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Date: **19 January 2018**

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 Annex A

Prosecution's Final Submissions following the Appeal Hearing

Source: **Office of the Prosecutor**

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Introduction

1. At the conclusion of the recent appeal hearing, the Appeals Chamber invited the Parties and participants to make additional written observations, not exceeding 15 pages, if in their view those additional observations would help in a better understanding or clearer refutation of a point already before the Chamber, or if there was lingering concern that a point may not clearly have been understood.[1]

Submissions

2. In these submissions, the Prosecution specifically addresses four topics arising from the recent appeal hearing. However, more generally, it also notes occasions on which the principled arguments developed in Court by the Parties may have departed from the specific facts of this case.[2] The Prosecution thus urges the Appeals Chamber to examine all the arguments developed in the appeal hearing both in light of the specific written submissions made by the Parties and participants, and the reasoning of the Trial Chamber in the Judgment.

A. The nature of liability under article 28 of the Statute

3. Many arguments advanced during the appeal hearing—especially concerning *mens rea*, causation, and the necessary and reasonable measures that a superior is required to take—rest on assumptions (sometimes contentious ones) about the nature of liability under article 28. Crucially, the Statute must be interpreted *as it is*—when properly interpreted according to the Vienna Convention—and not what particular constituencies might urge that it *should* be.[3]

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[1] T-374, 88:18-25; e-mail of 15 January 2018 on behalf of the Presiding Judge. All transcript references in this submission refer to the edited English version of the transcript, and hyperlinks are thus only within the Court's RM system, and not to the final, public versions of those transcripts. For full references, *see* Annex A (glossary).

[2] The Prosecution provides three examples. 1.) *Compare* T-372, 25:22-24, 40:16-17 (Defence claim that the Trial Chamber "ignore[d]" the evidence of two witnesses "in relation to effective control") *with* Judgment, paras. 273-297, 391-392, 412-416, 420, 423, 425, 427, 529, 565, 589, 591, 594, 596-597, 599; Response, paras. 128-132, 170-177. 2.) *Compare* T-373, 68:4-21 (Defence claim that "the Trial Chamber conveniently forgot to mention" evidence relevant to Mongoumba, including that the flight of "enemy" forces was "unanticipated") *with* Judgment, paras. 536, 539, 541-544 (the Mongoumba attack was a "punitive" operation, etc). In any event, even the unanticipated flight of an enemy *arguendo* does not alter the significance of crimes against the civilian population outside the conduct of hostilities. 3.) *Compare* T-373, 96:12-16 (Defence claim that notice of the necessary and reasonable measures that Mr Bemba should have taken was contained in "six different documents" and "hundreds of pages of pleadings") *with* explanatory table used in Ms Brady's submissions, provided to the Appeals Chamber by e-mail of 10 January 2018 (citing Confirmation Decision, paras. 438-442, 458-477, 481-501 (total: 24 pages); Post-Confirmation DCC, paras. 23-31, 58-75, 91-100 (total: 14 pages)). The Prosecution acknowledges that *further* details were also contained in other auxiliary documents provided to the Defence before trial, such as the Evidence Summary and IDAC.

[3] *See e.g.* *Ngudjolo* Redaction AD, Dissenting Opinion of Judge Pikis, para. 11. In the context of amendments to the Rules, by analogy, *see e.g.* *Ruto* Statements AD, paras. 37-43 (legal texts must be interpreted on the basis of the text agreed by all participating States; broader arguments concerning the intentions or understandings of particular States require caution).

This will be a landmark judgment for superior responsibility,[4] and this mode of liability must be fit for its object and purpose.

4. First, as a *sui generis* mode of liability,[5] and *not* a crime in its own right,[6] superior responsibility can and must accord with the principle of culpability. *But* although this means there must be a sufficient nexus between the accused and the crimes of which they are convicted, this does not necessarily always require causation.[7] (Nor, as the Prosecution has elsewhere argued, is a causation requirement for superior responsibility under the Statute in any event well founded based on the ordinary terms of article 28, its context, and its object and purpose.[8]) Rather, the "bridge of culpability"[9] between the accused superior and the subordinates' crimes for which they are convicted is adequately built instead on the foundations of:

- the requirement for the superior to have a *culpable mental state vis-à-vis* the subordinates' crimes, as defined in the Statute;[10]
- the requirement for the superior, *with that mental state, personally to have breached the specific duty imposed upon them* by international law: the duty to "exercise control properly", which means taking all necessary measures to prevent or repress subordinates' crimes or to refer them for proper investigation;[11] *and*
- the requirement for the charged crimes to have been *actually committed* by subordinates *under the superior's effective control* (and thus whose crimes the superior had the material ability to prevent or punish, but did not).

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[4] T-373, 11:16-17.
[5] This has always been the Prosecution's position: *see e.g.* Response, paras. 232-233; T-373, 51:2-4, 98:6-14, 102:18.
[6] *Contra* T-373, 101:7, 124:10-11.
[7] *See e.g.* Response, paras. 230 (*especially* fn. 838), 231 (*especially* fn. 845); T-373, 98:15-99:1. *Contra* Reply, paras. 53, 59.
[8] *Contra* T-373, 100:17-22, 104:11-17. The transcript records two persons speaking simultaneously at page 104, and so only reflects the first of "two alternative plain readings" mentioned by Prosecution counsel. *See further* Response, paras. 227-229, 243-253 (applying the VCLT interpretive approach to article 28). *Compare also* Reply, paras. 52, 60; *with* Response, paras. 228, 244-246. The absence of any reference to causation for superior responsibility in the Statutes of the ICTY and ICTR is not directly on point since those instruments are jurisdictional, and not sources of law—but in any event customary international law does not recognise a causation requirement for superior responsibility: *see* T-373, 104:2-9, 105:1-25; Response, para. 249 (*especially* fns. 908-912).
[9] T-373, 104:11-12; T-374, 4:14-15.
[10] This culpable mental state under article 28 means either: sufficient subjective awareness of the *subordinates' crimes*, or an absence of subjective awareness of the subordinates' crimes *but* subjective awareness of *other circumstances which should have triggered a duty to take further steps*, which would have established subjective awareness of the subordinates' crimes. The steps required vary depending on whether article 28(a) or (b) applies. *See* T-373, 13:5-19, 15:4-16:14, 17:5-19:8, 39:5-15.
[11] *See e.g.* Statute, art. 28(a). *See also* Response, para. 245; T-373, 14:20-22 (Prosecution); 65:23 (Defence), 69:9-11 (Defence). The Defence is thus incorrect to suggest, in other submissions, that the Statute does not define what it means to exercise control "properly": T-373, 66:9-10, 92:10-12, 107:9-10, 107:13-18.

