I. ON THE PROCEDURAL ASPECTS

Under Article 246 of the Military Judicial Code: *'Regardless of how legal proceedings are initiated, the court that the defendant has been brought before must assess its ex officio jurisdiction or must decline jurisdiction'.*

According to Article 83 of the same Code, *the Military High Court may also hear appeals of judgments handed down at first instance by the Military Courts* and Article 278 provides that *appeals shall be brought before the Military High Court where the disputed decision has been handed down by the Military Courts.*

Stamp

The Military High Court shall comply with all of these legal requirements through a prior assessment of its competence to hear the case and the admissibility of the appeals lodged by both the Public Prosecutor and the aforementioned defendants.

It notes in this case that the judgement against which the Public Prosecutor and the defendants B., M., M., B., P., Z., C., Z., S., S., M. and M. have appealed was handed down by the Military Court of SOUTH KIVU under case no 0105/2017; the case has been appealed and ***its jurisdiction*** to hear it ***is founded*** on the basis of Articles 83 and 278 mentioned above.

In addition, it is entitled to rule on all issues raised by the parties regarding the grounds for appeal.

Concerning **the admissibility of the appeals,** the Military High Court shall verify the deadlines, the form and the capacity of the appellants.

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On this matter, it notes that, under Article 278 of the Military Judicial Code, *the appeal shall be lodged within five clear days of the day on which the interested party was informed of that decision*. It shall be lodged by *a statement or letter missive sent to the registry* of the court *that handed down the judgment. The procedure shall be that laid down by the Code of Ordinary Criminal Procedure.*

Stamp

The Military High Court points out that Article 96 of the Code of Criminal Procedure to which the Military Judicial Code refers regarding the *appeals procedure* grants both the Public Prosecutor and the defendant the option of lodging an appeal;

The Military High Court notes that, when lodging their appeal with the registry of the Military Court of SOUTH KIVU on 15 December 2017, through their counsel, Mr M., a lawyer of the bar association of Bukavu, and holder of special powers of attorney as of 14 December 2017, the two men contacted Mr K., a [REDACTED], in order to join forces against B. to denounce the abuses ordered by the latter and carried out by his

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group. Mrs S., the [REDACTED], who escaped the punishment inflicted on her [REDACTED], informed the investigators that her husband had been injured by one of his attackers, in this case the defendant M.

Revolted by this killing, the inhabitants of the city of KAVUMU [REDACTED] of defendants S. and Z., who were accused of being the perpetrators, in retaliation.

Similarly, Mr K. was a [REDACTED] in the city of [REDACTED]. His relationship with the honourable B. darkened following the denunciations he made regarding the activities of a group called 'JESHI la YESU' which the aforementioned honourable deputy was alleged to support. He signed his death warrant on the day that he lodged a complaint against B. with the Public Prosecutor of BUKAVU, where the latter was accused of murdering Mr M.: M., S., Z., B. and his son J. were hot on his heels. He was followed from P.'s house to his own home where he was found at table. Several bullets were fired into his body using a firearm.

Stamp

Thanks to the courage of [REDACTED], who followed the attackers, M., the most slender, and M. were recognised; the first because of his height and the second because he contacted his boss, B., to say that he had accomplished his mission.

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As regards the FARDC [Armed Forces of the Democratic Republic of the Congo], an attack carried out against their base in BUHINDA on the night of 1 to 2 July 2014 by the fighters of the JESHI LA YESU militia resulted in two soldiers in the regular army, in this case, K. and K., being seriously injured, and three AK-47 weapons and ammunition belonging to the FARDC were taken by the attackers, who took refuge in the [REDACTED] plantation which belongs to the honourable B.

Stamp

On the night of 10 to 11 July 2014, another FARDC base in KABULUNGU was attacked by the same JESHI la YESU militia acting on the orders of the aforementioned defendant B. During this attack, Lieutenant B. was killed, while his comrades-in-arms, Sergeant S. and Corporal B., were seriously injured.

In the face of this unprecedented situation, the Comité Local de Sécurité [Local Security Committee] deployed all of its human resources to investigate the cause of this evil act which had spread terror. It was in this context that C. was dispatched by the local branch of the ANR [National Intelligence Agency] to infiltrate the [REDACTED] plantations – the known refuge of the attackers. For his part, [REDACTED] and [REDACTED], Mr M., infiltrated [REDACTED] into the aforementioned plantation and undertook in-depth enquiries to identify the alleged perpetrators of these disgraceful acts.

Having obtained corroborating witness testimonies and detailed confessions from certain identified members, it became apparent that these criminal acts had been committed by the 'JESHI LA YESU' or 'ARMY OF JESUS' insurrectional militia, led by the aforementioned B., a militia whose headquarters were based in the [REDACTED] plantation, which had

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beenoccupied by force by the latter since 17 November 2007 in view of the letter of 12 May 2011.

