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THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmánski

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public *with* Public Annex A

**Prosecution's Document in Support of Appeal against Trial Chamber III's
"Decision on Sentence pursuant to Article 76 of the Statute"**

Source: Office of the Prosecutor

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I. Introduction

1. In its “Decision on Sentence pursuant to Article 76 of the Statute”, Trial Chamber III correctly set out the following principle:

a proportionate sentence [...] acknowledges the harm to the victims and promotes the restoration of peace and reconciliation. [A] sentence should be adequate [...] to ensure that those who would consider committing similar crimes will be dissuaded from doing so.¹

2. The Prosecution appeals the 18-year term of imprisonment imposed on Jean-Pierre Bemba Gombo (“Bemba”) because it is legally flawed, stands in stark contrast to the Chamber’s careful reasoning in the Decision, and fails to fulfil the Chamber’s own proper aspiration to acknowledge the harms committed and to deter their future reoccurrence.

3. In particular, the “joint sentence” of 18 years’ imprisonment—which, being equivalent to the individual sentences for the crimes of rape, was the absolute *minimum* term permitted by the Statute in these circumstances—does not reflect the totality of Bemba’s culpability, including the gravity of *all* the crimes of which he was convicted, the harm suffered by *all* victims and the different types of criminality and victimisation. In fact, it fails to reflect the distinct nature of the crimes of murder and pillage and their particular gravity (which the Chamber otherwise correctly emphasised), and fails to acknowledge the distinct harms suffered by the victims of those crimes. It therefore does not provide adequate, or any, retribution for those crimes.

4. Moreover, by implying—incorrectly—that no punishment for additional types of violent crime is warranted once a perpetrator has committed one type of offence, the sentence fails to provide sufficient deterrence to future perpetrators.

¹ [Decision](#), para. 11. For long citation of all references, see glossary in Annex.

5. In this appeal the Prosecution does not challenge the Chamber's determination of the sentences for *each of the individual crimes* (rape: 18 years; murder: 16 years; pillage: 16 years),² or the relevant underlying factual findings. To the contrary, the Chamber's analysis in these respects was both reasonable and correct.

6. However, the Chamber erred in then concluding, in the context of the five individual sentences it imposed, that it was permissible in the circumstances of this case to impose the minimum possible *joint* sentence allowed by article 78(3)—just 18 years. The very limited reasoning presented to justify that conclusion failed to address the obvious contradictions with the careful analysis characterising the rest of the Decision.³ Treating article 78(3) as a purely formalistic requirement, the Chamber failed to provide adequate explanation for why the minimum possible joint sentence was appropriate in these circumstances.

7. Accordingly, the Chamber made three errors in determining the joint sentence imposed under article 78(3).

- First, the Chamber erred in law by misapplying article 78(3) and rule 145(1)(a) and thereby failing to properly impose a joint sentence that reflected the totality of Bemba's culpability. Article 78(3) requires a Chamber first to impose individual sentences for each crime for which a conviction is entered, and then, in a distinct and reasoned second step, to impose a joint sentence. By simply ordering the individual sentences to "run concurrently",⁴ and by failing to weigh the relevant factors required

² The Chamber entered separate but identical convictions and sentences for counts of rape and murder as war crimes and crimes against humanity (*i.e.*, two sentences of 18 years for rape; two sentences of 16 years for murder). See [Decision](#), para. 94.

³ See [Decision](#), para. 95 (finding that "all crimes are geographically and temporally connected and Bemba's responsibility is based on the same conduct" and that "the highest sentence imposed, namely, "18 years for the crimes of rape, reflects the totality of Bemba's culpability").

⁴ [Decision](#), para. 95.

inter alia by rule 145(1)(a), the Chamber breached—and, indeed, may have entirely misunderstood—this requirement.⁵

- Second, further or in the alternative, the Chamber erred in law by failing to provide sufficient reasoning for the single most important and consequential finding in the Decision, namely that “18 years for the crimes of rape, reflects the totality of Mr Bemba’s culpability”.⁶ After a 35-page analysis supporting its determination of the individual sentences, the Chamber imposed the minimum possible joint sentence in a single paragraph—which is inconsistent with, and indeed neglects, its numerous relevant previous findings. Even if the Chamber had properly appreciated the law, it was obliged to provide an adequate explanation for this obvious contradiction at the heart of the Decision. This was not only necessary for the Decision to be properly understood, but also to ensure the fairness of the trial.
- Third, in any event, in these circumstances, imposing a joint sentence of 18 years’ imprisonment constituted an abuse of the Chamber’s discretion. In particular, no reasonable Chamber could have found that the individual sentence imposed for the crimes of rape reflected the totality of Bemba’s culpability,⁷ taking into account the victims and the gravity of the other crimes. Given the nature and extent of the Chamber’s factual findings—and in particular its findings regarding the five cumulative convictions for three clearly distinguishable types of criminality and victimisation (sexual violence, violence to life, deprivation of property) with largely different victims—the Chamber’s determination to impose the legal minimum

⁵ [Lubanga SAJ](#), para. 43.

⁶ [Decision](#), para. 95.

⁷ [Decision](#), para. 95.

sentence permitted by article 78(3) is so unfair and unreasonable as to constitute an abuse of discretion.

8. Each of these errors materially affected the Decision because they each led the Chamber to impose a sentence that was disproportionate to the harm caused to the victims of the crimes, and to Bemba's overall culpability.⁸ Each of these errors alone requires that the joint sentence of 18 years' imprisonment be reversed and increased. The Prosecution maintains its recommendation from trial that a sentence of at least 25 years' imprisonment would be appropriate,⁹ and consistent with the Chamber's reasoning regarding the individual sentences it properly imposed.

9. This is perhaps the most serious case in which a person has been exclusively convicted of superior responsibility in the history of international criminal law. Bemba not only failed to prevent or punish the serious crimes of murder, rape and pillage committed by his subordinates, but was found to have aimed at encouraging them and directly contributed to the continuation and further commission of these distinct crimes.¹⁰ He should be sentenced accordingly.

II. Standard of Review

10. Article 81(2) provides that a sentence may be appealed on the basis of "disproportion between the crime and the sentence". Proportionality is generally measured by the relationship between the degree of harm caused by the crime(s) and the culpability of the convicted person, on the one hand, and the length of sentence, on the other. To exercise its discretion properly, a Chamber must enter a sentence that is proportionate to the crime(s) and that reflects the totality of the culpability of the convicted person.¹¹

⁸ [Lubanga SAJ](#), paras. 39-41, 44-45.

⁹ See [Prosecution Sentence Submissions](#), para. 127.

¹⁰ [Decision](#), para. 66.

¹¹ See [Lubanga SAJ](#), para. 40.

11. Although the Appeals Chamber will not generally interfere with a Trial Chamber's exercise of discretion in sentencing, it can and should do so when a sentencing determination is vitiated by an error of law, an error of fact, or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.¹²

12. Since a Trial Chamber must weigh and balance all relevant factors when determining an appropriate sentence,¹³ its failure to consider a factor mandatory for the proper exercise of its discretion can amount to a legal error.¹⁴ Failure to address relevant portions of evidence or facts may likewise constitute a failure to provide a reasoned opinion, another legal error.¹⁵ In assessing such errors, consistent with its well established practice, the Appeals Chamber should not defer to a Trial Chamber's interpretation but instead should reach its own conclusions as to the appropriate law, and then determine whether or not a Trial Chamber's interpretation was correct.¹⁶

13. The further requirement of article 83(2)—that the sentence be materially affected by an error of fact or law or procedural error—is met when a Trial Chamber's exercise of discretion has led to a disproportionate sentence, as it did in this case.¹⁷

¹² [Lubanga SAJ](#), para. 41 (referring to [Kony Admissibility Appeal Decision](#), para. 80). See also para. 44 (reaffirming that the Appeals Chamber's review in such circumstances will be deferential, intervening only if (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion).

