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Date: **21/12/2016**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public with Public Annex A

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

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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INTRODUCTION

1. Mr. Jean-Pierre Bemba Gombo (the "Appellant") submits that the Prosecution's Document in Support of Appeal against Trial Chamber III's "Decision on Sentence pursuant to Article 76 of the Statute" ("Prosecution Appeal")[1] should be dismissed.

2. While the Appellant agrees that the *Decision on Sentence pursuant to Article 76 of the Statute* ("Sentencing Decision")[2] which sentenced him to a total of 18 years' imprisonment is seriously flawed, the Prosecution Appeal is repetitious, by its own admission, lacks authority[3] and fails to establish that there is any basis on which the sentence should be increased. Instead, as outlined in the Appellant's sentencing appeal brief, if the conviction against him is sustained by the Appeals Chamber, either in whole or in part, the sentence should be significantly reduced.[4]

I. FIRST GROUND: THE CHAMBER DID NOT FAIL PROPERLY TO IMPOSE A JOINT SENTENCE

3. Contrary to the Prosecution's submissions, the Trial Chamber did not misapply Article 78(3) of the Rome Statute ("Statute"), together with Rule 145(1)(a) of the Rules of Procedure and Evidence ("Rules"), by failing to undertake a "properly reasoned process of judicial analysis at both steps" of the Article 78(3) sentencing process.[5] The Prosecution's argument that there was a failure to engage in such a process at the second stage, *i.e.*, when determining the 'joint sentence' to be imposed, is based on an erroneous reading of paragraph 95 of the Sentencing Decision and on a flawed view that certain factors are required to be considered when determining a 'joint sentence' pursuant to Rule 145(1)(a).

[1] ICC-01/05-01/08-3451.
[2] ICC-01/05-01/08-3399.
[3] Prosecution Appeal, para. 29.
[4] ICC-01/05-01/08-3450-Conf, para. 10.
[5] Prosecution Appeal, para. 27. *See also* paras. 20, 31.

4. Further, while the Trial Chamber did provide an explanation as to why a 'joint sentence' of 18 years should be imposed, on the basis of the plain terms and drafting history of Article 78(3), it is to be queried whether such an explanation was required.

5. In short, the Prosecution's first ground of appeal fails to establish that the Trial Chamber committed any error in its application of the sentencing procedure set out in Article 78(3) of the Statute and should be dismissed.

A. THE TRIAL CHAMBER DID APPLY A REASONED PROCESS FOR DETERMINING THE 'JOINT SENTENCE'

6. To support the argument that the Trial Chamber did not provide "a properly reasoned opinion reflecting the separate exercise of discretion required by article 78(3)"[6] when determining the 'joint sentence', the Prosecution presents paragraph 95 of the Sentencing Decision as an extension of the Trial Chamber's reasoning for the individual sentences imposed on the crimes for which Mr. Bemba was convicted.[7] This is incorrect.

7. Instead, a plain reading demonstrates that paragraph 95 is relevant to the 'second step' of the Article 78(3) process and sets out the Trial Chamber's reasoning for the imposition of a 'joint sentence' of 18 years. In this regard, the Trial Chamber identifies four bases on which it considers a 'joint sentence' of 18-years is warranted, namely: (i) based on the same acts, it entered cumulative convictions for murder and rape as war crimes and crimes against humanity; (ii) all the crimes for which Mr. Bemba was convicted are geographically and temporally connected; (iii) Mr. Bemba's responsibility is based on the same conduct; and (iv) 18 years, which is the highest individual sentence imposed for rape, is the figure which reflects the

[6] Prosecution Appeal, para. 40.
[7] Prosecution Appeal, paras. 28, 31-37.

totality of Mr. Bemba's culpability.[8] While no express reference is made to Article 78(3) or 'joint sentence', the result of this reasoning is patently the imposition of a "joint sentence specifying the total period of imprisonment" as required by Article 78(3). The Prosecution fails to acknowledge this result.