But unfortunately, all those who were involved in this campaign to save the population were kept under watch by the father of the militia and constituted an obstacle to be quickly neutralised either through their death or through attacks on their physical integrity.

Stamp

The same was true for certain members of this movement who had defrocked and denounced the criminal hegemony of this insurrection group. This was what justified the fate meted out to Mr M. and Mr K.

The defendant rejected this version of events, alleging a set-up orchestrated by the provincial and local authorities – gripped by hate and jealousy – for the purposes of putting an end to [REDACTED].

Indeed, the defendant, an honourable [REDACTED], was arrested on 21 June 2016 for breaching the law, without his [REDACTED], at the personal request of the [REDACTED], his excellency M., who harboured enmity towards him. These two figures were in open conflict following different [REDACTED] and [REDACTED] initiated by B. against the [REDACTED] of South Kivu, the last of which was against the [REDACTED] for the interior regarding the growing insecurity in the province of South Kivu in general and in the territory of KABARE in particular.

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It was in these circumstances that the [REDACTED] C. threw his full weight into reaching a compromise with certain local authorities in KABARE, in particular the [REDACTED], Mr G. (T12), who was also in conflict with the [REDACTED] owing to illegal fees collected by the chiefdom at the expense of peaceful citizens and which the [REDACTED] had requested be abolished.

Certain opinion leaders as well as the former challengers to the honourable B. in the [REDACTED], which made [REDACTED], and the [REDACTED], as a result of which he was [REDACTED], were also called upon by detractors determined to cause the [REDACTED] political downfall. The example of [REDACTED] (T11) and Mr J., [REDACTED] of the defendant, bear witness to this.

Stamp

Owing to all of these conflicts, these authorities joined forces against the honourable [deputy] and the strategy they adopted was clear: to lay the blame for all of the acts of rape, killing and others that took place in the city of KAVUMU and its surroundings at this time on B.

Having been tried by the Military Court of South Kivu for all of these crimes, B and the members of his group were sentenced to the aforementioned punishments.

Having been called to review the decision of the trial court judge, the Military High Court shall respond to the appellants' complaints regarding the procedure, before examining the charges against the defendants.

III. THE PROCEDURAL ARGUMENTS OR COMPLAINTS

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Regarding the procedure, all of the defendants present have asked the Military High Court to dismiss the disputed sentence and to abandon all of the legal proceedings against them by invoking three grounds, namely the lack of competence of the Military Court, the unconstitutionality of the jurisdiction and of its decision, and the obscuri libelli [lack of clarity of the action].

Stamp

1. On the lack of competence of the Military Court

The defendants and their defence counsels maintain that the Military Court of South Kivu should have judiciously applied Article 246 of the Military Judicial Code and declared itself naturally lacking competence to hear the case on the basis of a combination of Articles 91, 99 and 100 of Organic Law No 13/011-B of 11 April 2013 on the organisation, functioning and competence of the ordinary courts, since the Court of Appeal, to the exclusion of any other Court, is the only court that is competent to try crimes against humanity that are attributed to non-military persons, namely the member of the Provincial Assembly, and that the offences listed in Article 91 of the aforementioned organic Law do not fall within the field of application of Article 111 of the Military Judicial Code, which grants the Military Courts competence to try persons from outside the army.

In the view of the Public Prosecutor, this argument carries no legal force and arises from a poor understanding of the law. The jurisdiction of the Court is grounded in particular on the provisions of Article 111(2), Article 112(6) and Article 115 of the Military Judicial Code, as amended and supplemented by Organic Law No 17/003 of 10 March 2017.

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2. On the unconstitutionality

The defendant B. claims that, by refusing to order a stay of proceedings in response to the argument of unconstitutionality raised in the case regarding the failure to apply the [REDACTED] provided for in [REDACTED], in conjunction with [REDACTED], the Military Court of South Kivu breached Article 162 of the Constitution, gave its own rulings precedence over the Constitution and deprived the defendant and his accomplices of their natural judge.

Stamp

3. Poor interpretation of the Rome Statute

The Military Court, according to the defendants, has misunderstood Article 27 of the Rome Statute of the ICC. In reality, the Court in question is neither the Court of Appeal nor the Military Court nor the Military High Court, but the Court of Cassation. In the spirit of the Statute, the immunity conferred on the official capacity of the perpetrator of an international crime is ineffective only before the ICC.

The Public Prosecutor has contested this argument. It is of the opinion that the [infringement of the Constitution] was observed by the Military Court to the extent that its action was taken in accordance with an international treaty, in this case the Rome Statute, which the Constitution declares to have primacy over laws, including itself, and which, in Article 27 on immunity, lays down the principle of the irrelevance of official capacity, a principle that is echoed in Article 20c of Book II of the Penal Code.

