

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/07

Date: 23 May 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**

**Decision on Sentence pursuant to article 76 of the Statute**

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

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Mr Éric MacDonald, Senior Trial Lawyer

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**Legal Representatives of Applicants**

**Office of Public Counsel for Victims**

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**States' Representatives**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Mr Harry Tjonk

**Victims Participation and Reparations  
Section**

**Other**

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	ANNEX I – OPINION OF JUDGE VAN DEN WYNGAERT	

**Trial Chamber II** of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 23, 76, 77 and 78 of the Rome Statute (“the Statute”) and rule 145 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

## **I. BACKGROUND**

1. On 7 March 2014, the Chamber, by majority, Judge Christine Van den Wyngaert dissenting, delivered its judgment in accordance with article 74 of the Statute (“the Judgment”).<sup>1</sup> The Chamber acquitted Germain Katanga of the crimes of rape and sexual slavery as crimes against humanity and as war crimes, and of the crime of using children under the age of 15 years to participate actively in hostilities as a war crime. However, the Chamber found him guilty of accessoryship in the attack of 24 February 2003 on Bogoro, Ituri district, Democratic Republic of the Congo (“the DRC”), and, more specifically, as an accessory to the crime of murder as a crime against humanity and as a war crime; the crime of attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime; the crime of destruction of enemy property as a war crime; and the crime of pillaging as a war crime.
2. In compliance with article 76(1) of the Statute, the Chamber therefore commenced the sentencing procedure. In sentencing, the Chamber is bound by article 76(2) of the Statute to hold a hearing if requested by the Prosecutor or the accused, or to hold one on its own motion. Accordingly, the Chamber noted that, in concluding its closing statement filed on 30 March 2012, the Defence had expressly “request[ed] that additional submissions be made

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<sup>1</sup> [“Judgment pursuant to article 74 of the Statute”, 7 March 2014, ICC-01/04-01/07-3436 \(“Katanga Judgment”\).](#)

pursuant to article 76(2), if need be”,<sup>2</sup> which amounts to requesting such a hearing.

3. By order of 7 March 2014,<sup>3</sup> (“the Order of 7 March 2014”), the Chamber therefore requested the parties and the Common Legal Representative of the main group of victims (“the Legal Representative”) to submit, by 17 March 2014, written observations on the procedures and principles for sentencing. The Chamber also requested them to submit, within the same time limit, all observations they considered necessary for it to make a reasoned determination in compliance with rule 145 of the Rules. Lastly, it invited the Prosecution and the Defence to inform the Chamber, no later than 24 March 2014, whether they intended to call one or more witnesses or to present any documentary evidence.
4. In the Order of 7 March 2014, the Chamber notified the Defence that the parts of the Judgment – drafted in French – of special relevance to the procedure to determine the sentence would be translated into English and made available to it as of 11 March 2014, while the remaining parts would be notified to it subsequently and on a regular basis. The Chamber did emphasise, however, that Germain Katanga understood, spoke and read French,<sup>4</sup> something his Counsel also recalled.<sup>5</sup>
5. On 11 March 2014, the Chamber rejected a request by the Legal Representative for extension of the 24 March 2014 time limit.<sup>6</sup>

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<sup>2</sup> [Defence, “Second Corrigendum to the Defence Closing Brief”, 23 April 2012, ICC-01/04-01/07-3266-Conf-Corr2 with Annex \(29 June 2012, ICC-01/04-01/07-3266-Corr2-Red\) \(“Defence Closing Brief”\), para. 1333.](#)

<sup>3</sup> [“Ordonnance portant calendrier de la procédure relative à la fixation de la peine \(article 76 du Statut\)”, 7 March 2014, ICC-01/04-01/07-3437 \(“Order of 7 March 2014”\).](#)

<sup>4</sup> Order of 7 March 2014, para. 3.

<sup>5</sup> [Defence, “Defence Request regarding the Translation and Notification of the Article 74 Decision”, 28 February 2014, ICC-01/04-01/07-3433, para. 3.](#)

<sup>6</sup> [“Décision relative à la Requête du Représentant légal commun du groupe principal de victimes aux fins de prorogation du délai de dépôt des observations sur la Règle 145 du Règlement”, 11 March 2014, ICC-01/04-01/07-3439.](#)

6. On 17 March 2014, the Prosecution,<sup>7</sup> the Defence<sup>8</sup> and the Legal Representative<sup>9</sup> submitted their observations on the procedure and principles for sentencing. In its observations, the Defence applied, *inter alia*, for the initial 24 March 2014 time limit to be deferred to 7 April 2014. In a request dated 19 March 2014 (“the Request of 19 March 2014”),<sup>10</sup> the Defence reiterated the application in further detail. In its decision dated 20 March 2014,<sup>11</sup> the Chamber extended the initial 24 March 2014 time limit for the parties and the Legal Representative to 7 April 2014. The Chamber stated that, while ensuring the swift conduct of the last phase of proceedings, it would consider the Defence’s concern about the need for more time to file the most complete information possible.<sup>12</sup>
7. On 24 March 2014, the Defence requested an extension of page limit, pursuant to regulation 37(2) of the Regulations of the Court,<sup>13</sup> arguing that the requested extension would enable it to make the most complete observations possible, not only on the application of rule 145 of the Rules to the instant case, but also on the application of the deduction of time from sentence as provided by article 78(2) of the Statute and on the witnesses it might call to appear before the Chamber. By a decision of 25 March 2014, the Chamber

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<sup>7</sup> [Office of the Prosecutor, “Prosecution’s Submissions on the Procedures and Principles for Sentencing”, 17 March 2014, ICC-01/04-01/07-3444 \(“First Prosecution Observations”\).](#)

<sup>8</sup> [Defence, “Defence Observations on the Proceedings and Principles Relevant to Sentence”, 17 March 2014, ICC-01/04-01/07-3443 \(“First Defence Observations”\).](#)

<sup>9</sup> [Legal Representative, “Observations relatives à la procédure et aux principes relatifs à la fixation de la peine”, 17 March 2014, ICC-01/04-01/07-3441 \(“First Observations of the Legal Representative”\).](#)

<sup>10</sup> Defence, “Defence Request for Extension of Time”, 19 March 2014, ICC-01/04-01/07-3445-Conf (“the Request of 19 March 2014”).

<sup>11</sup> [“Décision relative à diverses demandes de la Défense de Germain Katanga consécutives à l’ordonnance du 7 mars 2014 sur la procédure relative à la fixation de la peine”, 20 March 2014, ICC-01/04-01/07-3447 \(“Decision of 20 March 2014”\).](#)

<sup>12</sup> [Decision of 20 March 2014](#), para. 11.

<sup>13</sup> Defence, [“Defence Request for Extension of Page Limit”, 24 March 2014, ICC-01/04-01/07-3448.](#)

granted the request in part, authorising the Defence to make a 70-page filing.<sup>14</sup>

8. On 4 April 2014, as requested by the Presiding Judge by an e-mail of 20 March 2014,<sup>15</sup> the Registrar submitted a report containing information about Germain Katanga's solvency, the compensation that he might make to victims of the crimes committed and his conduct while in detention.<sup>16</sup>
9. The parties and the Legal Representative submitted their observations on 7 April 2014 within the time limit set by the Chamber.<sup>17</sup> They will be examined in detail in the body of the instant decision but a brief overview can be given immediately.
10. After underscoring the gravity of the crimes in the light of both article 78 of the Statute and rule 145(1)(c) of the Rules, the Prosecution then listed the aggravating circumstances which, in its view, the Chamber ought to take into account in determining the sentence, and excluded all mitigating circumstances.<sup>18</sup> Lastly, the Prosecution sought authorisation to call the current chief of Bogoro village as a witness to testify about the impact of the crimes on the people of Bogoro who survived the attack of 24 February 2003 and to enter into the record parts of the Special Report on Ituri by the UN

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<sup>14</sup> ["Décision sur la requête de la Défense aux fins d'augmentation du nombre de pages autorisé \(norme 37-2 du Règlement de la Cour\)", 25 March 2014, ICC-01/04-01/07-3450.](#)

<sup>15</sup> E-mail sent by the Presiding Judge of Trial Chamber II to the Registry at 15:35 on 20 March 2014, copying the parties and the Legal Representative.

<sup>16</sup> [Registry, "Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga", 4 April 2014, ICC-01/04-01/07-3453-Conf, reclassified as "public" by "Order on the Prosecution and Defence requests for admission of documentary evidence into the record of the sentencing proceedings and on the Legal Representative's request for reclassification of a Registry report," 10 April 2014, ICC-01/04-01/07-3463-Conf \("Observations of the Registry regarding solvency, compensation of victims and Germain Katanga's conduct in prison"\).](#)

<sup>17</sup> [Office of the Prosecutor, "Prosecution's Sentence Request, 7 April 2014, ICC-01/04-01/07-3455 \("Second Prosecution Observations"\); Defence, "Defence Observations on Sentencing," 7 April 2014, ICC-01/04-01/07-3456-Conf \("Second Defence Observations"\); Legal Representative, "Observations du Représentant légal relatives à la fixation de la peine", 7 April 2014, ICC-01/04-01/07-3457-Conf \("Second Observations of the Legal Representative"\).](#)

<sup>18</sup> [Second Prosecution Observations](#), in particular paras. 32-41.

Special Mission to the DRC (“MONUC”) where they are relevant to the crimes committed on that day in that location.<sup>19</sup>

11. For his part, the Legal Representative laid emphasis on the gravity of the crimes committed. He drew particular attention to the extent of the harm caused to victims and their family members, and described the conditions of the attack, recalling how civilians had been chased and tracked down, and then killed. The Legal Representative highlighted Germain Katanga’s actual key role.<sup>20</sup> He listed the aggravating circumstances to be taken into account against him<sup>21</sup> and downplayed any anticipated mitigating circumstances that might be raised.<sup>22</sup> Lastly, asked that the Registrar’s report of 4 April 2014 on Germain Katanga’s solvency and the possible compensation of victims be reclassified as public, except for its annexes.<sup>23</sup>
  
12. The Defence, for its part, firstly reviewed Germain Katanga’s personal history<sup>24</sup> and then discussed his low degree of participation; his non-leading role, which was limited to weapons distribution; and the fact that he did not have the intent but only knowledge of the commission of crimes.<sup>25</sup> Further, it emphasised that no factor taken into account as an aspect of the gravity of the crime might additionally be taken into account as a separate aggravating circumstance.<sup>26</sup> The Defence outlined all the factors which, in its opinion, supported consideration of mitigating circumstances in Germain Katanga’s favour.<sup>27</sup> In particular, it made a lengthy submission on Germain Katanga’s role in the demobilisation process,<sup>28</sup> and on the time he had spent in detention

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<sup>19</sup> [Second Prosecution Observations](#), para. 42.

<sup>20</sup> [Second Observations of the Legal Representative](#), paras. 9-40.

<sup>21</sup> [Second Observations of the Legal Representative](#), paras. 41-47.

<sup>22</sup> [Second Observations of the Legal Representative](#), paras. 48-54.

<sup>23</sup> [Second Observations of the Legal Representative](#), p. 21.

<sup>24</sup> [Second Defence Observations](#), paras. 5-13.

<sup>25</sup> [Second Defence Observations](#), paras. 14-42.

<sup>26</sup> [Second Defence Observations](#), paras. 43-52.

<sup>27</sup> [Second Defence Observations](#), paras. 53-126.

<sup>28</sup> [Second Defence Observations](#), paras. 55-76.

in the DRC and hence the need for that time to be taken into account pursuant to article 78(2) of the Statute. The Defence expressed the desire to call – to appear by video link, if necessary – two witnesses who were well-positioned to testify about Germain Katanga’s behaviour within his community, for instance, following the events, as part of demobilisation programmes.<sup>29</sup> Lastly, it requested the Chamber’s authorisation for entry into the record of several documents including four witness statements taken by the local investigator in respect of Germain Katanga’s moral standing.<sup>30</sup>

13. On 8 April 2014, the Chamber issued an order authorising the appearance of witnesses called by the Prosecution and by the Defence, specifying that this will take place video link and instructing the Registrar to take all necessary steps to that effect without delay. In the same order, the Chamber scheduled 5 and 6 May 2014 for the hearings during which the witnesses would testify, the Prosecution would make its submissions, the Legal Representative would submit its observations, the Defence would present its arguments and the convicted person would, if he so desired, make the statement provided for under article 67(1)(h) of the Statute.<sup>31</sup>

14. In the light above all of the observations made at its invitation<sup>32</sup> by the Prosecution<sup>33</sup> and the Legal Representative,<sup>34</sup> the Chamber ruled by order of 10 April 2014<sup>35</sup> on the entry of documentary evidence into the record of the

<sup>29</sup> [Second Defence Observations](#), paras. 127-155.

<sup>30</sup> [Second Defence Observations](#), paras. 156-160.

<sup>31</sup> [“Ordonnance relative aux requêtes du Procureur et de la Défense en vue de faire déposer des témoins lors de l’audience sur la peine”, 8 April 2014, ICC-01/04-01/07-3458.](#)

<sup>32</sup> E-mail sent by a Legal Officer in the Chamber to the parties and the Legal Representative at 15:46 on 7 April 2014.

