

PARTLY DISSENTING OPINION OF JUDGE SANG-HYUN SONG

I. FACTORS A TRIAL CHAMBER SHOULD TAKE INTO ACCOUNT WHEN SENTENCING

1. I agree with the majority of the Appeals Chamber that it is appropriate to reject the Prosecutor and Mr Lubanga's respective appeals against the Sentencing Decision. I further agree with the majority that, based on article 78 (1) of the Statute and rule 145 (1) (c) and (2) of the Rules of Procedure and Evidence, a Trial Chamber should weigh and balance the following factors when determining a sentence: the gravity of the crime, all the mandatory factors listed in rule 145 (1) (c), any relevant aggravating and mitigating factors, and the individual circumstances of the convicted person.¹ I also agree with the majority's statement that "the Court's legal texts provide for several potential interpretations of the interaction between the factors of article 78 (1) of the Statute and those of rule 145 (1) (c) of the Rules of Evidence and Procedure".² However, I disagree with the majority that "it is not necessary in the context of the present appeal to determine which of the possible approaches to the interaction between the factors of article 78 (1) of the Statute and those of rule 145 (1) (c) of the Rules of Procedure and Evidence is correct".³ In my view, to ensure a consistent sentencing practice, the Appeals Chamber should have provided further guidance on how a Trial Chamber should take these factors into account when determining sentence.

2. In my view, despite the language used in rule 145 (1) (c) of the Rules of Procedure and Evidence, namely that "the Court shall [...] [i]n addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to [...]", this provision means that, when assessing the factors mentioned in article 78 (1) of the Statute, the Trial Chamber shall give consideration to the factors listed in rule 145 (1) (c) of the Rules of Procedure and Evidence. In this regard, I agree with the majority that "it is difficult to discern the meaning of the 'individual circumstances of the

¹ Majority opinion, paras 32-33.

² Majority opinion, para. 61.

³ Majority opinion, para. 66.

convicted person' [listed in article 78 (1) of the Statute] if it is wholly distinct from [the factors] listed under rule 145 (1) (c) of the Rules of Procedure and Evidence".⁴

3. Regarding the specific factors mentioned under rule 145 (1) (c) of the Rules of Procedure and Evidence, it is my view that, as a general matter, the extent of the damage caused, in particular 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; and the circumstances of manner, time and location are factors to be considered in the context of the gravity of the crime. However, the age, education, social and economic condition of the convicted person should be considered in the context of the individual circumstances of the convicted person pursuant to article 78 (1) of the Statute.

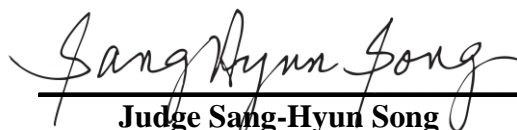
4. Accordingly, I would have included, at the end of the overview of the Court's sentencing scheme, the clarification that the Trial Chamber should take into account the following three overall factors when determining sentence:

- a) The gravity of the crime pursuant to article 78 (1) of the Statute as informed by those factors identified above in paragraph 3 as set out in rule 145 (1) (c) of the Rules of Procedure and Evidence;
- b) Aggravating and mitigating circumstances pursuant to rule 145 (2) of the Rules of Procedure and Evidence;
- c) The individual circumstances of the convicted person pursuant to article 78 (1) of the Statute as informed by those factors identified above in paragraph 3 as set out in rule 145 (1) (c) of the Rules of Procedure and Evidence

⁴ Majority opinion, para. 64.

II. THE TRIAL CHAMBER ERRED WHEN IT ENTERED THREE SEPARATE SENTENCES

5. Furthermore, in light of my view that the Trial Chamber erred (i) in holding that article 8 (2) (e) (vii) of the Statute contains the three separate offences of conscription, enlistment and use to actively participate in hostilities, as well as (ii) in convicting Mr Lubanga of these three separate offences,⁵ it follows that the Trial Chamber also erred in entering three separate sentences. Instead, it should have entered one sentence. In determining this sentence, the Trial Chamber should have taken into account that the crime was committed through enlistment, conscription and use to participate actively in hostilities as part of the assessment of the *gravity* of the crime pursuant to article 78 (1) of the Statute and rule 145 (1) (c) of the Rules of Procedure and Evidence.


Judge Sang-Hyun Song

Dated this 1st day of December 2014

At The Hague, The Netherlands

⁵ Judge Song Dissenting Opinion.