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Date: **17 March 2014**

TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v.GERMAIN KATANGA

Public Document

Prosecution's Submissions on the Procedures and Principles for Sentencing

Source: **Office of the Prosecutor**

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

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I. Background

1. On 7 March 2014, Trial Chamber II ("Chamber") invited the parties and the legal representative of the principal group of victims ("legal representative") to file written submissions by 17 March 2014 on the procedure to be adopted for sentencing under Article 76(2) of the Rome Statute ("Statute"), and the principles, relating in particular to the appropriate standard of proof, that the Chamber must apply.[1]

2. The Chamber confirms that there will be a sentencing hearing.[2] By 24 March 2014, the parties and legal representative may make relevant written submissions under Rule 145 of the Rules of Procedure and Evidence ("Rules"), and must confirm if they intend to call any witnesses or submit any additional documentary evidence during the sentencing hearing.[3] The Chamber states that during the sentencing hearing the parties and legal representative will be able to elaborate upon their submissions regarding sentencing.[4]

3. These submissions address the procedure to be adopted for sentencing under Article 76 of the Statute, and the principles to be applied.

II. Submissions on Sentencing Procedure

4. The procedure for sentencing is set out in the Statute and Rules. When passing sentence, the Chamber must consider, *inter alia,* Articles 23, 76, 77, 78, and 81(2)(a) of the Statute and Rules 143, 145, and 146 of the Rules.[5]

(i) *Separate sentencing hearing*

5. The Chamber has already indicated that it intends to schedule a separate sentencing hearing, pursuant to Article 76(2) and Rule 143.[6] Precise rules

[1] ICC-01/04-01/07-3437, p.5, para.4, p.6.
[2] ICC-01/04-01/07-3437, p.5, paras.6-7, p.7.
[3] ICC-01/04-01/07-3437, p.5, para.5, p.7.
[4] ICC-01/04-01/07-3437, p.5, paras.6-7, p.7.
[5] *Prosecutor v Lubanga*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute ("Lubanga Article 76 Decision"), p.9, para.17.
[6] ICC-01/04-01/07-3437, p.5, paras.6-7, p.7.

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

6. Article 76(1) requires that when the Chamber considers the appropriate sentence it "take into account the evidence presented and submissions made during the trial that are relevant to the sentence."[7] Article 76(2) expressly provides for the possibility of presenting additional evidence and submissions during the sentencing hearing. The Chamber has already indicated that during the sentencing hearing the parties may further develop their submissions and may produce additional evidence and witnesses, provided notice of such additional evidence is given by 24 March 2014.[8]

(ii) ***Type of additional evidence that may be heard at the sentencing hearing***

7. The additional evidence that may be heard at the sentencing hearing may address the character of the convicted person,[9] and may include psychological or psychiatric evidence[10] and statements regarding the impact on victims.[11] It may also address aggravating and mitigating factors.[12] It is not limited to the facts and circumstances arising from the charges, as identified in the confirmation decision.[13]

8. Any applications to the Chamber seeking to introduce new evidence must only relate to new evidence that is strictly relevant, and must provide sufficient detail of the nature of the additional evidence and issues to which it is relevant for sentencing.[14] Accordingly, any new evidence, either by way of witness or documentary evidence, must only relate to sentencing and must

[7] Lubanga Article 76 Decision, p.9, para.19.
[8] ICC-01/04-01/07-3437, p.5, para.5, p.7.
[9] *See e.g. AFRC case*, SCSL-2004-16-T, Sentencing Judgment, 19 July 2007, para.6; *Prosecutor v Erdemovic*, Case No. IT-96-22-T, Order for protective measures for witness X, 18 October1996.
[10] *See e.g. Prosecutor v. Erdemovic*, Case No.IT-96-22-T, Sentencing Judgment, 29 November 1996.
[11] *See e.g. Prosecutor v. Tadic,* Case No. IT-94-1-T, Scheduling order, 27 May 1997, and *Prosecutor v. Tadic,* Case No.IT-94-1-T, Scheduling order, 12 June 1997.
[12] Rule 145 of the Rules.
[13] Lubanga Article 76 Decision, pp.11-13, paras.27-31.
[14] *See e.g. AFRC case*, SCSL-2004-16-T, Sentencing Judgment, 19 July 2007, para.13. The Trial Chamber did not deem it necessary for witnesses to be called at the sentencing stage and denied the Defence request to call one witness.

not seek to deal with the merits of the decision to convict in the Article 74 judgment.[15]

9. If additional evidence is tendered during the sentencing hearing, the parties should be permitted to make supplementary oral or written observations regarding the relevance, probative value and weight to be attributed to such evidence. Moreover, if Mr. KATANGA chooses to testify, the Prosecution should be permitted to question him by way of cross-examination or if he chooses to make an unsworn oral statement, the Prosecution should be permitted to make submissions on the weight to be attributed to such statement and/or testimony.[16]

(iii) ***Participation of legal representative of victims***

10. The Chamber has authorised the legal representative to participate in the sentencing process including at the hearing.[17] Indeed, participating victims through their legal counsel are permitted to participate in the sentencing hearing, pursuant to Rule 91(2). The considerations in particular under Rule 145(1)(c), 145(2)(a)(ii) and Rule 145(2)(b)(iii) and (iv) affect the personal interests of victims and it is right that they be permitted to submit their views and concerns on these topics.