The Military High Court points out, in response to the first argument regarding lack of competence, that, under the final paragraph of Article 156 of the Constitution, an organic law lays down the rules regarding

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the competence, organisation and functioning of the Military Courts, that under our current legislation, Law No 023/2002 of 18 November 2002, the Military Judicial Code, Article 76 of which lays down the material competence of the Military Courts, is applicable and that Organic Law No 13/011-B of 11 April 2013 on the organisation, functioning and competence of the ordinary courts having not set aside Articles 111 and 112 of the Military Judicial Code in its repealing provisions, these provisions are up to date and grant the military courts both material and personal competence regarding persons outside the army, making use of weapons and with regard to members of insurrection groups. It has been found that the material competence of the Military Courts is laid down by Article 76, paragraphs [...] of Law No 023/2002 of 18 November 2002, the Military Judicial Code, which provides that, '*the Military Courts shall try, on the territory of the Republic, offences of a military nature punished under the provisions of the Military Penal Code*' and strengthened by Article 111 of the Military Judicial Code, which places within the purview of the Military Courts all those who, having been members of the former armies, rebel factions, insurrection groups or armed militias, are guilty of several military crimes, in particular participation in an insurrection movement' (Constitutional Court under Constitutional Record 0055 in the case of Mr RERUZI OPONGO Pierre et al. v. the Public Prosecutor at the TMG [Military Garrison Court] of Kin/Gombe, unpublished).

Stamp

Examining the argument of unconstitutionality regarding the infringement of [REDACTED] by the Military Court of South Kivu owing to its failure to apply the [REDACTED] that the honourable [REDACTED] B. was entitled to and the deprivation of the defendants of their natural judge,

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the Military High Court rules that this argument is admissible but unfounded.

Firstly, it points out that, in the case of the [REDACTED] B., who is being prosecuted for crimes against humanity, Article 27 of the Rome Statute of the ICC, on the basis of which he is being prosecuted, lays down the principle of the irrelevance of official capacity. The Court specifies that Article 20c of the Congolese Military Penal Code, as amended and supplemented by Law No 15/022 of 31 December 2015, which provides, *'that as regards prosecutions for the crimes referred to in Title IX regarding crimes against the peace and security of humanity, the lay shall apply equally to all persons without any distinction based on official capacity. In particular, the capacity as a head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility, nor shall it, in and of itself, constitute a ground for reduction of sentence,'* constitutes an internal legal basis. It applies 'in specie causa' given that it applied prior to the arrest of the provincial deputy on 21 June 2016 in BUKAVU.

Stamp

Second, all of the defendants having been prosecuted for acts undertaken as part of an insurrection movement, the judge that the law assigns to them in accordance with Article 19(1) of the Constitution was, at first instance, the judge whose decision is under review as shown above.

Examining the third procedural argument relating to the incorrect interpretation of Article 27 of the Rome Statute of the ICC by the Military Court of South Kivu, the Military High court also finds this

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argument to be unfounded.

In fact, since December 2015, the laws implementing the Rome Statute, which include Law No 15/022 of 31 January 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code, have drawn lessons from the Rome Statute of the ICC and have consequently required the domestic courts to apply principles that guide the prosecution of crimes against the peace and security of humanity.

Stamp

The defendants are therefore wrong to have claimed Article 27 of the Rome Statute to be irrelevant and to have incorrectly invoked a decision of the ICC cited by the legal doctrine (Congo v. Belgium, 14 February 2012).

The Military High Court also notes that, after having raised the argument regarding the intelligibility of the charges (obscuri libelli) during the proceedings, the defendants did not, with good reason, return to it in their oral arguments, because such an argument that is admissible 'in limine litis' is irrelevant at appeal, the defendants having sufficiently justified themselves on the basis of the facts that each and every one of them understood.

Regarding the substantive arguments, the defendants have split them into breaches of the following six principles:

- Individual criminal liability (Article 17(8) of the Constitution and Article 3 of the Military Penal Code);
- Actori incubit probatio;
- In dubio pro reo;
- Adversarial principle;

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- Right to a fair trial;
- Freedom of evidence in criminal matters.

The Military High Court shall examine whether these principles have been breached through an analysis of each charge brought against each defendant.

Stamp

3. CRIMES AGAINST HUMANITY

All of the defendants have been charged with these crimes, which are conceptualised in the first paragraph of Article 7 of the Rome Statute as follows: '*For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*'. Based on this definition, the contextual constituent elements of such a crime are:

- the existence of a widespread or systematic attack;

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- the existence of a civilian population targeted by the attack;
- the existence of a State or organisation behind the attack;
- the existence of a political element;
- the link between the acts in question and the attack;
- knowledge of this attack.

The notion of attack is not necessarily limited to the military sphere. It is understood to mean, 'conduct, a campaign or an operation directed against the civilian population'.

Stamp

It may be widespread or systematic.

A **widespread** attack is a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.

As for the **systematic** character of the attack, this refers to the fact that the act is *organised following a regular pattern on the basis of a common policy* and involves substantial public or private resources. This policy need not be officially adopted as a State policy. There must however be a sort of **preconceived plan or policy** *(Rutaganda case*, Trial Chamber I, 6 December 1999, para. 69; *Musema,* Trial Chamber I, 27 January 2000, para. 204).

