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THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

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

Public

With Public Annexes A, B, C, D and E

**Appellant's submissions on the contextual elements of crimes against humanity,
pursuant to ICC-01/05-01/08-3564**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. Mr Bemba has consistently argued that there was no organizational policy to commit any attack, whether widespread or otherwise, against the civilian population.¹ The present submissions, expanding on Mr Bemba's appeal ground, further establish that his criticisms of the Trial Chamber's approach to the contextual elements of CAH are well-founded.

2. A Trial Chamber is required find that there was a widespread or systematic attack directed against a civilian population, as defined by Article 7(2) of the Rome Statute ("Statute"), meaning the multiple commission of Article 7(1) crimes pursuant to or in furtherance of a state or organizational policy. This requirement is every bit as important as establishing that the underlying crimes have been committed, and the identity of their perpetrators. They need to be proved beyond reasonable doubt by cogent evidence. These elements elevate mere crimes to the status of CAH.

3. The Trial Chamber relegated these essential elements to secondary requirements, firstly, by defining them so narrowly, as to make them almost inevitably provable, secondly by relying on irrelevant factors (principally pillage), and thirdly, by resorting to evidence, which even by its own standards, was not sufficiently reliable to find any other element of the alleged offences proven.

4. The more detailed answers to the Appeals Chamber's questions are set out below.

A. SUBMISSIONS

(i) **How should a "policy" be understood: can it be inferred from the manner in which the crimes were committed or does it require something more?**

5. In the Appellant's submissions, a "policy" is a well understood concept and can be given its natural meaning.² It need not be formalised, or expressly declared, and can be

¹ ICC-01/05-01/08-3121-Conf, paras. 398-412; ICC-01/05-01/08-3434-Conf, paras. 422-444.

² ICC-01/05-01/08-3343-AnxII, para. 30.

inferred from the circumstances of the attack.³ But at the ICC its proof requires sufficient evidential nexus to a State or organization.

6. The Trial Chamber acknowledged as much by accepting the need for “a variety of factors, which, **taken together**, can establish that a policy existed”.⁴ These factors, based on prior case law, were said to include: that the attack was planned, directed or organized; a recurrent pattern of violence; statements, instructions or documentation attributable to the State or organization condoning or encouraging the commission of crimes; and/or an underlying motivation. Referencing the *Elements of Crimes*, the Chamber noted that a policy “requires the active promotion or encouragement of an attack against a civilian population by a State or organization.”⁵

7. Prior cases list a variety of factors which, when taken together, may give rise to an inference a policy existed. The most comprehensive, albeit non-exhaustive, list appears in *Blaškić*, and includes the general content of a political programme, as it appears in the writings and speeches of its authors; and links between the military hierarchy and the political structure and its political programme.⁶

8. Inferring a policy from a range of factors, including those demonstrating a nexus between the crimes and the State/organization, is consistent with the ICC’s practice. The *Gbagbo* DCC lists evidence such as preparation for atrocities, public expressions of willingness to use violence, and the organization, recruitment, training, and financing of the perpetrators.⁷ In confirming this case, the majority of the Pre-Trial Chamber noted the importance of understanding how the organization operates, in order to determine “whether the policy to carry out the attack is attributable to the organization.”⁸

9. In *Katanga*, the Trial Chamber stated that a policy can be inferred “by discernment of, *inter alia*, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or

³ *Katanga* TJ, paras. 1109-110; ICC-02/11-01/11-534, para. 4.

⁴ ICC-01/05-01/08-3343 (“Judgment”), para. 160.

⁵ Judgment, para. 159.

⁶ *Blaškić* TJ, para. 204.

⁷ ICC-02/11-01/11-592-Anx2-Corr2-Red, paras. 79-98.

⁸ ICC-02/11-01/11-656-Red, para. 217.

organization.”⁹ However, inferring a policy from the manner in which the crimes were committed alone was insufficient; “to equate the term ‘policy’ with the concept of ‘regular pattern’” would be “tantamount to considering it analogous to ‘systematic’.”¹⁰

10. In that case, a policy was inferred on the basis of a wealth of factors including that the attack was planned; that the plan was consonant with an established discriminatory ideology; and that the perpetrators were driven by vengefulness. There was no question of inferring the “policy” solely from the manner in which the attack was ultimately carried out. Again, the factors demonstrated an evidential link to the organization.

11. There is no precedent whereby a policy to commit an attack against any civilian population has been inferred from the manner in which the crimes were committed alone. Judge Ozaki observed that “while a pattern of violence may be relevant from an evidentiary perspective, it does not itself constitute a policy.”¹¹ The existing jurisprudence demonstrates the necessity of a sufficient evidential nexus between the crimes, and the State or organization. A pattern of crimes is not enough.

(ii) Whether a policy to attack the civilian population was adequately described in the present case

12. In the Confirmation Decision, the purported organizational policy was identified by reference to two factors; a pattern of conduct and the perceived motivations of those pursuing the pattern of conduct:

[...] 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, they followed an established house-to-house system of attack aimed at creating a climate of fear, they broke into houses, looted goods and committed other crimes such as rape if the civilians resisted the troops. Furthermore, they acted in groups often targeting the same houses several times a day.¹²

⁹ *Katanga TJ*, para. 1109.

¹⁰ *Katanga TJ*, para. 1112.

¹¹ ICC-01/05-01/08-3343-AnxII, para. 30.

¹² ICC-01/05-01/08-424, para. 115.