8. Instead, the Prosecution construes paragraph 95 as relevant only to the 'first step' of the Article 78(3) process whereby individual sentences are determined for each crime for which a person has been convicted.[9] This position does not withstand scrutiny.

9. The Prosecution's reliance on "the plain language of the [Sentencing] Decision"[10] and the Chamber's use of the phrase "the sentences […] shall run concurrently"[11] as evidencing an error is without merit. Instead, it is the logical conclusion to the analysis undertaken by the Trial Chamber regarding the length of the 'joint sentence' which should be imposed in the particular circumstances of the case. The Trial Chamber determined that 18 years was the appropriate figure based on the four factors detailed above. Given the reasoning employed by the Trial Chamber in determining the 18-year figure, it is evident that the Trial Chamber was not "indicating *how* multiple individual sentences should be enforced" but was actively engaged in "a separate exercise of discretion with respect to a joint sentence under article 78(3)."[12] Accordingly, "[i]n these circumstances" where the figure for the 'joint sentence' to be imposed is not higher than that imposed for the crime of rape, the Trial Chamber correctly concluded that the sentences for murder, rape and pillage could "run concurrently".[13]

[8] Sentencing Decision, para. 95.
[9] Prosecution Appeal, paras. 33-37.
[10] Prosecution Appeal, paras. 33-34.
[11] Sentencing Decision, para. 95.
[12] Prosecution Appeal, para. 33.
[13] Sentencing Decision, para. 95.

10. In fact, the Prosecution concedes that "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 possible joint sentence permitted by article 78(3)".[14] As explained above, this is what happened in this case.

11. The fundamental flaw in the Prosecution's position is further underlined by its argument that the fact that "the [Sentencing] Decision contains only very limited references to "article 78(3)", "rule 145(1)(a)", or the notion of the 'joint sentence'" means the Trial Chamber failed to engage in the necessary reasoning when determining the 'joint sentence'.[15] Without more, little, if any, significance can be placed on such a weak argument.

12. Instead, what is important is that the Trial Chamber correctly directed itself on the law regarding the imposition of sentences where a person has been convicted of more than one crime,[16] a fact acknowledged by the Prosecution,[17] and then correctly applied it.[18] In this regard, the Trial Chamber followed the requirements of Article 78(3) by specifying the sentence for each offence for which Mr. Bemba was found guilty in paragraph 94 of the Sentencing Decision and then pronouncing a total period of imprisonment in paragraph 95. The Trial Chamber was fully aware of the steps which had to be taken in the case of multiple convictions and, thus, did not fall into error. Set in this context, the number of references to Article 78(3), Rule 145(1)(a) and 'joint sentence' in the Sentencing Decision is irrelevant.

13. Equally irrelevant is the Prosecution's argument that the "[t]he 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

[14] Prosecution Appeal, para. 28.
[15] Prosecution Appeal, para. 34.
[16] Sentencing Decision, para. 12. *See also* para. 8 where the Trial Chamber states that it took "into account, *inter alia*, Article […] 78 and Rule […] 45" for the purposes of the Sentencing Decision.
[17] Prosecution Appeal, para. 30.
[18] Sentencing Decision, para. 95.

analysing the total period of imprisonment that Bemba should serve."[19] This argument is based on a single footnote.[20] Given, first, that the footnote concerns the imposition of a global sentence instead of individual sentences when "a set of underlying crimes" are connected in various ways and, second, that the Trial Chamber in this case imposed both, it is obvious that the Trial Chamber did not follow this caselaw to apply the 'one step' approach to sentencing used at the ICTR and SCSL. Instead, it is reasonable to conclude that the Trial Chamber referenced the jurisprudence of these Courts to support its conclusion that the figure of an 18 year 'joint sentence' was appropriate overall because there was a geographic, temporal and conduct connection between the crimes of pillage and murder, which had both been accorded sentences lower than 18 years, and the crime of rape.

