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International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **18 April 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public

Prosecution's Submissions on the Procedures and Principles for Sentencing

Source: **Office of the Prosecutor**

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I. Introduction

1. On 14 March 2012, Trial Chamber I (Chamber) invited the Prosecution and legal representatives of victims to file written submissions by 18 April 2012 on the procedure to be adopted for sentencing under Article 76 of the Rome Statute (Statute) and the principles to be applied by the Chamber.[1] These responsive submissions accordingly do not address the sentence the Prosecution will request or the evidence presented during the trial that it argues is applicable to sentence. Rather, the Prosecution anticipates that the Chamber will entertain views specifically on the sentence the parties and participants believe should be imposed.

2. The procedure for sentencing is set out in the Statute. Article 76 requires a hearing if either party requests and also allows the Chamber to convene such a hearing on its own initiative. Article 77 sets out the available penalties – imprisonment for up to 30 years, or imprisonment for life under certain circumstances, a fine, and criminal forfeiture – and Article 78 provides that the Chamber must pronounce sentence the person for each crime of conviction and then impose a joint sentence for all crimes. In determining the appropriate sentence, Rule 145 of the Rules of Procedure and Evidence (Rules) requires the Court to consider and balance numerous other factors, including the culpability and degree of participation of the convicted person, the circumstances of the person and the crimes, the harm caused to the victims and their families, and appropriate aggravating and mitigating factors.

3. In the Prosecution's submission, the Court must predominantly consider that the crimes under the jurisdiction of the International Criminal Court are "the most serious crimes of concern to the international community as a whole"; they

[1] ICC-01/04-01/06-2844, para. 3.

"threaten the peace, security and well-being of the world".[2] There is no sliding scale or hierarchy of gravity of offenses in the Statute.[3] Rather, the Court's starting point is that it will only adjudicate the most serious crimes known to the international community. Yet despite their gravity, the crimes in this Court are not subject to the significantly higher penalties – cumulative terms that easily exceed 30 years' imprisonment, the greater possibility of life imprisonment, and even the death penalty -- that many national systems provide in their domestic laws to punish comparable criminal conduct.

4. The Prosecution considers that the sentencing policy has to take into consideration the seeming conflict between the scale of these gravest crimes in the world and the available sentences. Sentencing in the International Criminal Court cannot suggest a seeming tolerance of criminal conduct that, if committed in national systems, would be severely punished. In addition, the Prosecution submits that, to avoid inexplicable sentencing discrepancies, it is necessary that the Court presume a consistent baseline for determining any sentence for conviction of one or more of these grave crimes; the baseline must also be substantial; and it cannot be adjusted based on a theory that some crimes are necessarily less heinous than others.

5. Accordingly, the Prosecution urges that the Court presume that an appropriate sentence be a substantial percent of the statutory maximum, around 80% of the scale. This presumption will ensure that this Court's sentence will be sufficiently severe, and thus will reflect the gravity of these crimes and of comparable harms punished in national systems. The baseline presumption can then be adjusted,

[2] Rome Statute of the International Criminal Court (*hereinafter* "Statute"), Preamble; also Article 5(1).
[3] The ICTR Appeals Chamber has consistently held that there is no such hierarchy (*The Prosecutor v. Kambanda*, Appeal Judgement, 19 October 2000; *The Prosecutor v. Akayesu*, Appeal Judgement, 1 June 2001). The ICTY adopted the same view and it now seems settled law that there is no hierarchy between the two crimes (L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, p. 248). *See also Prosecutor v. Stakic*, Appeal Judgement, 22 March 2006, para. 375, where the Chamber confirmed that there was no hierarchy between crimes, including the crime of genocide.

in accordance with Rule 145, to take into account the mitigating and aggravating circumstances, other relevant factors applicable to the convicted person and the particular circumstances of his crimes.

