commander of Operations in the CAR, the latter was still in contact with his hierarchy in Gbadolite during the 2002-2003 intervention in the CAR. The Chamber underlines that the MLC Commander of Operations was contacted at least once by Mr Jean-Pierre Bemba in February 2003 when he was given the order to withdraw the MLC troops from the CAR. This was an order which he immediately started to implement.[663]

475. Witness 40 further states that in compliance with the hierarchical military structure of the MLC, the MLC Commander of Operations in the CAR contacted the Chief of Staff of the MLC.[664] The MLC Commander of Operations in the CAR also submitted reports on issues relating to the Congolese soldiers to the MLC Chief of Staff,[665] who in turn was under a duty pursuant to article 16 of the MLC Statute, to report to the Commander-in-Chief of the MLC (*i.e.*, Mr Jean-Pierre Bemba).[666]

476. The Chamber is not persuaded by the Defence submission that since the three points addressed in the reports did not involve military operations, Mr Jean-Pierre Bemba lacked authority and control over the MLC in the CAR. On the contrary, the Chamber is of the opinion that the three points referred to by the Defence demonstrate that the MLC troops remained under the control of MLC headquarters in Gbadolite. This is apparent from the fact that the MLC Commander of Operations in the CAR referred to his hierarchy in Gbadolite for disciplinary matters, logistical purposes, and for manpower reinforcements.[667] For instance, as mentioned in paragraph 472 above, the MLC Commander of Operations in the CAR referred some cases of pillaging to his hierarchy in Gbadolite, which led to the opening of an

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[663] Statement of witness 40, EVD-P-002298 at 0272-0277; see also RFI press release, "*Malade de la guerre civile*", EVD-P-02107 at 0143.
[664] Statement of witness 40, EVD-P-002298 at 0272-0275.
[665] Statement of witness 40, EVD-P-002298 at 0272-0275; statement of witness 36, EVD-P-00143 at 0409.
[666] MLC Statute, EVD-P-00024 at 0200-0201.
[667] Statement of witness 40, EVD-P-02298 at 0273 (lines 320-323).

investigation.[668] Moreover, when the MLC Commander of Operation requested a reinforcement battalion, the 5th Battalion was sent to the CAR in the course of the intervention.[669]

477. Finally, Disclosed Evidence demonstrates that Mr Jean-Pierre Bemba took the decision to withdraw his troops from the CAR and signed a joint "communiqué" with Mr Ange-Félix Patassé in January 2003 announcing the gradual withdrawal of the MLC troops from the CAR.[670] Consequently, Mr Jean-Pierre Bemba contacted his Commander of Operations in the CAR in February 2003 ordering him to start withdrawing his troops.[671]

b) Mr Jean-Pierre Bemba knew that MLC troops were committing or were about to commit crimes

478.Having reviewed the Disclosed Evidence as a whole, the Chamber finds sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba knew that the MLC troops were committing or were about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003.

479. The Chamber is of the view that there is a distinction between the knowledge required under article 30(3) and article 28(a) of the Statute. This is justified on the ground that the cognitive element under article 30 of the Statute is only applicable to the forms of participation as provided in article 25 of the Statute. Under article 30 of the Statute the person is aware of the occurrence of a result of his own act, whether as a principal or an accessory, while this is not the case with article 28, where the

[668] *"Rapport opération militaire à Bangui du 29 oct 2002 au 15 mars 2003,"* EVD-D01-00051.
[669] Statement of witness 40, EVD-P-02295 at 0208.
[670] EVD-P-02168 at 0512 and 0534; see also press release *"Le Citoyen"* dated 14 February 2003, EVD-P-0050; RFI press release dated 13 February 2003, EVD-P-00019 at 0682; RFI press release, dated 13 February 2003, EVD-P-02106; press release *"Le Confident"* dating 23 January 2003, EVD-P-00054.
[671] Statement of witness 40, EVD-P-02297 at 0275 (lines 397-398), at 0276 (lines 450 and 454), and at 0277 (lines 456, 465, 468 and 472).

person does not participate in the commission of the crime (*i.e.*, the crime is not a direct result of his own act).