B. RULE 145(1)(A) DOES NOT REQUIRE THE TRIAL CHAMBER TO TAKE INTO ACCOUNT CERTAIN FACTORS WHEN IMPOSING A 'JOINT SENTENCE'

14. The Prosecution's argument that the Trial Chamber was required to take into account specific factors such as "the *variety* of crimes, victims and types of victimisation" pursuant to Rule 145(1)(a) when determining the 'joint sentence' is without basis.[21]

15. As identified by the Appeals Chamber, the significance of Rule 145(1)(a) in the Court's sentencing regime is that it contains the "overarching requirement that 'the totality of any sentence […] must reflect the culpability of the convicted person.'"[22] The Appellant accepts that this overarching requirement applies to any 'joint sentence' pronounced under Article 78(3).[23] However, the Court's sentencing framework as explained by the Appeals Chamber in *Lubanga* and the approaches

[19] Prosecution Appeal, para. 35.
[20] Prosecution Appeal, para. 35 citing to Sentencing Decision, fn. 279.
[21] Prosecution Appeal, para. 39. *See also* para. 38.
[22] *Lubanga* Sentencing Appeal Judgment, para. 33.
[23] Prosecution Appeal, fn. 71.

taken by Trial Chambers I and II in the *Lubanga* and *Katanga* cases to the imposition of a 'joint sentence', establish that no specific factors require to be taken into account to give effect to Rule 145(1)(a) when pronouncing the 'joint sentence'. Instead, certain "relevant factors"[24] must be taken into account earlier in the sentencing process and pursuant to different provisions.

16. In *Lubanga*, the Appeals Chamber noted that, pursuant to Rule 145(1)(b), in determining the sentence a Trial Chamber is required to "[b]alance all the relevant factors".[25] The Appeals Chamber identified these factors as "the gravity of the crime and the individual circumstances of the convicted person" under Article 78(1), the "non-exhaustive list of additional factors" set out in Rule 145(1)(c) and "the factors of any mitigating and aggravating circumstances" under Rule 145(2).[26]

17. There is no requirement that the Trial Chamber "balance" all these factors more than once, *i.e.*, at the stage of pronouncing the sentence for each individual crime and again when pronouncing the joint sentence, which is what the Prosecution erroneously appears to suggest.[27] They simply have to be taken into account properly as part of the sentencing process. Indeed, according to the Appeals Chamber's explanation of the sentencing procedure in *Lubanga*, once all the "relevant factors" have been "identified and taken into account […] the Trial Chamber 'shall pronounce a sentence for each crime', as well as 'joint sentence specifying the total period of imprisonment' which cannot be less than the highest individual sentence."[28] Therefore, according to the foregoing, having balanced all the relevant factors, all that remains in a case involving multiple convictions is for the Trial Chamber to pronounce sentences which "must reflect the culpability of the convicted person" pursuant to the "overarching requirement" of Rule 145(1)(a). The Trial Chamber correctly followed this sentencing procedure in the present case.

[24] Rules, Rule 145(1)(b).
[25] *Lubanga* Sentencing Appeal Judgment, para. 33.
[26] *Lubanga* Sentencing Appeal Judgment, para. 32.
[27] Prosecution Appeal, paras. 24 (second bullet point), 27, 31, 38-41.
[28] *Lubanga* Sentencing Appeal Judgment, para. 33.

18. Of concern is that the Prosecution attempts to distort the above process in support of its position by misrepresenting that in *Lubanga* the Appeals Chamber "held that when exercising its discretion under rule 145(1)(a), a Chamber 'must weigh[…] and balanc[e] all the relevant factors."[29] The Appeals Chamber made no such determination. It did not find that any factors have to be taken into account when applying Rule 145(1)(a). Instead, it noted the specific terms of Rule 145(1)(a) and then recalled more generally that a Trial Chamber "determines the sentence by weighing and balancing all the relevant factors."[30] This "weighing and balancing" is uncontroversial and takes part during the sentencing process, not necessarily when pronouncing a 'joint sentence' which should comply with the "overarching requirement" of Rule 145(1)(a) that it "reflect the culpability of the convicted person".

