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Date: **27 November 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 with Public Annexes A-B

Public Redacted Version of "Prosecution Response to 'Appellant's submissions on the contextual elements of crimes against humanity, pursuant to ICC-01/05-01/08-3564'"

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Introduction

1. Mr Bemba was correctly and reasonably convicted of crimes against humanity committed by MLC troops under his effective control pursuant to an MLC organisational policy.[1] These crimes formed part of a widespread attack against the CAR civilian population.[2] Notwithstanding Bemba's attempt to adopt aspects of the Appeals Chamber's questions as part of his appeal,[3] the Parties appear to *agree* on at least some of the key legal principles. Where they consistently divide is in the *application* of those principles to the facts of this case. But, just as in his appeal against conviction,[4] Bemba does not accurately portray the Judgment or the evidence. His renewed factual arguments must therefore fail.

Confidentiality

2. This response is filed confidentially because it refers to confidential information.

Submissions

3. The Prosecution responds in the following paragraphs to the seven questions asked by the Appeals Chamber,[5] and to Bemba's submissions.[6] Given the brevity of this response, the Prosecution can if necessary elaborate on its submissions in the forthcoming hearing, if requested in the Appeals Chamber's further scheduling order.[7]

A. Question (i): how should a 'policy' be understood; can it be inferred?

4. The requirement for a "State or organizational policy" ensures that an attack against the civilian population has a 'collective' dimension, such that a State or organisation may be said to have encouraged it, by acts or deliberate omissions.

5. Thus, the Prosecution and Bemba seem to agree that the policy requirement is "well understood", and that the "policy" in question "need not be formalised or expressly declared, and can be inferred from the circumstances of the attack."[8] Bemba, moreover, cites the *amicus curiae* brief of Professors Robinson, DeGuzman, Jalloh, and Cryer in the *Gbagbo*

[1] Judgment, paras. 687, 692, 694-695, 742. For full citations of all references, *see* Annex A.
[2] Judgment, paras. 672, 674, 688-690.
[3] Bemba Submissions, paras. 1, 3. In fact, the Defence appealed only the Chamber's approach to *mens rea* with regard to the contextual elements of crimes against humanity, and its factual determination that there was an "MLC" policy: Conviction Appeal Brief, paras. 414-421, 422-444.
[4] *See e.g.* Prosecution Response, para. 300.
[5] *See* Order for Submissions.
[6] *See* Bemba Submissions.
[7] *See* Scheduling Order.
[8] Bemba Submissions, para. 5.

case,[9] which further elucidates these principles,[10] and with which the Prosecution concurs. This was also the Chamber's legal approach, which Bemba did not appeal.[11]

6. It follows therefore that the Parties agree that the policy requirement—a diplomatic compromise[12]—has, in Professor Robinson's words, only a "modest purpose": specifically, to "screen out 'ordinary crime', that is, unconnected crimes committed by diverse individuals".[13] This was not only the view taken in *Tadić*,[14] which was the basis of the Canadian proposal leading to the drafting of article 7(2)(a),[15] but is also extensively supported in other academic commentary,[16] and is moreover consistent[17] with the uncertain status of the policy requirement in customary international law.[18]

7. Furthermore, a "modest" State or organisational policy requirement necessarily follows from the ordinary meaning, context, and object and purpose of article 7 and the Statute. Although the Prosecution acknowledges that judicial opinion at this Court has occasionally

[9] Bemba Submissions, para. 5, fn. 3 (citing *Gbagbo* Amicus Submission, para. 4). Professor Robinson, part of the Canadian delegation, was "one of the leading negotiators on Article 7 of the Statute": Kress, p. 868.
[10] *See e.g.* *Gbagbo* Amicus Submission, *especially* paras. 4-5, 14, 21-31.
[11] *See* Judgment, paras. 159-160. Concerning Bemba's appeal, *see above* fn. 3.
[12] *See e.g.* Sadat, p. 353; Hunt, pp. 64-65; Robinson (1999), pp. 47-48; Hwang, pp. 492-501; Van Schaack, p. 844; DeGuzman, p. 372; Von Hebel and Robinson, pp. 96-97. *See also* Judge Ozaki's Opinion, para. 31.
[13] Robinson (2014), p. 111. *See also* pp. 107, 111-112, 117-122, 133; Robinson (2015), pp. 703, 710.
[14] *Tadić* TJ, para. 653.
[15] Hwang, p. 503; *see also* p. 497; Von Hebel and Robinson, p. 95; Robinson (2015), pp. 708-709; *Gbagbo* Amicus Submission, para. 22. *See also* Van Schaack, p. 840.
[16] *See e.g.* Jalloh, pp. 431-432; Sadat, pp. 353-354, 371, 376-377; DeGuzman, p. 374; Chesterman, pp. 316-317; Cryer et al, pp. 197-198; Von Hebel and Robinson, p. 96; *Gbagbo* Amicus Submission, para. 22. Such an approach follows from the *collective* nature of crimes against humanity: Robinson (2001), p. 64; Robinson (2014), p. 114; Robinson (2015), pp. 710-711. *See further* Luban, pp. 90, 97-98, 108.
[17] *Gbagbo* Amicus Submission, para. 27. *See also* Sadat, p. 373.
[18] *See e.g.* Cryer et al, p. 197; Jalloh, pp. 396-402, 418, 435; Kress, p. 870; Halling, p. 831; Hansen, p. 7; O'Keefe, p. 144, mn. 4.58; Hall and Ambos, p. 244, mn. 109; Robinson (2014), pp. 108-110; Schabas (2008), pp. 960-965, 981; DeGuzman, p. 337; Robinson (1999), pp. 48-50; Robinson (2015), pp. 712-713; Cassese et al, p. 107; Cassese, pp. 375-376; Hunt, pp. 64-65; Mettraux, pp. 145, 173-175.On the one hand, text "essentially" identical to article 7 of the Statute has recently been provisionally adopted as draft article 3 for the proposed convention on crimes against humanity: CAH Draft Articles, art. 3; CAH Drafting Committee Statement, p. 6; *but see also* CAH Special Rapporteur Report, paras. 122 (*especially* fn. 222), 140; Sadat, pp. 373 (fn. 268), 375; DeGuzman, p. 353; Statute, art. 10. On the other hand, the *ad hoc* tribunals consistently *reject* a policy requirement: *see e.g.* *Kunarac* AJ, para. 98; *Semanza* AJ, para. 269; *Taylor* TJ, para. 511; *Case 002/01* AJ, paras. 707, 722-732; *see also* Sadat, p. 349 (policy requirement deliberately omitted from the SCSL Statute); Ambos and Wirth, pp. 2-3, 12, 26-34 (policy requirement deliberately omitted from the UNTAET Special Regulation, but arguing that "a strong tendency to include a link to an authority" nonetheless exists in custom); Holvoet, pp. 48-49 (policy requirement deliberately omitted from the KSC Law). Likewise, States' own practice is divided. Some have indicated that their domestic legislation incorporates the 'policy' requirement or makes general reference to the approach of the Statute: *e.g.* Belgian CAH Statement, p. 1; Czech CAH Statement, p. 1; Dutch CAH Statement, p. 2; Korean CAH Statement, p. 7; UK CAH Statement, p. 1. Others make no such suggestion: *e.g.* Australian CAH Statement, pp. 1-8; Finnish CAH Statement, pp. 1-2; French CAH Statement, pp. 3-4; German CAH Statement, pp. 5-7; Spanish CAH Statement, p. 3; Swiss CAH Statement, pp. 1-2. All these States are also States Parties to the Statute.

divided,[19] a correct interpretation of the Statute does not allow for any elevated interpretation of the policy requirement. Since the term "policy" is itself ambiguous,[20] contextual and teleological approaches are key: an elevated definition of "policy" which eliminates the disjunction between widespread *or* systematic attacks,[21] or arbitrarily curtails this Court's jurisdiction over crimes against humanity,[22] must be avoided.

8. It follows that the policy requirement under article 7(2)(a) is "not as difficult as some early ICC cases [made] it".[23] It need not be bureaucratic, formalised, or precise; and may be implicit.[24] It need not implicate the highest levels of the State or organisation concerned,[25] and may be manifest in relevant *action* or, as appropriate, in *deliberate inaction*.[26] In general, it may be inferred from the manner in which relevant acts occur.[27]

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[19] *See e.g.* *Gbagbo* Adjournment Decision, paras. 36, 44; *Gbagbo* Adjournment Decision, Dissenting Opinion, paras. 4, 48; *but see* *Gbagbo* Confirmation Decision, paras. 213-216. Judge Van den Wyngaert did not dissent on this point: *Gbagbo* Confirmation Decision, Dissenting Opinion. *See also* *Katanga* TJ, paras. 1108-1113; *Katanga* TJ, Dissenting Opinion, paras. 226-258, 268 (analogising the policy required by article 7(2)(a) to the common criminal plan required by article 25(3)(d)).