480. The Chamber further wishes to clarify that, bearing in mind its findings with respect to Mr Jean-Pierre Bemba's criminal responsibility under article 25(3)(a) of the Statute, in particular paragraphs 394, 396 and 397, some of the arguments presented by the Prosecutor in support of its demonstration on Mr Jean-Pierre Bemba's *mens rea* under article 28 of the Statute can no longer be entertained. The Chamber refers in particular to the arguments put forward by the Prosecutor in paragraphs 113 and 115 of the Amended DCC.

481.The Chamber recalls the written submission of the Defence in which it was asserted that Mr Jean-Pierre Bemba was geographically distant from the theatre of operations since he was mainly in the DRC and simultaneously involved in the conclusion of peace agreements, and was therefore not aware of the crimes committed by MLC troops during the 2002-2003 intervention in the CAR.[672] The Defence further contends that there is no evidence that Mr Jean-Pierre Bemba received concrete information from the Operational Commander of the CAR General Staff[673] or from the MLC Commander of Operations in the CAR.[674] To this end, the Defence refers to witnesses 9, 44, 45 and 46, who stated that Mr Jean-Pierre Bemba did not receive direct information concerning the commission of the crimes. In this context, the Defence submitted a log book[675] containing messages from Bangui to the MLC headquarters alleging that no reference was made to the commission of the crimes and that they were not addressed to Mr Jean-Pierre Bemba.[676]

[672] ICC-01/05-01/08-413, paras 210-211.
[673] ICC-01/05-01/08-413, para. 213.
[674] ICC-01/05-01/08-413-Anx, p. 52.
[675] EVD-D01-00036.
[676] Pre-Trial Chamber III, ICC-01/05-01/08-T-11-ENG ET, p.122, lines 12-25 and p.123, lines 1-2. See also, Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p.79, lines 20-25.

482. The Chamber recalls its earlier finding that knowledge may be obtained by way of direct or circumstantial evidence.

483. The Chamber will first address the last point of the Defence's arguments pertaining to the information found in the log book. The Chamber observes that only four pages of the entire log book were disclosed to the Prosecutor by the Defence and that, taken out of its context, the Chamber is unable to assess the information contained therein. Therefore, the Chamber accords little weight to this piece of evidence.

484. With respect to the Defence's second contention, the Chamber concurs with the jurisprudence of the ICTY which made clear that:

> (...) The more physically distant the superior was from the commission of the crimes, the more additional *indicia* are necessary to prove that he knew them. On the other hand, if the crimes were committed next to the superior's duty-station this suffices as an important *indicium* that the superior had knowledge of the crimes, and even more so if the crimes were repeatedly committed.[677]

485. The Chamber acknowledges the fact that at all times relevant to the period of the intervention in the CAR, Mr Jean-Pierre Bemba was mainly stationed in the DRC.[678] But, this does not deny the fact that he traveled to the CAR at least once during this period,[679] and that there are several indications of Mr Jean-Pierre Bemba's knowledge of the crimes throughout the period of intervention. In particular, the Chamber refers to the statements of witnesses 6, 31 and 40 and the summary of the statement of witness 38, according to which, Mr Jean-Pierre Bemba travelled to Bangui in November 2002 to address his troops.[680] Witness 31 stated that Mr Jean-Pierre Bemba learned about the crimes committed by the MLC soldiers, and

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[677] ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, "Judgment", 31 July 2003, para. 460.

[678] See for instance, statement of witness 44, EVD-P-02391 at 0522.

[679] Statement of witness 6, EVD-P-00098 at 0115, para. 79; statement of witness 31, EVD-P-00102 at 0367-0368; summary statement of witness 38, EVD-P-00150; statement of witness 40, EVD-P-02345 at 0576-0581.