5. These close links between the superior and the subordinates' crimes—which the superior by their conduct has culpably condoned and tolerated—justify treating article 28 as a mode of liability, even if (uniquely) it is non-participatory. This is consistent with the plain terms of article 28, which underlines that it is a form of liability "*[i]n addition to* other grounds of criminal responsibility under this Statute".[12]

6. The Defence claim, apparently based on the approach of national jurisdictions, that "there is no responsibility without […] contribution" does not answer these arguments—which they had more than a year to consider[13]—and offers no principled reason why every other superior responsibility case ever adjudicated by a modern international tribunal, never requiring causation, is in some way inappropriate or unfair.[14] Given these multiple links of culpability, there is no question of "scapegoating" the superior.[15] Nor does the Prosecution argue for a "broad" interpretation of the Statute, but merely a workable one based on a proper interpretation;[16] it is the Defence which seeks instead an unduly *narrow* interpretation, never intended by the drafters.[17] Such an approach absolutely will "undermine the goals of criminal justice", potentially allowing some "commanders to slip through the gap".[18]

7. Second, the Defence positions on the nature of superior responsibility are fundamentally inconsistent. Professor Ambos suggests—without resolving the manifest conflict between this position and the plain terms and context of the Statute, not to mention international practice—not only that "the commander is taking part in the crimes"[19] but that he is "not just an assistant, you know".[20] Yet Ms Gibson suggests—in substantial *agreement* with the Prosecution position—that superior responsibility is "a form of liability that's unique in that it means […] commanders can be convicted, even when they didn't commit the crime", because of the special duties placed upon them by international law.[21]

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[12] *See also* T-373, 101:8-11, 101:24-102:20. On the distinction between articles 25 (especially articles 25(3)(c) and (d)(ii)) and 28, *see* Response, paras. 232-234; T-373, 50:22-51:7, 102:21-104:1.
[13] *See e.g.* Response, para. 231. *See also* Reply, paras. 56-58
[14] *Contra* T-373, 100:22-101:1. *See also* T-373, 62:1-18, 119:23-25; T-374, 79:1-10 (arguing with reference to domestic law).
[15] *Contra* T-373, 52:1-3.
[16] *Contra* T-373, 52:1; Reply, para. 60.
[17] *See* Response, paras. 250-253 (on the drafting history of article 28). *Contra* Reply, paras. 54-55.
[18] *Contra* T-373, 62:1-2.
[19] T-373, 119:23-25. Again, this argument is apparently based purely on national law.
[20] T-374, 78:23-79:10. *See also* T-373, 11:17-20.
[21] T-373, 124:6-125:7. Ms Gibson also affirms that superior responsibility is "not" a form of "accessorial liability" but instead is "something that's very different and unique".

8. Third, the Defence position on whether the commander has a 'legal duty to withdraw' is based on a 'straw man' argument. It misrepresents the Prosecution position, which did no more than reaffirm the superior's well-established duty to take *all* necessary and reasonable measures.[22] In particular, the Prosecution never asserted a '*per se* legal duty to withdraw',[23] but merely recognised that withdrawal *may* in some rare circumstances become a necessary and reasonable measure. This might arise, for example, if all the more targeted remedial measures were *impossible to put into operation*—but of course would *not* arise if those measures *were* put *properly* into operation.[24] The Defence is wrong, moreover, to posit a tension between a proper exercise of command and considering withdrawal[25]—as they said themselves, withdrawal is merely the "absolute last resort" which might be open to a superior, once they have exhausted other options to exercise their command properly.[26] The Trial Chamber did not err in recognising the possibility, especially on the facts of this case.[27]

9. Indeed, it is the Defence which is incorrect to imply that *every norm* of IHL—as well as the international criminal doctrine of superior responsibility—*individually* allows a balance to be struck between military necessity and humanitarian considerations.[28] To the contrary, while some specific *jus in bello* rules allow such a balance, they state this *expressly*. Otherwise, it is the framework of IHL *as a whole* which *already* reflects that balance (including in selecting which norms are framed as absolute, and which are not)—and therefore individual norms expressed as absolute cannot nonetheless be subject, implicitly, to a further and overriding assessment of military necessity.[29] Despite the Defence claims,[30] this repeats in substance the military necessity argument in their brief—which has been rejected in terms for more than 50 years.[31] There is no support for the claim that 'necessary and reasonable measures' are separately subject to "feasibility" (if understood in the sense of not being detrimental to military advantage),[32] provided they are "necessary" (*i.e.*, appropriate)