¹³ [Lubanga SAJ](#), para. 43.

¹⁴ [Lubanga SAJ](#), para. 42; see also [Admissibility Appeal Decision](#), para. 63.

¹⁵ [Gbagbo Interim Release Appeal Decision](#), para. 48. See also ICTY, [Perišić AJ](#), paras. 9, 95-96; ICTR, [Kalimanzira AJ](#), paras 99-100, 195-199.

¹⁶ See e.g. [Ngudjolo AJ](#), para. 20; [Lubanga AJ](#), para. 18; [Banda Translation Appeal Decision](#), para. 20; [Mbarushimana Confirmation Appeal Decision](#), para. 15; [Gbagbo Jurisdiction Appeal Decision](#), para. 76; [Ongwen IDAC Appeal Decision](#), para. 30.

¹⁷ [Lubanga SAJ](#), para. 45.

III. The Chamber's Findings

1. The individual sentences

14. Bemba was convicted as a person effectively acting as a military commander, under article 28(a), with responsibility for the following crimes committed by his subordinates over the course of about 4 ½ months:

- Murder as a crime against humanity and as a war crime;
- Rape as a crime against humanity and as a war crime;
- Pillage as a war crime.¹⁸

15. In the Decision, the Chamber identified, to the extent possible, the victims of each of these crimes.¹⁹ Likewise, it analysed separately the gravity of each of these types of crimes—rape,²⁰ murder,²¹ and pillage²²—and the specific aggravating circumstances applicable to the crimes of rape²³ and pillage²⁴. It thus recognised the distinct nature and consequences of each offence, each with characteristics that are not subsumed by the others. In particular, for example, the Chamber held that:

- The Chamber convicted Bemba of superior responsibility for the murder of P-87's brother, P-69's sister and an unidentified Muslim man.²⁵ It held that the murders committed in this case not only “deprive[d] the direct victim[s] of life”, which is “the ultimate harm”,²⁶ but also “injured” physically and/or psychologically other persons including those who

¹⁸ [Judgment](#), para. 752.

¹⁹ [Decision](#) paras. 27 (murder), 34 (rape), 48 (pillage).

²⁰ [Decision](#), paras. 36-40.

²¹ [Decision](#), paras. 27-33.

²² [Decision](#), paras. 49-51.

²³ [Decision](#), paras. 41-47.

²⁴ [Decision](#), paras. 52-58.

²⁵ [Decision](#), para. 27.

²⁶ [Decision](#), para. 29.

witnessed the killings.²⁷ The impact was “chronic and severe”.²⁸ In addition, the Chamber observed that the impact of the loss of the murdered person upon their relatives and dependents “cannot be underestimated”,²⁹ depriving various persons of “support, whether financial, physical, emotional, psychological, moral, or otherwise”.³⁰ Simply put, the consequences of the loss of life “rippled through the relevant communities.”³¹

- The Chamber convicted Bemba of superior responsibility for the rape of 28 girls, women and men.³² The rapes committed in this case were of “utmost, serious gravity”, causing damage to “victims, their families, and communities” that was “severe and lasting”.³³ Direct victims suffered a range of harms including grave “physical problems” and “psychological, psychiatric, and social consequences”,³⁴ including being “ostracised, socially rejected, and stigmatised.”³⁵ Victims described consequences including feeling suicidal, constantly anxious, sad, an overall sense of pessimism and inhibition, a loss of dignity, a feeling as if they were dead, and the destruction of their family.³⁶ Victims were often particularly defenceless,³⁷ and the rapes committed with particular cruelty.³⁸

²⁷ [Decision](#), para. 29. *See also* para. 32 (murders “were committed inside the victims’ homes and in the presence of others, including family members”, who “suffered severe and lasting harm”).

²⁸ [Decision](#), para. 31.

²⁹ [Decision](#), para. 29.

³⁰ [Decision](#), para. 30.

³¹ [Decision](#), para. 30.

³² [Decision](#), para. 34.

³³ [Decision](#), para. 37, 40.

³⁴ [Decision](#), para. 38.

³⁵ [Decision](#), para. 39.

³⁶ [Decision](#), paras. 38-39.

³⁷ [Decision](#), paras. 41-43.

³⁸ [Decision](#), paras. 44-47.

- The Chamber convicted Bemba of superior responsibility for the pillage of 25 individual direct victims (of which 12 were also raped),³⁹ as well as P-87's family, P-42's family, a church, nuns, priests and the gendarmerie in Mongoumba.⁴⁰ The acts of pillage committed in this case had "grave [...] and far-reaching" consequences for various aspects of the victims' personal and professional lives, often leaving them with nothing.⁴¹ As a consequence, the victims often lacked even the "basic necessities" of their livelihoods.⁴² The pillaging was again often committed with particular cruelty.⁴³

16. As a result of this careful analysis, the Chamber correctly and reasonably imposed the following individual sentences:

- Murder as a war crime: 16 years' imprisonment;
- Murder as a crime against humanity: 16 years' imprisonment;
- Rape as a war crime: 18 years' imprisonment;
- Rape as a crime against humanity: 18 years' imprisonment;
- Pillage as a war crime: 16 years' imprisonment.⁴⁴

³⁹ See [Decision](#), paras. 34, 48 (12 victims of pillage (P-68, P-68's sister in law, P-87, P-23, P-80, P-81, P-82, P-69, P-22, P-79, P-42's daughter, V-1) were also raped; other victims of pillage (P-119, P-69's sister, P-108, P-110, P-112, P-22's uncle, P-79's brother, P73, V2, an unidentified women outside PK22, the Mayor, and an unidentified "Muslim man and his neighbour") were not direct victims of rape).

⁴⁰ [Decision](#), para. 48.

⁴¹ [Decision](#), paras. 49-51.

⁴² [Decision](#), para. 51.

⁴³ [Decision](#), paras. 52-58.

⁴⁴ [Decision](#), para. 94.

2. The joint sentence

17. Having determined these individual sentences, the Chamber then considered the total time of imprisonment that Bemba should serve. In contrast to its previous detailed analysis, its reasoning was very brief:

The Chamber notes that, based on the same acts, it entered cumulative convictions for murder and rape as both war crimes and crimes against humanity. Further, all crimes are geographically and temporally connected and Mr Bemba's responsibility is based on the same conduct. The Chamber also considers that the highest sentence imposed, namely, 18 years for the crimes of rape, reflects the totality of Mr Bemba's culpability. In these circumstances, the Chamber decides that the sentences for the war crimes and crimes against humanity of murder and rape and the war crime of pillaging shall run concurrently.⁴⁵

18. On the law, the Chamber had directed itself that:

The Chamber must first identify and assess the relevant factors in Article 78(1) and Rule 145(1)(c) and (2). It must then balance all relevant factors pursuant to Rule 145(1)(b) and pronounce a sentence for each crime, *as well as a joint sentence specifying the total period of imprisonment. The total sentence cannot be less than the highest individual sentence. Pursuant to Rule 145(1)(a), the sentence must reflect the culpability of the convicted person.* Based on its intimate knowledge of the case, the Chamber has considerable discretion in imposing a proportionate sentence.⁴⁶

19. Beyond referring to the submission of the Defence,⁴⁷ the Chamber made no other reference in the Decision to article 78(3) or, in particular, the concept of a "joint sentence".