[680] Statement of witness 6, EVD-P-00098 at 0115, para. 79; statement of witness 31, EVD-P-00102 at 0367-0368; summary of the statement of witness 38, EVD-P-00150; statement of witness 40, EVD-P-02345 at 0576-0581.

accordingly, suspended two commanders who were suspected of pillaging.[681] Additionally, according to witness 40, Mr Jean-Pierre Bemba during this visit cautioned his army members against any misconduct and stated that "the one who [...] make mistakes, [...] will respond [...] to his mistakes".[682] This statement was followed by a speech given by the MLC Commander of Operations in the CAR who excused for the troops' misconduct and promised to ensure their discipline.[683] The speech provided by the MLC Commander of Operations in the CAR was then reported in a Central African news paper.[684]

486. Moreover, the Chamber recalls its previous finding that crimes against humanity of murder and rape and war crimes of murder, rape and pillaging were committed in the CAR from on or about 26 October 2002 to 15 March 2003. The attack directed against the CAR civilian population was widespread targeting various locations such as Bangui (districts of Boy-Rabé and Fouh), PK 12 and Mongoumba[685] as well as Bossangoa, Damara, Bossembélé, Sibut, Bozoum, Bossemptélé and PK 22.[686] The attack on those locations also lasted for a period of approximately five months. Disclosed direct evidence further corroborated by media sources establish that throughout the approximately five-month period of the MLC intervention in the CAR, the acts of murder, rape and pillaging were regularly

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[681] EVD-P-00101 at 0368-0369.

[682] EVD-P-02345 at 0580.

[683] Press release, *"Nation"* (*Le Bulletin de l'Agence Centrafrique Press N°153 du 21 au 27 Novembre 2002*), EVD-P-00052 ; see also summary of the statement of witness 38, EVD-P-00150 at 0066.

[684] Press release, *"Nation"* (*Le Bulletin de l'Agence Centrafrique Press N°153 du 21 au 27 Novembre 2002*), EVD-P-00052.

[685] See part V. A. on crimes against humanity which refers to the statements of witness 22, EVD-P-00104 at 0503-0504, 0512 and 0518; witness 38, EVD-P-00150 at 0164; witness 42, EVD-P-02393 at 0797 and 0802, and EVD-P-02355 at 0827 and 0828, and EVD-P-02356 at 0849; witness 68, EVD-P-02388 at 0402; witness 80, EVD-P-02394 at 0172-0173; witness 81, EVD-P-02398 at 0290; witness 29, EVD-P-02367 at 0031-0033.

[686] See part V. A. on crimes against humanity which, *inter alia,* refers to the statements of witness 42, EVD-P-02356 at 0849, and EVD-P-02393 at 0803; witness 68, EVD-P-02388 at 0400, 0401 and 0404; witness 80, EVD-P-02395 at 0187 and 0188; witness 22, EVD-P-00104 at 0511, 0512 and 0513; witness 80 at EVD-P-02394 at 0173; witness 9, EVD-P-02173 at 0157; witness 22, EVD-P-02359 at 0512; statement of witness 29, EVD-P-00145 at 0032, 0033, 0037; witness 26, EVD-P-00136 at 0175 and 0176; FIDH report, *"Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes"*, EVD-P-00014 at 0422.

broadcasted by international media such as RFI, BBC, Africa Numéro 1 and the Voice of America.[687] According to the statement of witness 44, these media can be listened to throughout the Congo and Africa.[688] Witness 44 further states that Mr Jean-Pierre Bemba regularly read the press or listened to the radio.[689]