[22] *See* T-373, 84:16-86:8. 115:10-11.
[23] *Contra* T-373, 65:2-3, 65:13-14, 66:12-13, 108:3-11, 109:1-3, 110:5-7, 114:7-8. *See also* Response, para. 273.
[24] *Contra* T-373, 93:4-9, 108:5-22, 110:5-7, 112:22-24, 113:12-20, 114:7-16, 119:3-10. Moreover, due *inter alia* to the separate requirement of effective control, this scenario is very unlikely to arise.
[25] *Contra e.g.* T-373, 67:14-21. The exact nature of this tension, moreover, is not clearly explained.
[26] T-373, 69:6-19, 109:1-7.
[27] *See* Judgment, para. 730.
[28] *Contra* T-373, 108:3-6, 108:16-22, 114:10-12, 119:6-8. *See also* T-373, 66:19-22, 92:21-22.
[29] *See e.g.* Cottier, p. 305, mn. 6.
[30] *Contra* T-373, 91:24-25.
[31] *See* Response, paras. 330-332.
[32] *Contra* T-373, 92:12-22, 93:4-9, 107:9-24. The Defence declines to use the established language of article 28 and customary international criminal law ("necessary and reasonable measures") and instead uses the language of article 86(2) of API ("all feasible measures within their power"). The only basis for their view that "feasible" in this context imports "military considerations" is based on the reservations or interpretive declarations made by

and "reasonable" (*i.e.*, within the superior's material possibility).[33] Conduct contrary to IHL, and *a fortiori* criminal conduct, is never a permitted means or method of warfare.[34]

10. Furthermore, Defence arguments concerning withdrawal consistently overlook the facts of this case—they claim that "investigations and prosecutions on the ground […] were done"[35] and that certain "necessary and reasonable" steps, like issuing "clarifying instructions", were "taken in this case."[36] Yet to the contrary, the Trial Chamber found that the measures taken were "limited in mandate, execution, and/or results", "were not properly and sincerely executed", were "grossly inadequate", "minimal", "not genuine" and as a whole, given Mr Bemba's material powers, "patently fell short of 'all necessary and reasonable measures'".[37] The Defence implication that the measures required vary according to the superior's degree of confidence in the available information is entirely unsupported in the jurisprudence, and contrary to the object and purpose of superior responsibility,[38] as well as the "non-negotiable tenet of the military ethos […] to be active".[39]

11. Finally, the Prosecution agrees that article 28 must be capable of equal and objective application.[40] This is precisely why shifting its focus to a broader assessment whether the superior was a 'good' superior—beyond the concrete legal question of the duty to prevent and punish crimes—is potentially so dangerous, and shunned by all other international tribunals. Yet any form of causation will lead inevitably in this direction.[41]

B. The MLC's organisational policy to attack the civilian population

12. In discussing the MLC's organisational policy to attack the civilian population, Judge Morrison correctly observed: "isn't it all boiled down to a matter of evidence at the end of the

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"NATO allies". *See e.g.* API Commentary, p. 1015, mn. 3548. Furthermore, to the Prosecution's knowledge, no similar interpretive declaration has been made by those NATO States which ratified the Statute of this Court, nor are any of the NATO States known to have registered their objection to the *ad hoc* tribunals' interpretation of customary law in this respect. Furthermore, the NATO States' reservation to API applies to *all* uses of the word "feasible" in API, which arises in a variety of contexts: *see e.g.* API, arts. 41(3), 56(2)(a), 56(2)(b), 56(2)(c), 57(2)(a)(i), 57(2)(a)(ii), 58, 76(3), 77(2), 78(1), 86(2). There is thus no evidence that this reservation reflected a *specific* concern about the scope of superior responsibility. Finally, the Prosecution notes that "the silence of […] other States Parties […] cannot be interpreted as an implicit agreement with any […] interpretive declarations", which by definition may represent a minority view: *Ruto* Statements AD, para. 42.

[33] *See* T-373, 85:2-11.
[34] *See* T-373, 86:9-22, 116:9-21.
[35] T-373, 113:19-20.
[36] T-373, 114:15-16.
[37] Judgment, paras. 720-731.
[38] *Compare* T-373, 42:10-43:7, *with* 44:20-45:2. *See above* fn. 33.
[39] T-373, 68:2-3. *See also* 17:1-4.
[40] *See* Response, paras. 242, 247; T-373, 11:16-23. *Cf.* T-373, 129:14-16.
[41] *See* Response, paras. 236, 238-239, 248.

day?"[42] The organisational policy "to attack the civilian population"[43] was clear and accorded with the notion of 'policy'[44] and its modest purpose to screen out "unconnected crimes committed by diverse individuals".[45] It is also consistent with ICC jurisprudence.[46]

13. The Trial Chamber reasonably found that there was an organisational policy to attack civilians based on its cumulative assessment of *eight criteria*.[47] These were: (1) the *modus operandi* of the MLC soldiers throughout the 2002-2003 CAR Operation;[48] (2) the recurrent pattern of violence in the areas under MLC control;[49] (3) the MLC soldiers' general motivation (self-compensation, through pillage or rape, and punishment of civilians);[50] (4) the scale, degree of organisation, and knowledge and involvement of the MLC hierarchy, not only concerning pillage but also rape and murder in certain areas (such as PK12 and the Port Beach naval base);[51] (5) the punitive attack in Mongoumba—of which Bemba had knowledge;[52] (6) MLC orders to exercise "vigilance" against civilians, including the use of force against them—which Bemba also knew and endorsed;[53] (7) inadequate and inconsistent training on standards of conduct;[54] and (8) Bemba's knowledge of MLC crimes and his ongoing failures—as well as those of other commanders—to prevent or punish them.[55] Reliance on such criteria to infer an organisational policy is entirely consistent with the approach of other ICC chambers. For example, chambers have considered: (i) perpetrators' motivations;[56] (ii) elements of organisation and coordination;[57] (iii) orders or statements to