(iv) ***Delivery of sentence***

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

III. Submissions on Sentencing Principles

[15] *See e.g.* ICC-01/04-01/06-T-360 (EN), p.27, l.12 -17; *See also* at p.29, l.20 – p.30, l.7.
[16] *See e.g.* ICC-01/04-01/07-1665, paras. 51, 68-76. The Prosecution submits that the same rules relating to the proceedings pursuant to Rule 140, should also apply at the sentencing hearing. *See also e.g.* ICC-01/04-01/06-T-356, p. 2, lines 11-21. Trial Chamber I dealt with this issue in the context of an unsworn statement given by Mr. LUBANGA during closing argument and ruled that: "*[i]t goes without saying that if any significant consequential matters arise from his observations, the Prosecution will be entitled to address us on the issue.*"
[17] ICC-01/04-01/07-3437, pp.4-5, paras.3-5, 7.

12. The Court is vested with the discretion to impose an appropriate sentence within the range of applicable penalties set out in the Statute. In determining the appropriate sentence, the Court must consider the objectives of sentencing, the inherently grave nature of the crimes prosecuted by this Court, any factors relevant to the gravity of the offence and any relevant aggravating and mitigating factors.

(i) Applicable Penalties

13. Article 77 establishes the three possible penalties for persons convicted of a crime under Article 5. First, Article 77(1)(a) provides that a specified term of imprisonment not exceeding 30 years may be imposed. In cases of "extreme gravity" and where "the individual circumstances of the convicted person" so warrant, a term of life imprisonment may be imposed. Article 78(2) provides that convicted persons shall be given credit for time served in custody in connection with the crime for which they have been convicted.[18] Sentences of imprisonment are to be served in state jurisdictions that are willing and determined by the Court to be suitable.[19] These sentences are made subject to future review by the Court for possible reduction, as described in Article 110.

14. Second, Article 77(2) provides that, "in addition to imprisonment", a fine may be ordered. This language makes plain that a fine *cannot* be imposed as an alternative to imprisonment.[20]

15. Third, Article 77(2)(b) provides that an order of forfeiture of proceeds and property derived from the crime may be imposed as an additional penalty to imprisonment..[21]

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[18] *See e.g. Lubanga Article 76 Decision,* p.10, para.24, p.37, paras.100-102, 108. The Chamber rejected the Defence request to deduct time for th period of detention in the DRC. As for the impact of detention by national authorities, *see also e.g. Prosecutor v. Lubanga,* Judgment on Jurisdiction Appeal, ICC–01/04–01/06-772 OA4, 14 December 2006, paras. 42 and 44; *Prosecutor v. Lubanga,* Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 121, and; *Prosecutor v. Lubanga,* Judgment on Jurisdiction Appeal, ICC–01/04–01/06-772 OA4, 14 December 2006, para. 42. *See also* Rule 101(E) of the ICTY and ICTR RPE and Rule 101(D) of the SCSL RPE.

[19] Rome Statute, Article 103(a).

[20] The final text left the judges to determine whether to order a fine in addition to a sentence of imprisonment. (See W.A. Schabas, 'Penalties', *in* A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court, A Commentary,* volume II, p. 1514).

(ii) The factors relevant to the determination of the sentence

16. When determining the appropriate sentence, the Chamber must take into account, *inter alia*, the purposes of sentencing, the inherent seriousness of the crimes prosecuted before the Court, as well as the specific factors as described in Article 78 and Rule 145.

A. The purposes of sentencing and seriousness of the crimes prosecuted

17. For sentencing purposes, the Chamber must take into account the heinous nature of the crimes prosecuted by the Court and objectives to be pursued in sentencing, including to ensure deterrence and end impunity for "the most serious crimes" of international concern that "threaten the peace, security, and well-being of the world", including "atrocities" against victims that "deeply shock the conscience of humanity", in the interests of present and future generations.[22] Although there are no other explicit provisions in the Statute dealing with the objectives of sentencing, objectives considered by the *ad hoc* Tribunals are also of potential relevance for this Court. ICTY and ICTR Chambers have given primary attention to the objectives of deterrence[23] and retribution.[24] The principles of reconciliation,[25] restoration of peace and rehabilitation have also been considered.[26]

B. Standard of proof of factors to be taken into account

18. Whereas the decision on the guilt of the Accused under Article 74(2) "shall not exceed the facts and circumstances described in the charges", pursuant to Rule

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[21] This differs from the ICTY RPE – Rule 105(B) – which allows ordering the restitution of property that may be in the hands of third parties, even those not otherwise connected to the crime.: W.A. Schabas, 'Penalties', *in* A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court, A Commentary,* volume II, p. 1516.

[22] Preamble paras.2-5, 9. *See e.g.* Lubanga Article 76 Decision, para.16. Trial Chamber I, in *Lubanga*, when considering the purposes of punishment at the ICC took into account the Preamble of the Statute, emphasising that: "the most serious crimes of concern to the international community as a whole must not go unpunished"; that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and that the ICC was established "to these ends and for the sake of present and future generations".