487. In addition, witnesses 15, 37 and 45 confirmed that Mr Jean-Pierre Bemba was directly told by his political circle and intelligence advisors about the acts of murder, rape and pillaging committed by MLC troops in the CAR.[690] According to witness 45, he denied the accuracy of the information claiming that "it was a plot against him".[691] In addition, witness 37 stated that on a daily basis, Mr Jean-Pierre Bemba discussed the events that occurred in the CAR with him as they were broadcast, yet he did not believe.[692] In the witness's opinion, Mr Jean-Pierre Bemba did not trust the media "very much", because he claimed that it was "bought".[693] Still, on 4 January 2003 Mr Jean-Pierre Bemba sent a letter to the Special Representative of the UN Secretary-General in the CAR refuting the allegations that his troops had committed serious human rights violations as they were bound by the military code.[694] The letter also stated that he believed that public opinion had been manipulated and misinformed.[695]

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[687] Statement of witness 26, EVD-P-00137 at 0205-206; statement of witness 44, EVD-P-02391 at 0537; see also RFI press release, "*Peur sur Bangui,*" dated 5 November 2002, EVD-P-02104 at 0133; BBC press release, "*CAR: Rebel forces reportedly tighten control over northwestern town after battle,*" dated 24 January 2003, EVD-P-02112 at 0377; RFI press release, "*A la recherche d'une solution de paix,*" dated 4 February 2003, EVD-P-02105 at 0139 ; RFI press release, "*Le MLC va-t-il partir?*" dated 13 February 2003, EVD-P-02106 at 0141; RFI press reelase, "*Malade de la guerre civile*" dated 17 February 2003, EVD-P-02107 at 0143; BBC press release, "*CAR· Government denies human rights violations by loyalist troops*" 23 February 2003, EVD-P-02114 at 0389.

[688] Statement of witness 44, EVD-P-02391 at 0537.

[689] Statement of witness 44, EVD-P-02390 at 0482.

[690] Statement of witness 45, EVD-P-02340 at 0492-0493 and at 0505-0517; statement of witness 15, EVD-P-02168 at 0540; statement of witness 37, EVD-P-00139 at 0475-0477.

[691] Statement of witness 45, EVD-P-02340 at 0492-0493.

[692] Statement of witness 37, EVD-P-00139 at 0482.

[693] Statement of witness 37, EVD-P-00139 at 0482.

[694] EVD-D01-00006.

[695] EVD-D01-00006 at 0077.

488.The Chamber is not persuaded by Mr Jean-Pierre Bemba's statement denying the accuracy of the information provided to him and which stated that his troops had committed these crimes. In the Chamber's opinion, there are several facts that lead the Chamber to reach such a conclusion. These facts include *inter alia* the availability of effective means of communications and an established reporting system within the MLC. These were not the only means of communication since Mr Jean-Pierre Bemba possessed a *phonie* at his house.[696] As stated earlier in this section, Mr Jean-Pierre Bemba had the material ability, throughout the 2002-2003 intervention in the CAR, to contact his Commander of Operations in the CAR.[697] Direct evidence, particularly the statements of witnesses 32[698] and 36[699] coupled with the summaries of the statements of witnesses 33[700] and 65,[701] demonstrate that he used such means of communication in order to contact the commanders in the field directly.

489. In sum and based on a thorough analysis of the evidence, the Chamber considers that Mr Jean-Pierre Bemba actually knew about the occurrence of the crimes committed during the five-month period of intervention. In reaching this conclusion, the Chamber has given particular weight to: the widespread nature of the illegal acts committed by the MLC troops; the length of the period over which these acts were committed; Mr Jean-Pierre Bemba's visit to his forces in Bangui in early November 2002 after the commission of crimes in late October 2002; his suspension of two commanders after his visit; his statement cautioning his forces about future misconduct; the existence of an effective reporting system at Mr Jean-Pierre Bemba's disposal; his ability to use the existing means of communication to contact the commanders in the field during the entire period of intervention; the fact that he was informed by his political circle and intelligence adviser of the