[20] *See* Robinson (2015), pp. 710 ("unfortunate label"), 721; Hunt, p. 65 ("a weasel word", and quoting Maxwell Fyfe: "'policy' is rather a loose word […] used by people when they want to get out of expressing a concrete meaning"); Werle and Burghardt, p. 1155 ("general agreement that this wording is ambiguous"); Hansen, p. 1 (quoting Burns, "extremely cryptic"); Jalloh, p. 436 ("linguistic quagmire"); Mettraux, pp. 143 ("linguistic haziness"), 149-150. *But see also* *Katanga* TJ, para. 1108, fn. 2632; *Gbagbo* Amicus Submission, para. 21.

[21] *Gbagbo* Confirmation Decision, para. 216. *See also* Sadat, p. 353; Halling, pp. 836-837; Robinson (1999), pp. 50-51; Hwang, p. 503; DeGuzman, pp. 372, 374; Cryer et al, p. 196; Robinson (2014), pp. 114-117, 132; Robinson (2015), pp. 706, 713-714, 721; Chaitidou, pp. 67, 72-73; *Gbagbo* Amicus Submission, para. 35. *See also below* fn. 65.

[22] *See e.g.* Sadat, pp. 335-336 (warning of "unduly restrictive interpretations of Article 7" based on "limitations […] not found in, or required by, the Statute, the Elements of Crimes, or customary international law"), 355, 370-371; Robinson (2015), pp. 703 ("it is vitally important" to correct the trend towards elevating the policy requirement "[i]f the ICC is to be a viable forum"), 722-723; *Gbagbo* Amicus Submission, paras. 14, 34, 36; Werle and Burghardt, pp. 1153, 1159-1160, 1165-1170; Halling, pp. 844-845; Mettraux, pp. 152-153. Although some authors have characterized the policy requirement as deliberately creating "a large net with big holes" (Schabas (2010), p. 853), not all 'big fish' are the same shape—anything more than a modest interpretation of the policy requirement arbitrarily allows some of the big fish out of the net: *see* Jalloh, pp. 389-390, 432, 434-435; *further below* fn. 29 (accompanying text). This is not a question of "uncritically 'victim-focused teleological interpretation'" but what the drafters of the Statute *actually* intended: Kress, p. 861; Jalloh, pp. 409, 413-415, 419; Robinson (2014), p. 113. By analogy, *see also* *Katanga* TJ, para. 1122.

[23] Robinson (2015), p. 723. *See above* fn. 19. *See also* *Gbagbo* Amicus Submission, para. 28.

[24] Robinson (2014), pp. 112, 122-130; Robinson (2015), pp. 709, 717-720; Werle and Burghardt, p. 1155; Robinson (1999), p. 51; Robinson (2001), p. 77; Hwang, p. 503; Cryer et al, p. 198; Guilfoyle, p. 247; Ambos (2014), p. 70; Hall and Ambos, p. 245, mn. 109; *Gbagbo* Amicus Submission, paras. 21, 24-26, 29, 32, 36. *See e.g.* Confirmation Decision, para. 81; *Katanga* Confirmation Decision, para. 396; *Gbagbo* Confirmation Decision, para. 215; *Katanga* TJ, para. 1108 (no "formal design"), 1110 (the policy may "become clear […] only in the course of its implementation, such that the definition of the overall policy is possible only *in retrospect*", emphasis supplied). *See also below* fn. 69 (no requirement for motive).

[25] Robinson (2014), p. 112; Robinson (2015), p. 709; *Gbagbo* Amicus Submission, para. 24. *See also* Judge Ozaki's Opinion, para. 30.

[26] Robinson (2014), pp. 112, 130-132; Cryer et al, p. 198; Guilfoyle, p. 247; Ambos (2014), pp. 70-72; Robinson (2015), p. 709. *See also below* paras. 10-11.

[27] Robinson (2014), pp. 112, 122-126, 128; Cryer et al, p. 198; Robinson (2001), p. 77; Robinson (2015), pp. 706, 709, 717-720, 723-724; *Gbagbo* Amicus Submission, paras. 24-26, 30-31, 33, 36; *Katanga* TJ, para. 1109;

9. Accordingly, proof of the State or organisational policy requirement is no different from proof of any other element under the Statute: it can be proven directly or inferentially, and does not depend on any particular type or form of evidence. Indeed, to achieve its object and purpose, it must be fact-sensitive,[28] and capable of application in a wide variety of social, political, and economic contexts.[29]

10. In these respects, the reference in the *Elements of Crimes*—which must be read consistently with the Statute[30]—to the need for the State or organisation to "actively promote or encourage" the attack merely explains the common sense view that the "policy cannot be inferred solely from the *absence* of governmental or organizational action";[31] it can, however, be established by means including evidence of the *positive acts* of State agents or members of the organisation (including at the 'grass roots' level), the *positive acts* taken in *response* to criminal and other conduct, or indeed by "a *deliberate failure* to take action" in relevant circumstances.[32] This interpretation is necessary to allow for the possibility, as in this case,[33] that an attack might only be charged as widespread and *not* systematic.[34]

11. Bemba's emphasis on the "sufficient evidential nexus" between the policy and the charged State or organisation is misplaced on the facts of this case.[35] The Statute does not require proof of a policy in the abstract, but a "*State* or *organizational* policy". Although this does not mean that the policy must be bureaucratic,[36] the acts or deliberate omissions which

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Judgment, para. 160 (fn. 361). *See also* Bemba Submissions, paras. 7-8; *cf.* para. 11. In her separate opinion, Judge Ozaki merely stated that "a pattern of violence […] does not itself constitute a 'policy'", although it is "relevant from an evidentiary perspective": Judge Ozaki's Opinion, para. 30. This is consistent with the Elements of Crimes: *see below* para. 10.

[28] By analogy, *see also* Eboe-Osuji, p. 124 (when an attack may be "directed" against a civilian population).

[29] *See e.g.* Sadat, pp. 336 (warning of "an under-inclusive conception of crimes against humanity that fails to encompass the diverse forms that such crimes can take, especially outside the political landscape of Europe"), 375; Hansen, pp. 39-41; Jalloh, pp. 416-417, 430-431; *Gbagbo* Amicus Submission, para. 34. *See also* Mettraux, p. 151; *above* fn. 22.

[30] Statute, art. 9(3). *See also* Ambos and Wirth, p. 33; Sadat, p. 355; Ambos (2014), p. 71. These elements, like article 7(2)(a) itself, were "part of a compromise reached after very difficult negotiations": Boas et al, p. 112; *see also* Robinson (2001), pp. 66-69, 74-76.

[31] *See* Elements of Crimes, art. 7, Introduction, para. 3, and fn. 6. *See also* DeGuzman, p. 374, fn. 182 (expressing concern that this language, on its face, is too restrictive).

[32] *See* Elements of Crimes, art. 7, Introduction, fn. 6. *See also* Jalloh, pp. 425-526; Robinson (2001), pp. 76-77.

[33] Confirmation Decision, para. 82.

[34] *See e.g.* Robinson (2014), p. 107 ("The term 'policy' is not equivalent to the term 'systematic'. 'Policy' does not necessarily require deliberate planning, direction, or orchestration; it requires only that some State or organization must have at least encouraged the attack, either actively or passively"); Ambos (2014), p. 71 ("to require an active policy for crimes against humanity would […] amount to deleting the 'widespread' alternative from Article 7"); Ambos (2011), p. 286 (favouring "a broad interpretation of the policy concept"); Ambos and Wirth, p. 34 ("A widespread attack which is not at the same time systematic must be one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction (toleration)").

[35] Bemba Submissions, para. 5.