13. This description is inadequate. *First*, its primary reliance on the “attacks following the same pattern” erroneously conflates the concept of “policy” with that of “system[atic]”.¹³ *Second*, it fails to identify the necessary nexus of the policy to the MLC. To attribute any policy to the MLC, the description should have identified how the MLC either (i) “actively promote[d] or encourage[d]” the policy; or (ii) implemented it through a “deliberate failure to take action, which was consciously aimed at encouraging” an attack.¹⁴ The description was silent on both.

14. The inadequacy in the charging of the policy was not corrected in the Second Revised Amended DCC, which contained no description of the policy.¹⁵ Instead, in language apparently directed at establishing the systematic nature of the attack, the Prosecution stated that the crimes were committed in an “organised manner” to “instil a climate of fear”, by way of house-to-house searches with “rapes and murders” being linked directly to the MLC seeking to “punish perceived rebel sympathisers”.¹⁶ The Prosecution also exceeded the Confirmation Decision by stating that the “general climate of fear” was instilled “with the hope of effectively destabilising the opposing army.”¹⁷ This “hope” finds no basis in the Confirmation Decision.

15. In reality, the “policy” element was an afterthought in this case. The Prosecution’s “detailed element-by-element analytical chart”,¹⁸ which “linked the evidence to the elements of each charge”,¹⁹ makes no reference to an organizational policy, or any evidence to support it.²⁰ No witnesses were asked whether the MLC had an organizational policy to commit CAH in the CAR, despite the Prosecution calling a who’s who of the MLC’s hierarchical structure.²¹

16. Contrary to the Appellant’s fair trial rights, the purported organizational policy was not adequately described in this case despite constituting an integral part of the charges.²²

¹³ *Katanga* TJ, para. 1112.

¹⁴ Elements of Crimes, Article 7, Introduction, para. 3 and fn. 6.

¹⁵ *See, contra*, ICC-02/11-01/11-592-Anx2-Corr2-Red, paras. 79-98.

¹⁶ ICC-01/05-01/08-593-Conf-AnxA, para. 43.

¹⁷ ICC-01/05-01/08-593-Conf-AnxA, para. 44.

¹⁸ ICC-01/05-01/08-682, paras. 21, 26.

¹⁹ ICC-01/05-01/08-656, para. 10.

²⁰ ICC-01/05-01/08-781-Conf-AnxA. *See* Table of Contents, p. 1.

²¹ ICC-01/05-01/08-3434-Conf, para. 424.

²² Statute, Article 67(1)(a), Regulations of the Court, Regulation 52; *Lubanga* AJ, paras. 118-123.

(iii) What was the organizational policy in the present case?

17. The organizational policy in the present case, albeit deficiently pleaded, is the policy identified in the Confirmation Decision.²³ However, despite this decision being “the authoritative document for all trial proceedings”,²⁴ the Trial Chamber ignored this policy in favour of a different, broader version.

18. The Trial Chamber found that the MLC’s organizational policy was “to commit an attack against the civilian population.”²⁵ As to its proof, the Trial Chamber was “satisfied that the existence of a policy to attack the civilian population is the only reasonable conclusion from a cumulative consideration of...[eight]...factors”.²⁶

19. A policy to attack the civilian population generally, without reference to punishing civilians for their support of rebels or to instilling a climate of fear is significantly broader than the policy described in the Confirmation Decision. Further, the factors considered by the Trial Chamber as proving the existence of a policy exceed the factors of pattern and motives relied on by Pre-Trial Chamber II.

(iv) Whether the factors relied upon by the Trial Chamber cumulatively provided a sufficient basis for its finding that there was an organizational policy in this case

20. The factors cumulatively relied upon by the Trial Chamber did not provide a sufficient basis for its finding that there was an organizational policy in this case. This conclusion applies regardless of the policy at issue, *i.e.* the narrow policy identified by the Pre-Trial Chamber or the broader policy considered by the Trial Chamber. This is because the narrow policy is subsumed by the broader.

21. The Trial Chamber’s errors in finding the existence of an organizational policy are in the Conviction Appeal Brief²⁷ and are incorporated by reference.

²³ ICC-01/05-01/08-424, para. 115.

²⁴ ICC-01/05-01/08-836, para. 37.

²⁵ Judgment, paras. 676, 669.

²⁶ Judgment, para. 676.

²⁷ ICC-01/05-01/08-3434-Conf, paras. 422-444.

22. The Trial Chamber, moreover, accepted as facts a number of explicit contradictions of any such policy in finding that the MLC had a Code of Conduct which prohibited crimes against civilians;²⁸ a criminal justice system including courts martial to prosecute offending soldiers;²⁹ that Mr. Bemba addressed the troops at PK12 warning them to behave properly;³⁰ that 7 soldiers were tried for pillage in the CAR;³¹ that Mr Bemba sent a investigative commission to Zongo to investigate allegations of pillage;³² that he wrote to the UN asking for help to investigate in the CAR;³³ and sent a similar commission to Sibut.³⁴ Regardless of the efficacy of these measures, their pertinence to the existence of a purported MLC organizational policy is plain. No reasonable Chamber could have failed to take account of them in relation to this issue and/or still come to the conclusion that such a policy in fact existed.