[23] *Prosecutor v. Delalic et al*, IT-96-21-T, Judgment, 16 November 1998, para 1234, *Prosecutor v. Serushago*, ICTR-98-39- S, Sentence, 2 February 1999, para 20.

[24] *Prosecutor v. Aleksovski*, IT-95-14/1-A, 24 March 2000, para 185.

[25] *Prosecutor v. Delalic et al*, IT-96-21-T, Judgment, 16 November 1998, para 1233.

[26] *Prosecutor v Nikolic*, IT-02-6/I-T, 2 December 2003, para 58-60.

145 and Article 78, considerations at sentencing clearly include matters outside the four corners of the document containing the charges ("DCC"). Moreover, whilst the decision on the guilt of the Accused under Article 74(2) must be made on the basis of the standard beyond reasonable doubt (Article 66(3)), neither the Statute nor the Rules provide for the applicable evidentiary standard for these other factual considerations going beyond the DCC.

19. However, Trial Chamber I in the *Prosecutor v Lubanga*[27] and the *ad hoc* Tribunals decisions make it clear that aggravating factors should be proved by the Prosecution beyond reasonable doubt. The *ad hoc* Tribunals have further held that the aggravating factors should be directly related to the charged offence.[28] In contrast, the standard applicable to mitigating factors as applied in the *Lubanga* case[29] and at the *ad hoc* Tribunals is proof on a "balance of probabilities". Mitigating factors may include circumstances not directly related to the offence[30] such as cooperation with the Prosecution, honest showing of remorse, or guilty plea.

C. Factors under Article 78 and Rule 145

20. Article 78(1) requires that the Court take into account the gravity of the crime and the individual circumstances of the convicted person. Rule 145 further provides that the sentence imposed "must reflect the culpability of the convicted person", "balance all the relevant factors including any mitigating and aggravating factors and consider the circumstances of both the convicted person and the crime".[31] Rule 145(1)(c) specifies that the Court *must* take into account the following factors: "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, the degree of participation of the convicted person, the

[27] Lubanga Article 76 Decision, paras. 32-33.
[28] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1), 79, 81.
[29] Lubanga Article 76 decision, para.34.
[30] Lubanga Article 76 decision, para.34. *See also* Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1), 79, 81.
[31] ICC RPE, Rule 145.

degree of intent, the circumstances of manner, time and location, and the age, education, social and economic condition of the convicted person."[32]

(1) The gravity of the crime

21. There is no sliding scale or hierarchy of gravity of offences in the Statute. In the Preamble and Article 5(1) of the Statute it is recognised that the Court has jurisdiction for "the most serious crimes of concern to the international community", which supports a presumption that all of the crimes listed in the Statute are of equal gravity.[33] The ICTY and ICTR do not regard war crimes as less grave than crimes against humanity.[34]

22. The ICC considers gravity at the earliest stages of a case, as an attribute of admissibility. There is a baseline finding of gravity in this case.[35] Rule 145 also identifies gravity as an aggravating factor.[36]

23. For instance, PTCI and II in the context of determining gravity as part of the admissibility requirement under Article 17(1)(d) have held that: "the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case". [37] PTCII further considered as relevant, the aggravating factors listed in Rule 145 (aggravating factors):

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[32] ICC RPE, Rule 145(1)(c).
[33] *See* Preamble, para.4. *See also* W.A. Schabas, 'Penalties', *in* A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court, A Commentary,* volume II, p. 1506.
[34] The early judgments from ICTY (*Prosecutor v. Erdemovic*, Judgment, Joint and Separate Opinion of Judge McDonald and Judge Vohrrah, 7 October 1997, paras 20, 22) and ICTR (*Prosecutor v. Kambanda,* Judgment, 4 September 1998, para. 14) Trial Chambers seemed to suggest that crimes against humanity rank higher than war crimes in terms of gravity. However, the ICTR Appeals Chamber has consistently held that there is no such hierarchy (*The Prosecutor v. Kambanda* Appeals Judgment, 19 October 2000 *The Prosecutor v. Akayesu*, Appeals Judgment, 1 June 2001). The ICTY adopted the same view and it now seems settled law that there is no hierarchy between the two crimes (L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, p. 248). *See e.g.Prosecutor v. Stakic*, Appeals Judgment, 22 March 2006, para 375, where the Chamber confirmed that there was no hiearchy between crimes, including the crime of genocide. *See also Prosecutor v Tadic*, Judgment, in Sentencing Appeals, ICTY-94-1-A, 26 January 2000, para.69; *Prosecutor v Furundzija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, para.243.
[35] ICC-01/04-01/07-1213-tENG; ICC-01/04-01/07-T-67-ENG. *See also e.g.* ICC-01/04-01/06-8-Corr, para.74.
[36] Lubanga Article 76 Decision, p.14, para.36, p.18, para.44.
[37] *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31. *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome

> When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(l)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.[38]

24. The Prosecution submits that any harm or consequence that are directly related to the crimes and that are objectively foreseeable, should also be taken into account for sentencing purposes under Article 78(1) as part of the assessment of gravity of the crime, or in the alternative, as part of the harm to victims and their families (under Rule 145(1)(c)), or as an aggravating circumstance (under Rule 145(2)(b)). The Chamber has a choice as to the rubric under which it assesses this factor: For instance, the Appeals Chamber in *Hadzihasanovic* commented that *"though gravity of the crime and aggravating circumstances are two distinct concepts, Trial Chambers have some discretion as to the rubric under which they treat particular factors."*[39]

25. If it is objectively foreseeable that any harm or consequence would occur as a result of a complicit individual's significant contribution, then this should be taken into account for sentencing purposes. For instance, at the Special Court of Sierra Leone ("SCSL"), the Trial Chamber considered the fact that "child soldiers were subjected to cruel and harsh military training" as a factor,

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Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 1 April 2010, para. 62.

