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No.: **ICC-01/05-01/08 A**

Date: **11/12/2017**

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

Appellant's Response to "Observations de la Représentante légale des victimes sur « *the parties' filings on the contextual elements of crimes against humanity* »"

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. PROCEDURAL HISTORY

1. On 30 October 2017, the Appeals Chamber rendered an “order for submissions on the contextual elements of crimes against humanity” whereby it ordered the Defence to file submissions on the issues related to his ground of appeal on the contextual elements of crimes against humanity by 13 November 2017, the Prosecution to respond by 27 November 2017, the Legal Representative of Victims (“LRV”) by 4 December 2017 and the parties to file any responses to the LRV by 11 December 2017.¹

2. On 13 November 2017, the Appellant filed its submissions on the contextual elements of crimes against humanity (“Appellant’s submissions”).² On 27 November 2017, the Prosecution filed its response to the Appellant’s submissions.³ On 4 December 2017, the LRV filed its response to the parties’ submissions.⁴

3. The Appellant submits the following brief reply.

B. SUBMISSIONS

(i) Organisational Policy

4. The definition of crimes against humanity (“CAH”) under the Statute of Rome requires *inter alia* proof of a state or organizational policy. Highlighting the absence of the requirement in the definition of a crime against humanity at the *ad hoc* tribunals only serves to underline the reason for its inclusion in the Statute of the ICC.

¹ ICC-01/05-01/08-3564.

² ICC-01/05-01/08-3573.

³ ICC-01/05-01/08-3578-Conf.

⁴ ICC-01/05-01/08-3582.

5. The ICTY, ICTR and SCSL had a jurisdiction to try offences which had already been committed and in relation to which the overarching state or organizational policy was accepted by many as a matter of historical fact. The requirement for a state or organizational policy at the ICC ensures that CAH in the future relates to offences of similar gravity and scale to those tried at the *ad hoc* tribunals. The ICC was not created (and does not have the resources) to act as court-martial to errant battalion commanders on a frolic of their own.

(ii) Widespread and Systematic Attack

6. Neither the forms completed by victims in support of their applications to participate in the proceedings, nor the fact of their participation, is evidence in the present case.

7. During the trial, in response to Mr. Bemba's request to admit a discrete number of victims' application forms used during the cross-examination of certain victim/witnesses, a majority of the Trial Chamber held that "in view of their administrative nature, the way and process of creation, and their limited purpose, the probative value of the application forms is limited",⁵ and "admitting application forms as evidence may be perceived by victim applicants as an unfair use of documentation that was provided to the Court for a discrete purpose"⁶

8. As such, the Trial Chamber confirmed in the Judgment that: "the victims' application forms themselves are not part of the evidence of this case and, in line with Article 74(2), have not been relied upon as evidence in the present Judgment."⁷

⁵ ICC-01/05-01/08-2012, para. 100.

⁶ ICC-01/05-01/08-2012, para. 102.

⁷ ICC-01/05-01/08-3343, para. 272.

9. The LRV's attempt to bolster the Trial Chamber's finding of contextual elements of CAH, on the basis of information neither admitted at trial, nor as additional evidence on appeal, is impertinent. If this wasn't already clear, the Appeals Chamber phrased the present questions in the following terms:

(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;

(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;

10. The LRVs reliance on the participation of victims is nothing more than another attempt to support the contextual elements finding with more of the same indirect and unreliable evidence as that relied on by the Trial Chamber. Moreover, the LRVs claim as to the significance of the number of participating victims does not bear scrutiny.

11. Since the start of the proceedings, the Appellant has consistently raised concerns about the credibility of the claims made in these 5,229 forms, and their relevance to the charges. The Appeals Chamber is aware, for example, of the practice of "intermediaries" completing false victims' application forms in the present case,⁸ and the testimony heard about the "intermediaries" encouraging Central Africans to invent incidents of rape and exaggerate economic claims in order to "eat more of the cake".⁹

⁸ ICC-01/05-01/08-3434-Conf, paras. 504, 508, fn. 969. *See also*, ICC-01/05-01/08-3121-Conf, paras. 223-227.

⁹ T-73-CONF-ENG, 19:24-25.

12. Against this backdrop, the Trial Chamber granted participatory rights to victims who claim to have suffered harm in areas into which the MLC never ventured, on dates before and after the MLC were present, and for claims in which the victim asserted – for example – that the crimes alleged were committed by Bozizé, and not the MLC. Many make fantastic claims for financial loss, often running to hundreds of thousands of euros for a few household items and some livestock. Others exhibit the frequent and repetitive use of “lawyerly” language in the body of the forms, or are merely “copy and paste” allegations of abuse by MLC soldiers (what the LRV refers to as “standardization”).¹⁰ By way of a brief survey:

- Applicant **a/16124/11** claims to be the victim of crimes occurred on February 2004,¹¹ a year after the withdrawal of the MLC;¹²
- Applicant **a/16112/11** claims Bozizé is responsible for the damages she suffered, and makes no mention of Bemba, Banyamulenge, or the MLC;¹³
- Applicants **a/1378/10, a/1531/10, a/1781/10, a/1809/10 and a/1287/10** say, in identical terms, that Bemba and his troops are responsible because they did not respected “*la Convention de Genève signée le 12 août 1949 et le droit international humanitaire*” or “*DIH*”;¹⁴
- Applicants **a/0124/11; a/17326/11; a/0734/11** claim to be victims of crimes committed on 16 March 2003,¹⁵ after the withdrawal of the MLC;¹⁶
- Applicant **a/0135/11** claims to be the victim of pillage of money, animals and goods, and estimates his loss at “trois cent quinze millions soixante dix mille francs CFA (315 070 000 XAF), namely 480.321,119 euros;¹⁷

¹⁰ ICC-01/05-01/08-3582, para. 25.