II. Prosecution's Submissions on Sentencing Procedure

(i) A separate sentencing hearing

6. Article 76(1) of the Statute provides that the Chamber will consider the appropriate sentence to be imposed taking into account the evidence presented and submissions made during the trial that are relevant to the sentence. Article 76(2) provides that the Chamber *may* hold a further hearing, and at the request of the Prosecutor or the Accused *shall* hold a further sentencing hearing, to hear additional evidence or submissions relevant to the sentence. The Accused requested a separate sentencing hearing in its observations on Article 76[4] and the Chamber has already indicated that it intends to schedule a separate sentencing hearing.[5]

7. Precise rules regarding the conduct of the sentencing hearing are not defined in the Statute or the Rules, and are left to be determined by the Chamber.

8. The convicted person has requested a separate sentencing hearing, which suffices to trigger the process under the Statute. Evidence can be heard at the hearing. The Prosecution also proposes that the parties and participants be permitted to make submissions in advance of imposition of sentence. The submissions can set out the evidence from the trial that they deem to be relevant to sentencing and their particular sentencing recommendations.

[4] ICC-01/04-01/06-1250, para. 4.
[5] Bearing in mind the length of time it will take the Registry to prepare the translation of salient sections to enable Mr Lubanga to prepare his submissions: ICC-01/04-01/06-2844, para. 4. See also, ICC-01/04-01/06-T-99, pages 39-40 and ICC-01/04-01/06-2360, para. 38.

(ii) Additional evidence may be heard at the sentencing hearing

9. Article 76(2) expressly provides for the possibility of presenting additional evidence during the sentencing hearing. The Chamber has already contemplated such a possibility: during the trial, the parties presented evidence relevant to sentencing as authorised by the Chamber (in accordance with Rule 140(2)(b)) "in order to avoid recalling witnesses unnecessarily".[6] The Chamber explained that having witnesses testify on matters related to sentencing "only arises if it is proposed that evidence *that would ordinarily be advanced at that separate sentencing hearing* should be given instead during the trial" [emphasis added].[7]

10. This further evidence may address the character of the convicted person[8] and may include psychological or psychiatric evidence. It may also address aggravating and mitigating factors.

11. Any applications to the Chamber seeking to call new evidence should be grounded in relevance and good cause with sufficient detail of the nature of the additional evidence and the issues to which it is relevant for sentencing. For an orderly presentation, the Prosecution submits that all parties and participants – including specifically the Defence – first should be required to identify its proposed evidence and detail its substance and relevance. Applications should be made well in advance to allow appropriate time for responses to the application and to prepare for the questioning of witnesses.[9]

12. The Prosecution notes that Mr Lubanga chose not to given sworn evidence during the trial. Should the Chamber determine that he can make a sworn or unsworn statement for the purpose of sentencing, the Prosecution should be

[6] ICC-01/04-01/06-1140, para. 32.
[7] ICC-01/04-01/06-T-99, pages 39-40.
[8] See, *AFRC case*, SCSL-2004-16-T, Sentencing Judgment, 19 July 2007, para. 6.
[9] The Prosecution notes that in the AFRC Sentencing Judgment, the Trial Chamber did not deem it necessary for witnesses to be called at the sentencing stage and denied the Defence request to call one witness. *AFRC case*, SCSL-2004-16-T, Sentencing Judgment, 19 July 2007, para.13.

permitted to question Mr Lubanga on the substance of his statement and make submissions on the weight to be attributed to it.[10]

13. For its part, the Prosecution does not presently intend to seek authorisation to call witnesses or tender new evidence during the sentencing hearing.

14. If additional evidence is tendered during the sentencing hearing, the parties should be permitted to make supplementary oral or written observations regarding the value and weight to be attributed to such evidence.

(iii) Participation of legal representatives of victims

15. The Prosecution submits that participating victims, through their legal counsel, should be permitted to participate in the sentencing hearing. Rule 145 mandates that in determining the appropriate sentence, the Chamber must consider the harm caused to victims and their families (Rule 145(1)(c)), any efforts of the convicted person to compensate victims (Rule 145(2)(a)(ii)), and the particular vulnerability of victims, particular cruelty or situations of multiple victims (Rule 145(2)(b)(iii) and (iv)). These considerations affect the personal interests of victims and they should be permitted to submit their views and concerns on these topics.