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

[39] *Prosecutor v Hadzihasanovć*, Appeals Chamber, Judgment, IT-01-47-A, 22 April 2008, para.317. *See also*, *Prosecutor v Vasiljević* Appeals Chamber, Judgment, IT-98-32-A, 25 February 2004, para.157; *Prosecutor v Taylor*, Trial Chamber, Sentencing Judgment, SCSL-03-01-T, 30 May 2012, ("Taylor Sentencing Judgment"), para.28, noting that some international Trial Chambers consider gravity and aggravating circumstances together. *See also Prosecutor v Brima*, Trial Chamber, Sentencing Judgment, SCSL-04-16-T, 19 July 2007, para.23.

amongst others, that exacerbated the gravity of the sentence.[40] Similarly, Judge Odio Benito in her Dissenting opinion in Lubanga assessed cruel treatment and sexual violence in her analysis of the gravity of the crimes.[41] It is not necessary that any such harm or consequence be directly attributed to the convicted person. For instance, in *Taylor*, the Trial Chamber citing decisions from the ICTY Appeals and Trial Chambers stated that aggravating circumstances need only have a "direct relation to the offences charged" or the offender himself, and did not require additional proof that the convicted person acted with intent and knowledge in respect of the aggravating factors. It is sufficient if the evidence established the connection to the offence of which the person was convicted and the objective foreseeability of the harm.[42] The ICTY Appeals Chamber has further confirmed that holding the individual responsible for such consequences falls within the notion of individual responsibility.[43] The test for aggravating circumstances is not the same test for criminal responsibility, rather it is foreseeability.[44]

(2) Individual circumstances of the convicted person

26. The Chamber must consider "individual circumstances of the convicted person" (Article 78(1)). Rule 145(1)(c) directs the Court to give consideration to the age, education, social and economic condition of the convicted person.[45] This is not an exhaustive list. The Court has the discretion to consider other

[40] *Prosecutor v Sesay, Kallon and Gbao*, Sentencing Judgment, CSCSL-04-15-T, 8 April 2009 ("RUF Sentencing Judgment"), para.180.
[41] ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, Sentencing Decision, p.41, heading (B) and paras.1,2, 6, 13.
[42] Taylor Sentencing Judgment, paras.24 and 30. *See also* the RUF Sentencing Judgment, para 23; *Prosecutor v Fofana and Kondewa*, Judgment on Sentencing, SCSL-04-14-T, 9 October 2007, para. 36. See also *Prosecutor v Kunarac,* Trial Chamber Judgment, 22 February 2001, IT-96-23-T &IT-96-23/1-T 22, para.850; *Prosecutor v Deronjic*, Judgment on Sentencing Appeal, IT-02-61-A, 20 July 2005 ("Deronjic Sentencing Appeal").
[43] Deronjic Sentencing Appeal, paras.124-125.
[44] *See e.g.* The Sentencing Guidelines Council, created to assist the courts of England and Wales with criminal cases, explains the requirement to impose a sentence that reflects the seriousness of the offence as provided by section 143(1) of the Criminal Justice Act (2003) also means an assessment of any harm that "might foreseeably be caused by the offence". Sentencing Guidelines Council, Guideline on Overarching Principles: Seriousness, Decemer 2004, p.5. Aggravating factors indicate either a higher than usual level of culpabiility (e.g. offence committed while on bail), or a greater than usual degree of harm (e.g. a serious physical or psychological effect on the victim even if unintended'). Thus the harm need only be a foreseeable consequence of the offence. See Sentencing Guidelines Council, Guideline on Seriousness, pp.5-7.
[45] Mark Jennings, 'Determination of the sentence', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court,* 2nd edition, p. 1436.

appropriate individual circumstances. Lubanga's marked awareness of the seriousness of the crimes was a relevant factor in his sentencing.[46]

(3) Aggravating circumstances

27. Rule 145(2) provides that the Court shall take into account, as appropriate, as aggravating factors: "any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature, abuse of power or official capacity, commission of the crime where the victim is particularly defenceless, and commission of the crime with particular cruelty or where there were multiple victims."[47] The parameters of what constitute aggravating circumstances are not exhaustively defined: Rule 145(2)(b) provides that any crimes involving discrimination or "other circumstances" not specifically enumerated in the Rules may also be aggravating factors influencing the Court's sentencing decision.[48] Thus the Court has an obligation to consider aggravating factors but has discretion in determining which factors are appropriately considered aggravating in a particular case.