[36] *See above* para. 8.

substantiate the policy must relate in some way to State agents[37] or members of the organisation. On the facts of this case, there is no question that the Chamber reasonably found an *MLC* organisational policy.[38] This was not solely "inferred from the manner in which the crimes were committed alone" but,[39] as the Prosecution has already argued, was expressly based on a cumulative assessment of multiple factors, including: the MLC troops' *modus operandi*, the recurrent pattern of violence over four and a half months encompassing each location in the broad geographical area under MLC control, the general motives of the MLC troops, specific MLC operations such as the punitive attack on Mongoumba, MLC orders, and not only the knowledge and acquiescence but the *active encouragement* of MLC commanders.[40] In these circumstances, undoubtedly, the organisational policy thus identified related sufficiently to the MLC.[41]

B. Question (ii): was a policy to attack the civilian population adequately described?

12. The Chamber's finding concerning the MLC organisational policy to attack the civilian population was adequately described,[42] in accordance with the law.[43] Bemba now contends that the organisational policy was inadequately charged,[44] alleging that the Pre-Trial Chamber first erred in charging the organisational policy,[45] and that the Trial Chamber then "ignored this policy in favour of a different, broader version."[46] This not only mistakes both the Confirmation Decision and the Judgment, but is opportunistic—Bemba failed to challenge the pleading of the organisational policy requirement at trial,[47] nor raised such arguments even in his specific ground of appeal claiming that the charges were inadequate.[48]

13. First, the Judgment did not exceed the scope of the Confirmation Decision, which concluded that "the attack perpetrated by MLC troops against the CAR civilian population

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[37] *See* Jalloh, pp. 423-424.
[38] *Contra* Conviction Appeal Brief, paras. 423-427.
[39] *Contra* Bemba Submissions, para. 11.
[40] *See* Judgment, paras. 675-687; Prosecution Response, paras. 296-328.
[41] *See also* Judgment, para. 686; Prosecution Response, para. 303 (the factors assessed by the Chamber "intrinsically linked such a policy to the MLC").
[42] *See below* para. 15.
[43] *See above* paras. 4-11.
[44] Bemba Submissions, para. 16.
[45] Bemba Submissions, para. 13.
[46] Bemba Submissions, para. 17. Although the Defence has elected to make this submission under question (iii) rather than question (ii), the intrinsic link between the two issues favours addressing them together.
[47] *See e.g.* Bemba Final Brief, paras. 381-397 (arguing inadequate notice regarding specific conduct, but not concerning the organisational policy), 398, 408-410 (arguing that the organisational policy was narrowly pleaded, but alleging it was inadequately pleaded).
[48] *See e.g.* Conviction Appeal Brief, paras. 115-128 (alleging specific acts were inadequately charged).

was conducted pursuant to an organizational policy."[49] This was the material fact to be proven at trial.[50] The subsequent passage quoted by Bemba did not identify *further* material facts,[51] but instead merely recapped the basis on which the Pre-Trial Chamber rejected Bemba's evidentiary challenge.[52] Correspondingly, the Judgment likewise only determined the existence of an MLC organisational policy "to attack the civilian population".[53] Since the Chamber was not bound to the same *evidentiary reasoning* adopted by the Pre-Trial Chamber, it was not obliged to enter findings with "reference to punishing civilians for their support of rebels or to instilling a climate of fear", nor limited only to considering the same "factors of pattern and motives".[54] Yet in any event the Chamber *did* expressly recognise evidence *inter alia* of the "recurrent pattern of violence"[55] and "the perpetrators' general motives", including "punish[ing] civilians who were suspected rebels or rebel sympathisers, or for MLC losses".[56] Bemba shows no error in these respects.

14. Second, the Confirmation Decision did not err in characterising the MLC organisational policy.[57] For the purpose of charging, it was crystal clear that the policy in question was an MLC policy.[58] It was not obliged further to "identify the necessary nexus of the policy to the MLC",[59] which again is an essentially evidentiary question. Accordingly, there was no need to cure the notice given of the organisational policy in this case,[60] nor indeed was the Prosecution (any more than Bemba) obliged to question witnesses in any particular fashion.[61] Likewise, the Pre-Trial Chamber did not "erroneously conflate the concept of 'policy' with that of 'system[atic]'".[62] Although evidence of a 'regular pattern' of criminality may not be *essential* to proving a policy,[63] it will often be the case that crimes executed according to a policy do follow *some* kind of pattern.[64] Yet this does not mean that

[49] Confirmation Decision, para. 110. *See also* para. 81.
[50] On the sufficiency of this material fact, *see e.g. above* fns. 24, 34; *also below* para. 15. On confirmation decisions, s*ee Lubanga* AJ, para. 124. On material facts, *see further below* para. 19.
[51] *Contra* Bemba Submissions, para. 12 (quoting paragraph 115 of the Confirmation Decision).
[52] *See* Confirmation Decision, paras. 111 (addressing alleged "inconsistencies in […] evidence"), 115 (rejecting "the Defence's challenge" on the evidence). *See further* paras. 112-114.
[53] *See e.g.* Judgment, paras. 676, 685, 687. *See also below* para. 15.
[54] *Contra* Bemba Submissions, paras. 17-19.
[55] Judgment, para. 677.
[56] Judgment, para. 678. *See also* para. 681 (considering the "punitive attack on Mongoumba").
[57] *Contra* Bemba Submissions, para. 13.
[58] *See e.g.* Confirmation Decision, para. 110 ("the attack perpetrated by MLC troops […] was conducted pursuant to an organizational policy"). *See also above* para. 11.
[59] *Contra* Bemba Submissions, para. 13.
[60] *Contra* Bemba Submissions, paras. 14-15.
[61] *Contra* Bemba Submissions, para. 15.
[62] *Contra* Bemba Submissions, para. 13.
[63] *Katanga* TJ, para. 1112. *See also* CAH Special Rapporteur Report, para. 143.
[64] *See e.g.* Confirmation Decision, para. 81; *Katanga* TJ, para. 1109.

all such crimes are systematic, implying a greater degree of rigour and coordination,[65] or that the "modest" policy requirement is misapplied if, on the facts, it is satisfied by *more specific* evidence than legally necessary.

C. Question (iii): what was the organisational policy?

15. Conforming to the Pre-Trial Chamber's approach,[66] the Chamber identified "a policy to attack the civilian population" and found this was "the only reasonable conclusion", even though this policy was not "formalised".[67] This was sufficient, and meets the requirement of article 7(2)(a) for a "State or organizational policy to commit such attack".[68] The Chamber was not required to ascribe to the MLC an ideology, motive or ulterior objective in manifesting its organisational policy.[69] Indeed, since the policy itself need not be formalised, expressly stated, or adopted at the highest levels,[70] it necessarily follows that the Chamber did not need to identify the policy in such terms.

D. Question (iv): was there a sufficient basis to find an organisational policy?

16. The factors identified in the Judgment cumulatively provided a sufficient basis to find the existence of the MLC organisational policy,[71] to the extent required by the law.[72] In this respect, since Bemba refers simply to his existing ground of appeal against the Chamber's factual reasoning,[73] the Prosecution likewise refers to its response.[74]

17. Bemba's claim that certain findings in the Judgment constitute "explicit contra-indications" of a policy misunderstands both the law that he purports to accept,[75] and the facts of this case. First, as previously noted, the existence of an organisational policy does not presuppose that *all* members of that organisation, including at the higher levels, partake in

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[65] *See e.g.* Sadat, p. 353; Robinson (1999), p. 50; Robinson (2001), p. 63; Cryer et al, p. 196; Von Hebel and Robinson, pp. 96-97; CAH Special Rapporteur Report, para. 143. *See also* *Gbagbo* Confirmation Decision, paras. 208, 216 (affirming that the test for 'attack' is less demanding than the test for 'widespread or systematic'); *Katanga* TJ, paras. 1101, 1113. *See also above* fn. 21.
[66] *See above* para. 13.
[67] Judgment, para. 676 ("the Chamber does not consider that the policy to attack the civilian population was formalised. Nonetheless, the Chamber is satisfied that the existence of a policy to attack the civilian population is the only reasonable conclusion"). On the factors considered, *see above* para. 11. *See also* Judgment, para. 687.
[68] *See* Statute, art. 7(2)(a);
[69] *Katanga* TJ, para. 1108; *Gbagbo* Confirmation Decision, para. 214 (citing *Ruto and Sang* Confirmation Decision, para. 213). Judge Van den Wyngaert did not dissent on this point: *Gbagbo* Confirmation Decision, Dissenting Opinion. *See also above* para. 8; Robinson (2015), pp. 715, 725-726, 728-731.
[70] *See above* para. 8.
[71] *Contra* Bemba Submissions, para. 20. *See above* para. 11.
[72] *See above* paras. 4-11.
[73] Bemba Submissions, para. 21 (citing Conviction Appeal Brief, paras. 422-444).
[74] Prosecution Response, paras. 296-328.
[75] *Contra* Bemba Submissions, para. 22. *See above* paras. 5-6.

it.[76] Thus, to any extent *arguendo* that some MLC members may have made some minor efforts to halt MLC criminality, this does not contradict the existence of a policy. Second, the existence of means within an organisation to control its members is not *per se* a contra-indicator of an organisational policy to attack a civilian population. To the contrary, it is the *way* in which such means are used which is significant.[77] Third, quite apart from the deficiency of the MLC Code of Conduct[78]—which, more to the point, was not made known to at least some MLC troops, including at a senior level[79]—the "limited"[80] measures actually taken by the MLC concerning crimes against the civilian population[81] were "grossly inadequate" and insincere.[82] This *strongly supports* the existence of a policy.