16. Rule 91(2) provides that victim participation shall include participation in hearings, unless the Chamber decides that the legal representative's interventions should be confined to written observations or submissions.

(iv) Delivery of sentence

[10] The Chamber previously ruled, in the context of Mr Lubanga's unsworn statement given during closing argument, that "[i]t goes without saying that if any significant consequential matters arise from his observations, the Prosecution will be entitled to address us on the issue." ICC-01/04-01/06-T-356, p. 2, lines 11-21.

17. The sentence is to be delivered publicly in the presence of the Accused, the Prosecutor, the victims or the legal representatives of participating victims and the representatives of the States which have participated in the proceedings, in accordance with Article 76(4) and Rule 144 (1).

III. Prosecution's Submissions on Sentencing Principles

18. The Court is vested with the discretion to impose an appropriate sentence within the range of applicable penalties set out in the Statute. In determining the appropriate sentence, the Court must consider any factors relevant to the gravity of the offence and any relevant aggravating and mitigating factors.

(i) Applicable Penalties

19. Article 77 establishes the three possible penalties for persons convicted of a crime under Article 5. First, Article 77(1)(a) provides that a specified term of imprisonment not exceeding 30 years may be imposed, with credit for time served in custody in connection with the crime for which they have been convicted.[11] In cases of "extreme gravity" and where "the individual circumstances of the convicted person" so warrant, a term of life imprisonment may be imposed. These sentences are subject to future review by the Court for possible reduction, as described in Article 110.

20. Second, Article 77(2) provides that, "in addition to imprisonment", a fine may be ordered. This language makes plain that a fine cannot be imposed *as an alternative* to imprisonment. In deciding whether the imposition of a fine is justified, Rule 146(1) requires that the Court first determine "whether imprisonment is a sufficient penalty" and must give consideration to the financial capacity of the convicted person, including any orders for forfeiture

[11] Statute, Article 78(2).

and, as appropriate, reparations. "Under no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants".[12] The Court shall also take into consideration "the damage and injuries caused, as well as the proportionate gains derived from the crime by the perpetrator".[13] If a fine is imposed, the Court may extend the term of imprisonment if the convicted person willfully fails to pay it.[14]

21. Third, Article 77(2)(b) provides that an order of forfeiture of proceeds and property derived from the crime may be imposed, but "without prejudice to the rights of bona fide third parties".

22. Pursuant to Article 79, the Court may order that money and other property collected through a fine or forfeiture be transferred to the Trust Fund.

(ii) Purpose of and factors relevant to the determination of the sentence

23. The Statute establishes the mandate to end impunity and contribute to the prevention of crimes.

24. Article 78(1) requires that the Court take into account the gravity of the crime and the individual circumstances of the convicted person. Rule 145 further provides that the sentence imposed "must reflect the culpability of the convicted person", "balance all the relevant factors including any mitigating and aggravating factors and consider the circumstances of both the convicted person and the crime".[15] Rule 145(1)(c) specifies that the Court *must* take into account

[12] ICC Rules of Procedure and Evidence (*hereinafter* "ICC Rules"), Rule 146(2)(a).
[13] ICC Rules, Rule 146(2).
[14] ICC Rules, Rule 146(5) and (6).
[15] ICC Rules, Rule 145.

the following factors: "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, the degree of participation of the convicted person, the degree of intent, the circumstances of manner, time and location, and the age, education, social and economic condition of the convicted person."[16]