[42] T-374, 47:10-14.
[43] Judgment, paras. 676, 685, 687. *See* Prosecution CAH Submissions, paras. 12-14.
[44] *Katanga* TJ, paras. 1108, 1113.
[45] Prosecution CAH Submissions, paras. 6-7; *see also* T-374, 36:23-39:9 (Prosecution oral submissions). *See also* T-374, 36:9-19. *Contra* T-374, 40:2-4, 42:3-43:2.
[46] *Katanga* TJ, para. 1142; *Ruto and Sang* Confirmation Decision, para. 216; *Gbagbo* Confirmation Decision, paras. 211, 221; *Blé Goudé* Confirmation Decision, paras. 127-128; *Ntaganda* Confirmation Decision, para. 19; *Ongwen* Confirmation Decision, paras. 62-63; *Gaddafi and Al-Senussi* Article 58 Decision, paras. 31, 35.
[47] Judgment, paras. 676-685. *See also* T-374, 44:12-45:2; Response, paras. 296-298; Prosecution CAH Submissions, para. 11. *Contra* T-374, 8:2-5.
[48] Judgment, para. 676. *See also* sections V(C)(3) (paras. 459-484); V(C)(4) (paras. 485-519); V(C)(5) (paras. 520-523); V(C)(9) (paras. 531-533); V(C)(11) (paras. 536-554) and V(C)(14) (*especially* para. 564).
[49] Judgment, para. 677.
[50] Judgment, para. 678. *See also* section (V(C)(14) (*especially* paras. 565-567).
[51] Judgment, paras. 679-680. *See also* sections V(B)(2)(a) (paras. 412-418); V(C)(2) (paras. 455-458); V(C)(3)(d) (paras. 480-484); V(C)(4) (paras. 485-519); V(C)(14) (especially para. 566); V(D)(2) (paras. 582-589); V(D)(5) (paras. 597-600); V(D)(6) (paras. 601-603).
[52] Judgment, para. 681. *See also* section V(C)(11) (*especially* paras. 541-542), and para. 571.
[53] Judgment, para. 682. *See also* section V(C)(14) (*especially* paras. 568-573, and fn. 1763 (P-213 was present when Bemba addressed MLC troops before deployment to the CAR and told them "All those you find there, men and women, you should kill them, destroy all the houses that we see there beyond Zongo. Destroy everything"; P-47 also recalled a similar injunction from an unidentified MLC commander).
[54] Judgment, para. 683. *See also* section V(A)(2) (*especially* paras. 391-393).
[55] Judgment, para. 684. *See also* section VI(F)(4) (paras. 719-734).
[56] *See e.g.* *Katanga* TJ, paras. 1144-1145, 1149; *Gbagbo* Confirmation Decision, para. 214; *Ongwen* Confirmation Decision, para. 62.

harm civilians;[58] (iv) mobilisation of armed forces, and patterns of offensive action;[59] and (v) the scale of violence.[60]

14. The focus in the appeal hearing on the significance of the link between MLC pillaging and article 7(1) acts, and the *modus operandi*, was thus just considering one part of the Trial Chamber's overall factual and *evidentiary* assessment.[61]

15. The Prosecution reiterates that the Trial Chamber was entitled to rely on the finding that rapes and murders were committed in the context of large scale and organised pillaging, which MLC leadership "benefited from and condoned",[62] as *evidence* to establish the existence of an MLC policy to attack the CAR civilian population: the material fact to be established.[63] This does not "water down" the nature of crimes against humanity.[64] The Trial Chamber's consideration of the factual association in this case between pillage and the article 7(1) acts (rapes, murders) as evidence probative to the *connection* between the article 7(1) acts—the essence of the policy requirement[65]—did *not* convert the finding of an organisational policy to attack civilians into a policy of pillaging civilians.[66] To the contrary, the course of conduct constitutive of the attack solely involved article 7(1) acts: murder and rape,[67] and the Trial Chamber was clearly mindful of this distinction.[68] Supporting the Trial Chamber's approach, other ICC chambers—for example, in the *Kenya* situation,[69] in *Ntaganda*,[70] and *Katanga*[71]—have likewise relied on pillage or destruction of property as *evidence* to infer the existence of a policy or to qualify the attack itself.

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[57] *See e.g.* *Katanga* TJ, paras. 1146-1147; *Ruto and Sang* Confirmation Decision, paras. 217-221; *Blé Goudé* Confirmation Decision, para. 128; *Ntaganda* Confirmation Decision, para. 19.
[58] *See e.g.* *Ntaganda* Confirmation Decision, para. 21.
[59] *Kenya* Article 15 Decision, para. 87 (referring to *Blaškić* TJ, para. 204, and the factors listed therein).
[60] *Kenya* Article 15 Decision, para. 87 (referring to *Blaškić* TJ, para. 204, and the factors listed therein).
[61] *See also* T-374, 45:16-22.
[62] Judgment, para. 679. *See also* paras. 681-682, 684-685.
[63] *See* T-374, 24:12-25:5. *See also* Judgment, para. 679. *Contra* T-374, 34:18-20.
[64] *Contra* T-374, 36:8-20. *See* T-374, 36:23-38:6, 39:3-9. *See also* Prosecution CAH Submissions, paras. 4-8.
[65] *See above* fn. 45.
[66] *Contra* T-374, 6:16-22, 7:15-18, 7:22-25, 43:9-19.
[67] Judgment, paras. 671-672. *See also* Prosecution CAH Submissions, para. 25.
[68] Judgment, para. 151.
[69] *Kenya* Article 15 Decision, para. 87 (referring to *Blaškić* TJ, para. 204, and considering "the destruction of non-military property, in particular, sacral sites" as a factor from which, among others, a State or organisational policy could be inferred)
[70] *Ntaganda* Confirmation Decision, para. 21 (relying, among other factors, on statements of UPC/FPLC leadership, including Ntaganda, that "troops should fight and *pillage* everything, including 'women'" (emphasis added) to infer the existence of a State or organisational policy).
[71] *Katanga* TJ, paras. 1142-1156, 1158-1162 (*especially* para. 1158, where the majority of the Trial Chamber relied on the *modus operandi* of the attack in Bogoro, which involved the killing of Hema population and the destruction and pillaging of their property to conclude "that the attack was carried out in a coordinated and

16. The Trial Chamber also reasonably relied on the *modus operandi* of MLC troops in the CAR to support its finding of an MLC organisational policy. The concept of a *modus operandi* does not necessarily entail an absolutely unique 'fingerprint',[72] but is a practical evidentiary concept.[73] What was relevant for the purpose of the Trial Chamber's analysis in this case was the repetition of the same acts, requiring a certain level of coordination and organisation. Again, the Trial Chamber's approach is supported by other ICC chambers' similar practice, such as in *Gaddafi and Al-Senussi*[74] and *Katanga*.[75]