[696] Statement of witness 36, EVD-P-00142 at 0376.
[697] Statement of witness 31, EVD-P-00102 at 0416-0417; statement of witness 44, EVD-P-02390 at 0482.
[698] Statement of witness 32, EVD-P-02371 at 0325-0327.
[699] Statement of witness 36, EVD-P-00142 at 0375-0376.
[700] Summary of the statement of witness 33, EVD-P-00151 at 0167.
[701] Summary of the statement of witness 65, EVD-P-02416 at 0005.

commission of murder, rape and pillaging by his MLC forces at least 3 months before the complete withdrawal of his troops; and the existence of media broadcasts throughout the entire period of intervention which reported about the commission of murder, rapes and pillaging by MLC forces. These facts established by the evidence clearly indicate that Mr Jean-Pierre Bemba was aware of the occurrence of these crimes as of the beginning of the operations and throughout the entire period of intervention.

c) Mr Jean-Pierre Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes by MLC troops

490. The Chamber finds sufficient evidence to establish substantial grounds to believe that Mr Jean Pierre Bemba – who was at all times relevant to the charges, a military-like commander with effective authority and control over the MLC troops – failed to take all necessary and reasonable measures within his power to prevent or repress the commission by the MLC troops of the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003. The Chamber bases this finding on the following considerations.

491. The Chamber acknowledges that MLC soldiers received military training which encompassed training on the use of arms, deployment and intelligence as well as training on discipline.[702] The MLC also placed at its command many officers who had been trained in military academies.[703] Furthermore, the MLC soldiers had been informed about the importance of respect for international humanitarian law and the code of conduct, which regulated the military discipline, the established Disciplinary

[702] Statement of witness 15, EVD-P-02168 at 0548; statement of witness 45, EVD-P-02392 at 0455-0456.
[703] Statement of witness 36, EVD-P-00142 at 0389; see also *Memorandum "Organsiation de l'Armée de Libération du Congo"*, which states that there were within the movement hundreds of officers and subalterns from international and national military academies, EVD-D01-00034 at 0639.

Board, and the court martial.[704] Moreover, the Chamber observes that, according to the code of conduct, the Commander of the Army, i.e. Mr Jean-Pierre Bemba, can also suspend any unit commander.[705]

492. In this regard, the Chamber observes that according to witness 36, the code of conduct was not distributed to all soldiers. Instead, political commissioners were there to popularize the code amongst soldiers.[706] The Chamber also notes that the code of conduct was written in French[707] and was interpreted into Lingala to the MLC soldiers by the political commissioners.[708]

493. The Chamber recalls the existence of a military judicial system as referred to above enabling Mr Jean-Pierre Bemba to initiate investigation and prosecution within the MLC structure. [709] In addition, Mr Jean-Pierre Bemba had the ability to issue decrees impacting on the organization of the said military judicial system as was the case with the Decree on the establishment of military jurisdiction within the ALC, which created a *Conseil de Guerre Supérieur* and a *Conseil de Guerre de Garnison*.[710] He also had the power to unilaterally arrest, detain and release soldiers.[711]

494. The Chamber notes that Mr Jean-Pierre Bemba specifically established a commission of enquiry to verify facts relating to alleged crimes committed by MLC soldiers. Consequently, a team of five ALC soldiers travelled to Bangui on

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[704] Statement of witness 15, EVD-P-02168 at 0548; statement of witness 45, EVD-P-02392 at 0455-0456.
[705] EVD-D01-00024.
[706] Statement of witness 36, EVD-P-00143 at 0409-0455; see also statement of witness 40, EVD-P-02349 at 0658-0660.
[707] EVD-D01-00024.
[708] Statement of witness 40, EVD-P-02349 at 0658-0660.
[709] Statement of witness 45, EVD-P-02392 at 0458; EVD-D01-00022 at 0156.
[710] Decree No 035/PRES/MLC of 16 November 2002 on the establishment of military jurisdiction within the ALC, EVD-P-00087.
[711] Statement of witness 32, EVD-P-02370 at 0308-0309; summary statement of witness 33, EVD-P-00151 at 0168; statement of witness 36, EVD-P-00143 at 0470; statement of witness 45, EVD-P-02392 at 0437.