(v) Whether, on the basis of the evidence accepted as credible in this case, it was erroneous for the Trial Chamber to have concluded that there was an attack directed against a civilian population, i.e. a course of conduct involving the multiple commission of criminal acts against a civilian population

23. Contextual elements form part of the substantive merits of the case.³⁵ They “must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole.”³⁶

24. In concluding that an “attack” occurred, the Trial Chamber found “consistent and corroborated evidence that MLC soldiers committed many acts of rape and murder against civilians during the 2002-2003 CAR Operation”.³⁷ In support, the Trial Chamber relied solely on paragraph 563 of the Judgment, which contains its finding that MLC soldiers “committed many acts of murder and rape, and many acts of pillaging”. This was a fatal shortcut.

²⁸ Judgment, paras. 392-393.

²⁹ Judgment, paras. 402, 403.

³⁰ Judgment, para. 594.

³¹ Judgment, paras. 597-600.

³² Judgment, paras. 601-603.

³³ Judgment, paras. 604-606.

³⁴ Judgment, paras. 612-620.

³⁵ ICC-02/11-01/11-432, para. 22 citing ICC-01/09-02/11-425, paras. 33-36.

³⁶ Elements of Crimes, Article 7, Introduction, para. 1.

³⁷ Judgment, para. 671.

25. *First*, the evidence considered in paragraph 563 is not limited to murder and rape, but also encompasses pillage, an act not listed in Article 7(1). At trial, the Prosecution tried to expand the crime-base the Chamber could consider, arguing that an attack “encompasses any mistreatment of the civilian population”.³⁸ The Trial Chamber correctly rejected this attempt.³⁹

26. Regardless, much of the evidence relied on in paragraph 563 concerns pillage. As such, by cross-referring to its finding that the MLC troops committed many crimes of murder, rape, and pillage, without grappling with the question of whether the crimes of murder and rape alone would be sufficient to establish a “course of conduct involving the multiple commission of acts”, the Trial Chamber impermissibly relied on evidence of non-CAH crimes. Its finding is accordingly unsafe.

27. *Second*, no individual analysis of “each incident underlying the contextual elements” was undertaken to ensure that they were “proved to the same threshold that is applicable to all other facts”.⁴⁰ Instead, the Trial Chamber made broad, sweeping findings based on evidence, which on proper analysis, was irrelevant, lacking specificity, and insufficient.

28. Paragraph 563 cites to the testimony of eight witnesses; CHM1, P229, P69, P9, P6, P178, P68 and V02. Testimonial evidence should, to the extent possible, “be based on first-hand and personal observations”.⁴¹ None of these witnesses gave first-hand evidence of any, let alone “many”, acts of rape and murder. Much of the evidence cited in paragraph 563 has nothing to do with rape or murder:

- (i) **CHM1** was questioned about “abuses and acts of violence” but gave no evidence about specific crimes.⁴²
- (ii) **P229** provided hearsay, obtained from medical examinations conducted in 2008, and did not identify perpetrators.⁴³

³⁸ ICC-01/05-01/08-3079-Conf-Corr, para. 32.

³⁹ Judgment, para. 151.

⁴⁰ ICC-02/11-01/11-432, para. 22.

⁴¹ ICC-02/11-01/11-432, para. 27.

⁴² Judgment, fn.1736, citing T-355, 28:6-29:9, 31:23-33:19, 42:16-25, 43:14-44:7.

⁴³ Judgment, fn.1736, citing T-101, 23:21-25:5, 27:15-28:9; T-102, 16:8-22.

- (iii) **P69** testified about “evil deeds” about which he had no first-hand knowledge.⁴⁴
- (iv) **P6’s** evidence about the map confirmed the locations charged (save for Boali) as being scenes of unspecified crimes and provided direct evidence of pillage.⁴⁵
- (v) **P9** provided hearsay from his investigations.⁴⁶
- (vi) **P178’s** evidence referred to cities where the MLC fought.⁴⁷
- (vii) **P68** testified about pillage and unspecified “abuses”.⁴⁸
- (viii) **V2** provided hearsay of rape, but the basis of the witness’ knowledge is unclear, and lacking sufficient detail.⁴⁹

29. This testimony does not prove beyond reasonable doubt the “multiple commission of acts”. The Trial Chamber’s consideration of this sub-element was perfunctory and lacked any of the analysis required to ensure that the evidence relied on was “sufficiently probative and specific”.⁵⁰

30. The insufficiency of this evidence was not cured by the Trial Chamber’s citation in paragraph 563 to its findings in Sections V(C)(3) to V(C)(7), V(C)(9) and V(C)(10) which relate to the charged locations. For each locality, the Chamber concluded in near-identical terms that there was “reliable evidence from various sources, including testimony, as corroborated by media articles, NGO reports, and the [*procès-verbaux*] that, in and around [insert locality], MLC soldiers committed acts of pillaging, rape, and murder”. These findings are not supported.

- (i) **Bangui:** None of the testimony cited in paragraph 461 demonstrates that the MLC committed acts of “murder, and rape” throughout Bangui. P6 gave hearsay evidence obtained during his investigations.⁵¹ CHM1’s testimony was limited to

⁴⁴ Judgment, fn.1736, citing T-193, 54:16-55:12.

⁴⁵ Judgment, fn.1736, citing T-95, 26:7-25, 27:10-12; T-95, 12-18-22.

⁴⁶ Judgment, fn.1736, citing T-102, 15:19-16:22, 21:5-14.

⁴⁷ Judgment, fn.1736, citing T-152, 49:14-21.