19. Finally, in both *Lubanga* and *Katanga*, neither Trial Chamber I nor II referred to any specific factors pursuant to Rule 145(1)(a) when pronouncing the 'joint sentence'. Having "[b]alance[d] all the relevant factors"[31] and determined the individual sentences for each crime for which Lubanga and Katanga were convicted, each Trial Chamber pronounced the 'joint sentence' in one sentence with no further reasoning.[32] The approach taken in *Lubanga* was not the subject of the Prosecution's sentencing appeal.[33]

[29] Prosecution Appeal, para. 39.
[30] *Lubanga* Sentencing Appeal Judgement, para. 43.
[31] Rules, Rule 145(1)(b).
[32] *Lubanga* Sentencing Decision, para. 99; *Katanga* Sentencing Decision, para. 147.
[33] ICC-01/04-01/06-2950.

C. THE PROSECUTION'S POSITION IS NOT SUPPORTED BY THE PLAIN TERMS OR DRAFTING HISTORY OF ARTICLE 78(3)

20. The plain terms of Article 78(3), its drafting history and the practice at this Court to date, raise the question of whether the Trial Chamber was required to provide any additional reasoning when imposing the 'joint sentence'.

21. Article 78(3) of the Statute provides, in relevant part, that:

> 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.

22. The plain terms of the provision simply require the Trial Chamber to pronounce sentences for each crime for which a conviction has been entered, followed by a single overall sentence. As outlined above, it is acknowledged that, in determining the sentences, Article 78(1) and Rule 145 require that certain "relevant factors" must be taken into account. However, provided these factors have been properly considered by the Trial Chamber during the sentencing process, there is no requirement that any additional reasoning and analysis be undertaken when the Article 78(3) stage is reached and the actual sentences are to be pronounced. Effectively, the Trial Chamber's prior assessment of the mandatory factors to be considered when determining sentence will be reasonably assumed to constitute the reasoning underpinning the sentences finally pronounced, which sentences must satisfy the "overarching requirement" of Rule 145(1)(a) and "reflect the culpability of the convicted person".

23. The drafting history of Article 78(3) also supports the view that the above straightforward approach to determining the 'joint sentence' is correct. Despite the Prosecution's extensive submissions on the purported significance of the Article

78(3) 'two-step' process,[34] the final text of this article simply reflects a compromise between two options which were proposed to govern the mechanism for the imposition of sentences where a person is convicted of more than one crime.[35]

24. As one commentator has explained, "[a]ccording to one variant, the Court would pronounce a single sentence that could be increased up to a maximum allowable penalty in the case of multiple convictions. The second option enabled the Court to specify whether multiple sentences would be consecutive or concurrent."[36]

25. The final text of Article 78(3) reflects the "bridge between the two views" – a separate sentence is to be pronounced for each crime but a single sentence is to be imposed on the convicted person, subject to certain conditions in relation to the length of the single sentence.[37] "The requirement of a single sentence avoids any ambiguity about the overall term."[38]

26. The Article 78(3) process is, therefore, straightforward and was correctly followed by the Trial Chamber. Specifically, having determined the sentences for each individual crime in accordance with the requirements and factors set out in Article 78(1) and Rule 145, the Trial Chamber correctly applied the "second step" of the Article 78(3) process and pronounced "a joint sentence specifying the total period of imprisonment." As described above, while the Trial Chamber was entitled to make this pronouncement in a purely "formalistic"[39] manner, it went beyond the plain terms of the provision and supported its determination with reasoning.

[34] Prosecution Appeal, paras. 24-29.
[35] *See* Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Penalties.
[36] Schabas, p. 908. *See also* Khan, pp. 1893-1894.
[37] Khan, p. 1894.
[38] Schabas, p. 908.
[39] Prosecution Appeal, para. 32.