30 October 2002 in order to investigate the alleged crimes.[712] Eventually, seven MLC soldiers were charged with attempted extortion or theft with the use of force. [713] Moreover, during his visit in November 2002,[714] Mr Jean-Pierre Bemba suspended two commanders, who had been suspected of pillaging,[715] and cautioned his army members against any future misconduct. [716]

495.The Chamber considers that, regardless of Mr Jean-Pierre Bemba's warning to his troops that any soldier who was involved in misconduct would be arrested and tried under the Movement's military law,[717] only two commanders were preventively suspended and seven soldiers were charged of pillaging before the military court in Gbadolite[718] In this regard, the Chamber recalls the conclusion reached by the ICTY Appeals Chamber in the *Kubura* and the *Halilović* cases in which it was stated that the measures taken by a superior does not depend on whether they "were of a disciplinary or criminal nature" so far as they were necessary and reasonable in the circumstances of the case.[719] Thus, it is the Chamber's view that its assessment in the present case is not dependent on the fact that Mr Jean-Pierre Bemba merely took a disciplinary measure against the two commanders or any other measure of a specific nature, if at all. Rather, the Chamber believes that the assessment of any measures taken by Mr Jean-Pierre Bemba should be first and

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[712] EVD-D01-00020.

[713] EVD-D01-00043; EVD-D01-00007; see also FIDH report, *"République Centrafricaine, Quelle justice pour les victimes de crimes de guerre"*, EVD-P-02268 at 1115; Agence France Presse, *"Crimes de guerre. Jean-Pierre Bemba rejette les accusations de la FIDH"*, dated 15 February 2003, EVD-P-00033 at 0346.

[714] Statement of witness 6, EVD-P-00098 at 0115, para. 79; statement of witness 31, EVD-P-00102 at 0367-0368; summary statement of witness 38, EVD-P-00150; statement of witness 40, EVD-P-02345 at 0576-0581.

[715] EVD-P-00101 at 0368-0369.

[716] Statement of witness 40, EVD-P-02345 at 0580 in which Mr Jean-Pierre Bemba stated: "the one who will [...] make mistakes, [...] will respond [...] to his mistakes".

[717] RFI press release *"Peur sur Bangui"* dated 5 November 2002, EVD-P-02104 at 0133; RFI broadcast dated 4 November 2002, EVD-P-02162 at track 06 from 06:22 onwards; see also BBC press release *"Government to investigate 'executions of Chadians'"* dated 5 November 2002, EVD-P-00019 at 0667.

[718] EVD-D01-00020 at 0152; EVD-D01-00043 at 0102-0104; EVD-D01-00051 at 0568; EVD-D01-00007.

[719] ICTY, *Prosecutor v Hadžihasanović and Kubura,* Case No. IT-01-47-A, "Appeals Chamber Judgment", 22 April 2008, para.142; ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-A, "Appeals Chamber Judgment", paras. 63-64.

foremost based on his material ability.[720] Moreover, the reasonable and necessary measures were those "suitable to contain the situation" at the time in term of preventing and/or repressing the crimes[721] and thus were within his powers and abilities.[722] The Chamber considers that this was not the case and that Mr Jean-Pierre Bemba disregarded the scale and gravity of the crimes committed and opted for measures that were not reasonably proportionate to those crimes during his visit in November 2002. This was followed by a passive attitude in relation to the prevention of future crimes that were committed thereafter or repression thereof. According to the evidence before the Chamber, such disproportionate measures taken by Mr Jean-Pierre Bemba with respect to the acts of pillaging were the only measure resorted to by him throughout the five-month period of intervention, and accordingly, crimes continued to be carried out thereafter.[723]

496. Moreover, the Chamber recognises that the statement made by Mr Jean-Pierre Bemba to caution his troops against any future misconduct only addressed around 200 soldiers out of the two battalions deployed at the time.[724] In the Chamber's view, this was not sufficient to ensure that the warning would reach the remaining majority of the soldiers who were not present, especially since this was the only occasion on which he directly addressed his forces during the five-month period of intervention.[725] As the International Military Tribunal for the Far East stated: "[t]he

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[720] Article 86 of the Additional Protocol I; J. Pictet, (ed.), *ICRC Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (ICRC, 1958), pp. 35-36; Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (ICRC, 1987), MN 3548.