⁴⁵ [Decision](#), para. 95.

⁴⁶ [Decision](#), para. 12 (emphasis added).

⁴⁷ [Decision](#), para. 90.

IV. First Ground of Appeal: the Chamber erred in the application of article 78(3) and rule 145(1)(a) by failing properly to impose a joint sentence

20. The Decision is vitiated by the Chamber's misapplication of article 78(3), together with rule 145(1)(a). Although it determined the term of imprisonment which Bemba should actually serve (by ordering his *individual sentences* to be served *concurrently*), it failed properly to apply the reasoned process for determining a *joint sentence* which article 78(3) necessarily requires. Indeed, from its language and approach, it is unclear whether the Chamber understood article 78(3) to be anything more than a purely formal requirement. In so doing, the Trial Chamber failed to properly weigh and balance its previous findings made in the context of the individual sentences imposed, or indeed to conduct any substantive analysis with reference to rule 145(1)(a) at all.

21. The Chamber's erroneous application of the law led it to impose a sentence disproportionate to the nature and degree of harm caused by the separate crimes and thus to the *totality* of Bemba's culpability.⁴⁸ Had the Chamber properly applied article 78(3) and rule 145(1)(a), it would have identified a joint sentence reflective of the distinct harms identified in the Decision and represented by the individual sentences imposed. Such a sentence would, at least, have been greater than the minimum term allowed by article 78(3).

1. The applicable legal framework

22. Article 78(3) reads:

When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

⁴⁸ [Lubanga SAI](#), para. 40.

23. Rule 145(1)(a) further requires that a Trial Chamber, in its determination of the sentence pursuant to article 78(1), shall:

Bear in mind that *the totality of any sentence* of imprisonment [...] must reflect the culpability of the convicted person. [Emphasis added.]

24. Under the Statute, the determination of the period of imprisonment to be ultimately served when a person has been convicted of “more than one crime” is thus the result of a ‘two step’ process, requiring two distinct exercises of discretion:

- First, a Trial Chamber must exercise its discretion to decide on individual sentences for *each* crime for which convictions are entered. Each individual sentence must reflect the culpability of the convicted person for that specific crime,⁴⁹ including its gravity, its impact on the victims and the individual circumstances relevant to that crime.⁵⁰ As previously stated, the Chamber in this case properly exercised its discretion in determining individual sentences for the crimes of rape, murder and pillage in its 35-page analysis.⁵¹
- Second, and separately, a Trial Chamber must exercise its discretion to decide a *joint* sentence which will be the “total period of imprisonment” served by the convicted person. Such a joint sentence may never be *lower* than the highest individual sentence, but may be calibrated at a figure from that minimum threshold up to a maximum of 30 years or life imprisonment. The joint sentence need not necessarily be the sum of each individual sentence. Rather, the joint sentence imposed should reflect the number and variety of the convictions for which individual sentences were imposed,⁵² and thus, as required by rule 145(1)(a), the entirety of the

⁴⁹ See Rule 145(1)(a).

⁵⁰ Statute, art. 78(1).

⁵¹ [Decision](#), paras. 21-94.

⁵² See further e.g. Khan, p. 1899. See also Schabas, pp. 907-908.

convicted person's culpability—including the harm suffered by all the victims and the variety of types of criminality and victimisation for which the accused was convicted.⁵³ In the context of the two-step system applicable under the Statute, it will only very rarely be appropriate for the individual sentences additional to the highest sentence not to be reflected in the joint sentence at all.

25. This 'two step' process adopted by the Statute is undeniably a novelty in international criminal procedure, consciously chosen by the drafters in preference to the 'single step' approach which has been adopted by international and hybrid courts and tribunals,⁵⁴ including ICTY,⁵⁵ ICTR,⁵⁶ MICT,⁵⁷ STL⁵⁸ and SCSL.⁵⁹

26. For example, rule 87(C) of both ICTY and ICTR Rules of Procedure and Evidence, as well as rule 105(C) of the MICT Rules of Procedure and Evidence,⁶⁰ require the Trial Chamber *either* to impose a) multiple individual sentences which may only be served consecutively or concurrently, or b) one single sentence reflecting the totality of the criminal conduct.⁶¹ In other words, under the sentencing regimes of

⁵³ [Lubanga SAJ](#), para. 43.

⁵⁴ See also Stuckenberg, p. 851.

⁵⁵ See especially ICTY Rule 87(C).

⁵⁶ See especially ICTR Rule 87(C).

⁵⁷ See especially MICT Rule 105(C).

⁵⁸ See especially STL Rule 171(D).

⁵⁹ See especially SCSL Rule 101(C).

⁶⁰ The current formulation was adopted in the 19th edition of 19 January 2001. In their earlier formulation, rules 87(c) and 101(c) of both the ICTY and ICTR Rules did not allow for the imposition of a single sentence and required a Chamber to enter multiple sentences to be served either consecutively or concurrently: "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time *determine* the penalty to be imposed in respect of each finding of guilt": see e.g. ICTY Rule 87(c) (Rev.18) (emphasis added)). However, both ICTY and SCSL jurisprudence found that it was within a Chamber's discretion to impose a single global sentence *as an alternative to* multiple individual sentences, even under the old formulation of the Rules: see e.g. ICTY, [Kunarac AJ](#), paras. 342-344 ("The Appeals Chamber considers that the version of Rule 101(C) contained in the 18th edition of the Rules did not expressly require a Trial Chamber to impose multiple sentences for multiple convictions. It merely required the Trial Chamber to indicate whether multiple sentences, if imposed at all, would be served consecutively or concurrently. This was a rule intended to provide clarity for the *enforcement* of sentences. [...] The Appeals Chamber holds that neither Rule 87(C) nor Rule 101(C) of the 18th edition of the Rules prohibited a Trial Chamber from imposing a single sentence, and the precedent of a single sentence was not unknown in the practice of the Tribunal or of the ICTR. The newer version of Rule 87(C) of the Rules [...] simply confirmed the power of a Trial Chamber to impose a single sentence", emphasis added); SCSL, [Taylor SJ](#), paras. 9-11.

⁶¹ See ICTR Rule 87(C); ICTY Rule 87(C); MICT Rule 105(C) ("If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of

the ICTY, ICTR and MICT, judges have only a binary choice: either multiple individual sentences—in which case, the Trial Chamber will then *indicate* whether the convicted person should serve only either the single highest individual sentence ('concurrent' sentencing), or the arithmetic total of some or all the individual sentences ('consecutive' sentencing)—or a single global sentence whose quantum is set by the judges in their discretion.⁶²

27. By contrast, article 78(3) of the Statute creates a system which is both more flexible and more precise. On the one hand, it requires the Trial Chamber to make clear the sentence merited by each of the crimes for which a conviction is entered, enhancing the transparency of the sentencing process. On the other, it allows—and requires—the Trial Chamber to set a joint sentence which is more closely calibrated to the *totality* of the convicted person's culpability (on a spectrum from the highest individual sentence to the maximum sentence permitted by the Statute), having regard not only to the gravity of particular crimes but also the number of offences committed, their distinct nature and all of the victims who have suffered as a result of the different crimes. The separate joint sentence envisaged by article 78(3) unshackles the Trial Chamber from the binary choice only to order the concurrent or consecutive discharge of individual sentences, and gives great flexibility to reflect the particular circumstances of the case and to properly apply rule 145(1)(a) where there are multiple convictions. Yet it is inherent in this system that it requires a properly reasoned process of judicial analysis at both steps—otherwise, the very object of article 78(3) is defeated.