28. The jurisprudence of the ICTY, ICTR and SCSL has established a bar on double-counting, meaning that no factor forming part of the elements of the crime or that was taken into account as an aspect of the gravity of the crime may be additionally taken into account as a separate aggravating circumstance.[49]

(a) Abuse of power or official capacity

29. Article 27 states that official capacity shall not, in and of itself, constitute a ground for reduction of sentence. Indeed, the opposite seems to be true: "abuse of superior position" or "position of command" has also been accepted

[46] Lubanga Article 76 Decision, p.22, paras.54-56.
[47] ICC RPE, Rule 145(2)(b).
[48] ICC RPE, Rule 145(2)(b).
[49] Karim Khan, Rodney Dixon, *Archbold International Criminal Courts*. 3rd Edition, Sweet & Maxwell, 2009, page 1334. See, *Prosecutor v. Brima, Brima Kamara, Santigie Kanu,* SCSL-04-16-T, T.Ch. Sentencing Judgment, 19 July 2007, para 23; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao,* SCSL-04-15-T, T.Ch. Sentencing Judgment, 8 April 2009, para 102.

as an aggravating factor by ICTY Chambers.[50] A position of authority, whether civilian or military, gives rise to both duty and trust which, if broken or abused, would tend to aggravate the sentence.[51]

(b) Commission of the crime where the victims are particularly defenceless

30. The special vulnerability of the victims,[52] has been interpreted by the ICTY as meaning for instance, where the victims are women and children,[53] held captive by the accused,[54] or systematically disarmed (made defenceless) and then attacked[55]. In *Deronjic*, the Accused argued that the status of victims as civilians should not be considered an aggravating factor because civilian status was an element of the crimes against humanity with which he was charged. The Appeals Chamber agreed with the double-counting argument, but stated that "additional elements" indicating "particular vulnerability," would be considered.

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[50] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1) 79, 86: "abuse of superior position/position of authority or trust (accepted in 35 cases)." *See e.g. Prosecutor v Babic*, Appeal Chamber Judgment, Case No. IT-03-72-A, 18 July 2005, para.80.

[51] *See* Lubanga Article 76 Decision, para.97. See also ICC-01/04-01/06-2950, Prosecution's Document in Support of Appeal, pp.3-5, 27-31. *See also e.g. Prosecutor v Stakic*, Trial Judgment, 31 July 2003, Case No. IT-97-24-T, paras. 913-914; *Prosecutor v Stakic,* Appeal Judgment, Case No. IT-97-24-A, 22 March 2006, para.411; *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v Kambanda*, Appeal Judgment, Case No. ICTR-97-23-A, paras.118-119, 126; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Sentence, Case No. ICTR-95-I-T, 21 May 1999 at p. 15; *Prosecutor v Seromba*, Trial Judgment, Case No. ICTR-2001-66-I, 13 December 2006, para.390, *Prosecutor v Seromba*, Appeal Judgment, Case No. ICTR-2001-66-A, 12 March 2008, paras.229-230; *Prosecutor v Ndindabahizi*, Trial Judgment, Case No. ICTR-2001-71-I, 15 July 2004, para.508; *Prosecutor v Ndindabahizi*, Appeal Judgment, Case No. ICTR-01-71-A, paras.133-136.

[52] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1) 79, 86: "special vulnerability of victims (accepted in 31 cases)."

[53] *See e.g.* Lubanga Article 76 Decision, pp.14-18, paras.36-44. *See also* Dissenting Opinion of Judge Odio Benito, pp.41-52, paras.1-27. The use, enlistment and conscription of children as soldiers were held to be very serious crimes involving significant harm to victims and their families. *Prosecutor v. Blaskic,* ICTY, Judgment, March 3, 2000, para. 783: "In this case, the heinousness of the crimes is established by the sheer scale and planning of the crimes committed which resulted in suffering being intentionally inflicted upon the Muslim victims regardless of age, sex or status. In this respect, the Trial Chamber wishes to bring out the particularly heinous nature of the crimes at Ahmici where, during a carefully prepared attack, many Muslim children, women and adults were systematically murdered and sometimes burnt alive in their homes, the houses plundered and set alight and the mosques and religious buildings destroyed. Such facts constitute a decisive aggravating circumstance."

[54] *Prosecutor v. Furundzija*, ICTY, Judgment, December 10, 1998, para. 283: "In conclusion, the Trial Chamber holds that this case presents particularly vicious instances of torture and rape. The Trial Chamber further considers the accused's active role as a commander of the Jokers to be an aggravating factor. Finally, the Trial Chamber considers the fact that Witness A was a civilian detainee and at the complete mercy of her captors to be a further aggravating circumstance."

[55] *Prosecutor v. Deronjic*, ICTY, Judgment, March 30, 2004, para. 198.

(c) Commission of the crime with particular cruelty

31. The ICTY Chambers have interpreted this aggravating circumstance as meaning the "extreme suffering or harm inflicted on victims".[56]

(d) Commission of the crime where there were multiple victims

32. This aggravating circumstance has been interpreted by the ICTY Chambers as meaning the "scale of the crime", synonymous with a "large number of victims"[57]. In *Erdemovic,* for example, the Trial Chamber considered the fact that the accused personally shot and killed 70 to 100 Bosnian Muslim civilians to be an aggravating factor due to the "magnitude" and "scale" of the crime.[58] The Trial Chamber in *Blaskic* similarly accepted the number of victims as an aggravating factor and added that "[t]he number of victims must also be considered in relation to the length of time over which the crimes were perpetrated."[59]

(4) Mitigating circumstances

33. Rule 145(2)(a) requires the Court to take mitigating factors into account. It specifies two - "the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress" and "the convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court" – and leaves open the Court's consideration of other unspecified factors. As demonstrated below, the most-often cited additional factors in mitigation include cooperation, personal and family circumstances, remorse, and voluntary surrender.