E. Questions (v)-(vi): whether, given the evidence accepted as credible, it was erroneous to conclude there was a 'course of conduct' and 'widespread' attack

18. The Chamber correctly found that there was an attack directed against a civilian population (*i.e.*, a course of conduct involving the *multiple* commission of acts punishable under article 7(1) against a civilian population) and that the attack was *widespread*. These are primarily *legal* questions concerning the process applied to make specific findings under article 7. Bemba's evidentiary arguments are addressed under question (vii) below.[83]

E.1. The approach to the decision-making process was correct

19. Judicial decision-making is conducted in three stages.[84] First, the Chamber must assess the credibility and reliability of the evidence. Second, based on the totality of that evidence,

[76] *See above* para. 8.
[77] *Contra* Bemba Submissions, para. 22 ("[r]egardless of the efficacy of these measures, their pertinence to the existence of a purported MLC organizational policy is plain").
[78] The prohibition of property offences against the civilian population was ambiguous: *see* Judgment, paras. 392-393; Prosecution Response, paras. 267-268.
[79] *See* Judgment, paras. 391, 736; Prosecution Response, paras. 265-266, 269. The Code of Conduct was also only available in French, and only translated into Lingala *ad hoc*, often orally: Judgment, paras. 392-393; Prosecution Response, para. 267.
[80] Judgment, para. 720 ("all of these measures were limited in mandate, execution and/or results").
[81] *See e.g.* Judgment, paras. 582-589, 720 (concerning the Mondonga Inquiry, which did not address the responsibility of commanders or inquire into murder or rape, and only resulted in the prosecution of seven soldiers (the Gbadolite trial: *see* paras. 597-600) for minor acts of pillage); 601-603, 722 (concerning the Zongo Commission, which only concerned pillaging occurring in Zongo); 604-606, 723 (concerning Bemba's letter to General Cissé, which Bemba never followed up); 612-620, 725 (concerning the Sibut Mission, which was not an investigation and was conducted in a coercive atmosphere).
[82] Judgment, paras. 727-728.
[83] *See below* paras. 30-41.
[84] *Ntagerura* AJ, para. 174; *Halilović* AJ, para.125. *See also Ngudjolo* AJ, paras. 130-193 ("First stage: Assessment of the credibility of evidence"), 194-226 ("Second Stage: Fact Finding"), 227-228 ("Third Stage: Final assessment of all facts and evidence").

the Chamber must determine whether the "material facts"[85] alleged by the Prosecution—and *only* the material facts[86]—are established beyond reasonable doubt. Third, the Chamber must apply the law to its findings made beyond reasonable doubt and determine whether the legal requirements of the charges are fully met. Notably, material facts are distinct from "subsidiary" or "intermediate" findings which, although potentially relevant to the Chamber's internal *reasoning*, need not be established to the requisite standard of proof.[87]

20. The Chamber correctly followed this approach to find there was a "course of conduct involving the *multiple* commission of criminal acts" and that there was a "*widespread* attack".[88] First, it assessed the credibility and reliability of the evidence before it.[89] Based on this credible and reliable evidence, considered as a whole, it then found beyond reasonable doubt that there was an MLC attack against the CAR civilian population: this attack comprised *many* acts prohibited under article 7(1), lasted for four and a half months, and encompassed a large geographic area.[90] Finally, correctly applying the law to these factual findings, the Chamber concluded not only that there was a "course of conduct involving the *multiple* commission of criminal acts"[91] but that the attack was *widespread*.[92]

E.2. The Chamber correctly applied the tests for "multiple" acts and "widespread" attack

21. The Chamber did not err in law in determining the *multiple* commission of acts under article 7(1), establishing a course of conduct, or the *widespread* nature of the attack.

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[85] "Material facts" are those facts charged which are "indispensable for the conviction", and are usually drawn from the legal elements of crimes and modes: *see e.g.* *Lubanga* Reg 55 AD, fn. 163; *Lubanga* AJ, para. 121; *Gbagbo* Confirmation Hearing Decision, paras. 27-28; *Banda* Confirmation Decision, paras. 36-37; Chambers Practice Manual, p. 12. *See also* *Ntagerura* AJ, para. 174.

[86] *Lubanga* AJ, para. 22 ("'not each and every fact in the Trial Judgment must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends'", quoting *D.Milošević* AJ, para. 20); *Lubanga* TJ, para. 92; *Ngudjolo* TJ, para. 35. *See also* Chambers Practice Manual, p. 12; Prosecution Sentence Response, para. 77.

[87] *Lubanga* Reg. 55 AD, fn. 163; *Lubanga* AJ, paras. 22, 121; *Ngudjolo* AJ, Dissenting Opinion, para. 34; *Gbagbo* Confirmation Hearing Decision, paras. 27-28; *Banda* Confirmation Decision, paras. 36-37; Chambers Practice Manual, p. 12. At the *ad hoc* tribunals, *see further* *Halilović* AJ, para. 125; *Blagojević* AJ, para. 226; *Ntagerura* AJ, para. 174; *Galić* AJ, para. 218; *see also* *Kupreškić* AJ, para. 226 (applying this principle). In national jurisdictions, *see further e.g. Shepherd*, pp. 164-166 (Australia); *Chamberlain*, p. 626 (Australia); *Morin*, pp. 346-347, 354-362 (Canada); *JMH*, para. 31 (Canada); *MacKenzie* (Canada); *Thomas*, pp. 37-38 (New Zealand). *See also Meehan*, pp. 32-34 (UK (Northern Ireland)); *Murray*, pp. 126-127 (UK (Northern Ireland)); *Viafara-Rodriguez*, p. 913 (USA). *See also* Prosecution Sentence Response, para. 77.

[88] *See e.g.* Judgment, paras. 215, 218, 225.

[89] Judgment, paras. 563 ("reliable evidence from various sources"), 671 ("consistent and corroborated evidence"), 688 ("consistent and corroborated evidence").

[90] Judgment, para. 563. *See also* paras. 564, 671 (also finding that relevant acts were consistent with evidence of an MLC *modus operandi* throughout the 2002-2003 CAR operation).

[91] Judgment, paras. 671-672, and fn. 2094.

[92] Judgment, paras. 688-689, and fn. 2118.

22. To establish the *multiple* commission of acts, the Chamber had to find a "campaign or operation carried out against the civilian population",[93] or "a series or overall flow of events as opposed to a mere aggregate of random acts".[94] "[P]rovided that each of the acts fall[s] within the course of conduct and [they] cumulatively satisfy the required quantitative threshold",[95] which is low, the specific number is irrelevant—anything from "more than a few", to "several" or indeed "many" acts will suffice, even occurring in a single event.[96] It is clear the requirement has no connotation of scale, beyond the minimum required to be 'multiple'. Indeed, since a purely systematic attack may be charged, the requirement for the multiple commission of acts cannot amount to a requirement that the attack is widespread.[97]

23. By contrast, to establish the *widespread* nature of the attack, the Chamber did have to find that the attack was large-scale in nature affecting a large number of targeted persons.[98] Such attacks may be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[99] But what is 'large' is not absolute, and may also depend on other factors[100]—the assessment of whether the attack is widespread is thus neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts.[101] Likewise, although the Chamber rejected the relevance of the temporal scope of the attack,[102] this approach is not universally shared.[103] Thus, relevant factors may include the "large number of acts", the "number of individuals" directly victimised, the duration, and the size of the population or area otherwise affected.[104]

24. Notably, it is these material facts (*multiple* acts, *widespread* attack) which must be proven beyond reasonable doubt and not any *uncharged* acts, for which the accused is not

[93] Judgment, para. 149 (citing Confirmation Decision, para. 75; *Katanga* TJ, para. 1101). *See also* *Ruto and Sang* Confirmation Decision, para. 165; *Kenya* Art 15 Decision, para. 80; *Côte d'Ivoire* Art 15 Decision, para. 31; *Gbagbo* Confirmation Decision, para. 209.
[94] Judgment, para. 149 (citing *Gbagbo* Confirmation Decision, para. 209).
[95] Judgment, para. 150.
[96] Judgment, para. 150; Confirmation Decision, para. 81; *Katanga* TJ, para. 1101. *See also* *Gbagbo* Amicus Submission, paras. 7-13.
[97] Judgment, fn. 371; *Katanga* TJ, para. 1101. *See also* *Gbagbo* Amicus Submission, paras. 7-13; Von Hebel and Robinson, p. 96.
[98] Judgment, para. 163; *Katanga* TJ, para. 1123.
[99] Judgment, para. 163, Confirmation Decision, para. 83; *Gbagbo* Confirmation Decision, para. 222.
[100] *See e.g.* *Katanga* Confirmation Decision, para. 395 ("'widespread' has also been explained as encompassing 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"). *See also* Bemba Submissions, paras. 42, 47 ("no numerical threshold").
[101] Judgment, para. 163; *Gbagbo* Confirmation Decision, para. 222.
[102] Judgment, para. 163.
[103] *See e.g.* *Blé Goudé* Confirmation Decision, para. 131; *Ongwen* Confirmation Decision, para. 63; *Ntaganda* Confirmation Decision, para. 24.
[104] *See e.g.* *Blé Goudé* Confirmation Decision, para. 131. Judge Van Den Wyngaert, although writing separately, did not dissent in this respect: *see e.g.* *Blé Goudé* Confirmation Decision, Dissenting Opinion, para. 2.