Drawing on Article 50 of Additional Protocol I, which provides that, '*A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2) ,3) and 6) of the Third Convention and in Article 43 of this Protocol,*' while the case-law understands **civilian population** to mean persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds,

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detention or any other cause. *(See Rutaganda,* Trial Chamber I), 6 December 1999, para. 72; *Musema,* Trial Chamber I, 27 January 2000, para. 207).

Since crimes against humanity may be committed inside or outside the context of an armed conflict, the term *'civilian'* must be understood within the context of war as well as relative peace (Kayishema *and Ruzindana,* Trial Chamber II, 21 May 1999, para. 127–12).

Stamp

Under Article 7(2)(a), the conduct consisting of multiple acts must be adopted ***pursuant to or in furtherance of a State or organisational policy to commit such an attack.*** This condition presupposes the existence of either a 'State' or an 'organisation'.

The legal theory defines the concept of '**policy**' as any criminal action conceived circumstantially or callously with a proven intention of causing harm, in any form whatsoever, and as a result of a concentration or membership, and which includes a range of measures or strategies intended to enable a large-scale attack against the civilian population. It may also concern a deliberate failure to act in the case of this type of mass crime occurring in a State entity (MUTATA, LL, op. cit., p. 505).

This policy need not be formally laid out (G. KATANGA case, judgment, para. 1109). It may be inferred from several factors that, together, enable its existence to be established.

An **organisation** may be defined as an organised body consisting of persons with a particular objective (Jean-Pierre BEMBA case, para. 158).

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The mental element of a crime against humanity is ***the agent's knowledge*** of the mass nature of the attack and its devastating effects, even if that person is not aware of the strategies deployed to commit said crime (MUTATA, op. cit., p. 518).

It is appropriate to highlight the pre-identified contextual elements that render these offences crimes against humanity, but according to the Statute, each act contains specific constituent elements, which the Military High Court shall analyse after examining the parties' arguments regarding the contextual conditions of the facts.

Stamp

In the view of the Public Prosecutor, all of the contextual prerequisites have been met in the case in question, in that the civilian population of KAVUMU and all of the aforementioned surrounding regions experienced targeted killings and rapes among a select marginal group, in this instance very young girls aged between 18 months and 10 years. These acts were the work of an insurrection organisation called DJESHI LA YESU, an organisation whose ideology inspired a policy advocating the *conservation of recovered property for the benefit of indigenous peoples and control of the territory of KABARE with a view to negotiating with the authorities in KINSHASA, in the event of electoral failure, for the purpose of obtaining political posts and military ranks.*

The Public Prosecutor therefore agreed with the ruling of the trial court judge, who found the contextual conditions of a crime against humanity to have been met.

In opposition to this stance, the defendants put forward the argument that the trial court judge had applied the incorrect legal

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definitions to the facts, an argument that they explained in four branches.

For the first branch, they claimed that the alleged attack was neither widespread nor systematic with regard to the sequence of events. In effect, the three cases of rape in KAVUMU, of which the first occurred on 17 February 2014, the second on 9 January 2015 and the third on 3 October 2015, as well as the murders of K. in 2013 and K. in 2016, were '*simple aggregates of fortuitous and isolated acts*' which fell under common law; they did not fulfil the conditions laid down by the Statute to fall within the context required to constitute crimes against humanity.

Stamp

For the second branch, considering that the term *'civilian population'* refers to a ***group*** as opposed to individual civilians, the defendants claim that the rapes and murders in KAVUMU fall outside the field of crimes against humanity owing to the amount of time that elapsed between each of them.

For the third branch, since the trial court judge had not demonstrated the existence of DJESHI LA YESU, it was inadmissible, the defendants argued, to talk about an organisation and a policy that was allegedly pursued by that organisation. Likewise, the term *'group'* used by the trial court judge is inappropriate and not defined by the Rome Statute, which talks about *an organisation*.

For the fourth branch, the defendants reproached the Military Court of South Kivu for having founded its decision on superstitions and magico-religious beliefs which it considered to be salient evidence in a written legal proceeding which instead required real, material, concrete and not imaginary evidence.

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In response to the branches of the defendants' arguments, the Military High Court notes that the existence of DJESHI LA YESU is a reality and that the conditions of its creation and evolution on the ground have been described above, on the one hand.

On the other hand, the spectre of the [REDACTED] and the temptation of political ambitions led to the founder, in this case the honourable B, implementing the hegemonist policy described above, a policy carried out by people who could only be recruited from among the followers who had sworn allegiance to the dissident pastor to form the so-called army of Jesus.