(a) Cooperation

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[56] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1) 79, 86: "extreme suffering or harm inflicted on victims (accepted in 25 cases)".
[57] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1) 79, 86: "large number of victims (accepted in 15 cases)."
[58] *Prosecutor v. Erdemovic*, ICTY, Judgment, March 5, 1998, para. 15.
[59] *Prosecutor v. Blaskic*, ICTY, Trial Judgment, para. 784.

34. The jurisprudence of the *ad hoc* Tribunals indicates that cooperation must be "full, substantial, and unconditional" and "can include providing the Prosecution with information regarding other massacres, the names and identities of persons involved and testimony against other accused persons," particularly where that information had previously been unknown.[60] In *Blagojevic*, however, the Appeals Chamber of the ICTY noted that cooperation that is "less-than-substantial" may still be considered a mitigating circumstance by the Trial Chamber as long as it was accordingly given less-than-substantial weight in the sentencing decision.[61] The Appeals Chamber has held that an assessment of substantial cooperation must depend on the conduct of the Accused as a whole, rather than on one act.[62] It should be noted that at the ICTY, cooperation offered by the Accused's counsel is not regarded as "substantial" or treated as cooperation by the Accused himself.[63] Whether the Accused cooperated with the Prosecution is a question to be determined by the Court.[64] Some ICTR judges have accepted 'assistance to victims' as a mitigating factor,[65] but is not always accepted as mitigation. In particular, selective assistance to victims before or during the commission of the crimes may in fact be regarded as an aggravating factor.[66]

(b) Personal and family circumstances

35. A mitigating factor cited by ICTY Chambers is "family circumstances".[67] In *Kunarac et al.*, the Appeals Chamber found the status of the accused as a father of young children should be considered under "[a]rticle 24(2) of the Statute [which] requires the Trial Chambers to take into account "the individual

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[60] Karim Khan; Rodney Dixon, *Archbold International Criminal Courts*. 3rd Edition, Sweet & Maxwell, December 2009, 134 0-1342, citing *Prosecutor v. Erdemovic* and *Prosecutor v. Joao Fernandez*.
[61] *Prosecutor v. Blagojevic et al.*, Appeal Judgment, 9 May 2007, para. 344.
[62] *Prosecutor v. Bralo*, ICTY, Judgment on Sentencing Appeal, 2 April 2007, paras, 51-52.
[63] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, para 262.
[64] *Prosecutor v. Nikolic*, Case No. IT-02-60/1-A, 8 March 2006, paras 96-100 and 111-113.
[65] Hola, B., Bijleveld A., and Smeulers, C., "Punish for Genocide – Exploratory Analysis of ICTR Sentencing", *International Criminal Law Review 11 (2011) 745-773*
[66] *Prosecutor* v. *Bikindi (* ICTR-01-72) 2 December 2008, para. 457; *Prosecutor* v. *Muvunyi (*ICTR-2000-55A) 12 September 2006, para. 540.
[67] Hola, B., A. Smeulers, C. Bijleveld (2009), "Is ICTY sentencing predictable? An empirical analysis of ICTY sentencing practice," *Leiden Journal of International Law* 22(1), 88: "family circumstances (cited in 35 cases)".

circumstances of the convicted person."[68] However, the Appeals Chamber did not find that the family circumstance justified any reduction in the sentence.[69]

(c) Admissions of guilt and remorse

36. Guilty pleas are the most influential factor affecting sentencing judgments in both the ICTR[70] and ICTY cases.[71] The Prosecution submits that the Chamber needs to carefully assess the sincerity and weight to be attributed to any public expressions of remorse, in particular when made post-conviction.[72] The ICTY Appeals Chamber in *Momir Nikolic* stated that "only a 'real and sincere' expression of remorse constitutes a mitigating circumstance".[73]

D. Other factors to consider in determining the length of the sentence

(1) Multiple convictions

37. Article 78(3) regulates the determination of sentences in cases where the accused is convicted of more than one crime. It requires that a separate sentence be pronounced for each crime, but a single sentence imposed which shall be no less than the highest individual sentence pronounced, and shall not exceed 30 years imprisonment or a sentence of life imprisonment.[74]

(2) Sentencing for criminal responsibility under Article 25(3)(d) of the Statute

38. Whilst an individual's "degree of participation" is one of the factors to be considered under Rule 145, the Prosecution submits that this does not mean that there should be any automatic determination of a sentencing range