<sup>33</sup> Office of the Prosecutor, “Prosecution’s response to the Defence request to have statements and documents introduced at the sentencing proceedings”, 9 April 2014, ICC-01/04-01/07-3460-Conf.

<sup>34</sup> Legal Representative, “Observations du Représentant légal sur l’admission de déclarations écrites de témoins potentiels de la Défense en vue de la fixation de la peine”, 9 April 2014, ICC-01/04-01/07-3461-Conf.

<sup>35</sup> “Order on the Prosecution and Defence requests for admission of documentary evidence into the record of the sentencing proceedings and on the Legal Representative’s request for reclassification of a Registry report”, 10 April 2014, ICC-01/04-01/07-3463-Conf-tENG.

sentencing proceedings as requested both by the Prosecution and by the Defence. It granted the Defence's request, in particular with respect to four written witness statements, and dismissed the Prosecution request, which it considered irrelevant for the purposes of article 76 of the Statute.<sup>36</sup> It also emphasised that all care was to be taken to ensure that, during the sentencing hearing, no reference was made to substantive issues which had already been dealt with in the Judgment of 7 March 2014. Lastly, the Chamber ruled on a request for reclassification made by the Legal Representative.

15. On 10 April 2014, a few hours after the abovementioned order was made, the Defence filed an application in essence challenging the authorisation granted to the Prosecution to call a witness at the sentencing stage, and requesting the Chamber to reconsider its decision.<sup>37</sup> The Defence also requested the Chamber to order the Prosecution to disclose any material in its possession relating to the witness it proposed to call to testify and to submit a signed written statement.<sup>38</sup>
16. On 11 April 2014, the Chamber ordered the Prosecution to submit, by 16 April 2014, any witness testimony or voice recording in its possession and directed the Defence to submit to it, by 17 April 2014, any observations it may have regarding any documents.<sup>39</sup>

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<sup>36</sup> E-mail sent by the Prosecution to the Chamber, the Defence and the Legal Representative, at 17:16 on 8 April 2014, in response to the e-mail sent by a Legal Officer of the Chamber at 11:28 on 8 April 2014.

<sup>37</sup> Defence, "Defence Request for Variation of the Trial Chamber's Order", 10 April 2014, ICC-01/04-01/07-3465-Conf ("Request for Variation").

<sup>38</sup> Request for Variation, para. 38.

<sup>39</sup> E-mail sent by a Legal Officer of the Chamber to the Office of the Prosecutor at 16:37 on 11 April 2014, copying the parties and the Legal Representative. It reads as follows: "[TRANSLATION] I have been instructed by the Chamber to inform you that it is apprised of the Defence's Request (the Request) No. 3465-Conf. of 10 April 2014 for variation of the Trial Chamber's Order No. 3458 of 8 April 2014. The Order authorised the Prosecution to collect the statement of the current chief of Bogoro village using video link to allow him to testify about the impact of the crimes on the community of people who survived the attack on that location. It equally instructs the Prosecution to submit by 12 noon on Monday, 14 April 2014, (the abovementioned Order mistakenly refers to 'Monday, 12 April'), a summary of the key points of the witness's projected testimony. In essence, the

17. On 14 April 2014, the Defence requested several protective measures for Witness D02-401.<sup>40</sup> The request was not challenged by the Prosecution or the Legal Representative.<sup>41</sup> The Registry, however, presented a report on 23 April 2014 recommending that certain protective measures be taken for the witness.<sup>42</sup> On 25 April 2014, the Chamber made a decision with respect to the recommendation.<sup>43</sup>
18. On 15 April 2014, the Defence notified the Chamber, the parties and participants that document DRC-D02-0001-1057 should no longer be entered into the record.<sup>44</sup> This was duly noted by the Chamber.<sup>45</sup>

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request considers that the presentation of a summary is insufficient and that the Prosecution should have conformed with the stipulations of rules 76, 77, 84, 111 and 112 of the Rules of Procedure and Evidence ('the Rules'). In order to avail the Defence of maximum information about the projected testimony of the person called by the Prosecution, the Chamber will extend the Prosecution's initial time limit from 12 noon on Monday, 14 April 2014 to 10 a.m. on Wednesday, 16 April. Within that time limit, it shall be incumbent upon the Prosecution to avail the Chamber, not only of further detail as demanded by the Order of 8 April 2014 above (paragraph 6 and in its operative provisions), but also any statement or voice recording of that witness in one of the Court's working languages. The Chamber orders the Prosecution to take care that the statements collected concern only paragraph 42 of Request No. 3455 of 7 April 2014. Should the Witness discuss, under examination, issues not mentioned in the Request, only the relevant parts should be singled out. Should the Prosecution seek to present a statement taken prior to the testimony of the chief of the village in November 2009 the procedure will be similar. The Defence shall submit its observations on all the information disclosed by the Prosecution at 10 a.m. on Thursday, 17 April 2014. Mindful of the urgency, the instant demands are, with the approval of the Chamber, being communicated by e-mail copying the parties and the Legal Representative."

<sup>40</sup>Defence, "Defence request for protective measures for Witness D2-401", 14 April 2014, ICC-01/04-01/07-3466-Conf.

<sup>41</sup> By e-mails received by the Chamber, respectively at 11:27 and 14:51 on 15 April 2014, the Legal Representative and the Prosecution advised it that they had no objection to the Defence's request.

<sup>42</sup> Registry, "Victims and Witnesses Unit's Report in relation to the Defence Request for Protective Measures for Witness D2-401", 24 April 2014, ICC-01/04-01/07-3473-Conf-Exp.

<sup>43</sup> "*Décision sur la requête aux fins de prononcé de mesures de protection au bénéfice du témoin D02-401*", 25 April 2014, ICC-01/04-01/07-3474-Conf.

<sup>44</sup> The Defence's e-mail sent to the Chamber, the parties and the participants, at 18:11 on 15 April 2014, reads as follows: "Please note that in its motion 3456-Conf, the defence requested, by mistake, the admission into evidence of the document DRC-D02-0001-1057; this document was not annexed to the motion and was not disclosed in e-court. Therefore, while the Chamber mentioned it in its decision 3463-Conf, Ordonnance relative aux requêtes du Procureur et de la Défense en vue de faire admettre des preuves documentaires (...), the document DRC-D02-0001-1057 should not be given an EVD number."

<sup>45</sup> E-mail sent by a Legal Officer of the Chamber to the Defence, at 14:19 on 16 April 2014. See also Registry, "Registrar's Report on the Implementation of Order ICC-01/04-01/07-3463-Conf,

19. On 16 April 2014, the Prosecution disclosed the key points to be addressed in the testimony of the witness it intended to call,<sup>46</sup> stating further that it had taken a statement from the witness by telephone and disclosed the recording of the statement.<sup>47</sup>
20. On 17 April 2014, the Defence forwarded its observations in response to the Prosecution's latest submission and the relevant witness's recorded statement.<sup>48</sup> The Defence maintained its objections and its request for the Chamber to review its order of 8 April 2014 and reconsider the authorisation to testify granted to the witness. On the same day, the Chamber rendered a decision rejecting the request for review made by the Defence on 10 April 2014.<sup>49</sup> On 25 April 2014, the Prosecution disclosed the transcription of its telephone conversation with the witness.<sup>50</sup>
21. On 30 April 2014, in response to a request dated 25 April 2014<sup>51</sup> the Chamber authorised the Legal Representative, under specific conditions, to cross-examine the witness called by the Prosecution.<sup>52</sup>
22. On 2 May 2014, Witness D02-404 also applied for protective measures.<sup>53</sup> On the same day, the Chamber received the Protection Unit's evaluation,<sup>54</sup>

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17 April 2014, ICC-01/04-01/07-3471-Conf. See also the Chamber's Oral Decision of 6 May 2014 ordering document DRC-D02-0001-1056 to be entered in the record ([T. 345](#), p. 27 and 28).

<sup>46</sup> Office of the Prosecutor, "*Principaux points sur lesquels le témoin de l'Accusation déposerait*", 16 April 2014, ICC-01/04-01/07-3467-Conf.

<sup>47</sup> *Ibid.*, para. 5.

<sup>48</sup> Defence, "Defence Observations on the Prosecution Submissions relative to P-233", 17 April 2014, ICC-01/04-01/07-3470-Conf.

<sup>49</sup> "*Décision sur la requête de la Défense tendant à ce que soit reconsidérée l'Ordonnance n°2458 du 8 avril 2014*", 17 April 2014, ICC-01/04-01/07-3472-Conf.

<sup>50</sup> "Courtesy" e-mail sent by the Prosecution to the Chamber, the Defence and the Legal Representative at 16:14 on 2 May 2014, See also, Office of the Prosecutor, "Prosecution's Communication of material disclosed to the Defence on 2 May 2014," 2 May 2014 ICC-01/04-01/07-3477-Conf-AnxA.

<sup>51</sup> Legal Representative of the main group of victims, "*Demande d'autorisation d'interroger le témoin du Procureur avec annexe confidentielle ex parte réservée au Bureau du Procureur et au Représentant légal*", 25 April 2014, ICC-01/04-01/07-3475.

<sup>52</sup> "*Décision sur la demande du Représentant légal aux fins d'être autorisé à interroger le témoin du Procureur*", 30 April 2014, ICC-01/04-01/07-3476.

<sup>53</sup> E-mail sent by the Registry to the Chamber at 10:17 on 2 May 2014.

which was in favour of the witness being provided guarantees similar to those which had just been granted to Witness D02-401 in the abovementioned decision of 25 April 2014. The Prosecution was consulted on the matter and stated that it concurred with the Protection Unit's position<sup>55</sup> while the Legal Representative stated that he was not opposed to it.<sup>56</sup>

23. During the hearing of 5 May 2014, the following successively testified by video link: the chief of Bogoro village, who was called by the Prosecution, and Witnesses D02-401 and D02-404, who were called by the Defence. Afterwards, the Prosecution made its closing statement and then presented its arguments on sentence.

24. On 6 May 2014, the Legal Representative presented his observations and the Defence pleaded on behalf of Germain Katanga, who subsequently made a statement in accordance with article 67(1)(h) of the Statute. The Chamber stated that it would render its sentencing decision on 23 May 2014.<sup>57</sup>

## II. ANALYSIS

### A. INTRODUCTION

25. Article 76(1) of the Statute stipulates that the Chamber, when considering the appropriate sentence, shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence. Pursuant to article 77(1) of the Statute and rule 145(3) of the Rules, it may impose a sentence of imprisonment which may not exceed 30 years, unless the extreme gravity of the crime and the individual circumstances of the convicted person warrant a term of life imprisonment. In addition, the Chamber may order a fine and/or the forfeiture of proceeds, property and

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<sup>54</sup> E-mail sent by the Registry to the Chamber at 16:38 on 2 May 2014.

<sup>55</sup> E-mail sent by the Prosecution to the Chamber at 18:03 on 2 May 2014.

<sup>56</sup> E-mail sent by the Legal Representative to the Chamber at 18:53 on 4 May 2014.

<sup>57</sup> [T. 345](#), p. 50.

assets derived directly or indirectly from the crime, pursuant to article 77(2) of the Statute.

26. Article 78 of the Statute and rule 145 of the Rules, which govern the Chamber's determination of the sentence, provide that the Chamber must take into account such factors as the gravity of the crime and the individual circumstances of the convicted person, any mitigating and aggravating circumstances, and all relevant factors that must be weighted by the Chamber. These factors will be examined further below. The Chamber will first state, however, the legal principles guiding its assessment.

## **B. APPLICABLE PRINCIPLES**

### **1. Facts and circumstances described in the charges**

27. According to the Prosecution, whereas the decision under article 74 of the Statute must not exceed the facts and circumstances described in the charges, the sentencing procedure may consider matters outside the framework defined by the Pre-Trial Chamber.<sup>58</sup> The Prosecution argues that evidence that may be heard at the sentencing hearing is therefore not limited to the evidence relating to the facts and circumstances described in the charges.<sup>59</sup>

28. The Prosecution notes that the assessment of mitigating circumstances may in fact include considerations that are not directly related to confirmed crimes, such as cooperation with the Office of the Prosecutor, and, in its own words, "honest showing of remorse".<sup>60</sup> Further, in accordance with rule 145(2)(b)(i),

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<sup>58</sup> [First Prosecution Observations](#), para. 18.

<sup>59</sup> [First Prosecution Observations](#), para. 7.

<sup>60</sup> [First Prosecution Observations](#), para. 19.

the convicted person's prior criminal convictions may be considered an aggravating circumstance.<sup>61</sup>

29. With respect to prior convictions, the Prosecution cites the jurisprudence of ad hoc tribunals, which considers the need for a nexus to be established with the offence of which the accused is convicted.<sup>62</sup> The Prosecution further states that, under specific conditions, the Chambers could also take into account aggravating circumstances in crimes of which the accused was not found guilty.<sup>63</sup>

30. According to the Defence, what can amount to mitigating circumstances may actually exceed the framework of facts and circumstances described in the Decision on the confirmation of the charges.<sup>64</sup> It notes, however, that only the allegations in the Document Containing the Charges were considered as aggravating circumstances by the *ad hoc* tribunals.<sup>65</sup>

31. In the instant situation, as specified below, the Chamber assessed only one aggravating circumstance regarding the convicted person's conduct and directly connected to crimes contained in the decision on the confirmation of the charges of which he was found guilty. The Chamber therefore finds no reason to rule on the assessment criterion proposed by the Prosecution.