Stamp

In addition, the collective aspect which gives the attack a widespread nature should not be confused with the notion of 'civilian population' which is clearly defined by Article 50 of Additional Protocol I. It has been deemed that the use of the term *'population'* does not mean that the entire population of the territory or geographical entity in which the attack took place must have been subjected to it. It is not necessary for the victim or victims of the act in question to share fundamental characteristics, in particular geographical characteristics, with the civilian population that constitutes the main target of the attack, except to note that these characteristics may serve to demonstrate that the act in question occurred within the context of the attack *(Semanza,* Trial Chamber III, 15 May 2003, para. 330).

As regards the spacing between the acts, given that the Statute does not specify how much time must separate the acts for them to count as crimes against humanity, the Military High Court judges this idea to be ineffective since the acts in question are part of a plan designed

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to implement the policy adopted by the organisation. But in this instance, the cases presented by the defence are not the only ones that have been recorded, documented and reported by the documents in the case file. Indeed, the security report of February 2016 compiled between 2007 and 2016 by the Organisation Populaire de Paix [Popular Peace Organisation] (OPP) and signed by K. lists the names of more than 125 people who were killed, including Mr M., and

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more than 20 young girls who were raped by the [REDACTED] militia in KAVUMU on the orders of the honourable B. (nos 3530–3533). One month later, on the night of 17 to 18 March 2016, Mr K. paid the price for his courage, having been deemed to be at odds with the hegemonic policy of the militia: he was killed in his home by men commanded by the honourable B., according to different witness statements contained in nos 3 to 4, 702 to 713 and 1323 to 1327 and the witness statements of T21 who, before the trial court judge and the hearing of the Military High Court of 3 July 2018, stated that he recognised [REDACTED] among [REDACTED] killers and heard the attackers asking [REDACTED] to report to the honourable [[REDACTED]] with a view to obtaining the promised payment.

Stamp

In 2017, the United Nations Group of Experts on the DRC published a final report which noted several cases of murders, child rapes in KAVUMU and attacks carried out against FARDC bases by B.'s militia, mentioning the latter in particular as being the leader of the group named JESHI LA YESU.

As for the superstitions and magico-religious beliefs considered by the defendants to be evidence on which the Military Court based its decision, the Military High Court deems this argument to be inappropriate in that these practices were mentioned not as proof of rape or murder, but as ***ingredients of systematisation classifying*** the attacks as crimes against the peace and security of humanity. Ultimately, it takes the same position as the trial court judge and the Public Prosecutor for Appeals.

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The decision of the Military Court of South Kivu shall not be overturned on appeal.

4. SPECIFIC OFFENCES

a. MURDER

The evidence in the case file reports a slew of crimes committed by the JESHI LA YESU militia led by the honourable B. (including in particular the list drawn up by the [REDACTED] K.), but only the cases listed in the settlement and examined by the trial court judge shall be reviewed by the Military High Court.

Stamp

Indeed, the Military Court found the facts constituting two murders committed as part of a widespread attack against the civilian population of KAVUMU, of M. on 25 January 2013 and of M. on 17 March 2016, respectively, to have been established. On the basis in particular of the witness statements of T4, T11 and T14 and the information of P1, P32 and P33 confirming the double murder, it found the following defendants to be implicated in the crime: B., M., M., S., M., M., P. and B.

In disputing the findings of the trial court judge, the defendants invoked four factual arguments and two legal arguments.

The factual arguments are:

1. The statements of C. are fragile given that M., whom C.

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claimed had confessed to the murder of K., denied everything completely.

2. The statements of witnesses T11 and T12 were misleading because the acquittal of M., who was prosecuted for the murder of M. by the TGI [High Court] of KAVUMU under case no 10214, a case that Mrs N., the [REDACTED] the late K., joined as a civil party, sufficiently proved the innocence of this defendant; likewise, the land dispute between the defendant and [REDACTED] of T12 under RCA 4580 justified the striking out of T12's testimony. The same was true for B. who, having been acquitted with M., was in conflict with T11 following his discovery of the murder of Mr L. by J., an ally of T11.

Stamp

3. The [REDACTED] of M. and Z. was an accident caused by a child who [REDACTED] without their parents there and if these defendants had been involved in the murder of K., [REDACTED] would have named them in case no 10214.
4. The injury to the left hand of S., a [REDACTED], was caused by a stone and not the dispute with K., whose [REDACTED] would have taken legal action against him if he had been involved in the crime.

The two legal arguments consisted, firstly, of a *breach of the 'non bis in idem' rule* regarding the defendants M. and B. Since they were acquitted on this matter in case no 10214 by the High Court of KAVUMU, they should not be prosecuted for the same crimes by the Military Court of South Kivu. The second of these arguments

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consisted of a *breach of the principle of individual criminal responsibility,*

in that the trial court judge charged all of the defendants on the basis of crimes allegedly committed by a single individual.

In the view of the Military High Court, all of the pleadings invoked by the defendants are unfounded.

Stamp

Regarding the first argument, it notes that the familiarity that transpired from the crimes and actions of C. towards M. during the trial lent credit to the statements of the former regarding the confessions of the latter to the murder of K.