27. Of note, and as already discussed above, is that Trial Chambers I and II in the *Lubanga* and *Katanga* cases also followed the plain terms of Article 78(3) and imposed a 'joint sentence' without providing any additional reasoning.[40] Moreover, the steps followed by Trial Chambers I and II conform to the outline of the "comprehensive scheme for the determination and imposition of a sentence" outlined by the Appeals Chamber in *Lubanga*.[41] This lends further persuasive support that Trial Chamber III not only correctly followed the sentencing procedure outlined in Article 78(3) but exceeded it by the provision of reasoning.

D. CONCLUSION

28. As argued above, the Trial Chamber did not misapply Article 78(3) and Rule 145(1)(a) and, as a result, impose a disproportionately lenient sentence. Indeed, it is the Appellant's position that the sentence imposed is disproportionately excessive.[42]

29. A proper analysis of the Sentencing Decision demonstrates that the Trial Chamber was not erroneously constrained by the binary question of whether the individual sentences imposed for each crime should be served concurrently for a total of 18 years' imprisonment, or consecutively for a total of 30 years' or life imprisonment.[43] Indeed, the Prosecution's assertion to the contrary is unsupported and made in the conclusion to the first ground. Rather, in relation to the "total sentence", the Trial Chamber only expressly noted a lower limit on its sentencing discretion, namely that such a sentence "cannot be less than the highest individual sentence."[44] The Trial Chamber also observed that it "has considerable discretion in imposing a proportionate sentence."[45]

[40] *Lubanga* Sentencing Decision, para. 99; *Katanga* Sentencing Decision, para. 147.
[41] *Lubanga* Sentencing Appeals Judgment, para. 32. *See also* para. 33.
[42] ICC-01/05-01/08-3450-Conf.
[43] Prosecution Appeal, para. 43.
[44] Sentencing Decision, para. 12.
[45] Sentencing Decision, para. 12.

30. In light of the fact that the Trial Chamber correctly applied Article 78(3) and Rule 145(1)(a) in the sentencing process and, despite not being strictly required so to do by the plain terms of Article 78(3), engaged in a properly reasoned exercise of its discretion when imposing the 'joint sentence' of 18 years, the Appeals Chamber should dismiss this ground of appeal. No error warranting appellate intervention is established.

II. SECOND GROUND: THE CHAMBER DID NOT FAIL TO PROVIDE A REASONED OPINION

31. The Prosecution's second ground of appeal[46] erroneously argues that the Trial Chamber "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'."[47] Given the overlap with the first ground of appeal regarding the provision of a reasoned opinion, this ground can be swiftly dealt with and should be dismissed for the following reasons.

32. *First*, as discussed above, a plain reading of Article 78(3), its drafting history and the practice at this Court to date indicates that the Trial Chamber was not required to provide any additional reasoning when imposing the 'joint sentence'.[48]

33. *Second*, should this Appeals Chamber find that a sentencing Chamber is required to provide additional reasoning to support its determination of a 'joint sentence', then such reasoning was provided in this case. As explained above, the Prosecution misconstrues the purpose of paragraph 95 of the Sentencing Decision.[49] The primary focus of this paragraph is not simply the imposition of a concurrent

[46] Prosecution Appeal, paras. 46-57.
[47] Prosecution Appeal, para. 46 citing to Sentencing Decision, para. 95.
[48] *See* paras. 20-27 above.
[49] *See* paras. 6-13 above.

sentence for all crimes[50] but, rather, the reasoning which underpins the Trial Chamber's determination that a 'joint sentence' of 18 years' imprisonment is appropriate in this case. It is as a result of this independent determination that the total period of imprisonment to be imposed is 18 years that the Trial Chamber concludes that the individual sentences can run concurrently.[51] Framing paragraph 95 correctly is important because it establishes at the outset that the 'fourth factor', which is the sole focus of the Prosecution's second ground of appeal, cannot be viewed in isolation from the other three factors referred to therein.