17. The Trial Chamber defined the MLC *modus operandi* as a pattern of conduct involving house-to-house searches once Bozizé's rebels had departed a location, resulting in intimidation, pillage, rape and occasionally murder.[76] These acts were consistently carried out over four and a half months across the territory of the 2002-2003 CAR Operation by the MLC troops.[77] These were not sporadic actions by a few rogue soldiers.[78] Rather, they required organisation and coordination, and were accepted by the MLC hierarchy, such as Mr Bemba.[79] To make these findings, the Chamber relied on the direct testimony of victims of the underlying incidents in Bangui, PK12, PK22, Sibut and Mongoumba,[80] as well as the supporting testimony of other witnesses, such as P-178, P-47, P-119, P-87 and P-63.[81] The testimony of CAR prosecutor P-6 and investigative judge P-9, who testified about the victims that they personally interviewed, was also relevant in this respect.[82]

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organised fashion" and thus to infer the existence of a systematic attack). *But see* *Katanga* TJ, Dissenting Opinion, para. 265 (disagreeing with *Katanga* TJ, para. 1138, where the majority relied on the scale of pillaging, among other factors, to conclude that the civilian population was the principal target of the attack).

[72] *See* T-374, 45:3-47:8.

[73] *See e.g.* Black's Law online dictionary ("method of operation"); Legal Dictionary online ("particular manner in which a crime is committed"); Merriam-Webster online dictionary ("method of procedure" or "distinct pattern or method of operation that indicates or suggests the work of a single criminal in more than one crime").

[74] *Gaddafi and Al-Senussi* Article 58 Decision, para. 33 (relying on the *modus operandi* of the Libyan security forces, involving house-to-house searches and detention of alleged dissidents, use of heavy weapons, and cover-ups, to infer the existence of an attack).

[75] *Katanga* TJ, paras. 878, 1113, 1158-1162. The majority of the Trial Chamber relied on a *modus operandi* (encirclement, destruction and pillaging, searching for and killing the Hema population) to infer the existence of a policy to attack the Hema population, expressly taking into account at para. 1109, among other factors, "repeated actions occurring according to the same sequence".

[76] Judgment, paras. 564, 676.

[77] The Trial Chamber found this *modus operandi* "continued consistently" throughout the operation: Judgment, para. 676. *See also* paras. 461, 486, 520, 525, 527, 531, 534, 543, 563, 596. *See further* T-373, 117:16-23.

[78] Judgment, paras. 685-686.

[79] *See above* fns. 51-53.

[80] *See* Judgment, para. 676, fn. 2103 (cross-referring to Sections V(C)(3) (Bangui), V(C)(4) (PK12), V(C)(5)(PK22), V(C)(9)(Sibut), V(C)(11)(Mongoumba) and V(C)(14) (general conduct of MLC troops)). *Contra* T-374, 8:20-24.

[81] Judgment, para. 564, fns. 1744-1746 (*see e.g.* T-150, 73:1-9 (P-178); T-177, 44:3-6 (P-47); T-82, 33:6-16 (P-119); T-44, 13:12-16, 21:20-22 (P-87); T-110, 4:6-13 (P-63)).

[82] T-374, 44:15-17. *See* Judgment, para. 564, *especially* fns. 1741, 1746.

18. Finally, bolstering the Trial Chamber's finding of an MLC organisational policy based on the eight criteria, it not only found that MLC field commanders encouraged and condoned MLC crimes, but that the failure by Mr Bemba and other senior MLC commanders to take action was likewise "deliberately aimed at encouraging the attack".[83] This too evinces the MLC organisational policy,[84] even though as a matter of law it is not required that all members of the organisation (or its leadership) share the policy.[85] Notably, given the evidence, the Trial Chamber would have been entitled to find even that Mr Bemba actively encouraged the attack.[86]

C. The attack was widespread

19. The Defence wrongly suggests that the article 7 (crimes against humanity) case against Mr Bemba boils down to "anonymous unsourced copies of a press report allegedly corroborated by somebody saying," for example, "'I heard the MLC committed crimes in Sibut'"[87] or "photocopies of Le Citoyen, which nobody even ever said they saw".[88] But if one looks at the reality of the Trial Chamber's evidentiary analysis, and the content of the trial record, it is clear that the Defence arguments are based on a faulty premise. Moreover, since the Defence apparently concedes that there would be no problem if "alternative forms of evidence" were also available, such as various kinds of "records" or "a sprinkling of witnesses from some of these towns",[89] their argument fails in its own terms.

20. The Trial Chamber's finding of a widespread attack was correctly based on the *entirety* of the evidence in the trial record, which it reasonably analysed and weighed. Having made the threshold assessment of admissibility,[90] the Trial Chamber was legally required to assess each piece of evidence in the context of all the other evidence when considering the weight to be given to it,[91] which it did.[92] The finding of a widespread attack is thus based on a robust

[83] *See e.g.* Judgment, paras. 679, 681-682, 685.
[84] *See* Prosecution CAH Submissions, paras. 10-11.
[85] *See* Prosecution CAH Submissions, paras. 8, 15. *Contra* T-374, 5:11-21, 72:11-23.
[86] *See especially* Judgment, paras. 399, 419, 420, 423, 427, 568-573, 700, and evidence cited in fns. 1151, 1152, 1162, 1184-1185, 1163-1171, 1763 (Mr Bemba and his subordinates ordered the use of force against civilians Mr Bemba had effective control over subordinates, including regular and direct communication with field commanders and issuance of direct operational orders).
[87] *Contra* T-374, 70:1-5.
[88] *Contra* T-374, 70:13-15. *See also* T-374, 14:5-6 ("[t]he premium item cited in paragraph 563 are the press articles"), 56:10-16 (Judge Van den Wyngaert summarising some of the evidence supporting paragraph 563 of the Judgment as "NGO reports, press articles, possibly anonymous hearsay, I don't know").
[89] T-374, 70:10-13 (conceding that their submission "would not work" in such circumstances).
[90] *See* Judgment, paras. 222-223. *See further e.g.* paras. 264-267, 269-270. *Contra* T-372, 8:18-19.
[91] *Lubanga* AJ, para. 22; *Ngudjolo* AJ, Dissenting Opinion, paras. 35-39; *Martić* AJ, para. 233; *Limaj* AJ, para. 153; *Halilović* AJ, para. 125; *Ntagerura* AJ, para. 174. *See also* Prosecution CAH Submissions, paras. 24-25.