⁴⁸ Judgment, fn.1736, citing T-48, 37:11-14.

⁴⁹ T-222-ENG, 54:21-25.

⁵⁰ ICC-02/11-01/11-432, para. 22.

⁵¹ T-94-ENG, 29:9-18.

information coming into his headquarters or what Mustapha told him.⁵² He mentioned no specific crimes.⁵³

- (ii) **PK12:** None of the testimony cited in paragraph 486 demonstrates that the MLC committed “numerous” and “continuous” acts of “rape, and murder” in PK12. P73, P178 and P42's testimonies concern pillage,⁵⁴ P112 mentions the stealing of animals,⁵⁵ P23 never witnessed any murder,⁵⁶ P69 spent one day in PK12, fled and then reports hearsay,⁵⁷ P38 witnessed a rape on one occasion⁵⁸ but otherwise reports hearsay,⁵⁹ and P119 “heard” about what the Banyamulengue were doing in PK12.⁶⁰
- (iii) **PK22:** None of the testimony cited in paragraph 520 supports the fact that MLC soldiers committed rape and murder in PK22. P119 “heard” about murders.⁶¹ P69 mentions pillage, and one murder that he “heard” about during OCODEFAD meetings.⁶² P6 gave hearsay evidence obtained during his investigations.⁶³
- (iv) **Damara:** None of the testimony cited in paragraph 525 demonstrates that MLC soldiers committed “rape and murder” in Damara. P63, P209, P6, P9 and P178 all gave hearsay evidence.⁶⁴
- (v) **Bossembélé-Bozoum axis:** None of the testimony relied on in paragraph 527 supports the finding that MLC soldiers committed “rape and murder” in Bossembélé. P173 was not present in Bossembélé, and was “told” about the crimes by MLC troops.⁶⁵ P6 referred to his investigation,⁶⁶ his only source of

⁵² T-355-CONF-ENG, 24:8-25:9, 26:1-22.

⁵³ Judgment, fn. 1304, citing T-355-CONF-ENG, 28:4-18 42:16-19, 43:14-44:7.

⁵⁴ Judgment, fn. 1408, citing T-70-CONF-ENG, 17:2-3, 18:8-14, 19:6-9, 23:9-19, 31:4-32:9; T-72-CONF-ENG, 7:11-15; T-64-CONF-ENG, 10:23-11:6; T-65-CONF-ENG, 33:20-34:7; T-68-CONF-ENG, 45:16-46:4, T-150-CONF-ENG, 62 :12-63 :11.

⁵⁵ Judgment, fn. 1408, citing T-129-CONF-ENG, 29:23-30:3.

⁵⁶ T-54-CONF-ENG, 13:19-21, 14:13-15.

⁵⁷ T-193-CONF-ENG, 55:13-15, 56:11-18, 57:2-13, T-196-CONF-ENG, 33:5-24.

⁵⁸ T-36-CONF-ENG, 29:1-35:12.

⁵⁹ T-34-CONF-ENG, 11:24-12:1, 40:9-15.

⁶⁰ Judgment, fn. 1408 citing T-83-CONF-ENG, 10:22-11:8.

⁶¹ Judgment, fn. 1567 citing T-84-CONF-ENG, 8:3-9:17.

⁶² Judgment, fn. 1567 citing T-193-CONF-ENG, 14:8-12; T-195-CONF-ENG, 4:16-5:3, 14:22-15:3.

⁶³ Judgment, fn. 1567 citing T-94-ENG, 47:15; T-95-CONF-ENG, 22:22-24.

⁶⁴ T-115-CONF-ENG, 14:24-15:1, 15:4-16, 16:9-25; T-117-CONF-ENG, 27:12-17, T-118-CONF-ENG, 14:19-15:3, T-122-CONF-ENG, 31:20-24, 32:10-16. *Also*, ICC-01/05-01/08-3121-Conf, paras. 168-170; Judgment, fn. 1585 citing T-94-ENG, 47:15-18; T-95-CONF-ENG, 3:22-4:8, 14:22-21:25, 24:3-9, 54:8-16, 62:5-63:11; T-96-CONF-ENG, 11:23-12:8; T-97-ENG, 6:17-7:9; T-102-CONF-ENG, 16:7-9, 24:22-46:11; T-104-CONF-ENG, 7:7-8:3, 28:2-12, 29:15-30:7; Judgment, fn. 1585 citing T-151-CONF-ENG, 10:13-15, 18:4-7, 25:5-26:24.

⁶⁵ Judgment, fn. 1591, citing T-149-CONF-ENG, 31:15-32:9.

⁶⁶ Judgment, fn. 1591, citing T-95-CONF-ENG, 3:22-4:8, 24:3-10, 54:8-16.

knowledge about rape,⁶⁷ and was unable to access the area.⁶⁸ While he did testify to seeing someone being taken behind a building and hearing “shots”,⁶⁹ in the absence of further information, any conclusion would be speculation. P9 exclusively provides hearsay.⁷⁰

- (vi) **Sibut:** None of the testimony cited in paragraph 531 demonstrates that MLC soldiers committed murder and rape in Sibut. V2 fled for a while and never saw anybody raped or murdered.⁷¹ CHM1's testimony was limited to information coming into headquarters or what Mustapha told him.⁷² He gave no evidence about specific crimes.⁷³ P69 provided hearsay evidence about crimes committed in the direction he thinks the MLC troops followed.⁷⁴ P173 was never in Sibut.⁷⁵ P38 never witnessed a rape or a murder in Sibut.⁷⁶ P119's evidence concerned PK12.⁷⁷
- (vii) **Bossembélé-Bossangoa axis:** Section V(C)(10) relates only to pillage.