criminally responsible and thus are for these purposes merely *evidence*.[105] Accordingly, it would have been legally incorrect for the Chamber to require anything except the material facts and charged acts to be proven beyond reasonable doubt.[106] Rather, the Chamber was required to assess all of the evidence *cumulatively*, and to determine on this basis whether each material fact was established beyond reasonable doubt. In other words, the standard of proof applies to the 'existence of the forest', not the individual trees.[107] This is the consistent approach not only of this Court,[108] but also other international tribunals.[109] It also follows that the Chamber is entitled to some deference in determining what *kinds* of evidence it considers to be relevant and probative of particular material facts.[110]

25. Bemba misrepresents the basis upon which the Chamber was entitled to conclude that the 'attack' in this case was widespread. First, although the Judgment is not always clear in

[105] *See further* *Gbagbo* Adjournment Decision, Dissenting Opinion, paras. 40-45. Thus, the "attack" is not the "mechanical aggregate" of specific incidents, which are themselves proved, but rather those incidents are merely *evidence* of the attack.
[106] *See above* paras. 19-20. In addition, of course, the Chamber entered findings beyond reasonable doubt for the *charged* acts of murder and rape: Judgment, paras. 624, 633. *Contra* Bemba Submissions, paras. 27, 34.
[107] *See e.g.* *Gbagbo* Amicus Submission, para. 42. A contrary approach would lead to unwieldy and lengthy trials, in which enormous time and effort would be spent on proving specific incidents for which the accused person might often not be held criminally responsible. In particular, this would make crimes committed as part of a "widespread" attack on a civilian population very difficult to punish. Nor is requiring proof of a 'sufficient number of incidents' an adequate compromise, since it introduces inevitable vagueness and subjectivity *ex ante* regarding what the Prosecution has to prove to meet the standard of proof: *cf.* Chaitidou, pp. 92-93.
[108] Other than in this case, no Trial Chamber has yet been required to rule on this issue: *see e.g.* *Katanga* TJ, para. 1162 (concluding that the attack was systematic, and thus declining to rule whether it was also widespread). However, at the lower article 61 standard of proof, *see e.g.* *Ongwen* Confirmation Decision, paras. 60-63; *Ntaganda* Confirmation Decision, paras. 22-30; *Blé Goudé* Confirmation Decision, para. 131; *Ruto and Sang* Confirmation Decision, paras. 175-178; *Katanga* Confirmation Decision, paras. 408-411. In *Gbagbo*, litigation before the Pre-Trial Chamber also touched on some similar issues (*e.g.* *Gbagbo* Adjournment Appeal Brief, paras. 17-53; *Gbagbo* Amicus Submission, paras. 7-13), but the Appeals Chamber did not rule on them: *Gbagbo* Adjournment AD, paras. 53-54. Instead, the litigation turned solely on the question whether specific "incidents" had each been pleaded as material facts: *Gbagbo* Adjournment AD, paras. 36-48. But this is not the case here, where only the 'course of conduct' and the 'widespread' nature of the attack are material facts: Confirmation Decision, paras. 91-92 ("having reviewed the Disclosed Evidence as a whole", finding "the existence of an attack", paras. 117-124 (assessing the "evidence as a whole", concluding that the attack was "widespread"). The DCC, an auxiliary document, took the same approach: DCC, paras. 36-40 (pleading multiple incidents of murder, rape, and pillage from 26 October 2002 to 15 March 2003, and estimating an overall number of victims (c. 1000) but not detailing individual acts or incidents, other than those charged).
[109] *See e.g.* *Case 002/01* TJ, paras. 169-173, 193 (finding a widespread attack based on a summary assessment of the events that occurred between 17 April 1975 and 6 January 1979, conducted in five paragraphs); *Taylor* TJ, paras. 518-546, 556, 558 (finding a widespread attack based on a general overview of the events that occurred between 30 November 1996 and 18 January 2002, including no detailed findings about individual incidents or crimes); *Vasiljević* TJ, paras. 51-56, 58 (even in the smaller context of a single town (Višegrad), finding a widespread (and systematic) attack based on a summary analysis of the relevant context of the charged crimes); *see also* *Lukić* TJ, paras. 37, 889-895. *See also* *Soedjarwo* (reasoning that 'widespread' can be proven without specific details). Sometimes, as in the *Prlić* case, findings on the widespread nature of the attack can be made exclusively on the basis of *charged* criminal incidents (if they are extensive), but this does not mean this approach is necessary where the charged incidents are not so wide: *see* *Prlić* TJ, Vol.III, paras. 638-646.
[110] For example, demographic evidence (where available) might be probative of the widespread nature of an attack, while not being suited to proof of the details of particular criminal episodes.

this respect, the Chamber appears to have restricted itself to considering acts of murder and rape.[111] Second, in determining that "many" acts of rape and murder occurred,[112] the Chamber did not confine itself to the charged acts but also considered the broader evidence:[113] *cumulatively*, this established that the necessary threshold was met.[114] In this respect, Bemba is thus wrong both to suggest that the 'widespread attack' found by the Chamber was confined to "[t]wo specific locations" or to "[t]wo specific time periods".[115] His claim for "white space" unaffected by the attack approaches the evidence in isolation, and must be rejected.[116] Likewise, although the Chamber did not itself consider the duration of the attack, it was entitled to do so and this only further confirms the widespread nature of the attack.[117] Comparison to other cases featuring a widespread attack based simply on the numbers of victims is immaterial;[118] faced with such an argument, one might equally draw attention to the 5,229 victims participating in this case,[119] whose observations on this issue will no doubt be instructive. But the material point remains that the Chamber's legal approach in finding a widespread attack was wholly correct.

E.3. Appropriations of property meeting the requirements of article 7(1)(k) may, in any event, legally be included in the "attack"

26. Notwithstanding the Prosecution's view that the Chamber did not rely on certain appropriations of property to establish the attack against the CAR civilian population or its widespread nature (*i.e.*, as "acts referred to in paragraph 1" of article 7),[120] any error in this regard would be harmless.[121] This is because it would not, ultimately, be legally incorrect for the Chamber to have done so, nor in any event were the acts of murder and rape alone insufficient to constitute a 'widespread' attack.

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[111] *See e.g.* Judgment, paras. 151, 563 (noting separately evidence of "many acts of murder and rape" and "many acts of pillaging"), 671 (discussing evidence of 'multiple acts', and referring to "many acts of rape and murder", but also cross-referring in this context *inter alia* to section VI(C), concerning pillage). *But see* para. 688 (discussing evidence of 'widespread', and referring to "many acts of rape, murder, and pillaging"). *Contra* Bemba Submissions, paras. 25, 49-50. *But see also further below* paras. 26-29 (concerning the legal possibility, in any event, of considering acts under article 7(1)(k)).
[112] Judgment, paras. 563, 671, 688.
[113] Judgment, para. 688, fn. 2118 (citing para. 563, which refers to sections V(C)(3)-(7), and V(C)(9)-(10)).
[114] *See above* paras. 19-20, 24. *Contra* Bemba Submissions, para. 40.
[115] *Contra* Bemba Submissions, para. 41.
[116] *Contra* Bemba Submissions, para. 43.
[117] *See above* fns. 102-103.
[118] *Contra* Bemba Submissions, paras. 47-48.
[119] *See* Judgment, para. 18. In each case, the Chamber was satisfied to a *prima facie* standard that the applicant had suffered harm as a result of one of the crimes charged against Mr Bemba: para. 20. The victims' application forms were not, however, relied upon as evidence: para. 272.
[120] *See above* para. 25.
[121] *See further e.g.* Prosecution Response, paras. 223, 225.

27. At trial, the Prosecution and Defence disagreed on the legal scope of the acts which might constitute the 'attack' for the purpose of crimes against humanity. The Chamber agreed with the Defence that "only those acts enumerated in Article 7(1)(a) to (k) may be relied upon to demonstrate the 'multiple commission of acts'",[122] which the Prosecution accepts. However, although these acts do not include pillage *stricto sensu*,[123] the Chamber did not expressly consider the implications of article 7(1)(k), which allows for an attack to be constituted, *inter alia*, by "[o]ther inhumane acts of a similar character" to those in article 7(1)(a) to (l) "intentionally causing great suffering".