'cable' of evidence composed of various different strands which, together, bear a heavy probative load: proof beyond reasonable doubt.[93] Because this 'cable' entwines oral testimony (including the Trial Chamber's assessment of the witnesses' demeanour and personal credibility) and documentary evidence, appellate deference is required.[94] This evidence included:

- Live (*viva voce*) evidence of MLC crimes from more than 19 direct witnesses who were not part of the MLC.[95] This evidence formed part of the 'crime-base' analysis in the Judgment, leading to the Trial Chamber's individual conclusions beyond reasonable doubt that 28 rapes and 3 murders were committed in and around Bangui, and in Mongoumba, in October to November 2002, and March 2003.[96]

- Both live and documentary evidence that the MLC was active on CAR territory in various locations from October 2002 to March 2003, and that the circumstances which were causally connected to the occurrence of MLC crimes (such as antipathy to civilians, inadequate payment and rations, self-compensation, orders to be "vigilant" against civilians, inadequate training) consistently prevailed throughout this period.[97]

- Live evidence from two witnesses (P-6 and P-9) who were professionally responsible for conducting the domestic investigation of crimes committed in the course of the 2002-2003 CAR Operation.[98] Based on their own experience in conducting this investigation, these witnesses testified that the MLC appeared to have a consistent *modus operandi*, which entailed looting, murdering and raping civilians once they had taken control of an

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[92] *See* Judgment, paras. 218, 224-227 (twice stressing "the principle of 'holistic evaluation and weighing of *all the evidence*'", emphasis supplied, and noting in this respect that it "was under no obligation 'to refer to the testimony of every witness or every piece of evidence on the trial record'").
[93] *See* T-374, 53:12-14. *Contra* T-374, 15:2-8, 32:12-16. The Prosecution's reference to a "low threshold" in the passage of the written submissions, referred to by the Defence, did not relate to the standard of proof but to the low numerical threshold of article 7(1) acts required to establish a "course of conduct" (*i.e.*, the *content* of this legal requirement, not the basis on which it is proved): *see* Prosecution CAH Submissions, para. 31, fn. 141 (cross-referring to para. 22 defining the "course of conduct").
[94] *See* T-372, 15:20-16:7; T-374, 63:2-64:18. *See further* Judgment, para. 563 ("there is reliable evidence from various sources, *including testimony*, as corroborated by media articles, NGO reports, and the *procès verbaux*", emphasis added).
[95] These included P-22, P-23, P-29, P-42, P-68, P-69, P-73, P-75, P-79, P-80, P-81, P-82, P-87, P-108, P-110, P-112, P-119, P-169, and P-209. These same and other witnesses also commonly testified that, to their knowledge, such experiences were far from uncommon: *see e.g.* Prosecution CAH Submissions, para. 35, fns. 170 (referring to the evidence of P-178), 173 (referring to the evidence of V-1). *See also e.g.* Judgment, para. 563, fn. 1736.
[96] *See e.g.* Judgment, paras. 624, 633. *See also* Prosecution CAH Submissions, paras. 34-37.
[97] *See e.g.* Judgment, paras. 565-573, 735-741.
[98] Judgment, paras. 264, 564.

area.[99] The Trial Chamber had ample opportunity to assess the reliability and credibility of the evidence of these professional witnesses over multiple days of testimony, and the witnesses were careful to explain the basis of their investigation, including its focus on the events at the time of the 2002-2003 CAR Operation,[100] and its objective and methodology.[101] P-9 was scrupulous in noting that he was not in a position to give a "personal opinion" about the credibility of each victim he interviewed, but that overall there was an "image of sincerity" which came across based on factors such as the injuries of victims, their distress, and their detailed accounts.[102] Both P-9 and P-6 explained that they received so many files in the course of their investigation that they could not interview every victim, and had to make a selection.[103] Both believed the true number of victims to be much higher.[104] They also related some of their own personal experiences.[105]

- Documentary evidence, in the form of approximately 200 *procès verbaux* reflecting the crimes reported to P-6 and P-9 in their investigation. This *dossier* was authenticated before the Chamber by P-9.[106] These records support P-6's and P-9's testimony of the crimes reported to them, and detail approximately 113 further rapes and 51 further murders, consistently associated with acts of pillage.[107] The Trial Chamber carefully explained the basis upon which it admitted this evidence, and the basis on which it relied