[721] ICTY, *Prosecutor v Delić*, Case No. IT-04-83-T, "Judgment", 15 September 2008, para. 76; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, "Appeals Chamber Judgment", 24 March 2000, paras. 73-74.

[722] ICTY, *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 122;

[723] See for example, *Hostages* Case, 11 TWC 759, p. 1311 ("[t]his defendant, with full knowledge of what was going on, did absolutely nothing about it [...] As commander [...] it was his duty to act and when he failed to do so and permitted these inhumane and unlawful killings to continue, he is criminally responsible").

[724] Statement of witness 6, EVD-P-00098 at 0115, para. 79; statement of witness 31, EVD-P-00102 at 0367-0368; summary statement of witness 38, EVD-P-00150; statement of witness 40, EVD-P-02345 at 0576-0581.

[725] As the International Military Tribunal for the Far East stated: "The duty of Army commander in such circumstances is not discharged by the mere issue of routine orders [...] His duty is to take such

duty of Army commander in such circumstances is not discharged by the mere issue of routine orders [...] His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out".[726] In this regard, the Chamber reiterates that Mr Jean-Pierre Bemba neither addressed his troops any further, nor followed up on his statement to the troops or took the reasonable and necessary preventive measures to avoid the occurrence of future crimes or any repressive measures to punish those responsible from his troops after crimes were committed during the relevant time referred to in the Amended DCC.

497. In its written submission,[727] the Defence contends that Mr Jean-Pierre Bemba called upon the United Nation Secretary General Special Representative to open an international investigation into any crimes that were committed in the CAR during the 2002-2003 intervention.[728]

498. With respect to the Defence submission, the Chamber observes that the letter was only sent on 4 January 2003 –i.e., more than two months after the beginning of the 2002-2003 intervention in the CAR. In the Chamber's opinion, Mr Jean-Pierre Bemba had the material ability to trigger internal investigations into the allegations at the time, as he had previously done during the first week of the 2002-2003 intervention in the CAR (although the measure was not proportionate). Yet, he failed to do so since the beginning of November 2002 throughout the remaining period of intervention. Thus, sending a letter to the United Nations to request an international investigation, let alone two months after the beginning of the intervention, is in the Chamber's opinion neither a necessary nor a reasonable a measure.

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steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out", see the Tokyo Judgment, *The International Military Tribunal for the Far East*, vol. I, p. 452.

[726] See the Tokyo Judgment, *The International Military Tribunal for the Far East*, vol. I, p. 452.

[727] ICC-01/05-01/08-413, paras 234, 239.

[728] EVD-D01-00006.

499. The Chamber also notes that, by the 13 January 2003, Mr Jean-Pierre Bemba was advised by the MLC Secretary General to withdraw his troops from the CAR.[729] Mr Jean-Pierre Bemba then signed a joint communiqué with Mr Ange-Félix Patassé, on mid-January 2003, announcing the gradual withdrawal of the MLC troops from the CAR starting in mid-February 2003.[730] Consequently, Mr Jean-Pierre Bemba issued an order to this effect to his Commander of Operations in the CAR in mid-February 2003. The order was complied with immediately and the troops took approximately one month to complete the withdrawal on 15 March 2003.