28. Such inhumane acts do not always connote the direct commission of violence.[124] As early as 1946, it was recognised that certain property crimes could be sufficiently grave to constitute crimes against humanity.[125] More recently, Ambos has argued for an understanding of 'other inhumane acts' that encompasses "serious" violations of human rights, including the right to a fair trial and the right to property.[126] Other commentators have noted that intentional "food deprivation" or "denial of humanitarian assistance" might qualify,[127] and Pre-Trial Chamber II accepted in principle that property destruction could meet the threshold.[128] The property appropriations in this case—where persons were intentionally deprived of the essential means for sustaining their lives and livelihoods—demonstrate such circumstances. Such conduct is of a character similar to the conduct expressly proscribed by article 7(1), and causes great suffering, or serious injury to body or to mental or physical health.[129] As the Chamber found, "[i]n P42's words, they took 'everything' and some victims were left with nothing." The consequences for victims were "grave" and "far-reaching".[130]

29. Accordingly, although Bemba was neither charged nor convicted of crimes against humanity on the basis of property appropriations—and this is not a position which the

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[122] Judgment, para. 151.
[123] *Katanga* TJ, Dissenting Opinion, para. 273. *See also* Bemba Closing Argument, p. 44.
[124] *See e.g.* Eboe-Osuji, p. 119. *See also* *Akayesu* TJ, para. 581 (using the example of apartheid).
[125] *See e.g.* Schwelb, p. 191 (quoting Lauterpacht, "'it is not helpful to establish a rigid distinction between offences against life and limb, and those against property. Pillage, plunder, and arbitrary destruction […] may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance").
[126] Ambos (2014), pp. 115-116.
[127] Hall and Stahn, pp. 238-239, mn. 99 (citing DeFalco and Rottensteiner).
[128] *See* *Kenyatta* Confirmation Decision, paras. 278-279.
[129] Statute, art. 7(1)(k). *See also* *Katanga* Confirmation Decision, paras. 445-453.
[130] Judgment, para. 646. *See also* Sentencing Judgment, paras. 49 ("grave consequences"), 50 ("far-reaching" consequences for victims, "often" leaving them "with nothing"), 51 ("often leaving them without basic necessities"), 56 (property was taken "without regard to the victims' livelihood or well-being"), 57 ("exceptional nature" of property appropriations in this case).

Prosecution seeks in any way to undermine—the Appeals Chamber nonetheless should not disturb the Chamber's finding of a *widespread attack* on the basis of any reliance *arguendo* upon evidence of property appropriations causing grave harm *unless* it is satisfied that those appropriations could not reasonably meet the requirements of article 7(1)(k).

F. Question (vii): whether, in respect of questions (v)-(vi), it was erroneous for the Chamber to have reached its conclusions on the evidence before it

30. At all times, the Chamber applied the required rigorous evidential standard.[131] Bemba fails to show that no reasonable Chamber could have found a 'course of conduct' and 'widespread' attack based on the totality of the evidence,[132] which included (but was not limited to) evidence of charged acts.[133] This "reliable evidence" emanated from "various sources, including testimony, as corroborated by media articles, NGO reports, and the *procès verbaux d'audition de victime* submitted to the Bangui Court of Appeals".[134] This evidence was correctly considered *cumulatively*,[135] both to assess its credibility and reliability, as well as to enter the relevant factual findings.[136]

31. Accordingly, the Chamber reasonably found that there was a course of conduct involving the multiple commission of acts under article 7(1), and that the charged acts of murder and rape were part of this course of conduct.[137] To so conclude, the Chamber relied upon mutually corroborative direct (first-hand) and hearsay evidence pertaining to: i) the charged acts of murder and rape;[138] and ii) the MLC troops' general conduct[139] and *modus operandi*.[140] Given this element's low threshold,[141] the Chamber's conclusion cannot sensibly be challenged.[142]

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[131] *Contra* Bemba Submissions, paras. 31-36.
[132] *See Lubanga* AJ, para. 27.
[133] *See* Judgment, fn. 1736 (cross-referring to the facts and evidence discussed in sections V(C)(3)-(7) and V(C)(9)-(10), which address: crimes in Bangui (paras. 459-484), PK12 (paras. 485-519, PK22 (paras. 520-523), Damara (paras. 524-526), Bossembélé-Bozoum axis (paras. 527-528, 534-535), and Sibut (paras. 531-533)).
[134] Judgment, para. 563 (emphasis added).
[135] Judgment, paras. 563 ("reliable evidence from various sources"), 671 ("consistent and corroborated evidence"), 688 ("consistent and corroborated evidence").
[136] *Ntagerura* AJ, para. 174; *Halilović* AJ, para.125.
[137] Judgment, paras. 671-672.
[138] Judgment, para. 671 (citing sections VI(A)-(C), and para. 563, citing sections V(C)(3)-(7), V(C)(9)-(10)).
[139] Judgment, para. 671, fn.2094 (citing para. 563).
[140] Judgment, para. 671, fn. 2095 (citing para. 564). Bemba's challenge to this finding not only repeats his arguments on appeal (*e.g.* Bemba Submissions, para. 35 (citing Conviction Appeal Brief, paras. 428-432; Prosecution Response, paras. 305-310)) but misrepresents the Chamber's findings: *see* Judgment, paras. 627, 634, 642. *See also* Prosecution Response, paras. 359-363.
[141] *See above* para. 22.
[142] *Contra* Bemba Submissions, para. 31.

32. Likewise, the Chamber reasonably found that the attack against the CAR civilian population, in the context of the 2002-2003 CAR Operation, was widespread,[143] comprising "*many acts* of rape [and] murder" over "a large geographical area".[144] To reach this conclusion, the Chamber relied upon mutually corroborative direct and hearsay evidence pertaining to: i) the charged acts of murder and rape; and ii) the MLC troops' general conduct.[145] Again, this conclusion was reasonable.

33. Indeed, the evidence of "many acts" of rape and murder was considerable, even if not all cited directly in the Judgment.[146] The Chamber's decision not to identify a particular number of victims was not only appropriately cautious (since the evidence is in this context necessarily fragmentary, looking at different times and locations[147]) but also right in principle—because a given number is not legally required. Yet, for example, just one UNDP-sponsored report identified approximately 514 victims of violent crime in the Bangui area alone at the material time, including at least 293 rapes.[148] P229, familiar with this study, suggested the number of rapes was higher still.[149] At trial, Bemba raised no more than a desultory challenge to the 'widespread' nature of the attack, and did not question this particular evidence at all.[150] Likewise, evidence such as the *procès-verbaux* provide a further snapshot of individual victimisation, detailing 113 rapes and 51 murders, consistently associated with acts of pillage.[151] Evidence of this kind before the Chamber was not only

[143] Judgment, para. 689.
[144] Judgment, para. 688 (emphasis added, referring to para. 563). This finding should also be considered in the context of the Chamber's conclusion, in finding a 'course of conduct', of a "*modus operandi* on the part of the MLC soldiers throughout the 2002-2003 CAR Operation and throughout the areas of the CAR in which they were present": para. 671 (citing para. 564).
[145] Judgment, para. 688, fn. 2118 (citing para. 563, which cites sections V(C)(3)-(7), V(C)(9)-(10)).
[146] Judgment, para. 227 (recalling that the Chamber was "under no obligation 'to refer to the testimony of every witness or every piece of evidence on the trial record'", citing appellate authority from the ICTY).
[147] *See also e.g.* EVD-T-OTP-00442/CAR-OTP-0011-0503, p. 0508 (noting that adverse security circumstances in late 2003 prohibited travel beyond Bangui).
[148] *See* EVD-T-OTP-00568/CAR-OTP-0030-0002). This report does not appear to be cited anywhere in the Judgment, but was clearly before the Chamber and was not excluded: *see* Prosecution Final Brief, paras. 34 (fn. 98), 109. As the Pre-Trial Chamber found, the methodology and context of the report support its reliability: Confirmation Decision, paras. 120-121. It was also mentioned by P229 (*e.g.* T-99, 49:20-51:19) and relied upon by other bodies, such as FIDH, in reports which the Chamber *did* cite in the Judgment: *see e.g.* EVD-T-OTP-00409/CAR-OTP-0004-0881, pp. 0942-0943; Judgment, paras. 461 (fn. 1304), 486 (fn. 1408), 520 (fn. 1567).
[149] *See e.g.* T-99, 49:20-51:19 (referring to EVD-T-OTP-00568/CAR-OTP-0030-0002).
[150] *See* Bemba Final Brief, paras. 398-412 (challenging Bemba's knowledge of the attack on the civilian population (*see* Prosecution Response, paras. 278-284) and the organisational policy, and referring only in paragraph 412 to the "paucity and unreliability of the evidence" of the widespread attack); Bemba Closing Argument, pp. 27-28, 39, 42 (without particulars, doubting the existence of a "tsunami of rape", and criticising only reliance on "expert witnesses, such as [P-229], in order to prove […] the contextual elements").
[151] *See* Annex B. *See also* EVD-T-OTP-00045/CAR-OTP-0010-0107, p. 0112 (P9 noting that "*je ne crois pas que toutes les victimes se sont présentées dans cette affaire. Les rapports du Ministère des Affaires Sociales que nous avons reçus s'élevaient à 250. Ils travaillent avec les victimes du PK 12, du km 5 et autres quartiers de la ville de Bangui*"); Prosecution Final Brief, para. 110.