Regarding the second argument, it notes that the crimes examined by the High Court of KAVUMU under case no 10214, allegedly committed by the defendants M. and B., concerned the murder of M. and were therefore different to those of the present case, which concern the murders of K. and K.

The [REDACTED] of M. and S. was confirmed during the Military Court's raid, whereas the care allegedly received by the latter defendant at PANZI hospital following his hand injury was denied by this healthcare establishment.

As concerns the legal arguments, the Military High Court points out that, although the crimes of case no 10214 were different to those of the present case as mentioned above, it is wrong for the defendants M. and B. to have invoked the principle of *'non bis in idem';* the Military Court was correct.

As regards criminal responsibility, the Military High Court places it on

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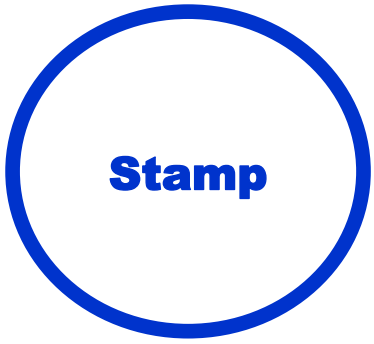
two levels, namely:

1. *The responsibility of the honourable B. as the hierarchical superior (Article 28(2) of the Rome Statute of the ICC).*



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2. *The criminal responsibility of all the other defendants on the basis of Article 25(3)(a) of the Rome Statute of the ICC.*

In this case, B., the principal defendant and hierarchical superior, exercised command over the entire movement and used his 'effective authority and control'. It was not necessary for him to be present at the scene of the crime, or for him to have contributed directly to the crimes being committed in order for him to be criminally responsible *(KAYISHEMA and RUZINDANA case, judgment, para. 200, law report,* p. 935). The moral endorsement of the criminal actions of his subordinates, which was betrayed by his interventions or promises of intervention in legal proceedings, was a form of participation in a criminal enterprise – a reprehensible passive attitude. As has been proven by the documents in the case file, including the statements of T11, C., [REDACTED] and Col B., he knew that his subordinates were committing or were going to commit crimes or he deliberately neglected to take into account information that clearly indicated that murders and other reprehensible crimes were actually linked to the activities of the JESHI LA YESU militia under his responsibility and control.

Stamp

All of the other defendants are being prosecuted on the basis of Article 25(3)(d) of the Statute, which provides as follows: '*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
[...]

> *(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons*

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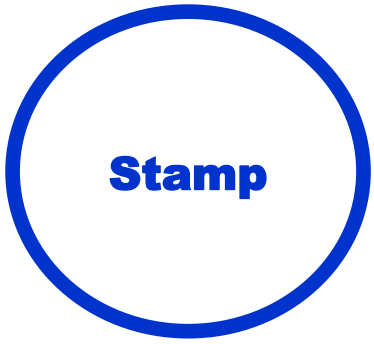
acting with a common purpose. Such contribution shall be intentional and shall either:



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i. *Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*

ii. *Be made in the knowledge of the intention of the group to commit the crime'.*

Stamp

The conditions required to fall within the purview of this provision are:

1. *The crime must be within the jurisdiction of the Court; in other words, an international crime or a crime against peace and security;*
2. *The criminals must be part of a group of people acting together in pursuit of a common purpose;*
3. *The defendant must have contributed significantly to the commission of the crime;*
4. *The contribution must have been intentional;*
5. *The defendant's contribution must have been intended to facilitate the criminal activity or must have been in full knowledge of the intention of the group or people to commit the crime.*

It emerges from the [judicial] investigation that the killing of Mr M., the [REDACTED] of the honourable B., who was cut down with machetes on 25/01/2013, was the result of his disapproval of the murder of M. and his opposition to the hegemonic aims of the [REDACTED] after the occupation of the [REDACTED] plantation. It was the work of a group of individuals that included the defendant S. and, in an attempt to defend

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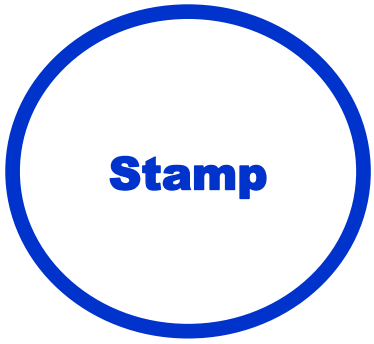
himself, K. injured his left hand (nos 950 to 957, report of confrontation between defendant S. and the victim MM4).



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These facts were confirmed before the Military Court in particular by P33 (hearing of 15/11/2017), by T14 (hearing of 16/11/2017) and by the statement of B. at the hearing.

This murder, like that of the [REDACTED] Mr K., was intended to eliminate any form of antagonism and to establish the ideology of local autonomy, the pledge of a political and military replacement by B. and his followers. Thus, with the exception of the defendants L., M., S., M., S. and I., the conditions for the individual criminal responsibility of the defendants as claimed by the Public Prosecutor have been met. Therefore, the following are subject to the law:

Stamp

- B.;
- S.;
- M.;
- Z.;
- M.;
- M.;
- M.;
- B. and
- P.

b. <u>THE RAPES</u>

This is when 'the perpetrator *invaded the body of a person* by conduct resulting in *penetration, however slight,* of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological

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oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.' (See Elements of Crimes, *Article 7(1)(g)-1, p.* 5).