31. The evidence relied upon to prove the “multiple commission of acts” element is fatally weak. Most relates to pillage or unspecified abuses and all of it bar one incident is hearsay.⁷⁸ Hearsay is admissible but in this case it is controversial, substantially unattributed and non-expert. Not only has the Appellant been denied the opportunity to cross-examine the statement maker but also in many cases the summariser. Crucially, given these difficulties, no evaluation was conducted by the Chamber explaining why this sub-element could be proved effectively by hearsay alone.⁷⁹ An assertion of cautious consideration was not enough.

32. Recalling that “it is preferable for the Chamber to have as much forensic and other material evidence as possible”, (such evidence being duly authenticated with clear and

⁶⁷ T-95-CONF-ENG 17:19-24, 18:18-20.

⁶⁸ Judgment, fn. 1591, citing T-95-CONF-ENG, 24:3-10.

⁶⁹ Judgment, fn. 1591, citing T-95-CONF-ENG, 17:4-10, 19:10, 20:16-17; T-96-CONF-ENG, 12:7-15.

⁷⁰ Judgment, fn. 1591, citing T-102-CONF-ENG, 16:7-22, 42:22-46:11; T-104-CONF-ENG, 7:10-15.

⁷¹ T-222-ENG, 51:11-18; T-225-ENG, 48:20-23, 49:6-19.

⁷² T-355-CONF-ENG, 24:8-25:9, 26:1-22.

⁷³ Judgment, fn. 1304 citing T-355-CONF-ENG, 28:4-18 42:16-19, 43:14-44:7.

⁷⁴ Judgment, fn. 1607 citing T-193-CONF-ENG, 14:7-12, 55:4-9, 29:21-25, 44:9-15. *Also* T-193-CONF-ENG, 57:2-7, 57:23-58:3; T-195-ENF-ENG, 33:16-19.

⁷⁵ T-149-CONF-ENG, 10:16-18.

⁷⁶ T-34-CONF-ENG, 40:9-15, 41:4-6.

⁷⁷ Judgment, fn. 1607 citing T-83-CONF-ENG, 10:4-13:5.

⁷⁸ P38 witnessed rape on one occasion (T-36-CONF-ENG, 29:1-35:12).

⁷⁹ *Katanga* TJ, para. 90; *Ngudjolo* AJ, para. 225, citing *Aleksovski*, Decision on Admissibility, para 15; *Kalimanzira* AJ, paras. 96, 119.

unbroken chains of custody), and that “wherever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witness,”⁸⁰ the compilations of hearsay and indirect evidence packaged together to support findings of multiple “murders and rapes” for each locality is manifestly insufficient.

33. In apparent “corroboration” of this testimony of “many acts of rape and murder”, the Chamber relies on press/NGO reports and the *procès-verbaux*.⁸¹ The error in this reliance is discussed under Qn.7 below. Regardless, these documents are also replete with references to pillage. 85 of the *procès-verbaux* relied on refer only to pillage.⁸² Others ascribe blame to Miskine, or Bozizé’s men.⁸³ Media reports are relied upon which make no reference to rape or murder.⁸⁴ Nevertheless, they are lumped into the mix as corroborative of “many acts of murder and rape” by the MLC.

34. As a further consequence of the failure to specify the incidents being relied upon to establish the existence of an attack, the Trial Chamber was only able to state that “many” acts of rape and murder had been committed. It was incumbent on the Chamber, as the finder of fact, to provide sufficient detail to show the basis on which it had found a sufficient number of incidents proven relevant to the establishment of the attack.⁸⁵

35. Finally, the Trial Chamber’s attempt to demonstrate that the “many acts of rape and murder” “constituted a course of conduct, and not merely isolated or random acts” by finding that “such acts were consistent with evidence of a *modus operandi*” is also flawed.⁸⁶ There is no evidentiary basis for such a *modus operandi*.⁸⁷ Further, the Chamber failed properly to assess whether the actual incidents it was relying on to prove the “multiple commission of acts”, *i.e.* those acts referred to in the evidence in footnote 1736, were carried out pursuant to the *modus operandi*.

36. By failing properly to analyse the evidence relied on to prove “the multiple commission of acts” the Trial Chamber erroneously applied less rigour to the evidential

⁸⁰ ICC-02/11-01/11-432, para. 27.

⁸¹ Judgment, fn. 1736.

⁸² Annex C.

⁸³ Annex C.

⁸⁴ EVD-T-OTP-00854/CAR-OTP-0013-0113.

⁸⁵ ICC-02/11-01/11-432, para. 23; ICC-01/04-01/07-3436-AnxI, para. 264.

⁸⁶ Judgment, para. 671.

⁸⁷ ICC-01/05-01/08-3434-Conf, paras. 428-432.

standard required to prove this contextual sub-element. Given that a Chamber may not adopt a more lenient standard in relation to incidents purportedly constituting the contextual elements of CAH than the standard applied to other alleged facts and circumstances,⁸⁸ this failure is fatal to the CAH conviction.