34. *Third*, once it is acknowledged that the four factors identified in paragraph 95 of the Sentencing Decision are all relevant to the Trial Chamber's determination of an 18-year 'joint sentence', the Prosecution's complaint that there was an absence of any reasoning in respect of the fourth factor is shown to be misconceived. More specifically, the flaw in the Prosecution's argument is that a fair analysis of the Sentencing Decision establishes that the first three factors inform the fourth and, thus, cannot be dismissed, as the Prosecution seeks to do, as either unconnected or irrelevant.[52]

35. Properly considered, the first three factors in paragraph 95 broadly identify the fundamental links between the underlying criminal acts of murder, pillage and rape, a fact which is ignored by the Prosecution.[53] In relation to the first factor, the same criminal acts underlie the convictions for murder and rape as both war crimes and crimes against humanity. The second and third factors cover **all** the crimes and

[50] Prosecution Appeal, paras. 48 ("[t]he Chamber succinctly indicated at least some of the factors which guided its decision to order **the sentences to run concurrently (**…)") (emphasis added); 49 ("the first three factors do not independently support the Chamber's conclusion that **the sentences for all five crimes shall run concurrently**") (emphasis added). *Also* the Prosecution's reliance on the *Čelebići* AJ (*see* Prosecution Appeal, fn. 80) is shown to be inapposite when the focus of paragraph 95 of the Sentencing Decision is correctly identified and presented.

[51] Note that, having identified the four factors, the Trial Chamber concludes that "**[i]n these circumstances** […] the sentences […] shall run concurrently." *See* Sentencing Decision, para. 95 (emphasis added).

[52] Prosecution Appeal, para. 49.

[53] Prosecution Appeal, para. 49.

identify that they are linked both geographically and temporally and that Mr. Bemba's criminal responsibility for them is based on the same conduct. It is reasonable to conclude that it these links which lead the Trial Chamber to determine that the total period of imprisonment should be the "highest sentence imposed" for the individual crimes which is 18 years.

36. *Fourth,* the Trial Chamber's conclusion that 18 years, which was the sentence imposed for the crime of rape, accurately reflects the totality of Mr. Bemba's culpability for the crimes of rape, murder and pillage does not contradict any of its prior findings.[54] Thus, no "comprehensive explanation" addressing this issue was required.[55]

37. It is acknowledged that the Trial Chamber made findings about the gravity of the murder and pillage convictions, held that the acts of pillage were committed with particular cruelty and imposed individual sentences of 16 years in respect of each crime.[56] However, integral to the determination of the individual sentences imposed for **all** the crimes for which convictions were entered was an assessment of the wider criminal context. Each crime was not considered in isolation to the others. In assessing the gravity of the murder conviction, the Trial Chamber took into account the fact that the underlying acts "were preceded or succeeded by acts of pillaging, rape and other violence and abuse".[57] In relation to rape, the Trial Chamber found that the underlying acts were committed with particular cruelty because they were committed "in conjunction with acts of murder, pillaging, and other violence and abuse during the same events and against the same direct and indirect victims".[58] Similarly, for pillaging, the Trial Chamber held that the underlying acts were committed with particular cruelty because they were committed "in conjunction with acts of murder, rape, and other violence and abuse

[54] Prosecution Appeal, paras. 53-54.
[55] Prosecution Appeal, para. 54.
[56] Prosecution Appeal, para. 53.
[57] Sentencing Decision, para. 32.
[58] Sentencing Decision, para. 47.

during the same events and against the same victims".[59] Further, all these findings show that it was not strictly the case that "largely different victims suffered different (or additional) harm as a result of these crimes"[60] but, rather, that a considerable number of the crimes were connected in that more than one crime was committed during one incident and against the same direct or indirect victims.

38. Therefore, a wider reading of the decision establishes that the Trial Chamber was cognisant of the links between the various crimes and expressly factored them in when assessing the individual sentences to be imposed. This, in turn, informed the determination of the 'joint sentence', alongside the factors identified in paragraph 95 of the Sentencing Decision which demonstrate the links between the crimes.

39. On this basis, it is evident that the Trial Chamber did provide an explanation as to why an 18-year sentence was appropriate in this case, there were no contradictions between the 'joint sentence' imposed and other findings in the Sentencing Decision which warranted any additional explanation and the Prosecution's arguments to the contrary are without merit. Accordingly, this second ground of appeal should be dismissed.