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[68] *Prosecutor v. Kunarac et al.*, ICTY, Appeal Judgment, 12 June, 2002, paras 362 and 408.
[69] *Prosecutor v. Kunarac et al.*, ICTY, Appeal Judgment, 12 June, 2002. Para. 362.
[70] Stephen M. Sayers, 'Defence Perspective on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia', 16 *Leiden Journal of International Law (LJIL)* (2003) p. 751.
[71] S. M. Sayers, 'Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia', (2003) 16 LJIL 751, at 768.
[72] Compare to the ICTY jurisprudence, where it is also not clear whether post-conviction remorse reduces the sentence at all. *See e.g. Prosecutor v. Deronjic*, ICTY, Sentencing Judgment, 30 March 2004, paras. 263 & 264.
[73] *Prosecutor v. Momir Nikolic*, ICTY, Judgment on Sentencing Appeal, March 8, 2006, para. 117.
[74] The Trial Chambers in the *ad hoc* Tribunals have consistently issued single, "global" sentences responding to multiple crimes committed over an extended period of time. In 2000, the ICTY Rules of Procedure and Evidence were revised to reflect this policy and make explicit the option of global sentencing. The revised Rule states that in an indictment containing multiple charges, the Trial Chamber, "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently" though the Chamber may also decide to "exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

according to the different modes of liability. In particular, there should be no automatically lower sentence for criminal responsibility as an accessory or under Article 25(3)(d).

39. First, the Prosecution submits that, as recognised by this Chamber, there is no hierarchy amongst the different modes of liability listed under Article 25. In particular, there should be no automatic difference in the sentence to be applied where an individual is held responsible under Article 25(3)(d), in contrast to Article 25(3)(a) or any other mode of liability under the Statute. Trial Chamber II in the Article 74 judgment confirmed that there is no such hierarchy finding that: "L'article 25 du Statute ne fait qu'identifier différents comportements illégaux et, en ce sens, la distinction proposée entre la responsibilité de l'auteur du crime et celle du complice ne constitue en aucun cas une 'hiérarchie de culpabilité' (hierarchy of blameworthiness) pas plus qu'elle n'édicte, même implicitement, une échelle des peines.[...] [L]'auteur d'un crime n'est pas toujours consideré comme étant moralement plus répréhensible que le complice». [75] Judge Van den Wyngaert has also accepted that there not be any hierarchy of responsibilities under Article 25.[76]

40. Similarly, Judge Fulford, in his separate opinion in the Lubanga case, reacting to an argument made by some commentators,[77] also strongly rejects the notion of a hierarchy of seriousness amongst the various forms of participation in a crime under Article 25(3), and the argument that Article 25(3)(a) is the most serious and Article 25(3)(d) the least serious. Referring in particular to responsibility under Article 25(3)(d), he observes that "many of history's most serious crimes occurred as the result of the coordinated action of groups of

[75] *See* ICC-01/04-01/07-3436, pp.569-570, paras.1386-1387.
[76] *See* ICC-01/04-02/12-4, paras.22-30; ICC-01/04-01/07-3436-AnxI, para.279.
[77] *Prosecutor v Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford ("Fulford Separate Opinion in Lubanga"), p.598, para. 8, footnote 14. Cites Gerhard Werle, 'Individual criminal responsibility in Article 25 ICC Statute', 5 J. Int'l Crim. Justice 953, 957 (2007) (''Article 25(3)(a)-(d) establishes a value oriented hierarchy of participation in a crime under international law.").

individuals, who jointly pursued a common goal".[78] Judge Fulford further observes that there does not need to be rigorous distinctions amongst the modes of liability under Article 25(3) for sentencing purposes, stating that: "[w]hilst it might have been of assistance to 'rank' the various modes of liability if, for instance, sentencing was strictly determined by the specific provision on which an individual's conviction is based, considerations of this kind do not apply at the ICC. Article 78 of the Statute and Rule 145 of the [Rules]... provide that an individual's sentence is to be decided on the basis of 'all the relevant factors'.... Although the 'degree of participation' is one of the factors... these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors."[79]

41. Similarly, the Appeals Chamber of the SCSL after a review of customary international law and national jurisprudence, concluded that for sentencing purposes there was no hierarchy of gravity amongst the forms of criminal participation under the SCSL Statute that include various forms of liability for participation and complicity in perpetration of crimes.[80]

42. Second, Article 25(3)(d), which provides for liability for complicity in group crimes, is a serious form of liability which should give rise to a severe sentence, in particular in light of the nature and impact of the accused's contribution and his role in the crime. Indeed, the seriousness of this mode of liability is demonstrated by its origins: the language is largely drawn from the

[78] Fulford Separate Opinion in Lubanga, pp.597-598, para. 8. See also e.g. W. Schabas, An Introduction to the International Criminal Court, Third Edition ("Schabas"), p.211: "The International Criminal Court... is targeted at the major criminals responsible for large-scale atrocities. Most of its 'clientele' will not be the actual perpetrators of the crimes, soiling their hands with flesh and blood. Rather, they will be 'accomplices', those who organise, plan and incite genocide, crimes against humanity and war crimes."
[79] Fulford Separate Opinion in Lubanga, p.598, para. 9.
[80] *Prosecutor v Taylor*, SCSL-03-01-A, Appeals Judgment, 26 September 2013, paras.666-670. See Article 6(1) of the SCSL Statute: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime".

conspiracy provisions of the International Convention of the Suppression of Terrorist Bombings 1997.[81]

43. Although Article 25(3)(d) has no exact counterpart in the *ad hoc* Tribunals, it has features which are similar to two well-recognised modes of liability at the *ad hoc* Tribunals, namely joint criminal enterprise (JCE) and aiding and abetting. Accordingly, principles developed by the ICTY and ICTR relating to these two modes may be of use when sentencing for crimes committed pursuant to Article 25(3)(d) in this Court.