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<sup>61</sup> [Prosecution Closing Statement, T. 345](#), p. 2.

<sup>62</sup> [First Prosecution Observations](#), paras. 19 and 25.

<sup>63</sup> According to the Prosecution, "[TRANSLATION] If the aggravating factor [...] on which we are basing ourselves is a crime of which the convicted person was not found guilty, or if the accused person was not convicted, that aggravating factor can nevertheless be taken into account at the time of sentencing as long as it is directly related to the crimes of which the accused person was found guilty and was objectively foreseeable. In that particular case, when aggravating factors are related, and were objectively foreseeable, the Prosecution must demonstrate that these crimes themselves and their foreseeability were proven beyond reasonable doubt. However, and this is an important point, it is necessary to prove beyond reasonable doubt the link between the accused person and these crimes." ([Prosecution Closing Statement, T. 345](#), pp. 2-3).

<sup>64</sup> [First Defence Observations](#), para. 25.

<sup>65</sup> [First Defence Observations](#), para. 25.

32. Regarding the mitigating circumstances, the Chamber considered that it could take into account factors not directly connected to the offences charged, such as cooperation with the Prosecution, a show of sincere remorse or a guilty plea.

## 2. Standard of proof

33. The Prosecution considers that aggravating circumstances must be proved beyond reasonable doubt,<sup>66</sup> and the Defence concurs.<sup>67</sup> With regard to possible granting of mitigating circumstances, the parties also concur that that the assessment should not be conducted with respect to the criterion of reasonable doubt but rather with respect to the standard commonly referred to as the "balance of probabilities."<sup>68</sup>

34. On this topic, the Chamber endorses the conclusions of Trial Chamber I in *Lubanga*, and states that it will take the approach suggested by the parties, which, in essence, follows the jurisprudence. Therefore, only those facts which are proved beyond reasonable doubt may be taken into account to convict or as aggravating circumstances. The Chamber may, however, consider a mitigating circumstance where, on a balance of probabilities, the Defence establishes the existence of such a circumstance.<sup>69</sup>

## 3. Double counting

35. The Chamber emphasises that, in its view, factors to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and vice versa.<sup>70</sup>

<sup>66</sup> [Prosecution Closing Statement, T. 344](#), pp. 71 and 81.

<sup>67</sup> [First Defence Observations](#), paras. 26-27.

<sup>68</sup> [First Prosecution Observations](#), para. 19; [First Defence Observations](#), paras. 26 and 27.

<sup>69</sup> [Trial Chamber I, \*The Prosecutor v. Thomas Lubanga Dyilo\*, "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-2901 \("Decision on Sentence in \*Lubanga\*"\)](#), paras. 33-34.

<sup>70</sup> [Decision on Sentence in \*Lubanga\*](#), para. 35. See also, [First Prosecution Observations](#), para. 28; [First Defence Observations](#), paras. 37-39.

### C. PURPOSES OF THE SENTENCE

36. In determining the sentence, the Chamber will consider several factors which, although very dissimilar, all give meaning to the penalty imposed.

37. Articles 77 and 78 of the Statute do not specify the purpose of the criminal punishment imposed. However, in accordance with the Preamble, “the most serious crimes of concern to the international community as a whole must not go unpunished”<sup>71</sup> and States Parties are “determined to put an end to impunity for the perpetrators of [the most serious] crimes and thus to contribute to the prevention of such crimes”.<sup>72</sup> There must, therefore, be punishment for crimes which “threaten the peace, security and well-being of the world”<sup>73</sup> and the sentence should act as a deterrent.

38. When determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members.<sup>74</sup> It therefore considers that the role of the sentence is two-fold: on the one hand, punishment, or the expression of society’s condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose.<sup>75</sup> The punitive aspect of the sentence is therefore meant to restrain any desire to exact vengeance and it is not so much the severity of the sentence that should prevail as its inevitability. When determining the sentence, the Chamber must further ensure that, pursuant to rule 145(1)(a) of the Rules, the sentence reflects the degree of culpability while contributing to the restoration of peace and

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<sup>71</sup> [Statute](#), Preamble, para. 4.

<sup>72</sup> [Statute](#), Preamble, para. 5.

<sup>73</sup> [Statute](#), Preamble, para. 3.

<sup>74</sup> [First Observations of the Legal Representative](#), para. 27.

<sup>75</sup> Also see, in this respect, [Prosecution Closing Statement, T. 344](#), p. 56.

reconciliation in the communities concerned. Lastly, the extent to which the sentence reflects the culpability of the convicted person addresses the desire to ease that person's reintegration into society, although, in particular in the case of international criminal law, this goal cannot be considered to be primordial as the sentence on its own cannot ensure the social reintegration of the convicted person.

#### **D. FACTORS TO BE TAKEN INTO CONSIDERATION PURSUANT TO RULE 145 OF THE RULES**

39. The determination of sentence procedure must comply with the following principles: firstly, *nulla poena sine lege*,<sup>76</sup> which prevents arbitrary imposition of criminal sanctions, thereby ensuring legal certainty; secondly, proportionality,<sup>77</sup> which compels the Bench to tailor penalties to fit the gravity particular to the crime; and, thirdly, individualised sentencing, which leads the Court to take into account the individual circumstances of the convicted person and the global context of the conviction when it determines the sentence.<sup>78</sup>

40. In accordance with article 78 of the Statute, when determining the sentence the Chamber must take into account such factors as the gravity of the crime and the individual circumstances of the convicted person. Rule 145 of the Rules provides a non-exhaustive list of factors to which the Chamber must give consideration: the extent of the damage caused; the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person. It also requires the Chamber

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<sup>76</sup> [Statute](#), articles 23 and 77.

<sup>77</sup> [Statute](#), article 78; [Rules](#), rule 145.

<sup>78</sup> [Rules](#), rule 145.

to take into account possible mitigating or aggravating circumstances. Lastly, according to rule 145, the Chamber must determine a sentence which reflects the degree of culpability and balance all the relevant factors.

41. The parties and the Legal Representative have made submissions on most of the relevant factors, which the Chamber presents below.

## 1. Gravity

### a) Notion

42. In order to determine a proportionate sentence, the gravity of the acts committed by the convicted person first has to be weighed. The sentences to be imposed must, therefore, reflect the gravity of the crime charged. In this respect, accused persons appearing before the Court must be conscious of the fact that the crimes with which they are charged are the most serious crimes of concern to the international community as a whole,<sup>79</sup> and, as a consequence, are deserving of the heaviest sentence.

43. All crimes forming the grounds for the criminal conviction are not necessarily of equivalent gravity and the Chamber has the duty to weight each of them<sup>80</sup> by distinguishing, for example, those against persons from those targeting only property. In order to determine the gravity, the particular circumstances as well as the nature and degree of participation of the convicted person in the commission of the crime must be taken into account, given that the sentence, as mentioned above, and as underscored in the Prosecution Closing Statement,<sup>81</sup> must be proportionate to the offence committed and to the

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<sup>79</sup> [Statute](#), Preamble, para. 7. See also, [Prosecution Closing Statement, T. 344](#), p. 70.

<sup>80</sup> See, among others, Mark Jennings, "Article 78 – Determination of the sentence" in O. Triffterer (Editor), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1436.

<sup>81</sup> [Prosecution Closing Statement, T. 344](#), pp. 55 and 58-59.

culpability of the convicted person.<sup>82</sup> Furthermore, the gravity criterion must be assessed from both a quantitative and a qualitative standpoint.<sup>83</sup>

## **b) Analysis**

44. The Chamber recalls its finding, in the Judgment, that all the crimes of murder as a war crime and as a crime against humanity, and those of attack against civilians, destruction and pillaging as war crimes, committed by the Ngiti militia of Walendu-Bindi *collectivité*, were committed during the same attack that took place in Bogoro on 24 February 2003 and resulted in numerous civilian casualties. According to the Chamber, the crimes committed in that area on 24 February 2003 were of an unquestionable magnitude considering not only the very conditions in which the attack took place but also its dimension of clear discrimination against the predominantly Hema population who lived there. The Chamber notes that the scars are still visible to this day.

45. The Chamber further notes that Germain Katanga was convicted of contribution “in any other way” to the commission of the crimes by the group of commanders and combatants from that *collectivité*.

### **i. Violence and the scale of crimes committed**

46. The Chamber concludes, in its Judgment, that the village of Bogoro was attacked from all directions by combatants very early on 24 February 2003, at about 5 a.m., while it was still dark and the inhabitants were at home, asleep.<sup>84</sup> The fact that the attackers arrived from all directions made it difficult for the villagers to flee. Most of those who testified as witnesses had to take

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<sup>82</sup> [Statute](#), article 78(1); [Rules](#), rule 145.

<sup>83</sup> [First Prosecution Observations](#), para. 23; [Second Observations of the Legal Representative](#), para. 9.

<sup>84</sup> [Katanga Judgment](#), in particular paras. 810 and 872.

cover in the bush and move with great care to escape them.<sup>85</sup> After the attack, the village was strewn with corpses.<sup>86</sup>

47. The Chamber also concluded that, using machetes and/or firearms, the group of Ngiti combatants from Walendu-Bindi intentionally killed at least 30 civilians not taking part in the hostilities. Considering, in particular, the detailed testimony of Witness P-353, the Chamber was satisfied beyond reasonable doubt that the number of victims of the killings carried out on that date by Ngiti combatants far exceeded that figure.<sup>87</sup> The Chamber further found that some elderly people and 13 children, 11 of whom were aged less than six years,<sup>88</sup> were murdered.<sup>89</sup>

48. The Chamber further noted that the Ngiti attackers did not confine themselves to seizing control of Bogoro by attacking the forces of the *Union des Patriotes Congolais* [Union of Congolese Patriots] (“the UPC”) who were present but, during the fighting, they considered it necessary to pursue and kill civilians who were not taking part in the hostilities, all over the village and sometimes even in their houses.<sup>90</sup> The Chamber also noted that, when they invaded the camp, they also massacred inhabitants who had gone there, including those who had sought refuge in the Bogoro Institute.<sup>91</sup> The Chamber noted that, after the fighting ceased, the attackers had continued to pursue locals who had taken cover in the bush; flushed people out of their hiding places; sexually assaulted some of them; and killed

<sup>85</sup> [Katanga Judgment](#), in particular paras. 829-833 and 866.

<sup>86</sup> [Katanga Judgment](#), para. 839.

<sup>87</sup> [Katanga Judgment](#), para. 869. See also, [Katanga Judgment](#), Annex F.

<sup>88</sup> The corpse of the baby seen by P-132 ([Katanga Judgment](#), paras. 815 and 859); P-161’s two sons and four nephews and nieces ([Katanga Judgment](#), paras. 816 and 858; EVD-OTP-00047: List of victims from P-161’s family); P-323’s baby ([Katanga Judgment](#), paras. 819 and 863-864; P-323, T. 116, p. 74); Witness P-287’s daughter ([Katanga Judgment](#), paras. 822 and 863); P-161’s other two nephews ([Katanga Judgment](#), paras. 825 and 861; the two four-year old children who had taken refuge with P-353 ([Katanga Judgment](#), paras. 826 and 860). See also, [Katanga Judgment](#), Annex F.

<sup>89</sup> [Katanga Judgment](#), para. 869.

<sup>90</sup> [Katanga Judgment](#), paras. 858-862.

<sup>91</sup> [Katanga Judgment](#), paras. 863-865.

others.<sup>92</sup> The Chamber ultimately found that the villagers had been systematically targeted throughout the day. The crimes against the civilians followed a regular pattern and were particularly violent.<sup>93</sup>

49. Some of the crimes were not committed with the use of firearms but rather with machetes. Attackers cut up their victims limb by limb before taking their lives. Witnesses testified that the attackers not only opened fire on fleeing villagers but also attacked them with bladed weapons as they tried to run away.<sup>94</sup> These particularly cruel acts caused extreme physical suffering to those who were subjected to them before being killed and to those who somehow survived the injuries inflicted. The use of machetes caused serious and persistent trauma both to the survivors who had to have a limb amputated and to people who witnessed the suffering of their relatives. The women and men who survived those crimes still bear the permanent scars and are traumatised, having witnessed the cruelty of the acts constituting the crimes committed at that time.<sup>95</sup>

50. The survivors of the massacres were forced to flee, leaving behind all their possessions. When they returned to the village, they tried to find the bodies of their relatives who had been killed during the attack but very few succeeded and few were able to hold mourning ceremonies.<sup>96</sup> Lastly, family members were separated from each other and, for long, suffered because they had no news of what had happened to their relatives.<sup>97</sup>

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<sup>92</sup> See, in particular, [Katanga Judgment](#), paras. 866 and 876. The Chamber also emphasised that subsequently victims of sexual violence were often rejected by their community, which compounded the harm they suffered ([Katanga Judgment](#), para. 204).

<sup>93</sup> See [Katanga Judgment](#), paras. 1157-1162.

<sup>94</sup> See, in particular, [Katanga Judgment](#), paras. 858-862 and 864.