III. THIRD GROUND: THE CHAMBER DID NOT ABUSE ITS DISCRETION IN IMPOSING A JOINT SENTENCE OF 18 YEARS' IMPRISONMENT

A. INTRODUCTION

40. The Prosecution's assertion that Mr. Bemba's sentence of 18 years' imprisonment for the crime of rape, which is the longest to be handed down by this Court to date, fails to reflect the totality of his culpability, including for the crimes of murder and pillage and should be replaced by a 25-year sentence should be

[59] Sentencing Decision, para. 56.
[60] Prosecution Appeal, para. 53.

dismissed.[61] For the reasons given in the Appellant's appeal against sentence, the sentence is manifestly excessive.[62] In addition, the Prosecution fails to establish that the Trial Chamber's exercise of its broad sentencing discretion was so unfair and unreasonable as to vitiate its decision and require appellate intervention to increase the 'joint sentence' imposed. Accordingly, this third ground of appeal should be dismissed.[63]

B. THE TRIAL CHAMBER'S APPROACH IS NOT SO UNFAIR AND UNREASONABLE AS TO CONSTITUTE AN ABUSE OF DISCRETION

41. While the Appellant challenges the length of the sentence as excessive on a number of grounds,[64] the broad approach taken by the Trial Chamber – that the highest sentence imposed in respect of a set of connected underlying crimes "reflects the totality of Mr Bemba's culpability"[65] – is supported by sufficient reasoning in the Sentencing Decision and, thus, cannot be dismissed as "so unfair and unreasonable as to constitute an abuse of discretion".[66]

42. Of primary relevance to the Trial 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"[67] is the fact that the figures of 16 years themselves were determined by reference to the wider criminal context within which the murders and acts of pillage were committed. This wider criminal context included the commission of rape.

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[61] Prosecution Appeal, paras. 58-81, 86.
[62] ICC-01/05-01/08-3450-Conf.
[63] Prosecution Appeal, paras. 58-81.
[64] The Appellant also challenges his conviction. Should the conviction stand (in whole or in part), the Appellant submits his sentence should be reduced.
[65] Sentencing Decision, para. 95.
[66] Prosecution Appeal, para. 81.
[67] Prosecution Appeal, para. 61.

43. As already discussed above, in relation to murder, the Trial Chamber took into account in the gravity assessment the fact that the underlying acts "were preceded or succeeded by acts of pillaging, rape and other violence and abuse".[68] Therefore, for example, expressly informing the 16-year figure imposed for murder was, *inter alia*, the direct harm suffered by the murder victim, P87's "brother",[69] plus the harm suffered by P87 who witnessed the murder and had been raped earlier during the same incident.[70]

44. When determining that 16 years was an appropriate sentence for pillaging, factored into this figure as one of the factors relied on to prove that the acts of pillage were aggravated by being committed with particular cruelty was the fact they had been committed "in conjunction with acts of murder, rape, and other violence and abuse during the same events and against the same victims".[71] Therefore, comprised within the 16 year figure for pillage is the recognition that these acts were committed alongside, *inter alia*, acts of rape.[72]

45. While the Prosecution notes that the underlying acts of murder and pillage were often accompanied by other crimes and abuse, including rape, the Prosecution fails to acknowledge that a number of the acts of rape were expressly taken into account in determining the 16-year sentences imposed for both murder and pillage.[73]

46. Similarly, the crimes of murder and pillage were taken into account, alongside other factors, when determining the 18-year sentence imposed for rape. More specifically, the Trial Chamber found that the rapes were aggravated by particular cruelty because they were committed "in conjunction with acts of murder,

[68] Sentencing Decision, para. 32.
[69] ICC-01/05-01/08-3343 ("Judgment"), para. 624(a); Sentencing Decision, paras. 27-29.
[70] Judgment, paras. 472, 473, 633(c); Sentencing Decision, paras. 31, 32.
[71] Sentencing Decision, para. 56.
[72] Prosecution Appeal, fn. 137 which lists the 12 victims of pillage who were also raped.
[73] Prosecution Appeal, paras. 66, 78.