Four elements must be present for rape to constitute a crime against humanity:

Stamp

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population (see *Elements of Crimes, Article 7(1)(g)-1, p.* 5).

In the case in question, the trial court judge, on the basis in particular of the statements of the victims, including P17, P35, P18, P26, P36, P5, P19, P3, ruled the rape of the young girls to be established as follows: 35 children were raped by the insertion of the penis into the

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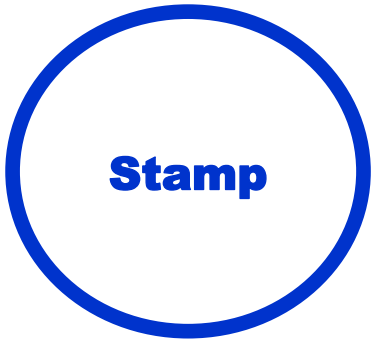
vagina; 05 children were raped by the insertion of an object such as a piece of wood, iron or a machete or a gun into the vagina; one child had a piece of iron inserted into their anus; 06 other children were subjected to attempted rape (medical report, nos 2061 to 2286).



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As concerns the '*modus operandi,*' certain attackers were armed with bladed weapons, specifically knives, machetes, pieces of iron, and rope commonly known as 'KAGOZI', and these bladed weapons were used either to force the doors of the victims' homes (nos 580, 1157 to 1162), or to be inserted into the children's vaginas in order to collect the hymen blood (nos 1145 to 1149, 1185 to 1190), which was requested by the [REDACTED] K.

Stamp

The defendants complained that the trial court judge incorrectly applied the theory of collective responsibility and based his decision on a coincidental presumption, namely the pursuit of hymen blood, with no irrefutable proof, it being understood that no defendant recognised the facts, that the witnesses C., T11 and T12 confirmed nothing, that the victims for the most part did not recognise their attackers, and that the expert reports (in particular, No 2431) did not name them as the perpetrators of the rapes.

For its part, the Public Prosecutor for Appeals described the defendants' arguments as unfounded, on the grounds that in the case of mass crimes such as these, Article 25 of the Rome Statute and Article 21a of the Congolese Penal Code provide for modes of participation that differ from the classic modes provided for in domestic law in Articles 21 to 23 of the CPC [Congolese Penal Code] and Articles 5 and 6 of the CPM [Military Penal Code]. These new provisions rest on the following three theories:

- The theory of individual commission, jointly with another, of a crime or that of the mutual attribution of the crime to each of the suspects or defendants if the objective elements are met;
- The theory of commission through another, or that of the

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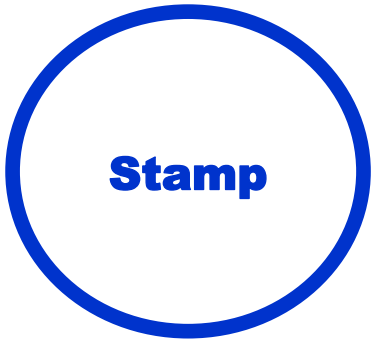
perpetrator behind the other;



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- The theory of the contribution of any other means to the commission of a crime.

The High Court endorses the reading of the charge and points out that it is sufficient for one member of the group to be incriminated and for that person to be part of the organisation's plan for all members to be criminally responsible. Consequently, K.'s involvement in the pursuit of the invulnerability of members of JESHI LA YESU, as per the aforementioned policy, and even the conviction of Z. constitute, in the eyes of the High Court, evidence of the rapes '*sui generis*' from which the entire organisation benefited.

Stamp

FOR THIS REASON

The Military High Court, ruling publicly **and after adversarial hearings concerning the defendants** B., B., M., M., M., Z., P., S., S., M., Z., C., M., C. and **by default concerning the defendants** I., L., M., M., N., S. and S.,

Having heard the Public Prosecutor;

Having regard to Article 149 of the Constitution;

Having regard to the Rome Statute of the International Criminal Court;

Having regard to Law No 023/2002 of 18 November 2002, the Military Judicial Code;

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Having regard to Law No 024/2002 of 18 November 2002, the Military Penal Code;

Having regard to the Ordinary Penal Code;

Having regard to the Code of Ordinary Criminal Procedure;

Having regard to Article 258 et seq of Book III of the Congolese Civil Code;

Stamp

DECIDES AS FOLLOWS

Ruling on the criminal proceedings

- **On the procedural aspects**

The defendants' aforementioned appeals are deemed to be admissible but unfounded and are dismissed;

The Public Prosecutor's appeal is deemed to be admissible and partially founded;

- **On the substantive aspects**

Making a new ruling, it confirms the decision of the trial court judge in his reasoning, but partially amends the provisions of this decision in that it did not specify the two aspects of a crime against humanity, and the Court thus does what the judge should have done:

With regard to the defendants in attendance

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1. *Concerning the charge of the illegal possession of weapons of war or ammunition*

B is found to have committed this offence and, with no mitigating circumstances being admitted, is sentenced to 20 years of penal servitude.