28. In this context, although it is not *per se* incorrect for a Chamber of this Court to order individual sentences to be served “concurrently” —in that this is the minimum

guilt and indicate whether such sentences shall be served consecutively or concurrently, *unless it decides* to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused”, emphasis added). *See also* STL Rule 171(D) (a virtually identical formulation).

⁶² So far, after the adoption of the new formulation of rule 87(C), ICTY and ICTR chambers have always opted to impose a single sentence without imposing individual sentences for each finding of guilt.

possible joint sentence permitted by article 78(3)—the Chamber’s reference to such language or concepts, which are redolent of the ‘single step’ approach, should trigger cautious, careful scrutiny.

29. The Prosecution acknowledges that the previous caselaw of this Court has not analysed the effect of article 78(3) in great detail, and occasion has not yet arisen for its practical operation to receive the scrutiny of the Appeals Chamber. This is just such an opportunity, however. And it is the requirements of the Statute, properly interpreted, which must be dispositive of the Court’s practice. The terms of article 78(3), given their ordinary meaning and in context, and in light of the object and purpose of the Statute, can only be understood to require the ‘two step’ analysis described above.

2. The Chamber’s error

30. The Chamber correctly set out the law by noting that under article 78(3) a Chamber must “pronounce a sentence for each crime, as well as a joint sentence specifying the total period of imprisonment”.⁶³ However, as previously noted,⁶⁴ it made no further reference to these requirements in the Decision.

31. Indeed, the Chamber erred in law by failing to properly apply in practice the reasoned process for determining a *joint sentence* required by article 78(3) and rule 145(1)(a). While the Chamber correctly conducted the analysis required under the ‘first step’ and determined individual sentences, each reflecting the gravity of the individual crimes and the harm suffered by the victims of those crimes,⁶⁵ it failed to undertake the analysis required by the ‘second step’, including with reference to rule 145(1)(a). The Trial Chamber did not separately exercise its discretion to determine a joint sentence reflecting the totality of Bemba’s culpability, including the joint gravity

⁶³ [Decision](#), para. 12 (referring to [Lubanga SAJ](#), para. 33).

⁶⁴ *See above* paras. 17-19.

⁶⁵ [Decision](#), paras. 20-94.

of all three crimes, the different types of criminality and victimisation and the harm suffered by the victims of all the crimes.

32. If anything, the Chamber's characterisation of its conclusion as imposing "concurrent" sentences suggests that it may have erroneously confused the requirements of article 78(3) with the 'one step' practice of other international tribunals, or viewed article 78(3) as being only formalistic in its significance and not requiring a separate analysis and exercise of discretion. The following indicators in the Decision individually and cumulatively demonstrate the Chamber's legal error.

a. The plain language of the Decision

33. The Chamber expressly stated that "the [individual] sentences [...] shall run concurrently".⁶⁶ The Chamber's language clearly reflects the 'one step' process, indicating *how* multiple individual sentences should be enforced (namely concurrently), as opposed to a separate exercise of discretion with respect to a joint sentence under article 78(3).

34. Conversely, the Decision contains only very limited references to "article 78(3)", "rule 145(1)(a)", or the notion of the "joint sentence". None of these appear in the context of the Chamber's reasoning when assessing the total period of imprisonment that Bemba should actually serve.

b. The erroneous reference to the legal framework at the *ad hoc* tribunals

35. The Chamber's failure to apply the 'two step' process required by article 78(3) is further demonstrated by its reference to concepts from ICTR and SCSL caselaw when analysing the total period of imprisonment that Bemba should serve. In particular, the Chamber observed as follows:⁶⁷

⁶⁶ [Decision](#), para. 95.

⁶⁷ [Decision](#), fn. 279 (emphasis added).

Where a set of underlying crimes are geographically and temporally connected, and the convicted person's responsibility therefor is based on the same conduct, *it may be appropriate for a global sentence to be imposed, instead of individual sentences for each crime*, so long as such global sentence adequately reflects the convicted person's culpability.

36. As indicated by the Chamber, this language derives from judgments of the ICTR Appeals Chamber in *Nahimana et al.* and *Kambanda*. Likewise, the SCSL Appeals Chamber used the same language in *Fofana et al.*⁶⁸ However, as discussed above,⁶⁹ these jurisdictions follow the 'one step' approach to sentencing.

37. The Chamber's observation strongly indicates that it misunderstood its obligations under article 78(3). The Statute permits no alternative discretion of the kind apparently contemplated by the Chamber—nor, indeed, is there any need for such a discretion given the great flexibility available to a Chamber in determining the joint sentence in the 'second step' of the process.⁷⁰ Rather the requirement in article 78(3) to determine a joint sentence is an unqualified obligation, requiring the Chamber separately to exercise its discretion pursuant to rule 145(1)(a).

c. Lack of reasoning on material factors

38. Rule 145(1)(a) requires that, in determination of the sentence, the Court shall "[b]ear in mind that the *totality* of any sentence [...] must reflect the culpability of the convicted person" (emphasis added).⁷¹ This obligation must necessarily apply not only to the assessment of individual sentences, but also to the separate assessment of the appropriate joint sentence.

⁶⁸ [Decision](#), fn. 279 (citing ICTR, [Nahimana AJ](#), paras. 1042-1043; [Kambanda AJ](#), para. 111; SCSL, [Fofana AJ](#), paras. 546-552).

⁶⁹ See above paras. 25-26.

⁷⁰ See above paras. 24, 27.

⁷¹ The Prosecution notes that the *chapeau* of rule 145(1) refers to article 78(1), but not to article 78(3). However, from the structure of article 78 itself, it is apparent that article 78(3) is a specification of the general duty in article 78(1), which is applicable to the sentencing both of a person convicted of a single crime and a person convicted of multiple crimes, to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person". Accordingly, rule 145(1) must be understood to include sentencing determinations under article 78(3). To conclude otherwise would be to defeat the object and purpose of these provisions.

39. In addition, the Appeals Chamber in *Lubanga* held that when exercising its discretion under rule 145(1)(a), a Chamber must “weigh[...] and balanc[e] all the relevant factors”.⁷² Accordingly, in determining the joint sentence to impose, the Chamber should have referred to the *variety* of crimes, victims and types of victimisation which its findings reflect.⁷³

40. Yet, instead, the Chamber seemed to treat its determination of Bemba’s total term of imprisonment as a mere formality that did not require a properly reasoned opinion reflecting the separate exercise of discretion required by article 78(3). The Chamber thus largely replicated the approach of early ICTY practice:⁷⁴ it discussed at length the individual sentences, but failed to provide any material reasoning in support of its conclusion that the sentences shall run concurrently.⁷⁵

41. This lack of reasoning again suggests that the Trial Chamber followed the ‘one step’ approach, according to which a Chamber, having determined individual sentences, merely *indicates* (as opposed to *assesses*) how they should be enforced—a routine and bureaucratic determination—rather than engaging in a substantial and properly reasoned exercise of discretion that is based on the totality of the relevant factors.