pillaging, and other violence and abuse during the same events and against the same direct and indirect victims".[74] These inherent links between the crimes of murder and pillage and the individual sentence imposed for rape further justify the Trial Chamber's determination that the highest sentence imposed for the underlying crimes appropriately encapsulated Mr. Bemba's culpability for the purposes of the 'joint sentence'. Again, however, in its appeal brief, the Prosecution fails to acknowledge that the acts of pillage and murder are integral to or form any element of the determination of the sentence imposed for the rapes.

47. Accordingly, the Prosecution's claim that "the [Sentencing] 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"[75] is belied by the above described approach taken by the Trial Chamber when assessing the gravity of the murder conviction and the aggravating circumstances for the rape and pillage convictions.

48. The Trial Chamber's conclusion that the highest sentence imposed for the individual underlying crimes should constitute the 'joint sentence' does not rest on the role played by each crime in determining the individual sentence for the other charged crimes alone. Having pronounced individual sentences for each crime for which a conviction was entered, the Trial Chamber broadened its focus to consider the total period of imprisonment Mr. Bemba should serve. The Trial Chamber identified the specific factors which it considered relevant to the determination of the overall sentence.[76] As explained above, these four factors established the links between the crimes, which in turn informed the determination that the highest sentence imposed reflected the totality of Mr. Bemba's culpability. The Prosecution fails to address the Trial Chamber's reasoning on this point.

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[74] Sentencing Decision, para. 47.
[75] Prosecution Appeal, para. 62. *See also* paras. 4, 83.
[76] Sentencing Decision, para. 95.

49. In light of the foregoing, it is clear that the Trial Chamber did not fall "at the last hurdle".[77] The "diverse crimes" for which Mr. Bemba was convicted are all inextricably linked.[78] It was these links, apparent from a plain reading of the decision, which led the Chamber to find that the highest sentence which it imposed for the underlying individual crimes properly reflected Mr. Bemba's overall culpability and, thus, was pronounced as the total period of imprisonment which Mr. Bemba should serve.

50. Overall, the Prosecution's third ground of appeal effectively boils down to a simple dispute about the exercise of the Trial Chamber's discretion. However, it fails to substantiate to the requisite high threshold that the Trial Chamber exercised its discretion so unreasonably or unjustly as to vitiate the sentencing decision and warrant the imposition of a higher sentence. In these circumstances, no appellate intervention is merited and the ground should be dismissed.

CONCLUSION

51. While irrelevant to the actual substantive grounds of appeal, the Prosecution's assertion that this case "is perhaps the most serious case in which a person has been exclusively convicted of superior responsibility in the history of international criminal law" perfectly encapsulates the Prosecution's misconceived view of this case and its approach to sentencing.[79]

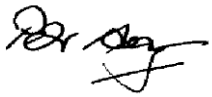
52. This is not a case about genocide, extermination and mass murder.[80] It is a case concerning a temporally and geographically limited crime base and a commander, geographically remote from the crime scenes who did not issue any orders to his

[77] Prosecution Appeal, para. 82.
[78] Prosecution Appeal, para. 82.
[79] Prosecution Appeal, para. 9.
[80] *See, Bagosora et al.* TJ, in which Ntabakuze was convicted solely as a superior for genocide, extermination, persecution and violence to life and sentenced to 35 years.

troops to commit crimes, who was convicted for failing to prevent the commission of 3 murders, 28 rapes and 16 instances of pillaging, or to punish his subordinates for them. In these circumstances, a sentence of 18 years, let alone 25 years, was manifestly excessive.

53. None of the Prosecution's grounds of appeal establish that the Trial Chamber committed any error such that the Appellant's sentence should be increased. Accordingly, for the reasons argued more fully above, the Appellant requests the Appeals Chamber to dismiss the Prosecution Appeal.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 21 December 2016

It is hereby certified that this document contains a total of 5,821 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.