corroborated by the evidence of charged acts, but also by the numerous NGO reports, media reports, and other evidence recounting similar crimes at various locations and times throughout the area during the 2002-2003 CAR Operation.[152]

34. Bemba's submissions that the Chamber "relied solely on paragraph 563",[153] and that the majority of the evidence is hearsay or cannot be relied upon,[154] thus misrepresent the Chamber's reasoning and conclusion, and ignore most of the evidence and the Chamber's findings. His allegation that "[m]uch of the evidence cited in paragraph 563 has nothing to do with rape or murder" is simply incorrect.[155] As the following paragraphs further show, the Chamber's conclusion that there were "many acts" of rape and murder was reasonable—and since this sufficed to establish the existence of the course of conduct and the widespread nature of the attack,[156] any reference also to the appropriation of property was irrelevant.[157]

F.1. Bemba misrepresents the testimony of the eight witnesses cited at paragraph 563

35. The Chamber reasonably relied, with other direct evidence, on the consistent and mutually corroborative evidence of eight witnesses to establish not only that multiple acts of rape and murder occurred but, indeed, that they were numerous and geographically widespread.[158] Bemba seeks to minimise these witnesses by underplaying relevant aspects of their testimony, mischaracterising them as having nothing to do with rape or murder.[159]

- CHM1 was [REDACTED], [REDACTED].[160] He [REDACTED] reports of criminal conduct;[161] his reference to "abuses and acts of violence" was "all encompassing" including rape.[162]

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[152] *See e.g.* Judgment, para. 563. *See especially* e.g. EVD-T-OTP-00442/CAR-OTP-0011-0503, pp. 0507-0516 (AI report referring to approximately 26 murders and "widespread rapes" potentially up to 316); EVD-T-OTP-00395/CAR-OTP-0001-0034, pp. 0048-0053 (FIDH report referring to accounts of approximately 6 murders and "many rapes", exceeding 84); EVD-T-OTP-00411/CAR-OTP-0004-1096, p. 1103 (FIDH report referring to victims' accounts of "systematic[]" murder and rape). On the FIDH and AI reports, *see* Prosecution Final Brief, paras. 111-112. *See further* paras. 34, 45-48, 50-51, 53, 55, 72, 76, 78, 80, 91, 94, 97-98.
[153] Bemba Submissions, para. 24.
[154] Bemba Submissions, paras. 31-34, 36, 39.
[155] *Contra* Bemba Submissions, paras. 28, 30.
[156] *See above* paras. 24-25.
[157] *But see also above* paras. 26-29 (even if the Chamber had also considered the appropriation of property, or the acts of murder and rape did not alone constitute a widespread attack, finding a widespread attack remained correct and reasonable).
[158] *See* Judgment, para. 563, fn.1736 (citing evidence of rape and murder in Bangui, PK12, PK22, Damara, and Bossembélé-Bozoum axis (V(C)(3)-(7)), and Sibut and Bossembélé-Bassamboa axis (V(C)(9)-(10)).
[159] *Contra* Bemba Submissions, paras. 28-29. By contrast, Bemba does not challenge the relevant content of the other documentary evidence, but only whether it could properly have been relied upon: *see below* paras. 39-41.
[160] *See* T-353, 16:6-17:11.
[161] *See* T-355, 22:23-23:2, 24:17-25:9.
[162] *See* T-356, 64:18-65:3. *Contra* Bemba Submissions, para. 28(i).

- P229 is Head of the Psychiatry Department of the National Hospital in Bangui, and has considerable direct experience assisting victims of sexual violence arising from the 2003 conflict.[163] He explained that, from the reports he received and interviews he conducted, the perpetrators were repeatedly identified as "*Banyamulengue*".[164]

- In addition to his reference to "evil deeds",[165] P69 witnessed his sister's murder, his wife's rape and was himself raped.[166]

- P6 (a CAR public prosecutor) and P9 (a CAR investigative judge) provided reliable direct evidence about their own official judicial inquiry,[167] in which they interviewed victims of murder, rape and pillage.[168]

- P178 not only testified about MLC combat locations,[169] but also murders and rapes.[170]

- P68 not only referred to pillage and unspecified abuses mentioned by people around her neighbourhood,[171] but was also raped herself, and witnessed her sister's rape.[172]

- V2 visited the hospital in his capacity as president of a youth movement and saw victims of murder and rape, including a naked girl throwing up sperm.[173]

F.2. Bemba misrepresents the Chamber's findings on the commission of murder and rape

36. Bemba also challenges the Chamber's reference to the evidence discussed (and the findings made) in sections V(C)(3), V(C)(4), V(C)(5), V(C)(6), V(C)(7), V(C)(9) and V(C)(10),[174] alleging that the findings "are not supported" by the evidence.[175] However, Bemba ignores the specific evidence and detailed findings set out in those passages.[176] Thus:

- Concerning Bangui, in section V(C)(3), Bemba ignores the evidence of murder and rape discussed in the 10 pages following paragraph 461.[177]

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[163] T-99, 20:1-6, 21:6-9, 34:12-24. *Contra* Bemba Submissions, para. 28(ii).
[164] T-100, 15:1-5; *see also* T-101, 21:6-11. *See also above* para. 33.
[165] Bemba Submissions, para. 28(iii).
[166] *See* Judgment, paras. 496, 498.
[167] *Contra* Bemba Submissions, paras 28(iv)-(v). *See* Judgment, paras. 264, 564.
[168] *See* Prosecution Response, para. 308. *See also* Confirmation Decision, paras. 118-124.
[169] Bemba Submissions, para. 28 (vi).
[170] T-152, 5:25-8:17.
[171] Bemba Submissions, para. 28 (vii).
[172] Judgment, para. 633 (a).
[173] T-223, 36:24-37:5; T-224, 6:3-14. *Contra* Bemba Submissions, para. 28 (viii).
[174] Judgment, para. 563, fn.1736 (citing evidence of rape and murder in Bangui, PK12, PK22, Damara, and Bossembélé-Bozoum axis (V(C)(3)-(7)), and Sibut and Bossembélé-Bassamboa axis (V(C)(9)-(10)).
[175] Bemba Submissions, para. 30.
[176] Judgment, para. 671 (citing para. 563, referring to sections V(C)(3)-(7), V(C)(9)-(10) in their entirety). *Contra* Bemba Submissions, para. 30 (notably challenging 'overview' paragraphs in the Judgment: *e.g.* paras. 461, 486, 520, 527, 531).
[177] *Contra* Bemba Submissions, para. 30(i). *See* Judgment, paras. 462-484. CHM1 specifically testified about rapes, murders and pillaging: *see above* fns. 161-162. Bemba oversimplifies P6's evidence: *see above* fns. 167-168. *See also* Prosecution Response para. 308.