¹¹ ICC-01/05-01/08-1978-Conf-Anx121-Red, p. 4.

¹² ICC-01/05-01/08-3343, para. 562.

¹³ ICC-01/05-01/08-1978-Conf-Anx110-Red, p. 4.

¹⁴ ICC-01/05-01/08-1957-Conf-Anx124-Red, p. 10; ICC-01/05-01/08-1957-Conf-Anx130-Red, p. 11; ICC-01/05-01/08-1957-Conf-Anx146-Red, p. 11; ICC-01/05-01/08-1957-Conf-Anx150-Red, p. 11; ICC-01/05-01/08-1957-Conf-Anx119-Red, p.10.

¹⁵ ICC-01/05-01/08-1957-Conf-Anx25-Red, p. 4; ICC-01/05-01/08-2073-Conf-Anx199-Red, p. 4; ICC-01/05-01/08-2185-Conf-Anx22-Red, p. 4.

¹⁶ ICC-01/05-01/08-3343, para. 562.

¹⁷ ICC-01/05-01/08-1957-Conf-Anx34-Red, pp. 4, 5, 15.

- Applicant **a/16129/11** claims to be the victim crimes which occurred on 22 October 2002,¹⁸ before the MLC troops arrived the CAR;¹⁹
- Applicant **a/0800/09** claims to be the victim of crimes which occurred in PK22 on 27 October 2002,²⁰ when the Trial Chamber has the MLC capturing this area “soon after” 15 November 2002;²¹
- Applicant **a/0386/11** claims to be the victim of crimes which occurred in Mongoumba on 16 November 2002,²² when the Trial Chamber found that the MLC arrived only on 5 March 2003, and left that day, or the following;²³

13. In reality, the Trial Chamber approached the participation of victims with the same care that it dedicated to its evidential findings. Scratch the surface, and these “5,229 victims” of the 1,500 MLC troops are impossible to accept by any objectively reasonable standard.

14. The LRV’s response to the Appellant’s submission on the contextual elements of CAH is thus undermined by its reliance on “evidence” which was explicitly rejected as such.²⁴ This reliance is, nonetheless, significant. The mere fact that the LRV felt obliged to resort to the applications of the participating victims to support the Trial Chamber’s conclusions, underlines the Appellant’s concerns about the evidence which the Trial Chamber did take into consideration.

¹⁸ ICC-01/05-01/08-1978-Conf-Anx126-Red, p. 4.

¹⁹ ICC-01/05-01/08-3343, para. 380.

²⁰ ICC-01/05-01/08-796-Conf-Exp-Anx198-Red, p. 9.

²¹ ICC-01/05-01/08-3343, para. 520.

²² ICC-01/05-01/08-1604-Conf-Anx194-Red, p. 4.

²³ ICC-01/05-01/08-3343, para. 543.

²⁴ ICC-01/05-01/08-3582, paras. 25, 32, 34, 46, 47, 48, 49.

15. Had the LRV been able to point to concrete examples of direct and cogent evidence relied upon by the Trial Chamber to support the contextual elements findings, this would have no doubt assisted the Appeals Chamber in its determination of whether the Trial Chamber erred in reaching its findings. Instead, the LRV's recourse to non-evidence, much of it irrelevant to the charges, is telling.

16. For example, in relation to question (vii) concerning the Trial Chamber's reliance on media articles, NGO reports, and procès-verbaux, the Appellant explicitly addressed the evidentiary basis underpinning the Trial Chamber's findings concerning Damara. The Trial Chamber found that "there was reliable evidence [...] that MLC soldiers committed acts of pillaging, rape and murder against civilians in Damara".²⁵ In his submissions, the Appellant noted that there was no direct evidence of any crimes in Damara, and that the evidence relied upon by the Trial Chamber to make this finding was indirect or other evidence and largely irrelevant "media reports".²⁶

17. The LRV does not respond to the Appellant's concerns about the inherent weakness of the evidence relied upon to make findings of murder, rape and pillage in Damara. Instead, she simply asserts that she represents to date 1,064 victims of Damara and its surroundings.²⁷ Leaving aside the fact that this is just another way of saying that a number of application forms were filled in, this submission is irrelevant to the question of whether the Trial Chamber erred in its reliance on secondhand, hearsay, unsourced, unreferenced evidence admitted from the bar table in making the finding that the MLC committed "pillaging, rape and murder throughout Damara".²⁸

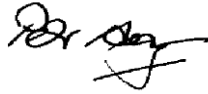
The whole respectfully submitted.

²⁵ ICC-01/05-01/08-3573, para. 54, citing Judgment, para. 525.

²⁶ ICC-01/05-01/08-3573, paras. 54-55.

²⁷ ICC-01/05-01/08-3582, para. 46.

²⁸ ICC-01/05-01/08-3343, para. 525.



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Done at The Hague, The Netherlands, 11 December 2017²⁹

²⁹ This submission complies with Regulation 36 of the Regulations of the Court.