25. Whereas the decision on the guilt of the Accused under Article 74(2) "shall not exceed the facts and circumstances described in the charges", the Rule 145 considerations at sentencing clearly include matters outside the four corners of the document containing the charges ("DCC"). Neither the Statute nor the Rules define the applicable evidentiary standard for these factual considerations. Although case law of the *ad hoc* Tribunals indicates that aggravating factors should be proved by the Prosecution beyond reasonable doubt and should be directly related to the charged offence,[17] this Court is not bound by this jurisprudence and there is good reason to depart from it. The Statute provides a maximum available penalty of 30 years (unless the case presents extreme gravity), and within that available term, the Court has the discretion to determine the appropriate sentence based upon the convicted person's particular characteristics, the characteristics of the crime, or the harm suffered. The Prosecution submits that the Statute permits the Court, upon consideration of the required and appropriate factors, to reach its discretionary decision on a term of years without requiring that the factual basis for its findings be proved beyond reasonable doubt. In particular, the Prosecution submits that the Chamber may find relevant aggravating factors, as well as mitigating ones, based on a standard of "balance of probabilities". [18]

a. The gravity of the crime

[16] ICC Rules , Rule 145(1)(c).
[17] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1), 79, 81.
[18] The *ad hoc* Tribunals impose this standard for mitigating factors.

26. Unlike the definition of crimes and jurisdiction at the *ad hoc* Tribunals, gravity in the ICC is an attribute of admissibility.[19] There is a baseline finding of gravity in this case.[20] PTCI and II in the context of determining gravity as part of the admissibility requirement under Article 17(1)(d) have held that: "the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case".[21] PTCII further considered as relevant, the aggravating factors listed in Rule 145 (aggravating factors):

> When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(l)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.[22]

b. Individual circumstances of the convicted person

[19] While Rule 145 itself identifies gravity as a potential aggravating factor, given that gravity was already determined at the initiation of the case, that additional aggravating factor should be applicable only when the "extreme gravity" of the crime justifies departing from the term of years and imposing a sentence of life imprisonment.

[20] ICC-01/04-01/06-8-Corr, para.74.

[21] *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31. *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 1 April 2010, para. 62.

[22] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 1 April 2010, para. 62.

27. The Chamber must consider "individual circumstances of the convicted person" (Article 78(1)). Rule 145(1)(c) directs the Court to give consideration to the age, education, social and economic condition of the convicted person.[23] This is not an exhaustive list. The Court has the discretion to consider other appropriate individual circumstances.

i Aggravating circumstances

28. Rule 145(2) provides that the Court shall take aggravating factors into account, as appropriate. Its non-exhaustive list includes "any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature, abuse of power or official capacity, commission of the crime where the victim is particularly defenceless, and commission of the crime with particular cruelty or where there were multiple victims."[24]

29. The jurisprudence of the ICTY, ICTR and SCSL have established a bar on double-counting, meaning that no factor that is an essential element of the crime may be additionally taken into account as a separate aggravating circumstance.[25]

ii Mitigating circumstances

30. Rule 145(2)(a) requires the Court to take mitigating factors into account. It specifies only two - "the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress" and "the convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court" – but leaves open the Court's consideration of other unspecified

[23] Mark Jennings, 'Determination of the sentence', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, p. 1436.
[24] ICC Rules, Rule 145(2)(b).
[25] See *Prosecutor v. Brima, Brima Kamara, Santigie Kanu*, SCSL-04-16-T, T.Ch. Sentencing Judgment, 19 July 2007, para. 23; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, T.Ch. Sentencing Judgment, 8 April 2009, para. 102.

factors. The most-often cited additional factors in mitigation include cooperation, personal and family circumstances, remorse, and voluntary surrender.

(iii) Multiple Convictions

31. Article 78(3) regulates the determination of sentences in cases where the accused is convicted of more than one crime. It requires that a separate sentence be pronounced for each crime, but a single sentence imposed which shall be no less than the highest individual sentence pronounced, and shall not exceed 30 years imprisonment or a sentence of life imprisonment.

32. Though Article 78(3) does not address fines, the Prosecution submits that they too should be considered by the Court in a unified way, taking into account all crimes of which the person concerned has been convicted.[26]

Dated this 18th day of April 2012
At The Hague, The Netherlands

[26] R. E. Fife, 'Applicable Penalties', *in* O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Second edition, p. 1427.