(vi) Whether, on the basis of the evidence accepted as credible in this case, it was erroneous for the Trial Chamber to have concluded that the attack was widespread

37. The nub of the Trial Chamber's analysis of whether the attack was widespread is that:⁸⁹

MLC soldiers committed many acts of rape, murder, and pillaging against civilians over a large geographical area, including in and around Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bando, Bossemptele, Boali, Yaloke, and Mongoumba.

38. In support of this finding, the Trial Chamber, again, cites only to paragraph 563. As such, the same errors which infect the finding of "an attack", also undermine the finding that the attack was "widespread".⁹⁰ Again, a more lenient evidential standard was applied to incidents purportedly constituting the contextual elements of CAH.

39. The difference in approach is blatant. When assessing the "underlying acts", the Trial Chamber declined to rely on evidence which was not sufficiently probative and specific.⁹¹ It rejected evidence that "P42 learned from others" that Banyamulengue shot his cousin, because this "hearsay evidence is lacking in sufficient detail including about its source".⁹² It declined to rely on P22's evidence that she "heard from her aunt" of a cousin killed in Bossangoa, because it was "lacking in sufficient detail, in particular as to the actual means and cause of...death."⁹³ However, when it came to the contextual elements, the Trial Chamber relied on unsourced, undetailed hearsay evidence to make the critical finding that "the MLC committed many rapes and murders" throughout the CAR.

⁸⁸ ICC-02/11-01/11-432, para. 22; *Lubanga AJ*, para. 22.

⁸⁹ Judgment, para. 688.

⁹⁰ Qn.5, above.

⁹¹ ICC-02/11-01/11-432, para. 22.

⁹² Judgment, para. 521.

⁹³ Judgment, para. 535.

40. Even putting this vague hearsay to one side, the “specific underlying acts” of 3 murders and 28 rapes for which Mr Bemba was found responsible⁹⁴ cannot substantiate a “widespread” attack. “Widespread” connotes a large-scale attack, which must be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁹⁵

41. The Trial Chamber gives the impression that the 3 murders, and 28 instances of rape were committed throughout the CAR (geographically) and throughout the intervention (temporally). They were not. They either occurred (i) within 22km of Bangui before the end of November 2002, or (ii) in Mongoumba on 5 March 2003.⁹⁶ Two specific time periods. Two specific locations.

42. “Widespread” encompasses an attack carried out over a large geographical area, or an attack in a small geographical area, but directed against a large number of civilians.⁹⁷ In this case, there was neither.

43. Just as significant is the “white space” areas on the map where no crimes were found to occur, and months which passed without incident. There is no direct evidence of murders and rapes in Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, and Yaloke; constituting huge swathes of CAR territory in which the MLC spent most of the intervention. There is no direct evidence of murders or rapes between end-November 2002 and 4 March 2003. As in *Mbarushimana*, where the crimes were insufficient because, *inter alia*, they “were found to have been committed and scattered over a 6-month period”,⁹⁸ the crimes in this case were “scattered”.

44. Moreover, a Trial Chamber should look to the “characteristics, aims, and nature” of the acts in determining whether a widespread attack occurred.⁹⁹ Rather than an attack to

⁹⁴ Judgment, para 624 and 633.

⁹⁵ ICC-01/05-01/08-424, para. 83.

⁹⁶ Annexes D and E.

⁹⁷ ICC-01/04-01/07-717, para. 395, citing *Blaškić* TJ, para. 206; *Kordić & Čerkez* AJ, para. 94; Werle, p. 225, para. 656.

⁹⁸ ICC-01/04-01/10-465-Red, para. 265.

⁹⁹ ICC-01/05-01/08-424, para. 86; *Katanga* TJ, para. 1124.

“exterminate the Tutsis”¹⁰⁰ or “wipe out the Hema”,¹⁰¹ these were three isolated incidents of opportunistic killings.

45. P87’s brother was shot after he refused to hand over his scooter to three MLC soldiers.¹⁰² P69’s sister was killed after she refused to hand over money.¹⁰³ The “unidentified Muslim man” in Mongoumba was killed after he refused to give up his sheep.¹⁰⁴

46. These were not killings carried out as part of an attack on the civilian population. At most, they were a response to three people’s refusal to hand over their belongings. These are “isolated” and “random” acts that do not rise to the level of CAH.¹⁰⁵

47. In addition to being geographically isolated and temporally scattered, the underlying acts are few in number. There is no numerical threshold which triggers a finding of a “widespread” attack. However, the crime-base in this case comes nowhere near the thousands (or hundreds of thousands) killed or raped in other recognized occurrences of CAH. The acts in BiH “were committed on the territory of eight BiH municipalities over a period of two years...and resulted in thousands of victims.”¹⁰⁶ In Cambodia, the attack comprised “forced transfer, murder, extermination, enforced disappearance...victimized millions”.¹⁰⁷ In Sierra Leone, thousands of civilians were killed and thousands of others were abducted, burnt, beaten, mutilated and/or sexually abused.¹⁰⁸ At the ICC, Ntaganda is charged with at least 680 murders,¹⁰⁹ and an attack which “resulted in a large number of civilian victims, in a broad geographical area”.¹¹⁰ The *Gbagbo* case was confirmed with “at least 160 people” killed and “at least 38 women” raped,¹¹¹ in an attack lasting over 4 months.¹¹²

¹⁰⁰ *Seromba* AJ, para. 206.

¹⁰¹ *Katanga* TJ, para. 1126.

¹⁰² Judgment, para. 475. *Also* ICC-01/05-01/08-3079-Conf-Corr, para. 467; T-45-CONF-ENG, 10:8-12.