3. The Chamber’s error materially affected the Decision

42. The Chamber’s misapplication of article 78(3) and rule 145(1)(a) vitiated the Chamber’s exercise of discretion and ultimately led to a disproportionate sentence. The error under the First Ground of Appeal prevented the Chamber from choosing a sentence between the highest individual sentence and the sum of all individual sentences (up to 30 years’ or life imprisonment) which fully reflects the totality of

⁷² [Lubanga SAJ](#), para. 43.

⁷³ See above paras. 23-24.

⁷⁴ See above para. 26.

⁷⁵ [Decision](#), para. 95. In comparison, see e.g. ICTY, [Tadić 1997 SJ](#), para. 75; [Tadić 1999 SJ](#), p. 17; [Delalić TJ](#), para. 1286; [Furundžija TJ](#), para. 295; [Kupreškić TJ](#), p. 327.

Bemba's culpability, including the collective gravity of the various crimes of which he was convicted, the different types of criminality and victimisation, and the harm suffered by all of the victims.

43. In other words, having identified the individual sentences, the Chamber erroneously considered only whether these sentences should be served concurrently for a total of 18 years' imprisonment, *or* consecutively for a total of 30 years' or life imprisonment. Misled by this erroneous binary question, the Chamber did not consider it necessary (or even possible) to exercise its discretion to impose a separate total sentence in the range between 18 and 30 years. As such the Chamber deprived itself of the possibility of ordering a joint sentence consistent with its own findings on the gravity of the crimes.

44. The Appeals Chamber should correct this error, reverse the joint sentence of 18 years of imprisonment, and determine a new and higher joint sentence under article 78(3) that is proportionate to all of the crimes for which Bemba was convicted and that properly reflects his culpability for all those crimes, pursuant to rule 145(1)(a).⁷⁶

45. In this case the Appeals Chamber is well suited to exercise its own discretion, and to impose an appropriate sentence as the Prosecution does not challenge any of the Trial Chamber's factual findings. Thus the Appeals Chamber will not need to review the evidence that was before the Trial Chamber but rather may rely—in its fresh consideration—on the Trial Chamber's correct findings.⁷⁷

⁷⁶ Regarding the proper exercise of discretion for the imposition of a new sentence, *see also below* paras. 58-81.

⁷⁷ *See also* [Prosecution Sentence Submissions](#); [Prosecution Oral Sentence Submissions](#), pp.2-20. The Appeals Chamber may also order further sentencing submissions, if necessary.

V. Second Ground of Appeal: the Chamber failed to provide a reasoned opinion

46. Even if the Appeals Chamber concludes that the Chamber did properly understand and seek to apply article 78(3) and rule 145(1)(a), the Chamber further erred in law by failing to provide sufficient reasoning for its finding that “18 years for the crime of rape, reflects the totality of Mr Bemba’s culpability”.⁷⁸ On the basis of this inadequately reasoned consideration—which appears to be inconsistent with its previous findings—the Chamber imposed the legal minimum sentence of 18 years’ imprisonment, a sentence manifestly inadequate to reflect the totality of his culpability.

1. The Chamber’s error

47. As indicated above, the most important determination in the entire Decision—in that it is most consequential for Bemba—is to be found in the following paragraph:⁷⁹

The Chamber notes that, based on the same acts, it entered cumulative convictions for murder and rape as both war crimes and crimes against humanity. Further, all crimes are geographically and temporally connected and Mr Bemba’s responsibility is based on the same conduct. The Chamber *also* considers that the highest sentence imposed, namely, 18 years for the crimes of rape, reflects the totality of Mr Bemba’s culpability. In these circumstances, the Chamber decides that the sentences for the war crimes and crimes against humanity of murder and rape and the war crime of pillaging shall run concurrently.

48. The Chamber succinctly indicated at least some of the factors which guided its decision to order the sentences to run concurrently: 1) war crimes and crimes against humanity (murders and rapes) were based on the same acts; 2) all crimes are geographically and temporally connected; 3) Bemba’s responsibility is based on the

⁷⁸ [Decision](#), para. 95.

⁷⁹ [Decision](#), para. 95 (emphasis added).

same conduct; and 4) 18 years for the crimes of rape reflects the totality of Bemba's culpability.

49. However, the first three factors do not independently support the Chamber's conclusion that the sentences for all five crimes shall run concurrently. The first factor is limited to multiple convictions of the crimes of rape and murder both as war crimes and crimes against humanity, while the second and third factors merely refer to multiple crimes committed in the CAR over a period of 4 ½ months that are all attributed to Bemba pursuant to the same mode of liability under the Statute.⁸⁰

50. The key factor underpinning the Chamber's conclusion is actually the fourth: "[t]he Chamber *also* considers that the highest sentence imposed, namely, 18 years for the crimes of rape, reflects the totality of Mr Bemba's culpability".⁸¹ The Chamber provided no explanation whatsoever as to why it was of the view that the individual sentence of 18 years imposed for the crimes of rape also reflects the gravity and the harm suffered by the victims of the crimes of murder and pillage, as well as the totality of Bemba's culpability for these separate crimes.

51. The Appeals Chamber has held that:

Decisions [...] must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, [...] it is essential that it indicates with sufficient clarity *the basis of the decision*.

⁸⁰ Of themselves, the second and third factors are of questionable materiality. At the ICTY, even in applying its distinct 'one step' analysis, the Appeals Chamber reversed a sentence in which a superior received multiple convictions for different crimes, where each conviction received an identical 7-year sentence and all those sentences were ordered to be served concurrently: *see e.g.* ICTY, [Delalić AJ](#), para. 741 ("a consideration of the gravity of the offences committed [...] involves, *in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes*. The fact that the Trial Chamber did not take adequate account of the gravity of Mucić's offences, and specifically of the underlying crimes, is also demonstrated by the fact that the sentences imposed in respect of each count were identical: seven years for each count. [...] *It effectively simply imposed a global sentence of seven years to cover every offence, which was a manifestly erroneous assessment of the totality of Mucić's conduct. An alternative implication is that the Trial Chamber considered that the criminal conduct of Mucić was effectively the same under each count—a failure to prevent or punish. However, [...] such an approach fails to take account of the essential consideration that the gravity of the failure to prevent or punish is in part dependent on the gravity of the underlying subordinate crimes*", emphasis added).

⁸¹ [Decision](#), para. 95 (emphasis added).

Such reasoning will not necessarily require reciting each and every factor that was before the [...] Chamber to be individually set out, but it must identify *which facts it found to be relevant in coming to its conclusion*.⁸²

52. In this case, the Chamber failed to provide *any*—let alone a “sufficiently clear”—basis for its conclusion that the individual sentence of 18 years for the crimes of rape accurately reflects the totality of Bemba’s culpability for the crimes of rape, murder and pillage. Nor did it identify any fact it found relevant in this regard.

53. This is particularly significant because the Chamber’s conclusion is in direct contradiction with its own prior findings regarding the particular gravity of the crimes of murder and pillage, namely that a separate aggravating circumstance applies to the crime of pillage; that largely different victims suffered different (or additional) harm as a result of these crimes;⁸³ and that the crimes of murder and pillage each justified separate individual sentences of 16 years’ imprisonment.