<sup>95</sup> Witness Byaruhanga, [T. 344](#), pp. 7-8 and 10.

<sup>96</sup> P-166, T. 225, pp. 62-63; Witness Byaruhanga, [T. 344](#), pp. 20-21. See also, [Second Observations of the Legal Representative](#), para. 14.

<sup>97</sup> See, in particular, P-161, T. 111, pp. 6-7; P-353, T. 215, pp. 19-20. In fact, the women who were raped and then abducted disappeared, and some were even thought to be dead before they succeeded in freeing themselves ([Katanga Judgment](#), para. 1007, 1010 and 1018 [The Chamber notes, in particular,

51. Apart from the crimes listed above, the Chamber found that, on 24 February 2003, the attackers tore down and/or torched or even unroofed buildings belonging to the majority Hema people of Bogoro and occupied buildings in the Diguna Mission, including the CECA 20 church attended by the Hema. The Chamber noted that these acts of destruction took place in the whole village all day long, even after the village fell to the attackers. According to several eye-witnesses most of the buildings were torched and destroyed<sup>98</sup> and the Chamber noted that a large number of the existing houses in the *groupement* were rebuilt by non-governmental organisations (NGOs) after the attack.<sup>99</sup>
52. The Chamber further noted that the property of the mainly Hema civilian population of Bogoro which was essential for daily life, such as roofing sheets, furniture and various other personal items, food and domestic animals, above all livestock, had been taken away by attackers and also by women and children, some of whom were armed and who assisted them in the enterprise. In addition the combatants forced the people who had been captured there, in particular women, to transport the loot.<sup>100</sup> The loss of this property had significant consequences for the daily lives of the victims,<sup>101</sup> as was corroborated by the village chief, who, on 5 May 2014, came and testified before the Chamber that one of the most persistent consequences of the battle was poverty.<sup>102</sup> Apparently, many locals have since been forced to start life afresh away from Bogoro, where they chose not to return as they

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that Witness P-132 appears on the EVD-OTP-00203 list: List of victims of the attacks on Bogoro between 2001 and 2003, DRC-OTP-1007-0033, number 114]).

<sup>98</sup> [Katanga Judgment](#), paras. 942, 946, 948, 950 and 957.

<sup>99</sup> [Registry: "Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo", 3 February 2012, ICC-01/04-01/07-3234 with confidential annex \(ICC-01/04-01/07-3234-Anx-Red\) \("Procès-verbal de transport"\)](#), para. 68. See also, Witness Byaruhanga, [T. 344](#), pp. 12-13.

<sup>100</sup> [Katanga Judgment](#), para. 932.

<sup>101</sup> [Katanga Judgment](#), paras. 928 and 953. See also, [Second Observations of the Legal Representative](#), para. 23.

<sup>102</sup> Witness Byaruhanga, [T. 344](#), pp. 14-15.

would have had to start again from scratch or simply did not have the means.<sup>103</sup>

**ii. The discriminatory dimension of the attack**

53. The Chamber notes that many witnesses testified that, during the attack, they heard attackers threatening and victims begging for mercy, crying and pleading to be spared. The Chamber also notes that several witnesses testified that combatants specifically asked locals about their ethnic background so as to decide their fate and that, as a result, many of them were forced to pass themselves off as non-Hema for their lives to be spared.<sup>104</sup>

54. After the attack, the mainly Hema inhabitants vacated Bogoro.<sup>105</sup> It should be noted that Ngiti combatants were driven by an anti-Hema sentiment, and that, as noted by the Chamber in its Judgment, the Hema were the people targeted in Bogoro. Therefore, in the instant case, the attack against the civilian population took on an obviously discriminatory dimension. As the Chamber also noted in the Judgment, Ngiti combatants considered the Hema and their allies to be their enemy, an ethnic group which repeatedly attacked and threatened their territory, and it is essentially on the basis of that belief that action was taken against the Hema people of Bogoro.<sup>106</sup>

**iii. Current situation in Bogoro and the harm caused to victims and their relatives**

55. As the Prosecution stated at trial, Bogoro is still scarred by the crimes committed on 24 February 2003. The Prosecution noted that, on the whole and as a result of the crimes that were committed there, its people were now

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<sup>103</sup> See in particular,, P-166, T. 225, pp. 54-55; EVD-OTP-00202: Previous statement by P-166 (DRC-OTP-1007-0005, para. 15); P-132, T. 138, p. 83.

<sup>104</sup> [Katanga Judgment](#), paras. 819, 853, 877.

<sup>105</sup> [Katanga Judgment](#), para. 855.

<sup>106</sup> [Katanga Judgment](#), paras. 718, 850-855 and 1142-1156.

even poorer than before.<sup>107</sup> The Legal Representative of Victims stated that the Bogoro population as a whole had been affected by the attack.<sup>108</sup>

56. In his testimony the chief of Bogoro village and Babiase *groupement*, who, owing to his position, is in constant touch with Bogoro locals<sup>109</sup> and is therefore particularly well-positioned to discuss their situation, emphasised that the after-effects of the fighting were still being felt and there was a high number of widows, widowers and orphans, some of whom had been unable to find a host family.<sup>110</sup> He also stated that before the attack there were several schools in the area whereas, since 24 February 2003, parents have found it difficult to enrol their children in school.<sup>111</sup>

57. The village chief stated that many families had suffered from the damage caused in Bogoro on that day. He further stated that some locals still suffered from physical disabilities and/or psychological trauma,<sup>112</sup> adding that they had a vivid recollection of the attack of 24 February 2003.

58. The witness also stated that some of the survivors of the attack had subsequently returned to Bogoro. He emphasised, however, that many survivors were scared of returning owing to memories of the fighting.<sup>113</sup>

59. Lastly, regarding existing infrastructure in Bogoro, the village chief stated that some NGOs had endeavoured to rebuild some structures, such as school and administrative buildings. He emphasised, however, that it had not been possible to reconstruct all the buildings that had been destroyed and that the inhabitants had not returned to their living standards preceding the attack.<sup>114</sup> He stated that the main form of hardship currently endured by the

<sup>107</sup> [Prosecution Closing Statement, T. 344](#), pp. 57-58.

<sup>108</sup> [Closing Statement of the Legal Representative, T. 345](#), p. 4.

<sup>109</sup> Witness Byaruhanga, [T. 344](#), pp. 17-18.

<sup>110</sup> Witness Byaruhanga, [T. 344](#), pp. 7-10.

<sup>111</sup> Witness Byaruhanga, [T. 344](#), pp. 13 and 18-20.

<sup>112</sup> Witness Byaruhanga, [T. 344](#), pp. 8 and 10.

<sup>113</sup> Witness Byaruhanga, [T. 344](#), pp. 11 and 12.

<sup>114</sup> Witness Byaruhanga, [T. 344](#), pp. 12 and 13.

inhabitants of Bogoro was unquestionably poverty.<sup>115</sup> In conclusion, the Chamber considers that as a result many people found themselves excluded from their community's economic and social life.

60. Questioned about whether the Ngiti and Hema now live together in Bogoro, the witness stated without hesitation that real and vibrant collaboration existed.<sup>116</sup>

#### iv. Degree of participation and intent of Germain Katanga

61. As stated by the Chamber in its Judgment, article 25 merely identifies and lists various forms of illegal conduct and, in that respect, the proposed distinction between the liability of a perpetrator of a crime and that of an accessory to a crime does not in any way amount to a hierarchy of blameworthiness, let alone prescribe, even by implication, a scale of punishments.<sup>117</sup> The convicted person's degree of participation and intent must therefore be assessed *in concreto*, on the basis of the Chamber's factual and legal findings in its Judgment.

62. In the instant case, the Chamber notes that it was unable to establish beyond reasonable doubt that Germain Katanga was present in Bogoro on 24 February 2003.<sup>118</sup> Furthermore, the Chamber could not make a finding on his alleged participation in celebrations when fighting ceased and the battle was won<sup>119</sup> or whether he claimed victory after the fighting.<sup>120</sup>

63. The Chamber found that it was not established that in February 2003 the Ngiti militia of Walendu-Bindi *collectivité* was an organised apparatus of

<sup>115</sup> Witness Byaruhanga, [T. 344](#), pp. 14-15.

<sup>116</sup> Witness Byaruhanga, [T. 344](#), p. 24.

<sup>117</sup> [Katanga Judgment](#), paras. 1386-1387.

<sup>118</sup> [Katanga Judgment](#), para. 752. See also, [Second Defence Observations](#), paras. 19-22; [Defence Closing Statement](#), [T. 345](#), p. 19.

<sup>119</sup> [Katanga Judgment](#), para. 753.

<sup>120</sup> [Katanga Judgment](#), para. 754.

power and that at the material time the convicted person wielded such power over the militia as to control crimes within the meaning of article 25(3)(a) of the Statute.<sup>121</sup>

64. As recalled in the Prosecution Closing Statement,<sup>122</sup> the Chamber found that he made a significant contribution to the commission of certain crimes by the group of commanders and combatants of Walendu-Bindi *collectivité* since that contribution had considerable influence on their perpetration and the manner of their perpetration.<sup>123</sup>

65. The Chamber underscores the significance, in the instant case, of Germain Katanga's contribution in the particular context of Walendu-Bindi *collectivité* in February 2003, noting that his involvement allowed the militia to avail itself of logistical resources which it did not possess and which were paramount for it to attack Bogoro. Thus his contribution secured military superiority for the Ngiti combatants over their adversary, the UPC, and allowed them to see through their purpose of ridding Bogoro of the predominantly Hema civilian population. Without the strategic military alliance made by Germain Katanga and without his contribution of weapons and ammunition, Ngiti combatants would not have had the necessary means to successfully carry out the attack of 24 February, and would not have been able to execute their criminal purpose, which was to wipe out Bogoro and eliminate its mainly Hema civilian inhabitants.<sup>124</sup>

66. The Chamber further considered that, in February 2003, Germain Katanga did indeed hold the highest-ranking position in the Ngiti militia of Walendu-Bindi *collectivité*, also known as the *Force de résistance patriotique en Ituri*

<sup>121</sup> [Katanga Judgment](#), para. 1420. See also, [Second Defence Observations](#), paras. 19 and 23-27; [Defence Closing Statement, T. 345](#), p. 19.

<sup>122</sup> [Prosecution Closing Statement, T. 344](#), p. 64. See also, [Second Observations of the Legal Representative](#), para. 40; [Closing Statement of the Legal Representative, T. 345](#), pp. 6-7.

<sup>123</sup> [Katanga Judgment](#), para. 1679.

<sup>124</sup> [Katanga Judgment](#), paras. 1679-1681.

[Patriotic Force of Resistance in Ituri] (“the FRPI”),<sup>125</sup> and that, from early February 2003, he was called “President” of the organisation.<sup>126</sup> He was also called commander or chief of Aveba. He was a renowned soldier and had undeniable military authority over the *collectivité*.<sup>127</sup> Regarding his effective powers, the Chamber found that he facilitated the receipt and storage of weapons and ammunition arriving in Aveba from Beni and therefore exercised the power not only to allot them to the Walendu-Bindi commanders but also to decide the quantity of ammunition to allocate, as his instructions in this regard were obeyed.<sup>128</sup> The Chamber also found that, in Bogoro, on 24 February 2003, local combatants of Walendu-Bindi *collectivité* used weapons and ammunition from Beni, which they received upon arrival in Aveba.<sup>129</sup>

67. In the particular context of the instant case, in the Chamber’s view, it was apparent that the influence of all of the convicted person’s actions, which brought to pass the crimes of attack against civilians, murder, pillaging and destruction of property proved considerable. In fact, his activities as a whole and the various forms which his contribution took had a significant influence on the commission of those crimes.<sup>130</sup>

68. Germain Katanga contributed further, being fully aware that the Ngiti combatants of Walendu-Bindi *collectivité* were hostile – a sentiment which he personally shared – to the Hema, and, considering the group’s behaviour in the past, that the Ngiti militia would commit the crime of killing, murder, attack against civilians as well as the crimes of destruction of property and pillaging. As recalled by the Chamber in the Judgment, Germain Katanga

<sup>125</sup> [Katanga Judgment](#), para. 1420.

<sup>126</sup> [Katanga Judgment](#), para. 1361.

<sup>127</sup> [Katanga Judgment](#), paras. 1359-1360.

<sup>128</sup> [Katanga Judgment](#), para. 1362.

<sup>129</sup> [Katanga Judgment](#), para. 1675.

<sup>130</sup> [Katanga Judgment](#), para. 1681.

perfectly understood the nature of fighting in the ongoing war in Ituri at the time and knew about the suffering it caused the civilian population. He knew about the events that occurred in Nyakunde in September 2002, only a few months before Bogoro was taken, and provided detail about them, describing them as a “massacre”.<sup>131</sup>

69. In the light of the foregoing therefore, Germain Katanga’s degree of participation and intent in the instant case must not be underrated, especially as the commission of the crimes on 24 February 2003 involved particular cruelty.