[99] Judgment, para. 564.
[100] T-102, 14:11-12, 30:4-9.
[101] T-102, 18:8-20:8; T-104, 42:20-43:2. *See also* T-94, 22:5-9, 22:18-24, 37:14-38:15, 42:19-43:9 (P-6's consistent testimony). In particular, both P-9 (the senior investigating judge) and P-6 (the prosecutor) explained that victims—including victims from elsewhere—were questioned during hearings held at the Bangui *Palais de Justice* by P-9, his "Registrar" and the Prosecutor (usually P-6, but sometimes replaced by one of his subordinates). The questioning of each witness lasted, depending on the case, between 30 minutes and 3 hours. *See* T-102, 15:20-16:22, 23:3-4, 26:14-27:12. *See also* T-94, 37:20-38:15, 40:22-23, 44:17-45:3, 47:13-19 (P-6's consistent testimony). Although during their inquiry P-9 and P-6 also investigated crimes committed by other groups, it was "very easy" to distinguish crimes committed by MLC soldiers from the others—particularly considering their language, clothing and personal equipment. *See* T-102, 43:15-44:16, 49:21-50:17, 7:22-8:3; T-104, 4:10-5:5, 7:10-13, 31:4-10. *See also* T-94, 29:9-19, 49:4-16; T-95, 11:3-12:3 (P-6's consistent testimony).
[102] *See e.g.* T-102, 30:24-31:7, 39:13-40:6.
[103] T-102, 19:9-20:18; T-104, 42:20-43:2. *See also* T-94, 37:14-22 (P-6's consistent testimony).
[104] *See e.g.* T-95, 10:11-23, 15:2-10 (P-6 estimating that they interviewed approximately 300-350 victims, of which three-quarters were rape victims); EVD-T-OTP-00045/CAR-OTP-0010-0107, p. 0112 (P-9 believing that the *procès verbaux* by no means represented the entirety of similar victims across the CAR at this time).
[105] *See e.g.* T-95, 16:10-17:10.
[106] Judgment, para. 264; Dossier Admissibility Decision, para. 67. Relevant documents were signed by the victim and P-9, and the documents remained in P-9's custody until transferred to the ICC: T-102, 22:6-11; T-104, 31:20-32:9.
[107] *See e.g.* Judgment, para. 563, fn. 1736. *See also* Prosecution CAH Submissions, para. 33, fn. 151, Annex B.

upon it.[108] In particular, it emphasised that this evidence was used to "corroborate other evidence related to the contextual elements of the crimes charged",[109] such as the oral testimony of P-6 and P-9.

- Live evidence from P-229, who testified as an expert on rape as a weapon of war, and is Head of the Psychiatry Department of the National Hospital in Bangui, and has considerable direct experience of assisting victims of sexual violence arising from the 2003 conflict.[110] Again, the Trial Chamber had ample opportunity to assess this professional witness' demeanour and personal credibility. P-229 testified that, from the reports he received and the interviews he conducted, the perpetrators of rape were repeatedly identified as "*Banyamulengue*".[111] P-229 also testified that he was familiar with a UNDP-sponsored report—also in evidence—which identified at least 293 rapes (among 514 victims of violent crime) in the Bangui area alone at the material time,[112] and estimated that the real number would be higher still.[113]

- Documentary evidence in the form of media and NGO reports which refer to alleged MLC crimes at material times and places. The Trial Chamber properly directed itself to take a "cautious[]" approach with such evidence,[114] but made clear that they could be used to "corroborate other pieces of evidence".[115]

21. Based on all this evidence, the Appeals Chamber cannot find that no reasonable Trial Chamber could have concluded beyond reasonable doubt that the attack was widespread.[116] Indeed, at trial, the Defence raised no more than a desultory challenge to the 'widespread' nature of the attack, and did not question much of this evidence at all.[117] The blend of witness and other evidence was sufficient for a Trial Chamber reasonably to make the required finding, especially given the reality of the security and practical context which affected

[108] *See* Judgment, paras. 266-267; Dossier Admissibility Decision, paras. 63-72. *Inter alia*, the Trial Chamber noted that these documents were created as part of the official CAR judicial inquiry, in the aftermath of the crimes, and were signed by P-9 and the alleged victims.
[109] Judgment, para. 266.
[110] *See* Prosecution CAH Submissions, para. 35, fn. 163.
[111] *See* Prosecution CAH Submissions, para. 35, fn. 164.
[112] While this report was not apparently cited in the Judgment, it was clearly before the Trial Chamber and admitted into evidence, was the source for other materials which the Trial Chamber did cite, and was also considered credible and reliable by the Pre-Trial Chamber: *see* Prosecution CAH Submissions, para. 33, fn. 148 (citing EVD-T-OTP-00568/CAR-OTP-0030-0002).
[113] *See* T-99, 49:20-51:19 (referring to EVD-T-OTP-00568/CAR-OTP-0030-0002).
[114] *See e.g.* Judgment, para. 271.
[115] *See e.g.* Judgment, paras. 269-270.
[116] *See e.g.* T-372, 13:11-16:20; T-374, 67:2-20, 86:7-88:13.
[117] *See* Prosecution CAH Submissions, para. 33, fn. 150 (and citations therein).

evidence-gathering in the CAR at the times material to this situation. Accordingly, this finding must be upheld, even if members of the Appeals Chamber might consider that they would not themselves have reached such a conclusion if they had been the trial judges.

22. Finally, in this context, the Prosecution also recalls its respectful disagreement with the suggestion that, to prove a widespread attack ('a forest'), "you at least have to prove a substantial amount of trees beyond a reasonable doubt"[118]—even though, on the facts of this case, the Trial Chamber did establish the 31 individual underlying acts of rape and murder of which Bemba was convicted to this standard. Yet, in the Prosecution's view, only the attack and its widespread nature are material facts which must *necessarily* be established beyond reasonable doubt.[119] In defining a "material fact", the Prosecution distinguishes between the element of a crime (including the contextual element), which is an abstract legal notion,[120] and its factual counterpart alleged by the Prosecution (the "material fact").[121] This distinction is critical.[122]

23. Whether specific incidents ('individual trees') may *also* be material facts depends, as the Appeals Chamber ruled in *Gbagbo*, on *how* the Prosecution has pleaded the charges.[123] In this case, the Prosecution properly pleaded—and the Pre-Trial Chamber properly accepted—the attack and its widespread nature alone as material facts, to be established on the basis of the totality of the evidence, including individual incidents (subsidiary facts) which were not themselves material facts.[124] The Trial Chamber convicted on this same basis,[125] and did not err in doing so. This is perfectly consistent with the approach of other international tribunals.[126] Indeed, such an approach is necessary since the Prosecution may well, in appropriate cases, be able to prove a widespread attack beyond reasonable doubt without necessarily proving the details of any individual incident at all. Moreover, some forms of