54. In the face of these findings, a comprehensive explanation *why* the Chamber believed that 18 years’ imprisonment for the crimes of rape also reflected Bemba’s culpability for all other crimes was essential. Indeed, although rendered in the context of the ICTY’s distinct ‘one step’ sentencing system, the Prosecution notes the ICTY’s Appeals Chamber’s admonition that even imposing a single global sentence still “does not entitle the International Tribunal to impose [it] arbitrarily; due consideration must be given to each particular offence in order for its gravity to be determined, *and for a reasoned decision on sentence to be provided*”.⁸⁴ The need for a properly reasoned decision is even more pressing in the more articulated ‘two step’ sentencing process adopted by the Statute.

⁸² [Lubanga Redactions Appeal Decision](#), para. 20 (emphasis added).

⁸³ See below paras. 63-80.

⁸⁴ ICTY, [Blaškić AJ](#), paras. 718 (emphasis added), 723. See also [Delalić AJ](#), para. 771 (discretion in sentencing multiple convictions “must be exercised by reference to the fundamental consideration [...] that the sentence to be served by an accused must reflect the totality of the accused’s criminal conduct”).

2. The Chamber's error materially affected the Decision

55. The Appeals Chamber has held that a sufficiently reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible.⁸⁵ In that sense, the error described under the Second Ground of Appeal infringed on the fairness of the proceedings and the Prosecution's procedural rights.

56. In this case, the Parties, the participating victims and the Appeals Chamber are left with no indication as to which factors the Chamber found to be relevant, or how it weighed those factors, in concluding that the totality of Bemba's culpability, including for the crimes of murder and pillage, is accurately reflected in the individual sentence of 18 years' imprisonment imposed for the crimes of rape. As a result, it is difficult for the Prosecution to locate exactly where the Trial Chamber erred in its reasoning. This is the reason why, under its Third Ground of Appeal, the Prosecution also argues that the imposed sentence of 18 years' imprisonment is *per se* so unreasonable as to constitute an abuse of discretion—no matter what led the Chamber to this conclusion.

57. Failure to provide a reasoned opinion with respect to the most important and consequential finding leading to the Chamber's determination of the joint sentence under article 78(3) nullifies this part of the impugned Decision, and requires fresh consideration with adequate reasoning.⁸⁶ The Appeals Chamber, under article 83(2)(a) and pursuant to its power to "amend the decision or sentence", should freshly consider whether 18 years' imprisonment—deemed appropriate by the Chamber as a sentence for the crimes of rape—reflects the totality of Bemba's culpability for the crimes of rape, murders and pillage, and provide adequate

⁸⁵ [Lubanga Redactions Appeal Decision](#), para. 20; [Lubanga Second Redactions Appeal Decision](#), para. 30. See also e.g. ICTY, [Stanišić & Simatović AJ](#), para. 16.

⁸⁶ See e.g. ICTY, [Gotovina AJ](#), para. 64.

reasoning for its conclusion.⁸⁷ As held by the ICTY Appeals Chamber: when a Chamber's determination is vitiated by inadequate reasoning, "the Appeals Chamber will consider *de novo* the remaining evidence on the record to determine whether the conclusions [...] are still valid."⁸⁸

VI. Third Ground of Appeal: the Chamber abused its discretion in imposing the minimum possible joint sentence: 18 years' imprisonment

58. Finally, even if the Chamber correctly understood and discharged its obligation under article 78(3) and rule 145(1)(a), and its reasoning was adequate, the Chamber in any event abused its discretion when it found that the individual sentence of 18 years' imprisonment for the crimes of rape accurately reflects the totality of Bemba's culpability, including the crimes of murder and pillage, and thus constituted a proper joint sentence.⁸⁹

59. The Chamber made detailed factual findings regarding the victims and the gravity of the crimes of pillage and murder, the existence of an aggravating circumstance applicable to the pillage, and imposed separate individual sentences of 16 years' imprisonment accordingly. It imposed five cumulative convictions for three clearly distinguishable types of criminality and victimisation (sexual violence, violence to life, deprivation of property). In light of these findings, the Chamber's decision to impose the *minimum* joint sentence permitted under article 78(3) in this case is so unreasonable and unfair as to constitute an abuse of discretion. A sentence of 18 years' imprisonment for the crimes of rape does not reflect Bemba's total culpability, having regard to the variety of crimes for which he was convicted and all the victims who suffered as a result of these crimes.

⁸⁷ As detailed further in the Third Ground of Appeal, the Prosecution submits that the Appeals Chamber should increase the 18 years' imprisonment sentence imposed by the Chamber: *see below* para. 81.

⁸⁸ ICTY, [Gotovina AJ](#), para. 64. *See also* [Perišić AJ](#), para. 92 ("[s]uch a failure constitutes an error of law requiring *de novo* review of evidence by the Appeals Chamber"). In this case the Prosecution does not challenge any of the Chamber's factual findings, and so the Appeals Chamber will not need to review the evidence that was before the Chamber. It need only rely—in its fresh consideration—on the unchallenged findings of the Chamber. *See also above* para. 45.

⁸⁹ *See* [Decision](#), para. 95.

60. As the Chamber properly noted,

[A] proportionate sentence [...] acknowledges the harm to the victims and promotes the restoration of peace and reconciliation. [A] sentence should be adequate [...] to ensure that those who would consider committing similar crimes will be dissuaded from doing so.⁹⁰

61. The Chamber's decision to subsume three individual sentences of 16 years' imprisonment imposed for the crimes of murder and pillage in the individual sentences of 18 years' imprisonment imposed for the crimes of rape fails to live up to the Chamber's own principle: it does not acknowledge the harm suffered by the victims of the crimes of murder and pillage, which is clearly distinguishable from the harm suffered by the victims of rape. Not only were the direct victims of all the murders and many of the acts of pillage *different people* but, to the extent that some persons were both raped and pillaged, they suffered *additional and different harms* from each crime. Far from promoting peace and reconciliation, as its Decision acknowledges is an important sentencing factor,⁹¹ the Chamber's approach seems likely to create frustration among many victims.

62. In addition, the Chamber's approach severely undermines the deterrent effect of the sentence for similar crimes. The Decision sends the wrong signal that there is no extra cost for committing multiple types of crime: one can commit more than one type of crime against the same or different victims and effectively be punished only for the most serious one.

⁹⁰ [Decision](#), para. 11. *See also* para. 10; [Katanga SJ](#), para. 38.

⁹¹ [Decision](#), para. 11.

1. The grave acts of murder are not reflected in the individual sentence for rape

63. The Chamber convicted Bemba of the murder of P-87's brother, P-69's sister, and an unidentified Muslim man,⁹² and imposed two individual sentences of 16 years' imprisonment for murder as a war crime and as a crime against humanity.⁹³

64. The direct harm suffered by these three victims is not reflected in the sentence imposed for the crimes of rape, and thus is not reflected in the joint sentence imposed. The Chamber noted that murder deprives the direct victim of life—the ultimate harm⁹⁴—and held that, in this case, the crimes of murder are of serious gravity.⁹⁵

65. In addition, the Chamber found that other victims had been harmed both physically and psychologically as a result of these murders.⁹⁶ The murders were committed inside the victims' homes and in the presence of others—including family members.⁹⁷ Further, the Chamber found that persons who relied on the direct victims for support, "whether financial, physical, emotional, psychological, moral or otherwise, were also affected" and concluded that the impact "rippled through the relevant communities."⁹⁸ The harm suffered by these victims is also not reflected in the sentence imposed for the crimes of rape.