## 2. Aggravating circumstances

70. The Prosecution contends that, in the instant case, four of the factors listed under rule 145 of the Rules should be taken into account: (1) particularly defenceless victims;<sup>132</sup> (2) particular cruelty of the commission of the crime;<sup>133</sup> (3) motive involving discrimination;<sup>134</sup> and (4) abuse of power or official capacity.<sup>135</sup> The Legal Representative concurs with the contention with respect to the first three aggravating circumstances.<sup>136</sup>

71. Insofar as, in examining the gravity of the crimes, the Chamber has already taken into account the cruelty in the commission of the crimes against the inhabitants of Bogoro, including against vulnerable people such as children, and noted the discriminatory nature of the attack, under this section, it will analyse only the fourth aggravating circumstance alleged by the Prosecution, namely abuse of power or official capacity.

<sup>131</sup> [Katanga Judgment](#), paras. 1686-1689.

<sup>132</sup> [Second Prosecution Observations](#), paras. 39-40.

<sup>133</sup> [Prosecution Closing Statement, T. 344](#), p. 66.

<sup>134</sup> [Second Prosecution Observations](#), para. 41.

<sup>135</sup> [Second Prosecution Observations](#), paras. 33-38.

<sup>136</sup> [Second Observations of the Legal Representative](#), paras. 41-47; [Closing Statement of the Legal Representative, T. 345](#), p. 7.

72. In this respect the Prosecution submits that Germain Katanga, especially when acting as the President of the Ngiti militia of Walendu-Bindi *collectivité*, abused his position of power.<sup>137</sup> The Prosecution notes that the Chamber made many findings of fact about the convicted person's role and powers at the material time and emphasises that the Chamber considered that it was thanks to his position of power at the time that he contributed to the commission of the crimes, the success of the attack and the elimination of civilians.<sup>138</sup>

73. The Defence contends, given the particular circumstances, that the Prosecution misconstrued the concept and submits that the convicted person in no way abused his power or official capacity.<sup>139</sup>

74. The Chamber recalls that, at least as early as 9 February 2003, Germain Katanga was called "President" of the Ngiti militia of Walendu-Bindi *collectivité*.<sup>140</sup> In the run-up to the attack on Bogoro, he further wielded some military power in that *collectivité* and played a key role in the supply and distribution of weapons and ammunition to the various commanders there.<sup>141</sup> As a particularly renowned combatant,<sup>142</sup> Germain Katanga was indeed an important intermediary for anything connected with supplying weapons in the *collectivité*. He had the power to determine the needs, and to decide not only whether to allocate weapons but also the quantity of ammunition to be allocated and, to that end, to give instructions which were obeyed.<sup>143</sup>

75. In the Chamber's view, to establish this particular aggravating circumstance, it must be demonstrated that the convicted person not only exercised some

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<sup>137</sup> [Second Prosecution Observations](#), para. 33.

<sup>138</sup> [Second Prosecution Observations](#), paras. 34-38

<sup>139</sup> [Defence Closing Statement, T. 345](#), pp. 41-42.

<sup>140</sup> [Katanga Judgment](#), para. 1361.

<sup>141</sup> [Katanga Judgment](#), paras. 1360 and 1362.

<sup>142</sup> [Katanga Judgment](#), para. 1359.

<sup>143</sup> [Katanga Judgment](#), para. 1362.

authority, but also that he abused it.<sup>144</sup> Yet, in the instant case, it does not seem that Germain Katanga actually abused his position of power or that he used his influence to promote the commission of crimes. The Chamber does not therefore consider the convicted person's status or the exercise of his so-called position of power to be an aggravating circumstance.

### 3. Mitigating circumstances

76. The Prosecution and the Legal Representative consider that Germain Katanga should not benefit from any mitigating circumstance.<sup>145</sup> The Defence, however, contends that Germain Katanga's young age, the type of role he played, the exceptional circumstances in which he found himself, his capacity for genuine reform, the manner in which he cooperated with the Court, and his private and family life are the key factors in mitigation which the Chamber should take into account when imposing a sentence on him.<sup>146</sup>

77. The Chamber will now consider the factors presented by the Defence to determine whether they indeed amount to mitigating circumstances that may have an influence on the sentence imposed on Germain Katanga. However, it makes it clear at the outset that, as emphasised in the Defence Closing Statement,<sup>147</sup> establishing the existence of mitigating circumstances is relevant only for diminishing the sentence and by no means lessens the gravity of the crime.<sup>148</sup>

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<sup>144</sup> See in particular, [ICTY, \*Prosecutor v. Milošević\*, Case No. IT-98-29/1-A, Judgement on appeal, 12 November 2009](#), para. 302; [ICTY, "\*Prosecutor v. Hadžihasanović and Amir Kubura\*", Case No. IT-01-47-A, ICTY, Judgement on appeal, 22 April 2008](#), para. 320.

<sup>145</sup> [Second Prosecution Observations](#), paras. 3 and 32; [Second Observations of the Legal Representative](#), paras. 49-54 and 59.

<sup>146</sup> [Second Defence Observations](#), para. 4.

<sup>147</sup> [Defence Closing Statement, T. 345](#), pp. 13-14.

<sup>148</sup> [ICTY, \*Prosecutor v. Erdemović\*, Case No. IT-96-22, "Judgement", 29 November 1996](#), para. 46, citing [United States of America vs. Wilhelm List et al. \(Hostage Case\)](#), 19 February 1948, XI Trial of War Criminals, p. 1317. See also, [ICTR, \*The Prosecutor v. Jean Paul Akayesu\*, Case No. ICTR-96-4-T](#),

### a) Personal circumstances

78. The Defence contends that Germain Katanga's age,<sup>149</sup> his family life, the implication of and hardship as a result of lengthy separation from his family<sup>150</sup> and, lastly, his reputation as a courageous man who helped his community,<sup>151</sup> constitute factors which the Chamber should take into account in mitigation of the sentence.

79. In particular, regarding the age of the convicted person and his situation in November 2002, the Defence narrated how Germain Katanga was called upon, at a very young age, to act as the representative of his community in Aveba.<sup>152</sup>

80. According to the Prosecution and the Legal Representative, however, Germain Katanga's age cannot amount to a mitigating circumstance considering the important position that he held at the material time.<sup>153</sup> The Legal Representative further notes that such a young age is not a characteristic particular to the convicted person but that in Africa it is common among many warlords, in particular in the DRC.<sup>154</sup>

81. The Chamber notes that at the material time Germain Katanga was 24 years old.<sup>155</sup> It notes further, as did the Legal Representative,<sup>156</sup> that, in late 2002, several other local commanders were in the same age group as the

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["Sentence", 2 October 1998, para. 38; ICTR, \*The Prosecutor v. Jean Kambanda\*, Case No. ICTR-97-23-S, "Judgement and Sentence", 4 September 1998, para. 56.](#)

<sup>149</sup> [Second Defence Observations](#), paras. 9 and 13.

<sup>150</sup> [Second Defence Observations](#), para. 117.

<sup>151</sup> [Second Defence Observations](#), paras. 8 and 115-116.

<sup>152</sup> [Defence Closing Statement, T. 345](#), p. 23.

<sup>153</sup> [Second Prosecution Observations](#), para. 32; [Second Observations of the Legal Representative](#), paras. 49-50.

<sup>154</sup> [Second Observations of the Legal Representative](#), para. 50.

<sup>155</sup> D02-300, T. 314, p. 20.

<sup>156</sup> [Closing Statement of the Legal Representative, T. 345](#), p. 8.

convicted person.<sup>157</sup> According to the Chamber, therefore, the argument based on Germain Katanga's young age must be contextualised.

82. The Chamber, however, in response to the Defence request,<sup>158</sup> welcomes the convicted person's statements claiming that he had changed from since 2003, and had "[TRANSLATION] grown up" and had started to understand "[TRANSLATION] more and more things" which he did not understand at the material time owing to immaturity and the constraints he faced within his community.<sup>159</sup>

83. Nonetheless, with respect to the last point above, whereas it is undeniable that Germain Katanga, like many members of his community, suffered a great deal from the violence perpetrated against civilians in their *collectivité*, it is obvious from his testimony, taken as a whole – which reveals a wilful and enterprising spirit – that between 2002 and 2003 the convicted person, knowingly chose to take initiatives which he found necessary, in the interest of his community, in a well thought out objective of military and ethnic conquest. This attitude, at once protective and combative, earned him the trust of the members of his community and, in due course, by bolstering his "[TRANSLATION] cause", earned him respect, values that are considered fundamental in the society to which he belongs, and which he cannot now be blamed for attempting to uphold. Nonetheless, in spite of the particularly sensitive circumstances in which the convicted person found himself at the material time, the Chamber cannot consider that, as suggested by the Defence, he found himself completely "caught up" in late 2002 and in 2003<sup>160</sup> to the extent of no longer being capable of freely making decisions.

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<sup>157</sup> T. 255, pp. 7 and 30; T. 278, pp. 41-42; D02-300, T. 315, p. 52.

<sup>158</sup> [Defence Closing Statement, T. 345](#), pp. 24-26.

<sup>159</sup> D02-300, T. 322, p. 63. See also, [Defence Closing Statement, T. 345](#), pp. 40-41.

<sup>160</sup> [Defence Closing Statement, T. 345](#), See, in particular pp. 20-21.

84. The Chamber will also examine Germain Katanga's family situation. According to him, on 18 November 2002, he married Denise and they had three children: Samson Mayele, Anita MacAdams – born on 27 September 2005 while he was already in detention in the DRC<sup>161</sup> – and Carolina, who was born while he was in detention at The Hague.<sup>162</sup> He is also responsible for two nieces and for DieuMerci Guillaume,<sup>163</sup> an orphaned child aged five at the time he was found hiding under stalls at Kengelo market. Allegedly Germain Katanga asked the child what he was doing there and took him to his home in Aveba.<sup>164</sup>

85. He sees his family only twice a year and, according to the Defence, shows a keen interest, especially in the children's well-being and education.<sup>165</sup> The Chamber notes the tender ages of some of the children and the fact that, for reasons beyond their control, they have to face the challenges of growing up far away from their father, and considers that his "[TRANSLATION] strong"<sup>166</sup> family will ease Germain Katanga's reintegration.

86. Lastly, regarding Germain Katanga's "reputation", or what may be referred to as his "good character", the Chamber notes that it had previously considered that in August 2002 he had been a renowned combatant.<sup>167</sup> The Chamber further stated that, in late 2002 at least, he was reputable.<sup>168</sup> According to the Chamber, these attributes, which are in essence related to courage displayed in the military and on behalf of his community, cannot, however, be taken into account as mitigating circumstances.

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<sup>161</sup> D02-300, T. 314, p. 26.

<sup>162</sup> [Defence Closing Statement, T. 345](#), pp. 38-39.

<sup>163</sup> D02-300, T. 314, p. 26.

<sup>164</sup> D02-300, T. 314, p. 27.

<sup>165</sup> [Second Defence Observations](#), para. 117.

<sup>166</sup> [Defence Closing Statement, T. 345](#), p. 37.

<sup>167</sup> [Katanga Judgment](#), para. 1250.

<sup>168</sup> [Katanga Judgment](#), para. 1313.

87. According to several witnesses, Germain Katanga apparently had a good relationship with the civilians of his community,<sup>169</sup> while other combatants, such as Kisoro and Cobra Matata, tended to cause trouble even among locals, going as far as seizing property and exercising a reign of terror.<sup>170</sup> This was also stated by Witnesses D02-401 and D02-404, who testified before the Chamber on 5 May 2014.<sup>171</sup> As for Witness P-28, who was living in Aveba in February 2003, he stated that the convicted person ought to be considered to be a [TRANSLATION] “good person”.<sup>172</sup>

88. The Chamber therefore considers Germain Katanga’s young age, the fact that he is now the father of six children, and his kindly and protective disposition towards the civilians in his community as relevant factors in mitigation which may be taken into account in sentencing. However, in this respect, they cannot play a determinant role considering the nature of the crimes of which he was convicted and which were committed against the majority Hema civilians of Bogoro. The Chamber therefore will accord them very limited weight.<sup>173</sup>

#### **b) Germain Katanga’s subsequent conduct**

89. The Defence emphasises that Germain Katanga contributed to the peace process as of March 2003 and throughout 2003 and 2004 until he joined the Congolese army,<sup>174</sup> and that he encouraged the disarmament and demobilisation of militiamen and child soldiers.<sup>175</sup> The Defence considers that the demobilisation programme could not have been rolled out without his

<sup>169</sup> P-267, T. 166, p. 33; D02-134, T. 257, p. 47.

<sup>170</sup> See, in particular, D02-300, T. 315, pp. 47-49.

<sup>171</sup> D02-401, [T. 344](#), pp. 36-37; D02-404, [T. 344](#), p. 49.

<sup>172</sup> P-28, T. 222, p. 47.

<sup>173</sup> For example, [ICTR, \*The Prosecutor v. Rugambarara\*, Case No. ICTR-00-59-T, “Sentencing Judgement”, 16 November 2007](#), para. 57.

<sup>174</sup> [Second Defence Observations](#), para. 57; [Defence Closing Statement, T. 345](#), p. 28.