44. In particular, Article 25(3)(d)(ii) - the mode under which the accused has been convicted - has similarities to aiding and abetting in the case law of the ICTY in that it essentially consists of an accused's knowing assistance to a crime or crimes. However Article 25(3)(d)(ii) is arguably even more serious than aiding and abetting at the *ad hoc* Tribunals as the former mode additionally requires as an element of proof that the accused knowingly provides his acts of assistance *to a group acting with a common purpose*. Accordingly, ICTY and ICTR case law stating that liability for aiding and abetting might lead to a somewhat lower sentence,[82] is distinguishable. In any event, as the ICTY and ICTR Chambers have emphasised when sentencing an accused for aiding and abetting liability, the sentence will depend on the nature of the crime and the individual's form and degree of participation in the crimes. [83]

45. In addition, and as already advanced, Article 25(3)(d) has similarities to the mode of liability of joint criminal enterprise (JCE) applied by the ICTY and ICTR,[84] in particular the fact that under Article 25(3)(d)(ii) the accused must

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[81] UN Doc.A/RES/52/164 (1998), annex, Art 2(3). *See e.g.* Schabas, p.213; K. Ambos ''Individual Criminal Responsibility, Article 25 Rome Statute", in Commentary on the Rome Statute of the International Criminal Court, Second Edition, Triffterer (ed.), C.H.Beck.Hart.Nomos, ("K.Ambos), p.760; Albin Eser, 'Individual Criminal Responsibility', in The Rome Statute of the International Criminal Court: A Commentary, Vol.I, Cassesse, Gaeta & Jones (eds.), Oxford University Press, 2002 ("Eser"), p.802.

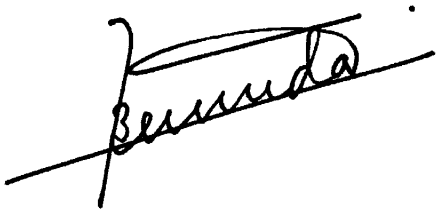
[82] *See Prosecutor v Vasiljevic,* IT-98-32-A, Judgment, 25 February 2004, para. 182; *Semanza v Prosecutor*, ICTR-97-20-A, Appeals Judgment, 20 May 2005.

[83] *Supra,* fn.82.

[84] The ICTY Trial Chamber in *Prosecutor v Tadic*, when describing the concept of a ''common criminal purpose'' of a joint criminal enterprise referred to Article 25(3)(d) of the Rome Statute as being a ''substantially similar notion": *See e.g. Prosecutor v Tadic*, Case No. IT-94-I-A, Judgment, 15 July 1999, paras.220-222. *See also e.g.* Schabas, pp. 213, 215.

provide his knowing assistance to a group of persons acting with a common purpose. This aspect of Article 25(3)(d)(ii) makes it an inherently serious mode of liability.

46. The fact that the accused person's contribution is removed from the actual commission of the crime is not determinative of the sentence to be imposed. For instance, the Appeals Chamber of the ICTY has confirmed that the fact a person is found responsible as a participant in a joint criminal enterprise does not mean that the individual should automatically receive a lower sentence, and may warrant them receiving a higher sentence than the direct participant in the crime.[85] In *Prosecutor v. Krajisnik,* the ICTY Appeals Chamber held that, where the convicted person's contributions to the JCE were extensive, "a severe sentence was warranted."[86] Likewise, certain national courts have also recognised that there be no lower sentence for individuals responsible for complicity than for those deemed to be "principals", such as the *Cour de Cassation* of France.[87]



Fatou Bensouda

Prosecutor

Dated this 17 March 2014

At The Hague, The Netherlands

[85] *See e.g. Prosecutor v Stakic*, IT-97-24, Appeal Judgment, 22 March 2006, para.380; *Prosecutor v Stakic*, IT-97-24, Judgment, 31 July 2003, para.918.
[86] *See e.g. Prosecutor v Krajisnik*, IT-00-39, Appeal Judgment, 17 March 2009, para.739.
[87] *See e.g.* Cour de Cassation, Chambre criminelle, 7 February 2001, 00-82-824: «Attendu qu'en relevant que les prévenus ont validé en connaissance de cause de fausses écritures ou certifié de leur sincérité, la cour d'appel a caractérisé sans insuffisance ni contradiction leur participation aux faits dénoncés et il n'importe qu'elle les ait déclarés coupables de faux et usage au lieu de complicité de faux et usage dès lors que l'erreur sur la qualification d'auteur ou de complice est sans influence sur la peine» ; Cour de Cassation, Chambre criminelle, 11 January 2001, 00-82-412: «Qu'il n'importe que pour l'un des vols, la cour d'appel ait qualifié la demanderesse de complice au lieu d'auteur principal dès lors que la peine est justifiée quelle que soit la qualification».