66. It is true that the killings typically took place when the victims resisted the MLC's looting.⁹⁹ In general, murders, pillaging and rapes were usually committed during the same series of events¹⁰⁰ and some persons were victims of more than one crime. However, the joint sentence imposed by the Chamber fails to fully take into

⁹² [Decision](#), para. 27.

⁹³ [Decision](#), para. 94.

⁹⁴ [Decision](#), para. 29.

⁹⁵ [Decision](#), para. 32.

⁹⁶ [Decision](#), para. 29.

⁹⁷ [Decision](#), para. 32.

⁹⁸ [Decision](#), para. 30.

⁹⁹ [Judgment](#), paras. 475, 496, 549.

¹⁰⁰ [Decision](#), paras. 32, 95.

account the clearly distinguishable *types* of criminality and victimisation (sexual violence, violence to life and deprivation of property) that the victims suffered as a result of these crimes, and the very different effects that these types of victimisation may have had.

67. For instance, P-87, whose brother was murdered, was both a direct victim of rape and also harmed by witnessing the murder of a close family member. As a result of being raped, the Chamber found that she suffered medical and psychological consequences, including depression, skin disorders and pelvic pain.¹⁰¹ Separately, and in addition, as a result of witnessing the killing of her brother, P-87 also suffered other chronic and severe consequences:¹⁰² nightmares, hallucinations and hearing voices calling her.¹⁰³ Similarly, the victims' parents, suffering the loss of their son, were also deprived of the comfort that funeral rituals may provide in periods of grief.¹⁰⁴

68. P-69, whose sister was murdered, was likewise both a direct victim of rape and also harmed by witnessing the murder and rape of close family members. The Chamber recalled his testimony about the humiliation he still feels today because of his and his wife's rapes: "we no longer have any value. We are wondering what we are going to do in order to recover our dignity."¹⁰⁵ Again, however, P-69 also testified about the distinct and unique horror he had to endure when he saw his sister shot.¹⁰⁶ The Chamber accepted P-69's testimony about the horrific scene that will forever be impressed in his memory: "I saw the brain of my sister. I saw that as if an animal's skull had been hit [...] she was killed like an animal, like a dog".¹⁰⁷ He eventually begged the perpetrator to be killed himself: "[i]n view of what they had done [...], I

¹⁰¹ [Judgment](#), para. 472.

¹⁰² [Decision](#), para. 31.

¹⁰³ [Decision](#), para. 31.

¹⁰⁴ [Decision](#), para. 30.

¹⁰⁵ [Decision](#), para. 39.

¹⁰⁶ [Decision](#), para. 29. *See also* [Judgment](#), para. 496.

¹⁰⁷ [Decision](#), para. 29. *See also* [Judgment](#), para. 496.

moved towards them and I asked them to kill me as well. To kill me after my sister.”¹⁰⁸ The Chamber found he was psychologically injured as a result of witnessing these events.¹⁰⁹

69. The body of P-69’s sister was in such a state that it could not be preserved and had to be buried the same day of the murder next to P-69’s compound. P-69 and other family members were deprived of the comforts that a proper funeral service may provide during periods of grief.¹¹⁰

70. The Chamber thus abused its discretion when it found that the crimes of murder are adequately reflected in the individual sentence imposed for rape.¹¹¹ Although geographically and temporally connected, the crimes of murder and rape are clearly distinguishable, and so are the victims of the crimes and their respective forms of victimisation. The joint sentence is thus not proportionate to the overall culpability of Bemba, as it does not encompass the direct harm of the three murder victims, or the harms additionally suffered by others as a result of the murders.

2. The grave acts of pillage are not reflected in the sentence for rape

71. The Chamber convicted Bemba of pillage as a war crime, harming many direct victims including 25 individuals, P-87’s family, P-42’s family, a church, nuns, priests and the *gendarmarie* in Mongoumba.¹¹² For these crimes, it imposed an individual sentence of 16 years’ imprisonment.¹¹³

72. The direct harm suffered by the victims of pillage is not reflected in the sentence imposed for the crimes of rape, and thus is not reflected in the joint sentence imposed.

¹⁰⁸ [Decision](#), para. 29.

¹⁰⁹ [Decision](#), para. 29.

¹¹⁰ [Decision](#), para. 30.

¹¹¹ [Decision](#), para. 95.

¹¹² [Decision](#), para. 48.

¹¹³ [Decision](#), para. 94.

73. The Chamber found that the acts of pillage were of serious gravity,¹¹⁴ and of exceptional nature.¹¹⁵ It held that they were “repeated, cruel, violent, and humiliating”.¹¹⁶ Accordingly, the Chamber concluded in this respect that the aggravating circumstance under rule 145(2)(b)(iv)—namely, that the crimes were committed with particular cruelty—had been established.¹¹⁷ Bemba’s subordinates pillaged property on a large scale—throughout the areas in which they were present—and with grave consequences for the victims:¹¹⁸ “they went through every single house and took whatever they wanted.”¹¹⁹

74. The Chamber recalled P-6’s testimony that “pillaging became widespread already on the very first day of the deployment of those [MLC] troops [...] it was in the house-by-house search that the MLC soldiers carried out these acts of violence”.¹²⁰ Bemba’s men took all sorts of items from the victims, including administrative documents, clothing, furniture, tools, radios, televisions, items of personal value, money, livestock, food, vehicles, and fuel. They took everything and some victims were left with nothing.¹²¹

75. The Chamber found that the consequences on victims were far-reaching, impacting various aspects of their personal and professional lives, often leaving them without basic necessities.¹²² For instance, as a result of pillaging, P-73 was unable to pay for medical treatment, V-2’s business has never recovered from the loss of necessary equipment, and many victims lost all their savings, foam mattresses and

¹¹⁴ [Decision](#), para. 51.

¹¹⁵ [Decision](#), para. 57.

¹¹⁶ [Decision](#), para. 57.

¹¹⁷ [Decision](#), paras. 52-58.

¹¹⁸ [Decision](#), para. 49; [Judgment](#), para. 646.

¹¹⁹ [Decision](#), para. 49.

¹²⁰ [Decision](#), para. 49.

¹²¹ [Judgment](#), para. 646; *see also* [Decision](#), para. 50.

¹²² [Decision](#), para. 51.

clothes, which they had worked hard to obtain.¹²³ The Chamber recalled P-38's testimony that:

the B[é]goua neighbourhood was full of all Bemba's rebels. They were breaking everything. They were stealing everything. It was terrible to see. So every house in B[é]goua was broken into and they took everything they could see: Radio sets, cell phones and everything that they could see.¹²⁴

76. There was no place to hide: Bemba's armed soldiers targeted unarmed victims in their homes, places of business, churches, hospitals, MLC bases and isolated locations such as the bush.¹²⁵ Not only were the victims unarmed, but they were also often particularly vulnerable as they were already fleeing and seeking refuge.¹²⁶ Acts of pillage were always carried out by multiple armed soldiers, often several times against the same victims,¹²⁷ and always accompanied by physical and verbal abuse, threats of violence, death and/or rape.¹²⁸

77. The Chamber found that Bemba's men were not concerned for the victims' livelihood or well-being, such as the ability to seek treatment, arrange burial or funeral services, or even feed their families.¹²⁹ They acted for pecuniary gain or, at times, to punish suspected enemies and their sympathisers.¹³⁰

78. As previously discussed,¹³¹ acts of pillage were often accompanied by acts of murder and rape:¹³² pillage and rapes were usually committed during the same series of events¹³³ and sometimes against the same victims.¹³⁴ Out of the 25 individual direct

¹²³ [Judgment](#), para. 566.