<sup>175</sup> [Second Defence Observations](#), paras. 58-67.

participation.<sup>176</sup> According to the Defence, he supported the reconciliation process and assisted war victims,<sup>177</sup> in particular by hosting many refugees, including Hema people, in Aveba, after the fall of Bunia in May 2003.<sup>178</sup> Lastly, as part of the peace restoration process, he agreed to be enrolled into the army and to leave Walendu-Bindi *collectivité*, which, according to the Defence, was considered there as a way of committing himself to peace efforts.<sup>179</sup> The Defence thus surmises that “this [...] is not the actions of the man seeking or pursuing the main chance, as was suggested”.<sup>180</sup>

90. The Defence arguments are grounded on a number of pieces of documentary evidence<sup>181</sup> and the testimonies of Germain Katanga himself,<sup>182</sup> Witnesses P-267,<sup>183</sup> D02-196<sup>184</sup> and, to a lesser extent, P-219<sup>185</sup> and D02-129.<sup>186</sup> The Defence also relies on the testimonies of Witnesses D02-401 and D02-404, who testified on these topics during the sentencing hearing, confirming the role played by the convicted person.<sup>187</sup>

**i. Attempts made to promote the peace process**

91. The Chamber considers that the efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could

<sup>176</sup> [Defence Closing Statement, T. 345](#), p. 30; [Second Defence Observations](#), para. 61.

<sup>177</sup> [Second Defence Observations](#), paras. 68-74.

<sup>178</sup> [Second Defence Observations](#), para. 69.

<sup>179</sup> [Second Defence Observations](#), para. 75.

<sup>180</sup> [Defence Closing Statement, T. 345](#), p. 27.

<sup>181</sup> [Second Defence Observations](#), paras. 58-60.

<sup>182</sup> [Second Defence Observations](#), paras. 69, 71 and 73.

<sup>183</sup> [Second Defence Observations](#), paras. 62-64 and 70-71.

<sup>184</sup> [Second Defence Observations](#), paras. 64-65.

<sup>185</sup> [Second Defence Observations](#), paras. 72-73. The Chamber, however, recalling its conclusion regarding the credibility of P-219, considers that it need not rely on the latter's statement ([Katanga Judgment](#), paras. 177-179).

<sup>186</sup> [Second Defence Observations](#), para. 74.

<sup>187</sup> See, [T. 344](#).

potentially mitigate the sentence.<sup>188</sup> It considers, however, that such efforts must be both palpable and genuine, without the need to demand results.

**a. Freeing of the Coopi NGO hostages**

92. According to the Defence, in early March 2003, Germain Katanga facilitated the release of four members of an NGO who were taken hostage by Cobra Matata, demonstrating that shortly after the battle of Bogoro he had started distancing himself from the other commanders.<sup>189</sup> The Chamber does note that D02-404, who after all testified before it, stated that he briefly encountered Germain Katanga for the first time, in Dele on 7 March 2003, further stating that during their second encounter, in mid-March 2003, Germain Katanga had taken part, alongside him, at Bavi camp, in negotiations to secure the release of the hostages.<sup>190</sup> In the Chamber's view, such conduct demonstrates his willingness and ability to engage in conciliatory action. However, this cannot be considered as evidence of the search for peace between the Lendu and Hema.

**b. Signing of the Agreement to End Hostilities and participation in the activities of the Ituri Pacification Commission ("Pacification Commission")**

93. According to the Defence, Germain Katanga's signing of the Agreement to End Hostilities on 20 March 2003 proves that he supported the peace process<sup>191</sup> and is one of the "positive acts" he undertook in that respect.<sup>192</sup> The Defence does acknowledge that Germain Katanga could have been influenced or manipulated into signing it but argues that after he signed it all his actions

<sup>188</sup> See, for example, [ICTY, \*The Prosecutor v. Blagojević and Jokić\*, Case No. IT-02-60-T, "Judgement", 17 January 2005](#), paras. 858-860; [The Prosecutor v. Plavšić](#), Case No. IT-00-39&40/1-S, "Sentencing Judgement", 27 February 2003, paras. 85-94 and 110.

<sup>189</sup> [Defence Closing Statement, T. 345](#), p. 29.

<sup>190</sup> D02-404, [T. 344](#), pp. 45-46.

<sup>191</sup> [Second Defence Observations](#), para. 57.

<sup>192</sup> [Defence Closing Statement, T. 345](#), p. 29.

became consistent with the search for peace.<sup>193</sup> The Prosecution argues that the convicted person signed the document only at the insistence of MONUC and UPDF [Uganda People's Defence Force].<sup>194</sup>

94. Relying notably on D02-404's testimony, the Defence further notes that, by taking part in in the Pacification Commission's proceedings and in opting for peace, Germain Katanga had distanced himself from the other commanders.<sup>195</sup> However, the Prosecution insists that Germain Katanga did state that he did not attend the Pacification Commission sessions and hence D02-404's testimony must be dismissed.<sup>196</sup>

95. In its Judgment of 7 March 2014, the Chamber considered that Germain Katanga read and signed the agreement to end hostilities, noting as well that he did so at the insistence of MONUC and the Ugandan authorities.<sup>197</sup> Furthermore, the commitment was not respected by the groups involved in the ongoing war in Ituri,<sup>198</sup> hence the signing of a "[TRANSLATION] recommitment to the cessation of hostilities" on 16 May 2003.<sup>199</sup>

96. The Chamber also notes that D02-404 stated before the Chamber that he had met Germain Katanga during the Pacification Commission meetings held in Bunia from 4 to 14 April 2003.<sup>200</sup> It notes, however, that, contrary to claims by P-12, who also personally attended the Pacification Commission's proceedings, the convicted person did not actually participate.<sup>201</sup> As noted by the Prosecution during the sentencing hearing,<sup>202</sup> this claim is in fact corroborated by Germain Katanga himself, who stated that he had gone to

<sup>193</sup> [Defence Closing Statement, T. 345](#), pp. 43-44.

<sup>194</sup> [Prosecution Closing Statement, T. 345](#), pp. 45-46.

<sup>195</sup> [Defence Closing Statement, T. 345](#), p. 34.

<sup>196</sup> [Prosecution Closing Statement, T. 345](#), pp. 45-46.

<sup>197</sup> [Katanga Judgment](#), para. 1353. See also, D02-228, T. 250, p. 19.

<sup>198</sup> [Katanga Judgment](#), para. 514; P-267, T. 171, p. 49.

<sup>199</sup> P-12, T. 196, pp. 18 and 21-22.

<sup>200</sup> D02-404, [T. 344](#), pp. 47-48.

<sup>201</sup> P-12, T. 195, pp. 56 and 61-62.

<sup>202</sup> [Prosecution Closing Statement, T. 345](#), pp. 53-54.

Bunia only on 14 April 2003,<sup>203</sup> which was after the closing of the Pacification Commission proceedings. It should be noted further that, whereas the name of the convicted person does appear on the list of participants of the Pacification Commission, unlike other people who were present he did not sign the document dated 14 April 2014, i.e. after the Commission's proceedings had come to a close.<sup>204</sup> In the light of these factors, the Chamber therefore considers that on a balance of probabilities Germain Katanga did not take part in the Pacification Commission proceedings in April 2003.

**c. Participation in the *Comité de concertation des groupes armés*  
[Committee for the Coordination of Armed Groups] (CCGA)**

97. The Pacification Commission proceedings led to the setting up of a Committee for the Coordination of Armed Groups ("CCGA"),<sup>205</sup> which, according to P-12, brought together military leaders to assess the security situation, identify situations which could get out of hand and negotiate the release of prisoners of war.<sup>206</sup> Several CCGA meetings were held in 2003.

98. It should be noted that D02-404 claimed that Germain Katanga attended the Pacification Commission proceedings,<sup>207</sup> was part of the group for the coordination of armed groups around April 2003 and presented himself at the time as being highly motivated. According to the witness, he was keen on fostering reconciliation and peace in Ituri as a whole, whatever its ethnic composition.<sup>208</sup> The Chamber notes, however, that according to P-12 Germain Katanga did not take part in the group's proceedings for the first

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<sup>203</sup> D02-300, T. 318, p. 46.

<sup>204</sup> EVD-OTP-000195: Final Report of the Ituri Pacification Commission (see, in particular, DRC-OTP-0107-0285 and DRC-OTP-0107-0308).

<sup>205</sup> P-12, T. 195, pp. 56 and 65-67.

<sup>206</sup> P-12, T. 196, p. 49.

<sup>207</sup> D02-404, [T. 344](#), pp. 47-48.

<sup>208</sup> D02-404, [T. 344](#), pp. 47-48.

time until its fourth meeting,<sup>209</sup> and the convicted person seems to corroborate this.<sup>210</sup>

99. In the light of these testimonies and, in particular, the statements made by the convicted person himself, the Chamber finds that Germain Katanga attended the meetings only as from August 2003, not from April.<sup>211</sup> Further, whereas, as stated by D02-404 before the Court, he may in theory have been a member of the working group from April 2003, it must be noted that his involvement in its activities started only in August 2003.

100. The Chamber further notes that a MONUC report dated 20 June 2003 referring to meetings attended by unidentified FNI/FRPI officials seems to indicate that the said officials did not attend CCGA meetings regularly, hence the claim made in the document that, during a session held from 19 May 2003 to 20 June 2003, they were requested to ensure regular attendance of their representatives on the consultation committee.<sup>212</sup>

#### **d. Aftermath of the May 2003 battle of Bunia**

101. The Defence contends that Germain Katanga fostered reconciliation among the people, notably by promoting dialogue with other ethnic groups and assisting war victims.<sup>213</sup> To buttress the point, it claims that, following the battle which took place in Bunia in May 2003, he welcomed many refugees to Aveba (including Hema).<sup>214</sup>

102. The Chamber notes that Witness D02-228 described in detail the UPC's taking of Bunia in May 2003 and the resulting significant displacement of the

<sup>209</sup> P-12, T. 196, pp. 51-53.

<sup>210</sup> D02-300, T. 319, p. 27-29.

<sup>211</sup> See also, EVD-D02-00249: Letter sent by Germain Katanga to the Chair of the Committee for the Coordination of Armed Groups dated 5 October 2003, acknowledging receipt of MONUC's invitation to attend the CCGA meeting scheduled for 10 October 2003.

<sup>212</sup> EVD-D02-00236: Bunia Sitrep of 20 June 2003 (DRC-OTP-0195-1515, para. 10).

<sup>213</sup> [Second Defence Observations](#), para. 68.

<sup>214</sup> [Second Defence Observations](#), paras. 69-74.

population. This is also corroborated by P-267, D02-404 and Germain Katanga himself.

103. The Chamber notes that Germain Katanga stated that, after the UPC combatants retook Bunia from Lendu control,<sup>215</sup> many refugees including a large number of Hema found refuge, especially in Aveba.<sup>216</sup> These statements were by and large corroborated by D02-404, who testified that, as Bunia fell, all its inhabitants fled towards Aveba with the aim of reaching North Kivu.<sup>217</sup> The Chamber notes that the statements are based on hearsay as the witness was neither in Bunia nor in Aveba at the material time.<sup>218</sup>

104. The Chamber notes, however, that, according to P-267, when Bunia was being taken in May 2003, the refugees who fled southwards, that is in the direction of Beni, and through Walendu-Bindi *collectivité*, were indeed inhabitants who were not UPC supporters, as the territories held by the UPC were in the north.<sup>219</sup> This witness further stated that, before the UPC attack, the whole allied population, namely the Hema,<sup>220</sup> had already fled northwards,<sup>221</sup> so only allies of the *Front des nationalistes intégrationnistes* [National Integrationist Front] (“the FNI”) remained and by the time the city was invaded it was almost deserted.<sup>222</sup>

105. The Chamber considers P-267’s testimony to be particularly credible as it puts the convicted person’s testimony into perspective and, whereas many refugees did indeed seek refuge in Aveba after Bunia was taken, most likely

<sup>215</sup> P-30, T. 178, p. 21. See also, p. 18.

<sup>216</sup> D02-300, T. 319, p. 24. See also, [Second Defence Observations](#), para. 69.

<sup>217</sup> D02-404, [T. 344](#), pp. 51-52.

<sup>218</sup> The Chamber notes that the witness testified to having personally encountered the Hema who had fled, further noting that the encounter was in Tchekele not Aveba.

<sup>219</sup> P-267, T. 163, pp. 61-63; T. 171, p. 50. See also, D02-300, T. 319, p. 24.

<sup>220</sup> P-30, T. 179, p. 49.

<sup>221</sup> See also, in this regard, the account given of P-30, T. 179, pp. 48 and 49.

<sup>222</sup> P-267, T. 171, p. 50. The Chamber also notes that, according to a MONUC report, in early 2004, although some Lubaró, Alur and Nande also lived in Aveba, most inhabitants were Lendu. The presence of Hema is not mentioned. (EVD-OTP-00221: MONUC report of 26 February 2004 [DRC-OTP-0011-0453, para. 9.b]).

the majority were Lendu. Irrespective of this, the people had been displaced as victims of a UPC attack and that is the status under which they received refuge in Aveba as allies. The Chamber therefore considers that such an action fails to establish that Germain Katanga was engaged in fostering reconciliation among the communities.