¹⁰³ Judgment, para. 496.

¹⁰⁴ T-220-ENG, 32:19-20.

¹⁰⁵ ICC-01/04-01/07-717, para. 394; ICC-01/05-01/08-424, para. 77.

¹⁰⁶ *Prlić* TJ, Vol. II, para. 646.

¹⁰⁷ *Nuon Chea and Khieu Samphan* TJ, para. 193.

¹⁰⁸ *Taylor* TJ, paras. 556, 558.

¹⁰⁹ ICC-01/04-02/06-203-AnxA, para. 53.

¹¹⁰ ICC-01/04-02/06-309, para. 24.

¹¹¹ ICC-02/11-01/11-656-Red, paras. 271- 274.

¹¹² ICC-02/11-01/11-656-Red, para. 224.

48. In numerical terms, the present case does not compare. Combined with the sporadic timing and isolated geographical nature of the underlying incidents, the crimes do not approximate to a “widespread” attack.

49. Again, the Trial Chamber impermissibly took into account pillage when determining whether the attack was widespread, expressly finding that “MLC soldiers committed many acts of rape, murder, **and pillaging** against civilians over a large geographical area”.¹¹³ Pillage is a non-CAH crime. The adjective “widespread” is directly linked to the “attack”. A Trial Chamber cannot assess whether an attack is widespread by including a wealth of non-CAH crimes to expand the numbers.¹¹⁴

50. In any event, 14 of the 16 proven instances of pillage occurred in Bangui and PK12.¹¹⁵ All 16 occurred either at the beginning of the intervention or on one day, 5 March 2003. Thus, they do not assist in expanding the crime-base to a sufficient level.

(vii) Whether in respect of questions v and vi, it was erroneous for the Trial Chamber to have reached its conclusions on the evidence before it (i.e. “testimony, as corroborated by media articles, NGO reports, and procès-verbaux”)

51. The same evidence was relied upon (paragraph 563) both to conclude that there was “an attack” and that it was “widespread”. The reliance on press/NGO reports and *procès-verbaux* in this paragraph to corroborate the primarily hearsay testimony was an error for the following reasons.

52. *First*, pursuant to the Chamber’s own reasoning, press/NGO reports can only be relied on to “corroborate other pieces of evidence”.¹¹⁶ Many of the locations identified in footnote 1736 as being corroborated by the press/NGO reports are not mentioned in testimony.¹¹⁷ In

¹¹³ Judgment, para. 688.

¹¹⁴ ICC-01/04-01/07-3436-AnxI, para. 265.

¹¹⁵ Judgment, para. 640.

¹¹⁶ Judgment, para. 269, citing ICC-01/05-01/08-2299, paras. 95, 101, 104, 107, 110, 124, 126, 128.

¹¹⁷ Judgment, fn. 1736. No witnesses testified about murders and rapes occurring in Paoua, Bogodi, Ndjo or Ngata, for example.

addition, the references to PK26¹¹⁸ and Ndjo¹¹⁹ as locations where crimes were committed are incorrect.

53. *Second*, the apparent “corroboration” of the primarily hearsay testimony by other sources of hearsay evidence (press/NGO reports, *procès-verbaux*), means that the contextual elements were found proven by hearsay evidence alone (save in one case).¹²⁰ In many cases the hearsay was from anonymous sources.¹²¹ The facts underlying the contextual elements must be proven beyond reasonable doubt.¹²² In the absence of reasoning regarding its assessment of each item of hearsay evidence (including addressing any deficiencies or difficulties) and how it met the standard of proof, it was not reasonably open to the Trial Chamber to draw such conclusions.¹²³

54. Taking Damara, for example, the Trial Chamber found that there was “reliable evidence from various sources, including testimony, as corroborated by media reports and the [*procès-verbaux*], that MLC soldiers committed acts of pillaging, rape, and murder against civilians in Damara.”¹²⁴ The testimony relied upon is all hearsay.¹²⁵ The remaining evidence which “corroborates” the testimony of rape and murder in Damara consists of:

- P6 and P9’s interviews which provide hearsay obtained from their investigation;¹²⁶
- The *procès-verbaux* (only two of which concern Damara);¹²⁷ and
- Three “media articles”.¹²⁸

¹¹⁸ EVD-T-OTP-00442/CAR-OTP-0011-0503 at 0515 (“**KMIE**...fled Bangui...towards PK26. Two of the MLC combatants separated her from a group of people sheltering in a school at PK22” (emphasis added)).

¹¹⁹ EVD-T-CHM-00049/CAR-OTP-0013-0098. The only references to Ndjo are in relation to “[u]ne psychose pèse sur le village de Ndjo” and “[o]n craint même à Ndjo...des risques de cannibalisme”.

¹²⁰ *Supra* fn. 78.

¹²¹ *See, e.g.*, Judgment, fn. 1736 citing EVD-T-OTP-00442/CAR-OTP-0011-0503, 0515-0517 (note 0516-0517 refers to rapes committed by Bozize's troops) (PK26, Damara, Kpabara); EVD-T-OTP-00853/CAR-OTP-0013-0090 (Yombo).

¹²² *Lubanga* AJ, para. 22.

¹²³ In relation to difficulties with relying on press/NGO reports, *see* ICC-02/11-01/11-432, para. 36.

¹²⁴ Judgment, para. 525, relied upon in Judgment, para. 563.

¹²⁵ Judgment, fn.1585.