Stamp

2. *Concerning the insurrection movement*

The following defendants are found to have committed this crime:

1. B.;
2. M.;
3. M.;
4. B.;
5. C.;
6. P.;
7. Z.;
8. C.;
9. S.;
10. Z.;
11. S.;
12. N.;
13. M.;
14. M.

The benefit of mitigating circumstances continues to be applied to C. and N. owing to their withdrawal from the group after they

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realised its subversive nature and particularly to C for his cooperative attitude towards the justice system;

Consequently, each defendant is sentenced as follows:

- B.: to penal servitude for life;
- M.: to penal servitude for life;
- M.: to penal servitude for life;
- B.: to penal servitude for life;

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- P.: to penal servitude for life;
- Z.: to penal servitude for life;
- C.: to penal servitude for life;
- S.: to penal servitude for life;
- Z.: to penal servitude for life;
- S.: to penal servitude for life;
- M.: to penal servitude for life;
- M.: to penal servitude for life;
- N: to 12 months of penal servitude and the payment of legal costs to be determined by the registrar, which must be paid within eight days, or 30 days of imprisonment for debt should payment not be made within the time limit;
- C.: to 12 months of penal servitude and the payment of legal costs to be determined by the registrar, which must be paid within eight days, or 30 days of imprisonment for debt should payment not be made within the time limit;

Stamp

3. ***Concerning the crime against humanity that all defendants are charged with:***

The decision of the trial court judge is partially amended by making the following clarifications:

➢ **For the crime against humanity of rape:**

It is held that this offence has not been established against the following defendants:

- S.;
- C.;

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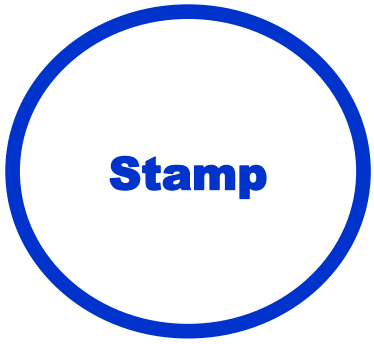
- N., and are consequently acquitted.

The offence has been established against the following defendants:

1. B.;
2. M.;
3. M.;
4. B.;
5. P.;
6. Z.;
7. C.;
8. S.;
9. Z.;
10. M.;
11. M.



Each of them is therefore sentenced, with no mitigating circumstances being admitted, to penal servitude for life.

➢ **For the crime against humanity of murder:**

It is held that this offence has not been established against the following defendants: L., M., S., M., S. and I., and are acquitted;

However, this offence has been established against the following defendants:

1. B.;
2. S.;
3. M.;
4. Z.;
5. M.;

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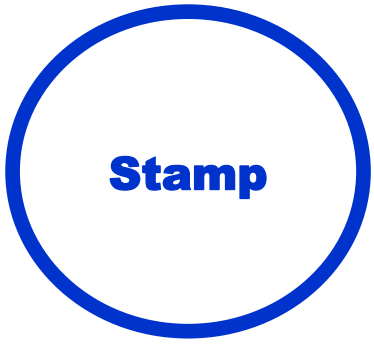
6. M.;
7. M.;
8. B. and
9. P.



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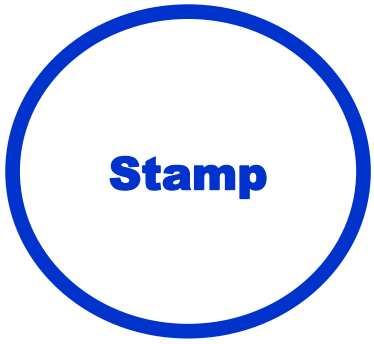
Each of them is therefore sentenced, with no mitigating circumstances being admitted, to penal servitude for life.

In accordance with Article 7 of the Military Penal Code, a single punishment – the harshest – is imposed as follows:



1. B.: penal servitude for life;
2. M.: penal servitude for life;
3. M.: penal servitude for life;
4. B.: penal servitude for life;
5. P.: penal servitude for life;
6. Z.: penal servitude for life;
7. C.: penal servitude for life;
8. S.: penal servitude for life;
9. Z.: penal servitude for life;
10. S.: penal servitude for life;
11. M.: penal servitude for life;
12. M.: penal servitude for life;

With regard to the absent defendants:

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I., L., M., M., N.,

S., S.:

In accordance with Articles 326 and 327 of the Military Judicial Code and confirming the decision of the trial court judge, the crimes are found not to have been established, and so they are acquitted and all proceedings against them are discontinued with no costs imposed.

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