**e. Support for the disarmament and demobilisation process**

106. The Defence emphasises that Germain Katanga promoted the disarmament and demobilisation of militiamen and child soldiers<sup>223</sup> and considers that the demobilisation programme could not have been rolled out without his participation.<sup>224</sup> The Defence argues that Aveba hosted the transit site set up for the demobilisation<sup>225</sup> and Germain Katanga maintained his cooperation throughout the enterprise.<sup>226</sup>

107. The Chamber notes its finding in the Judgment that a demobilisation programme for child soldiers had indeed been undertaken in Ituri in late 2004. In November 2004, thanks to the collaboration of Germain Katanga who had been present at the inauguration, Aveba – identified as the FRPI headquarters – hosted a demobilisation centre within which was a place reserved for children, although it was primarily meant for militiamen of that group.<sup>227</sup>

108. The Chamber notes in this respect that the Prosecution submitted at trial that Germain Katanga had been involved in the demobilisation process. The Prosecution noted further that several FRPI commanders were opposed to the process and that, following the departure of the convicted person, the

<sup>223</sup> [Second Defence Observations](#), paras. 58-67.

<sup>224</sup> [Defence Closing Statement, T. 345](#), p. 30; [Second Defence Observations](#), para. 61.

<sup>225</sup> [Second Defence Observations](#), para. 61.

<sup>226</sup> [Second Defence Observations](#), para. 67.

<sup>227</sup> [Katanga Judgment](#), para. 1068.

Aveba demobilisation site came under constant threat.<sup>228</sup> It noted that P-267 and D02-196, both of whom encountered Germain Katanga in Aveba in June 2004, testified that he had cooperated in the setting up of the site and its activities and had requested it to be built in Aveba.<sup>229</sup> The Prosecution further acknowledged that the Accused had set the tone during the launch of the site by allowing himself to be demobilised alongside a child and that he had protected the site which, subsequent to his departure, came under threat.<sup>230</sup> The Prosecution noted lastly that, according to P-267, all instructions regarding demobilisation were made through Germain Katanga's headquarters.<sup>231</sup> In spite of making all these statements of fact, during the sentencing hearing, the Prosecution submitted that Germain Katanga's role in that respect had to be contextualised and that it was incumbent upon the Defence to establish that it was evidence of rehabilitation.<sup>232</sup> The Legal Representative suggested, regarding Germain Katanga's involvement in the demobilisation process, that he may have "[TRANSLATION] sensed turning tides".<sup>233</sup>

109. According to Witness D02-401, who testified before the Chamber and took part in the demobilisation project that was rolled out in Ituri, in late 2004 he was posted to the Aveba transit site and encountered Germain Katanga. He testified that he spent five months there. According to him, the convicted person was a true embodiment of peace and took an active part in the programme activities: he attended meetings, made suggestions during the meetings and allegedly made a "[TRANSLATION] key contribution" to the

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<sup>228</sup> [Office of the Prosecutor, "Corrigendum du Mémoire final", 3 July 2012, ICC-01/04-01/07-3251-Conf-Corr-Red \("Prosecution Closing Brief"\)](#), para. 730.

<sup>229</sup> [Prosecution Closing Brief](#), para. 732.

<sup>230</sup> [Prosecution Closing Brief](#), para. 733.

<sup>231</sup> [Prosecution Closing Brief](#), para. 733.

<sup>232</sup> [Prosecution Closing Statement, T. 344](#), p. 75.

<sup>233</sup> [Closing Statement of the Legal Representative, T. 345](#), p. 8.

programme.<sup>234</sup> The witness also stated that they felt welcomed by him, that he paid attention to the well-being of his guests and provided a good level of security to those involved in the programme. According to him, Germain Katanga “[TRANSLATION] lead by example” as the first person to demobilise and by raising awareness among the other combatants.<sup>235</sup>

110. The witness further stated that in Aveba he had been able to demobilise Hema combatants from Boga and Bunia, as well as Pygmies who had been authorised by Germain Katanga to participate in the programme.<sup>236</sup> The Chamber notes that D02-401’s testimony is corroborated by the statements made by D02-400<sup>237</sup> and D02-403,<sup>238</sup> which were entered into evidence. The documents show that Germain Katanga had been at ease in his involvement in the demobilisation programme and that, unlike other militiamen, who refused to cooperate, he actually encouraged it. He also allegedly authorised the demobilisation of Hema combatants,<sup>239</sup> which is corroborated in part by the certificate of discharge of a UPC soldier who was demobilised in December 2004 and received at the Aveba transit centre.<sup>240</sup> Still according to D02-400’s statement, he allegedly set the tone during the opening of the transit site by handing over a weapon and, after his departure, there was increased insecurity.<sup>241</sup>

111. According to P-267, Germain Katanga wanted the demobilisation centre to be built in Aveba and, to that end, ordered the destruction of the *manyatas* [straw huts]<sup>242</sup> and protected the site.<sup>243</sup> The Chamber again notes

<sup>234</sup> D02-401, [T. 344](#), pp. 34-35 and 38.

<sup>235</sup> D02-401, [T. 344](#), pp. 35-36.

<sup>236</sup> D02-401, [T. 344](#), p. 36.

<sup>237</sup> EVD-D02-00253: Statement by D02-400 (DRC-D02-0001-1041 to DRC-D02-0001-1043).

<sup>238</sup> EVD-D02-00256: Statement by D02-403.

<sup>239</sup> EVD-D02-00253: Statement by D02-400 (DRC-D02-0001-1041).

<sup>240</sup> EVD-D02-00254: Certificate of discharge of a UPC soldier (DRC-D02-0001-1049).

<sup>241</sup> EVD-D02-00253: Statement by D02-400 (DRC-D02-0001-1043).

<sup>242</sup> P-267, T. 165, pp. 9-11. See also, T. 172, pp. 55-56.

<sup>243</sup> P-267, T. 166, pp. 16-17.

that, according to the claims of this witness, without the involvement of Germain Katanga from the outset, the demobilisation process could not have been rolled out, as many people had opposed it.<sup>244</sup> P-267 actually described Germain Katanga's conduct as being "[TRANSLATION] quite simply responsible."<sup>245</sup> Lastly, he also stated that the convicted person had demobilised alongside a child at the beginning of the process<sup>246</sup> and this, in the mind of the Chamber, sent a strong message to other combatants.

112. The Chamber also notes, as submitted by the Defence,<sup>247</sup> that several MONUC reports drafted from June 2003 onwards also attest to Germain Katanga's cooperation with that Mission and, consequently, to his involvement in the disarmament and demobilisation process. In fact, during their visits to Aveba, MONUC representatives considered that Germain Katanga "showed his interest in DDR [Disarmament, Demobilisation and Reintegration]", that the militia had even started formalities in that respect, twice concluding their reports by stating that the meeting had been fruitful and, during the meeting of 20 October 2003, that in that zone, it would be better to exploit the willingness on the part of local leadership in the DDR and general reconciliation area.<sup>248</sup> The MONUC report of 20 June 2003 also shows that the FNI/FRPI officials, including Germain Katanga, allegedly expressed their willingness to cooperate with it as well as with the Interim International Emergency Force<sup>249</sup> (IMEF, another name for the soldiers of Operation Artemis).<sup>250</sup> The Chamber further notes the contents of a MONUC internal report<sup>251</sup> describing the activities which took place on

<sup>244</sup> P-267, T. 165, pp. 58-59; T. 171, pp. 10-15.

<sup>245</sup> P-267, T. 171, p. 11.

<sup>246</sup> P-267, T. 171, p. 11.

<sup>247</sup> [Second Defence Observations](#), paras. 58-60.

<sup>248</sup> EVD-D02-00248: MONUC Report of 20 October 2004 (DRC-OTP-0009-365, paras. A.4.k and A.5); EVD-D02-00247: MONUC Report of 27 October 2003, para. A.5.

<sup>249</sup> EVD-D02-00236: Bunia Sitrep (DRC-OTP-0195-1516, paras. 6(a)(ii) and 14).

<sup>250</sup> P-317, T. 228, p. 57.

<sup>251</sup> EVD-OTP-00221: MONUC Report of 26 February 2004.

25 and 26 February 2004, in particular the 25 February visit to Aveba and Gety to assess the security and humanitarian situation.<sup>252</sup> The report shows that Germain Katanga was very amenable to the MONUC mission to both areas, and had approved the “DRC” process (i.e. disarmament and reintegration into the community).<sup>253</sup> The Chamber considers that it is worth recalling the statement made by Witness P-160 that, in late 2003, the convicted person was determined “[TRANSLATION] to walk the path of peace.”<sup>254</sup>

113. Nonetheless, according to P-12 and the information that he had received, in July 2003, the Ngiti also attacked Kasenyi village.<sup>255</sup> The Chamber equally notes that, in September 2003, Germain Katanga had been quite uncooperative with the MONUC, which visited him in Aveba. In fact, while stating his readiness to collaborate with the force to gather his militiamen, he demanded its help in exchange to assist him in his mission although he did not state the form of assistance he needed.<sup>256</sup> Lastly, the MONUC weekly report for the week of 6 to 12 December 2003 notes numerous incidents involving FNI/FRPI combatants for the period covered, including the cancellation of a MONUC mission to Gety for security reasons<sup>257</sup> and the destruction by UN peacekeepers of six FNI/FRPI camps followed by the release of prisoners and women detainees – “apparently” subjected to sexual violence – and the arrest of FNI/FRPI commanders as well as the discovery of a large stock of weapons.<sup>258</sup>

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<sup>252</sup> EVD-OTP-00221: MONUC Report of 26 February 2004 (DRC-OTP-0011-0453, para. 9).

<sup>253</sup> The “DRC” refers to a pilot project which was set up as part of the “*Programme national de désarmement et de démobilisation et de réinsertion*” [National Disarmament, Demobilisation and Reintegration Programme] (PNDDR) and run by the *Commission nationale de désarmement et réinsertion* [National Disarmament and Reintegration Commission] (CONADER) with the support of international stakeholders (P-267, T. 163, p. 77).

<sup>254</sup> P-160, T. 211, p. 42.

<sup>255</sup> P-12, T. 196, pp. 34-35.

<sup>256</sup> EVD-OTP-00220: Transcript of 12 September 2003 (DRC-OTP-0009-0372).

<sup>257</sup> EVD-OTP-00219: MONUC weekly report covering the week of 6 to 12 December 2003 (DRC-OTP-0009-0015, para. 2.b).

<sup>258</sup> *Idem*.

## f. Conclusion

114. From the foregoing, the Chamber is unable to establish, following the criterion of balance of probabilities, whether globally speaking Germain Katanga actually sought, through his alleged efforts, to actively promote the peace process.

115. Nonetheless, according to the Chamber, several documents and testimonies testify to the positive role that he played, specifically in the process of disarming and demobilising child soldiers. In fact, following the criterion of the balance of probabilities, the Chamber considers as established Germain Katanga's active participation in the demobilisation process and, bearing in mind his conduct, what amounts to his positive contribution at the time. It therefore considers that these efforts must be taken into account in the sentence to be imposed on him.

### ii. Statement of remorse and sympathy for the victims.

116. In its closing statement, the Defence recalled the statement made by the Accused before the Court and emphasised that, contrary to the Prosecution's suggestion, Germain Katanga had never denied the suffering endured by or the killing of civilians. On behalf of the convicted person, the Defence reiterated its sympathy and compassion for the victims, emphasising that such had been his position throughout the proceedings.<sup>259</sup>

117. The Chamber notes that a statement of remorse may be taken into account as a mitigating circumstance.<sup>260</sup> It states, nonetheless, that only a

<sup>259</sup> [Defence Closing Statement, T. 345](#), pp. 13-14.

<sup>260</sup> See, in particular, ICTY, [Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, "Sentencing Judgement", 18 December 2003](#), para. 242; [Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, "Sentencing Judgement", 27 February 2003](#), para. 81.

sincere statement of remorse may amount to such a circumstance.<sup>261</sup> Furthermore, whereas the expression of sympathy or genuine compassion for the victims may also be taken into account in the determination of the sentence, it cannot be considered commensurate to a statement of remorse under any circumstance, and must in the mind of the Chamber, be accorded less weight.<sup>262</sup>

118. Yet, the Chamber is bound to note, as was emphasised by the Prosecution and the Legal Representative,<sup>263</sup> that during proceedings Germain Katanga made no statement that can be interpreted as an expression of deep and genuine remorse. The Chamber notes that at best he made some statements attesting to his compassion for the victims and his desire for justice. The Chamber further notes that, at the end of the hearing for the determination of the sentence, in making his statement as provided by article 67(1)(h), Germain Katanga expressed his compassion in general for the victims of that war (the one ongoing in Ituri) and then described his feelings specifically with respect to the victims from his own community.<sup>264</sup>

119. The Chamber considers the statements to be mere convention<sup>265</sup> and that in actual fact Germain Katanga found it very difficult to acknowledge the crimes committed.<sup>266</sup>

120. Lastly, in its observations to the Chamber dated 4 April 2014, the Registry indicated that it had no reliable information about any action

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<sup>261</sup> See, in particular, ICTY, [Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, "Sentencing Judgement", 8 March 2006](#), para. 117.

<sup>262</sup> See, in this respect, ICTY, [The Prosecutor v. Strugar, Case No. IT-01-42-A, "Judgement on appeal", 17 July 2008](#), para. 366.