500. In this regard, the Chamber has concerns about the time taken by Mr Jean-Pierre Bemba to decide to withdraw his troops from the CAR, knowing that crimes had been committed as early as the first weeks of the operations, which even led to the crimes continuing to be committed. It is apparent that the MLC troops could have been withdrawn at any stage during the intervention. However, despite the need felt by Mr Jean-Pierre Bemba in January 2003 to withdraw, essentially as a result of international pressure,[731] he delayed giving the order for withdrawal for at least a month, thus inevitably failing to prevent the crimes that took place between mid January and mid February 2003.

501. In light of the foregoing and having thoroughly assessed the evidence, the Chamber reiterates its finding that Mr Jean Pierre-Bemba neither took the necessary nor the reasonable measures within his material ability to prevent or to repress the crimes committed by his MLC subordinates throughout the five-month period of the intervention in the CAR. The evidence shows that a genuine will to take the necessary and reasonable measures to protect the civilian population by preventing crimes or even repressing their commission was lacking. Mr Jena-Pierre Bemba's

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[729] Statement of witness 15, EVD-P-02168 at 0540. See also Statement of witness 44, EVD-P-02390 at 494 and EVD-P-2391 at 0533.
[730] EVD-P-02168 at 0512 and 0534; see also press release *"Le Citoyen"* dated 14 February 2003, EVD-P-0050 ; RFI press release dated 13 February 2003, EVD-P-00019 at 0682.
[731] Statement of witness 37, EVD-P-00139, at 0480-0481, 0489; statement of witness 44, EVD-P-02391 at. 0536; statement of witness 45, EVD-P-02340 at. 0474.

failure to fulfil his duties to prevent crimes increased the risk of their commission by the MLC troops in the CAR at all times relevant to the Case. In reaching this finding the Chamber has given particular weight to Mr Jean-Pierre Bemba's material ability to prevent and repress crimes; the availability of a functional military judicial system within the MLC through which he could have punished crimes committed and prevented their future repetition during the period of intervention; the absence of any measures with respect to the crimes committed by MLC troops between November 2002 and January 2003 which increased the risk of their future occurrence; and the length of time taken to announce the troop withdrawal and to issue an order to this effect, which led to the continuing commission of the crimes at least between mid January to mid February 2003.

FOR THESE REASONS, THE CHAMBER

a) determines that the Case falls within the jurisdiction of the Court and is admissible pursuant to articles 17(1) and 19(1) of the Statute;

b) declines to confirm that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 25(3)(a) of the Statute for the charges of crimes against humanity and war crimes as described in the Amended Document Containing the Charges;

c) declines to confirm that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 28(b) of the Statute for the charges of crimes against humanity and war crimes as described in the Amended Document Containing the Charges;

d) confirms that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 28(a) of the Statute for the following charges:

(i) murder constituting a crime against humanity (count 7) within the meaning of article 7(1)(a) of the Statute;

(ii) rape constituting a crime against humanity (count 1) within the meaning of article 7(1)(g) of the Statute;

(iii) murder constituting a war crime (count 6) within the meaning of article 8(2)(c)(i) of the Statute;

(iv) rape constituting a war crime (count 2) within the meaning of article 8(2)(e)(vi) of the Statute; and

(v) pillaging constituting a war crime (count 8) within the meaning of article 8(2)(e)(v) of the Statute;

e) declines to confirm that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 28(a) of the Statute for the following charges:

(i) torture constituting a crime against humanity (count 3) within the meaning of article 7(1)(f) of the Statute;

(ii) torture constituting a war crime (count 4) within the meaning of article 8(2)(c)(i) of the Statute;

(iii) outrages upon personal dignity constituting a war crime (count 5) within the meaning of article 8(2)(c)(ii) of the Statute;

f) commits Jean-Pierre Bemba Gombo to a Trial Chamber for trial on the charges as confirmed pursuant to article 61(7)(a) of the Statute;

g) decides that the five-day period to present an application for leave to appeal set out in rule 155(1) shall start running for the Defence as of the date of notification of the French translation of this decision;

h) remains seized of the Case until the present decision becomes final.

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

Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Monday, 15 June 2009

At The Hague, The Netherlands