[118] *See* T-374, 53:8-25.
[119] *See* T-374, 50:20-51:7, 52:3-14, 52:18-24.
[120] *See e.g.* Elements of Crimes.
[121] *See e.g.* *Lubanga* AJ, para. 121; *Lubanga* Regulation 55 AD, fn.163; *Ntagerura* AJ, para. 174; *Halilović* AJ, para. 125. *See also* *Ngudjolo* Victims AD, para. 35.
[122] *Ntagerura* AJ, para. 174; *Halilović* AJ, para. 125.
[123] *See* *Gbagbo* Confirmation AD, *especially* para. 47 ("it is for the Prosecutor to plead the facts relevant to establishing the legal elements [of an attack] and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack").
[124] *See e.g.* Confirmation Decision, paras. 91, 108, 116. The Defence is incorrect to suggest that the Appeals Chamber in *Gbagbo* rejected the distinction between material facts and subsidiary facts: *contra* T-372, 71:16-18. Rather, the Appeals Chamber merely noted that the Court's legal documents distinguish between facts and circumstances described in the charges, and "evidence": *Gbagbo* Confirmation AD, para. 37. Subsidiary facts are "functionally evidence": *Chambers Practice Manual*, p. 12.
[125] *See e.g.* Judgment, paras. 688-689.
[126] *See* Prosecution CAH Submissions, para. 24, fn. 109 (authorities therein).

evidence (overview evidence, demographic evidence, technical evidence and the like) may in appropriate circumstances suffice to establish the requisite scope of criminality beyond reasonable doubt, without addressing specific incidents.

D. Mr Bemba's responsibility is grave and justifies the individual sentences imposed

24. With regard to sentence, the Defence argued that, "convictions for war crimes are necessarily less grave than convictions for crimes against humanity", and that, if the Appeals Chamber were to recharacterise Mr Bemba's *mens rea* to 'should have known' under article 28(a) of the Statute, this too "needs to be measured in the sentence passed."[127] But this is incorrect. The essential question for sentencing—the gravity of the criminal conviction—turns primarily on the Trial Chamber's factual findings.

25. First, there is no hierarchy of crimes in the Statute, nor is such a notion suggested in the sentencing regime.[128] To the contrary, the crimes listed in article 5 are, severally, the "most serious crimes of concern to the international community as a whole".[129] The order in which they are listed in article 5 cannot be understood to indicate their relative gravity. Each category of crime in article 5 addresses a different protected value, and this Court has no mandate to assign relative significance to these different values, even if it was possible to do so. Thus, genocide preserves the integrity of groups, crimes against humanity preserve the integrity of the civilian population, war crimes preserve the necessary restraints on the horror of armed conflict, and aggression preserves the integrity of peaceful relations between States. War crimes—the most venerable body of international criminal law[130]—uniquely give effect to an entire body of public international law applying in armed conflict: IHL.[131] Thus, it cannot be said that war crimes are *per se* less serious than crimes against humanity: they are simply different.[132] This is demonstrated in practice by the Trial Chamber's conclusion that Mr Bemba deserved the *same* individual sentences for murder and rape both as war crimes and crimes against humanity.[133] The majority of the *Katanga* Trial Chamber also took the same approach.[134] Moreover, Mr Bemba's joint sentence is *already* the statutory minimum permitted under article 78(3)—his joint sentence (18 years) may "be no less than the highest

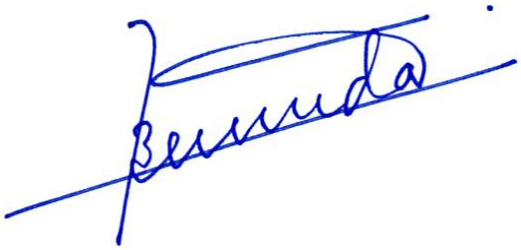
[127] T-374, 95:7-16.
[128] *See e.g.* Statute, art. 78; RPE, rule 145. *See also* Fife, p. 560.
[129] *See also* Statute, Preamble.
[130] Schabas, p. 220.
[131] *See e.g.* Cottier, p. 305, mns. 2, 5-6.
[132] *See e.g. Tadić* SAJ, para. 69; *Furundžija* AJ, paras. 240-243; *Mrkšić* AJ, para. 375.
[133] Sentencing Decision, para. 94.
[134] *Katanga* Sentencing Decision, para. 146.

individual sentence pronounced", which in this case is 18 years for the war crime of rape.[135] Therefore, even if *arguendo* the Appeals Chamber were to overturn the crimes against humanity convictions, the joint sentence must remain the same.

26. Second, any recharacterisation of Mr Bemba's *mens rea* would not necessarily justify a lower sentence. The duty under rule 145(1)(c) to consider "the degree of intent" in sentencing requires the assessment of the convicted person's *mens rea* on the facts, according to the principle of proportionate and individualised sentences.[136] And it is clear that in this case those factual findings, and the underlying evidence of Mr Bemba's *mens rea*, remain exactly the same. He becomes no less blameworthy. In any event, moreover, the article by Professor Robinson—upon which the Defence itself relies[137]—argues that even a "negligently ignorant commander may often be just as bad or worse than the commander with subjective foresight of crimes"; it is a question of fact.[138] Yet Mr Bemba was by no means ignorant, whatever the analysis, and fully deserves the individual sentences imposed, which should be given proper effect in an amended joint sentence.

Conclusion

27. For all the reasons above, and those previously argued by the Prosecution, the Appeals Chamber should dismiss the Defence appeals against conviction and sentence.



Fatou Bensouda, Prosecutor

Dated this 19th day of January 2018[139]

At The Hague, The Netherlands

[135] *See* Statute, art. 78(3); Sentencing Decision, para. 94(c).
[136] *See* *Lubanga* SAJ, para. 40; *Taylor* AJ, para. 666.
[137] *See* T-373, 9: 20-22.
[138] Robinson, p. 662.
[139] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.