¹²⁶ Judgment, fn. 1585 citing EVD-T-OTP-00044/CAR-OTP-0005-0099; EVD-T-OTP-00045/CAR-OTP-0010-0107, EVD-T-OTP-00046/CAR-OTP-0010-0120. P6 recounts that he saw someone being taken behind a building and hearing shots, but situates the event at a tollgate in Bossembélé on the road to Bouar, and as such it is unrelated to Damara.

¹²⁷ Judgment, fn. 1585, citing EVD-T-OTP-00142 to EVD-T-OTP-00252 (CAR-OTP-0001-0159 to CAR-OTP-0001-0546) and EVD-T-OTP-00254 to EVD-T-OTP-00344 (CAR-OTP-0002-0002 to CAR-OTP-0002-0137).

¹²⁸ Judgment, fn.1585 citing EVD-T-OTP-00852/CAR-OTP-0013-0052, EVD-T-OTP-00854/CAR-OTP-0013-0113, EVD-T-OTP-00820/CAR-OTP-0013-0114.

55. These “media articles” are **photocopies** of **extracts** from *Le Citoyen*. One extract, entitled “VILLE DE MONGUMBA SOUS LES TIRS DES HOMMES DE JEAN-PIERRE BEMBA”,¹²⁹ concerns Mongoumba and not Damara.¹³⁰ It has no identifiable author. No sources are identified. No original copies of *Le Citoyen* were provided in this case. No witness testified to having seen and read contemporaneously any copy relied upon. *Le Citoyen* not only exhibited a rampant anti-Patassé bias, but reported false events, including the death of Mustapha in December 2002.¹³¹ General Mustapha proved his vitality by testifying in front of the Chamber. These and other concerns were raised at trial.¹³² None were addressed in the Judgment. The photocopies of extracts are relied upon unreservedly, despite the fact that other Trial Chambers would likely have refused to admit them.¹³³

56. Considering that in Damara there is no direct evidence of rapes or murders, but the Judgment now records as a finding of fact that the MLC committed rapes and murders there, the Trial Chamber undoubtedly relied on the press reports and *procès-verbaux* as a springboard to leap from hearsay testimonial evidence to sweeping definitive findings. The Trial Chamber erroneously applied a lesser standard of proof to the contextual elements.

57. *Third*, the *procès-verbaux* should not have been relied upon at all. In light of the 2016 Appeals Chamber’s ruling that, “[w]here the specific circumstances of a case fall within the parameters set out in rule 68...the legal requirements of that provision must be observed for the prior recorded testimony to be admissible”,¹³⁴ the *procès-verbaux* should have been excluded. By any measure, they are “prior recorded testimony” for the purposes of Rule 68.¹³⁵ Therefore, given that neither limb of former Rule 68¹³⁶ could be satisfied in respect of

¹²⁹ EVD-T-OTP-00820/CAR-OTP-0013-0114.

¹³⁰ The only reference to “Damara” is “les forces de defense et de securite de centrafricaines ont fait arraisonner deux balielniens contenant des butins pris aux populations des villes liberees (Damara, Sibut, Bossembele, Bossangoa et Bozoum?)”.

¹³¹ EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0068.

¹³² ICC-01/05-01/08-3121-Conf, paras. 43-49, 479, 502.

¹³³ ICC-01/04-01/06-2589-Anx, pp. 14-15; ICC-01/04-01/07-2635, paras. 31, 36; ICC-02/11-01/11-432, paras 29, 35; ICC-02/11-01/15-539, para. 8.

¹³⁴ ICC-01/09-01/11-2024, paras. 3, 86.

¹³⁵ ICC-01/05-01/08-1386, para. 3; ICC-01/04-01/07-2635, paras. 42-50; ICC-01/09-01/11-1353, para. 86; ICC-01/09-01/11-1938-Corr-Red2, para. 32.

¹³⁶ Former Rule 68 is applicable. *See* ICC-01/05-01/08-3019-Conf, fns. 88, 111. Under the former rule, prior recorded testimony could only be admitted either: (i) where the witness was not present, if both parties had had the chance to examine the witness during the recording; or (ii) where the witness was present, if that witness did not object to the submission of the previously recorded testimony and the parties could examine the witness.

the *procès-verbaux*, the Trial Chamber should have reconsidered its prior decision admitting them and declared them inadmissible.¹³⁷

58. *Fourth*, even if the *procès-verbaux* were properly admitted, for any of the acts of murder or rape referred to in the press/NGO reports or *procès-verbaux* to provide corroboration, they must also have been shown to have been committed by the perpetrators pursuant to or in furtherance of the purported organizational policy.¹³⁸ These acts do not stand in isolation from the rest of the case. The Trial Chamber failed to undertake this assessment but, in any event, none of the press/NGO reports or *procès-verbaux* provides the requisite information necessary to address this point.

The whole respectfully submitted.



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Done at The Hague, The Netherlands, 13 November 2017

It is hereby certified that this document contains 5,941 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.

¹³⁷ Reconsideration is warranted when “new facts or circumstances that may influence that decision” arise or when decisions “are manifestly unsound and their consequences are manifestly unsatisfactory”; ICC-01/05-01/08-1691-Red, para. 17; ICC-01/04-01/06-2705, para. 18. Reconsideration can occur *proprio motu*; ICC-01/09-02/11-863, para. 11.

¹³⁸ ICC-01/04-01/07-3436-AnxI, para. 265.