¹²⁴ [Decision](#), para. 50.

¹²⁵ [Decision](#), paras. 53, 56.

¹²⁶ [Decision](#), para. 53.

¹²⁷ [Decision](#), paras. 53, 56.

¹²⁸ [Decision](#), para. 54.

¹²⁹ [Decision](#), paras. 53, 56.

¹³⁰ [Decision](#), para. 56.

¹³¹ *See above e.g. paras. 63-70, especially para.66.*

¹³² [Decision](#), para. 54.

¹³³ [Decision](#), paras. 32, 95.

¹³⁴ [Decision](#), para. 55.

victims¹³⁵ and the five groups of direct victims¹³⁶ of pillage, 12 individual victims were also direct victims of rape,¹³⁷ while 12 direct victims of pillage¹³⁸ and the five groups of direct victims of pillage¹³⁹ were not raped.

79. In any event, the individual sentence imposed by the Chamber for the crimes of rape does not reflect the harm suffered by the victims of pillage, regardless of whether they were also raped. Pillage involves a clearly distinguishable type of criminality and gives rise to a different type of victimisation or harm (deprivation of property as opposed to sexual violence). For instance, P-23 was both victim of rape and pillage. Because of the rapes he suffered grave physical and psychological consequences, and lost the respect of his community to the point that he considers himself “a dead man”.¹⁴⁰ But P-23 also suffered the far-reaching and distinguishable grave consequences of being deprived of everything he had. The Chamber relied on these portions of his testimony:¹⁴¹

I couldn't do anything because they took everything. They took everything from us, and that meant I had nothing. I was somebody who had a lot, but they took everything from me and I was left with nothing. I could do nothing.¹⁴²

They were strong, but my only strength today is justice. If justice can't side with me today, that is not important. I will go back home, and I will go back home and live in the poverty that I was plunged into.¹⁴³

¹³⁵ [Decision](#), para. 48 (P-68, P-68's sister in law, P-119, P-87, P-23, P-80, P-81, P-82, P-69's sister, P-69, P-108, P-110, P-112, P-22, P-22's uncle, P-79, P-79's brother, P-73, P-42, an unidentified women outside PK22, V-1, V-2, Mayor of Mongoumba, an unidentified “Muslim” man and his neighbour).

¹³⁶ [Decision](#), para. 48 (P-87's family, P42's family a church, nuns, priests and the gendarmerie in Mongoumba).

¹³⁷ See [Decision](#), paras. 34, 48 (victims of pillage P-68, P-68's sister in law, P-87, P-23, P-80, P-81, P-82, P-69, P-22, P-79, P-42 and V-1 were also raped).

¹³⁸ See [Decision](#), paras. 34, 48 (victims of pillage P-119, P-69's sister, P-108, P-110, P-112, P-22's uncle, P-79's brother, P-73, an unidentified women outside PK22, V-2, Mayor of Mongoumba, and an unidentified “Muslim man and his neighbour” were not direct victims of rape).

¹³⁹ See [Decision](#), paras. 34, 48 (relating, for example, to P-87's family, P-42's family, nuns and priests, and the gendarmerie in Mongoumba).

¹⁴⁰ [Judgment](#), paras. 487-494.

¹⁴¹ [Judgment](#), fn. 1450.

¹⁴² T-51-Red, 49:22-50:3 (cited in [Judgment](#), fn. 1450).

¹⁴³ T-52-Red, 5:25-6 (cited in [Judgment](#), fn. 1450).

80. Accordingly, the Chamber abused its discretion when it found that the crimes of pillage are adequately reflected in the individual sentence imposed for rape.¹⁴⁴ In fact, the joint sentence of 18 years' imprisonment, which derives from the individual sentence for the crime of rape, does not adequately reflect the serious crimes of pillage for which Bemba was convicted and the victims who suffered as a result of these crimes. It is therefore disproportionate to the harm caused to the victims of all the crimes and Bemba's overall culpability.

3. The Chamber's error materially affected the Decision

81. The Chamber's erroneous decision to impose the minimum possible sentence of 18 years considered in light of the Chamber's own findings is so unfair and unreasonable as to constitute an abuse of discretion, and led to a disproportionate sentence. Had the Chamber properly considered the full extent of Bemba's total culpability, including the harm suffered by all victims and the gravity and different types of criminality and victimisation of all three crimes for which he was convicted, it would have imposed a higher joint sentence. The Appeals Chamber should correct this error, reverse the imposed sentence of 18 years of imprisonment and revise it by increasing the term of imprisonment.

VII. Conclusion

82. This case is notable for the distinct and serious nature of the crimes committed over a prolonged period against a civilian population. The diversity of the charges reflects a continuing trend in cases before this Court.¹⁴⁵ This case thus represents one of the first tests of the unique framework crafted by the drafters of the Statute in article 78(3) to ensure that persons convicted for diverse crimes are sentenced justly

¹⁴⁴ [Decision](#), para. 95.

¹⁴⁵ See e.g. [Ntaganda Confirmation Decision](#) (confirming charges against Mr Ntaganda on 18 counts of more than 9 types of crimes); [Gbagbo Confirmation Decision](#) (confirming charges against Mr Gbagbo on 4 counts of 4 types of crimes); [Blé Goudé Confirmation Decision](#) (confirming charges against Mr Blé Goudé on 4 counts of 4 types of crimes); [Ongwen Confirmation Decision](#) (confirming charges against Mr Ongwen on 70 counts of more than 12 types of crimes).

and transparently. Despite its careful and thoughtful analysis of the merits of the case, however, the Chamber fell at the last hurdle in interpreting and applying this novel provision. This led it to subsume different kinds of criminality and types of victimisation—rape, murder and pillage—as well as many victims of these crimes, wholly in the sentence imposed for rape. This conclusion is contrary both to common sense and inconsistent with the statutory regime.

83. The 18-year sentence—itself demanded by the crimes of rape—fails both to express the international community’s necessary condemnation and to acknowledge the harm suffered by the various victims of murder and pillage. It also fails to dissuade the commission of similar ‘additional’ crimes in the future: even when multiple types of criminality are committed, only one type will effectively be punished.

84. The Appeals Chamber should now intervene to clarify the law, emphasise the need for a separate and reasoned exercise of discretion in determining joint sentences, and correct the Chamber’s errors.

85. For all the reasons above, therefore, and pursuant to article 83 of the Statute, the Prosecution requests the Appeals Chamber:

- (i) in relation to the First and Second Grounds of Appeal, to find that the Trial Chamber committed legal errors that materially affected the joint sentence; and
- (ii) in relation to the Third Ground of Appeal, to find that the joint sentence imposed by the Trial Chamber is so unfair and unreasonable as to constitute an abuse of discretion.

86. Given these findings, the Appeals Chamber should amend the joint sentence by increasing it to at least 25 years, pursuant to article 83(2)(a).

Word count: 10,485¹⁴⁶



Fatou Bensouda, Prosecutor

Dated this 21st day of October 2016
At The Hague, The Netherlands

¹⁴⁶ The Prosecution hereby makes the required certification: [Al Senussi Admissibility Appeal Decision](#), para. 32.