- Concerning PK12, in section V(C)(4), Bemba ignores the evidence of murder and rape in the 15 pages following paragraph 486.[178]

- Concerning PK22, in section V(C)(5), Bemba ignores the evidence of murder and rape in the two pages following paragraph 520.[179]

- Concerning sections V(C)(6)-(7) and (9), Bemba merely rejects (incorrectly) mutually corroborative evidence of murders and rapes—in Damara,[180] on the Bossembélé-Bozoum axis,[181] and in Sibut[182]—as mere hearsay.[183]

37. Furthermore, Bemba entirely fails to mention, or to challenge, the Chamber's findings in section V(C)(11) on crimes committed in Mongoumba,[184] which must equally have formed

[178] *Contra* Bemba Submissions, para. 30(ii). *See* Judgment, paras. 487-519. Contrary to Bemba's submission, P73, who was personally attacked and threatened with death by MLC soldiers who occupied his house in PK12 (*see* Judgment, para. 514), testified about abuses *other* than pillaging in PK12: T-70, 31:4-32:14. Similarly, P178 testified about crimes other than pillaging—including rape and murder: *see e.g.* T-151, 14:16-21, 16:8-14. P42 witnessed the rape of his 10 year-old daughter by MLC soldiers: *see* Judgment, para. 516. Bemba states that P23 never witnessed any murder, but omits to recall that P23 witnessed the rape of two of his daughters: *see* Judgment, para. 493. Bemba concedes that P38 witnessed a rape, but P38 also testified that the school became a place where the MLC raped girls: T-33, 54:18-55:10. Bemba observes that P69 spent one day at PK12, but omits to recall that P69 witnessed the murder of his sister and that he was himself raped by MLC soldiers: *see* Judgment, paras. 496, 498. P119, [REDACTED] ([REDACTED], *see* T-82, 7:21), had [REDACTED] interactions with the MLC (Judgment, fn. 1323, citing T-82, 25:15-23) and witnessed the multiple rape of two unidentified girls near her compound in the Fourth Arrondissement: Judgment, para. 467-470; *see also* Prosecution Response, paras. 372-375. Contrary to Bemba's suggestion, P119 did not only hear about what MLC soldiers "were doing in PK12", but explained that the MLC treated PK12's population the same way they treated the population in Bangui: they committed rapes, looting and murder. She also explained that information about the crimes circulated in Bangui, both via radio and conversations she had with the local population [REDACTED]: T-83, 10:22-13:17.

[179] *Contra* Bemba Submissions, para. 30(iii). *See* Judgment, paras. 522-523. Bemba oversimplifies P6's evidence: *see above* fns. 167-168. P119 had repeated interactions with MLC and witnessed the rape of two unidentified girls near her compound: *see generally above* fn. 178. P119 didn't simply testify that she had "'heard' about murders" but, rather, provided detailed evidence of what she was told about some specific murders in PK22. For example, she explained that [REDACTED] informed her of the death of [REDACTED]: T-84, 8:3-9:17. P119 further explained that people in Bangui would receive information about crimes committed against relatives who built houses and established themselves in PK22—like [REDACTED]. She also mentioned attending the funeral of an acquaintance from PK22: T-84, 9:4-12; T-83, 11:18-12:11.

[180] Bemba Submissions, para. 30(iv). *See* Judgment, paras. 524-526. Bemba merely disagrees with the Chamber's assessment of the evidence. P209 (T-117, 27:2-28:13, T-118, 14:19-15:19), P178 (T-151, 10:13-15, 18:4-7, 25:5-26:24) and P63 (T-110, 3:16-4:13) testified about rapes and murders committed in Damara and the basis for their knowledge. P6 and P9 provided reliable, direct evidence about the CAR judicial inquiry into the 2002-2003 CAR Operation: *see above* fns. 167-168; *see also* Prosecution Response, para. 308.

[181] Bemba Submissions, para. 30(v). *See* Judgment, paras. 527-528. Bemba oversimplifies P6 and P9's evidence: *see above* fns. 167-168; *see also* Prosecution Response, para. 308. Likewise, although Bemba states that P173 was not based in Bossembélé, he omits that the Chamber made findings concerning P173's contact with MLC officers and access to MLC sensitive information, explaining the basis for his knowledge: Judgment, para. 327.

[182] Bemba Submissions, para. 30(vi). *See* Judgment, paras. 531-533. Bemba observes that V2 never saw anybody being raped, but V2 saw the *victims* of rape: *see above* fn. 173. CHM1 specifically testified about rapes, murders and pillaging: *see above* fns. 161-162. As for P173, although Bemba states this time that he was not based in Sibut, he again omits the Chamber's finding as to the basis for P173's knowledge: *see above* fn. 181. P38 never personally saw a rape or a murder but, [REDACTED], heard about murders and rapes: T-33, 11:21-23; T-34, 9:1-17. P119 testified about the murder on the Sibut road of a man whose parents lived [REDACTED]: T-83, 11:2-5, 13:2-9; *see also above* fns. 178-179. P69 provided hearsay evidence about crimes in Sibut: T-193, 29:19-25, 44:9-19.

[183] Bemba Submissions, paras. 30(iv)-(vi), 31-32.

[184] Judgment, paras. 536-554.

the basis for its conclusion concerning the attack. Although footnote 1736 of the Judgment does not expressly refer to this section (but does mention "Mongoumba"), the Chamber expressly held that the specific criminal acts of which Bemba was convicted "constitute […] a portion of the total number of [criminal] acts" committed by MLC soldiers.[185] Since Bemba was convicted for the MLC troops' conduct in Mongoumba,[186] this must have been taken into account as part of its analysis of the threshold requirements for crimes against humanity.

F.3. The attack did not occur in isolation

38. Although the Chamber directed itself to consider only acts under article 7(1) in establishing the 'attack', as a matter of law,[187] this does not mean that the attack occurred in isolation. As the Judgment expressly noted, many of the acts of rape and murder occurred in the context of widespread pillaging,[188] and formed part of the same MLC *modus operandi*.[189] Accordingly, Bemba's assertion concerning the "characteristics, aims and nature" of the acts is immaterial.[190] Whether P87's brother, P69's sister and the unidentified Muslim man were killed because they resisted the appropriation of their belongings does not affect the Chamber's findings on the 'course of conduct' or the 'widespread' nature of the attack.[191]

F.4. The evidence was properly evaluated cumulatively, not in isolation

39. Bemba's criticism of the Chamber's approach to the evidence is premised on a mistaken approach to the fact-finding process.[192] The Chamber was not required to determine uncharged criminal acts beyond reasonable doubt, nor indeed could any chamber lawfully insist on doing so. Rather, it was required to make such findings only on the *material facts*: the 'course of conduct' and the 'widespread' nature of the attack.[193] Once the Chamber had undertaken its initial global assessment of the credibility and reliability of the evidence, it was right to weigh *all the relevant evidence cumulatively*. Conversely, it would have been erroneous to adopt Bemba's approach and to weigh the relevant evidence piecemeal.[194] Such

[185] Judgment, paras. 671, 688 (referring to sections VI(A)-(C): the crimes of which Bemba was convicted).
[186] *See* Judgment, paras. 549, 554, 624(c) (concerning murder); 545, 548, 551, 553, 633(k), 633(l) (concerning rape); 546-554, 640(p) (concerning pillage).
[187] Judgment, para. 151. *See also above* paras. 25-26.
[188] *See e.g.* Judgment, para. 679.
[189] *See e.g.* Judgment, para. 676.
[190] *Contra* Bemba Submissions, paras. 44-46. Furthermore, the test on which Bemba relies (para. 44, fn. 99, citing *inter alia* *Katanga* TJ, para. 1124) pertains to the nexus between *charged* acts and the attack, *not* the identification or characterisation of the attack itself. These are distinct issues: *see* *Katanga* TJ, paras. 1096-1099.
[191] By analogy, *see also* *Mbarushimana* Confirmation Decision, Dissenting Opinion, para. 17.
[192] *See* Bemba Submissions, paras. 31-33, 51-56.
[193] *See above* paras. 19-20, 24.
[194] *See e.g.* Bemba Submissions, paras. 54-55 (criticising the Chamber's approach to crimes in Damara).

an approach would mean, for example, that a wealth of relevant evidence for the widespread nature of the attack (a material fact) might be excluded simply because it did not prove, in isolation, a fact which is *not* a material fact. This would be absurd.

40. Accordingly, the proper question is only whether the Chamber could reasonably have found there was a 'course of conduct' and 'widespread' attack based on all the relevant evidence, weighed together. In this context, the probative value of hearsay and other forms of evidence must be assessed holistically, and not act by act.

F.5. Bemba shows no error in the approach to the procès-verbaux

41. Bemba's challenge to the reliance on the *procès-verbaux* is based primarily on his subjective view—raised only now—that the Chamber should, *proprio motu*, have reconsidered its decision admitting them into evidence.[195] Yet this does not suffice to show a legal error, and merely repeats his disagreement with the Chamber's approach.[196] Bemba is legally incorrect that each criminal act mentioned in the *procès-verbaux* needs to have been committed pursuant to the organisational policy;[197] to the contrary, this requirement applies to the *attack*, not the underlying evidence.[198]

Conclusion

42. For all the reasons above, and those previously set out by the Prosecution, the Appeals Chamber should dismiss the appeal against conviction.

Fatou Bensouda, Prosecutor

Dated this 27th day of November 2017[199]
At The Hague, The Netherlands

[195] *See* Bemba Submissions, paras. 57-58.
[196] *See* Judgment, paras. 264-267.
[197] Bemba Submissions, para. 58.
[198] *Gbagbo* Amicus Submission, paras. 37-41; *Gbagbo* Adjournment Decision, Dissenting Opinion, paras. 47-48.
[199] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.