<sup>263</sup> [Second Observations of the Legal Representative](#), para. 52; [Closing Statement of the Legal Representative, T. 345](#), pp. 8-9; [Prosecution Closing Statement, T. 344](#), p. 77.

<sup>264</sup> [T. 345](#), pp. 49-50.

<sup>265</sup> D02-300, T. 340, pp. 54-59.

<sup>266</sup> D02-300, T. 325, pp. 58-60.

Germain Katanga may have taken to compensate the victims.<sup>267</sup> When specifically questioned on this topic, the village chief stated that he had no knowledge whatsoever of any action by the convicted person in the interest of victims.<sup>268</sup>

121. In the light of the foregoing, the Chamber will therefore not consider that Germain Katanga's statement amounts to an expression of compassion or genuine remorse for the victims of Bogoro sufficient to be taken into account as a mitigating circumstance.

### **c) Cooperation with the Court and conduct in the detention centre**

122. The Defence argues that Germain Katanga fully cooperated with the Court, having attended hearings, shown utmost respect for the Court, court staff and the guards,<sup>269</sup> testified in person and answered questions from the parties, the Legal Representative and the Bench.<sup>270</sup>

123. The Prosecution argued that, following the jurisprudence of the ICTY, cooperation had to be "substantial, full and unconditional" and that, should cooperation which is less than substantial be taken into account, it should be accorded only limited importance in the determination of the sentence.<sup>271</sup> Questioned on that specific point by the Chamber, the Prosecution argued that Germain Katanga's conduct during hearings should be considered as normal and nothing exceptional and that it was the conduct expected of anyone appearing before a court.

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<sup>267</sup> *Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga*, para. 3.

<sup>268</sup> Witness Byaruhanga, [T. 344](#), p. 23. See also, [Closing Statement of the Legal Representative, T. 345](#), p. 9.

<sup>269</sup> [Second Defence Observations](#), paras. 118 and 120.

<sup>270</sup> [Second Defence Observations](#), paras. 39-42 and 119.

<sup>271</sup> [First Prosecution Observations](#), para. 34.

124. The Legal Representative stated that the Defence had described Germain Katanga as a young and intelligent man who adapted to situations. Similarly, while noting his good behaviour at trial, the Legal Representative considered that it was a careful choice made by the convicted person in deciding to take the stand as part of his defence strategy.<sup>272</sup>

125. The Prosecution denounced the behaviour of the convicted person in that he insisted on Lingala interpretation throughout proceedings at both the preliminary and the trial stages, whereas, in due course, he chose to testify in French, showing perfect mastery of the French language.<sup>273</sup>

126. The Chamber notes, that contrary to rules of procedure and evidence of the ad hoc criminal tribunals, which explicitly stipulate that cooperation must be substantial,<sup>274</sup> under rule 145 it is not a requirement. The Chamber notes that, on the one hand, the jurisprudence of the tribunals progressively became more flexible<sup>275</sup> and that, on the other, the Chambers have more leeway in the assessment of fact, and what does or does not amount to substantial cooperation.<sup>276</sup>

127. In its view, to be considered as a mitigating circumstance, cooperation need not be substantial. However, it must exceed mere good behaviour, which, albeit welcome, cannot on its own amount to a circumstance that could mitigate the sentence to be imposed.

128. In the instant case the Chamber notes that Germain Katanga did give a lengthy testimony, readily answered the questions from the parties,

<sup>272</sup> [Closing Statement of the Legal Representative, T. 345](#), pp. 8-9.

<sup>273</sup> [Prosecution Closing Statement, T. 345](#), p. 46- 47.

<sup>274</sup> [Rules of Procedure and Evidence of ICTs](#), rule 101. Rule 101(b)(ii) reads as follows: "Any mitigating circumstances including the *substantial cooperation* with the Prosecutor by the convicted person before or after conviction," whereas rule 145(2)(a)(ii) of the Court's Rules [of Procedure and Evidence] reads as follows: "The convicted person's conduct after the act, including [...] *any cooperation* with the Court."

<sup>275</sup> [ICTY, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, "Judgement on appeal", 9 May 2007](#), para. 344.

<sup>276</sup> [ICTY, Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, "Judgement on appeal", 5 July 2001](#), para. 126.

the participants and the Bench, and volunteered information and detail.<sup>277</sup> To a certain degree, the Chamber will take into account this positive attitude in determining the sentence. However, it cannot take into account Germain Katanga's attendance and his good behaviour in court or towards court staff or guards, which is behaviour any Chamber may expect of any accused person.

129. Regarding Germain Katanga's behaviour while in detention, the Chamber takes note of the internal memorandum on the subject forwarded by the Registry.<sup>278</sup> It notes that, according to the document, Germain Katanga's conduct over a period of six years may be considered as positive overall. It notes that, whereas the Defence addressed this in its observations of 7 April 2014, it did not, however, submit that his behaviour should be taken into account in mitigation.<sup>279</sup> Therefore, the Chamber will not rule on the matter.

#### **d) Violation of the rights of the Defence**

130. The Defence contends that violation of the rights of the convicted person may mitigate the sentence imposed on him<sup>280</sup> and that, in the instant case, there are irregularities which, considered as a whole, should mitigate the sentence.<sup>281</sup>

131. The Defence notes that during the time Germain Katanga spent at the Kinshasa central prison, from 10 March 2005 to 18 October 2007, he was

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<sup>277</sup> [Katanga Judgment](#), paras. 1529 and 1531, quoting the "[Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons](#)", 21 November 2012, ICC-01/04-01/07-3319-tENG, para. 51.

<sup>278</sup> Annex to the "[Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga](#)", (Internal Memorandum: "Description générale du comportement affiché par Germain Katanga pendant sa détention au quartier pénitentiaire de la Cour").

<sup>279</sup> [Second Defence Observations](#), paras. 122-126.

<sup>280</sup> [First Defence Observations](#), para. 56.

<sup>281</sup> [Second Defence Observations](#), see, in particular, para. 77.

detained under conditions falling far short of international standards and was subjected to multiple rights violations, notably of his right to personal liberty, to be brought promptly before the judicial authorities, to be informed of the charges against him and to the assistance of counsel, which should justify a reduction in the sentence.<sup>282</sup>

132. The Defence maintains that the violations perpetrated as from 2 July 2007, the date of the warrant of arrest issued by the Court, are imputable to the Court, Germain Katanga having found himself under the constructive custody of the ICC, and that “the Court became necessarily associated with the continuing violations of the rights of the accused”.<sup>283</sup>

133. The Defence also maintains that, even before the issuing of the warrant of arrest, Germain Katanga’s situation ought to have been of concern to the Court, that is to say from the moment the Prosecution identified him as a principal suspect in the Bogoro attack. It further maintains that, thenceforth, the Prosecution had a duty of care towards him and should not have ignored the continued flagrant violations of his rights. The Defence argues that it is irrelevant that Germain Katanga was held in detention by an entity not attached to the Court as such and contends that it is sufficient to note that the Prosecutor was, or should have been, aware that Germain Katanga’s detention conditions violated international human rights and Congolese domestic law.<sup>284</sup>

134. The Defence contends that the Prosecution treated Germain Katanga as a suspect as early as November 2005 and that, from a certain point in time during the ICC Prosecution investigations, the DRC authorities did not take any action in respect of the Ituri detainees because they were waiting for the

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<sup>282</sup> [Second Defence Observations](#), paras. 78-82.

<sup>283</sup> [Second Defence Observations](#), para. 83, citing “Defence motion for a declaration on unlawful detention and stay of proceedings”, 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp, paras. 101 and 106.

<sup>284</sup> [Second Defence Observations](#), para. 84.

Prosecution to complete its investigation.<sup>285</sup> This suggests, according to the Defence, that the Prosecution failed to act with due diligence in not taking steps for Germain Katanga's speedy transfer to the Court's detention centre, which by the same stroke would have ended his unlawful detention in the DRC. The Prosecutor allegedly also fell short of his duty to inform the Pre-Trial Chamber of Germain Katanga's situation and did not apply for appropriate orders from the Court to ensure that his rights were respected while the Prosecution continued its investigations.<sup>286</sup>

135. The Defence lastly submits that, although they had been raised in its motion on unlawful detention, no Chamber of the Court considered the merits of these contentions as the filing was considered to have been made out of time. As the instant observations are filed within the framework of the procedure for the determination of the sentence, it is no longer possible, according to the Defence, for them to be considered to have been filed belatedly. In referring to its observations on unlawful detention, therefore, the Defence submits that the Chamber should consider its arguments admissible and find that the irregularities are such that they can mitigate the sentence imposed on Germain Katanga.<sup>287</sup>

136. The Chamber considers that, should it be established that the convicted person's fundamental rights were violated, it would indeed be appropriate to take that into account in mitigation of the sentence to be imposed on him.<sup>288</sup> However, it considers that the Statute in no way authorises the Court to rule on the legality of Congolese detention procedures or to consider whether they

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<sup>285</sup> [Second Defence Observations](#), para. 85.

<sup>286</sup> [Second Defence Observations](#), para. 86.

<sup>287</sup> [Second Defence Observations](#), paras. 87-88.

<sup>288</sup> See, in particular, ICTR, [The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, "Decision", 31 May 2000](#), grounds for the decision, para. 6-b; ICTR, [The Prosecutor v. Jean Bosco Barayagwiza, Case No. ICTR-97-19-AR72, "Judgement \(Prosecutor's Request for Review or Reconsideration\)", 31 March 2000](#), See, in particular, Reasons, para. 75; ICTR, [The Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgement, 23 May 2005](#), para. 325.

flawed by violations. As a result, the Chamber cannot rule on alleged violations of Germain Katanga's rights to which he was subjected in the DRC while he was not in detention on behalf of the Court.

137. However, regarding the period during which Germain Katanga was in detention on its behalf, the Chamber considers that violations may be imputable to the Court only where they concern a procedure undertaken before it.<sup>289</sup> The Chamber will not entertain any violations of Germain Katanga's rights where such violations are unconnected to proceedings before it, even if they were committed during his detention on behalf of the Court.

138. In the case in point, and as elaborated upon hereunder, the Court considers that Germain Katanga's detention on behalf of the Court commenced on 18 September 2007.<sup>290</sup> The Court therefore considers that the time in detention in the DRC before this date was not spent on behalf of the Court and it will therefore analyse possible violations only as from 18 September 2007. In this connection, the Defence maintains that, during the interview preceding his transfer on 17 October 2007, Germain Katanga was not assisted by counsel, which is a component part of the right to a fair trial.<sup>291</sup> However, the Prosecution submitted in its observations on the motion on unlawful detention that during the proceedings he was assisted by his counsel.<sup>292</sup>

139. The Chamber notes that documentation on record establishes that, at about 10 a.m. on that date, Germain Katanga was taken from his cell to the *Auditorat général* [Office of the Chief Military Prosecutor] and interviewed for

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<sup>289</sup> See, for example, [Pre-Trial Chamber I, \*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi\*, "Decision on OPCD Requests", 27 April 2012, ICC-01/11-01/11-129.](#)

<sup>290</sup> See Section II(F): Deduction of time spent in detention, paras. 155-158.

<sup>291</sup> [Second Defence Observations](#), para. 82. See also, Defence, "Defence motion for a declaration on unlawful detention and stay of proceedings", 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp, paras. 34-35, 48 and 77.

<sup>292</sup> Office of the Prosecutor, "Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings", 24 July 2009, ICC-01/04-01/07-1335-Conf-Exp, para. 60.

identification.<sup>293</sup> As stated by the Defence, at that moment he was not in fact assisted by a lawyer, but it should be noted that he was advised of his right to be assisted by a lawyer during the procedure for the “notification” of the warrant of arrest issued by the Court.<sup>294</sup> His lawyer was contacted forthwith and, once the warrant of arrest had been read to Germain Katanga at about 7 p.m. on 17 October 2007, he was assisted by counsel until he boarded the aeroplane taking him to The Hague.<sup>295</sup> The Chamber notes that, during Germain Katanga’s initial appearance on 22 October 2007, the Counsel representing him stated that the warrant of arrest was read out to Germain Katanga at around 7 p.m. on 17 October, following a brief discussion with his lawyer.<sup>296</sup> Furthermore, according to the Registry’s information on the execution of the warrant of arrest and request for surrender of Germain Katanga, the latter was assisted by Counsel at the time of his appearance before the Congolese judiciary.<sup>297</sup>

140. Consequently, the Chamber considers that the Defence has failed to demonstrate that Germain Katanga’s detention as part of “procedural steps [...] designed to facilitate [his] transfer”, namely on 17 October 2007, was tainted by violation, as he was indeed assisted by Counsel at the time of his arrest and surrender to the Court.

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<sup>293</sup> T. 5, p. 18; Registry: [“Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga”, 22 October 2007](#), ICC-01/04-01/07-40-Anx3.3 and [ICC-01/04-01/07-40-Anx3.7](#). See also, Defence, “Defence motion for a declaration on unlawful detention and stay of proceedings”, 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp-AnxC, pp. 1-2.

<sup>294</sup> Registry: [“Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga”, 22 October 2007](#), ICC-01/04-01/07-40-Anx3.3 and ICC-01/04-01/07-Anx3.5.

<sup>295</sup> T. 5, pp. 18-19; Defence, Defence motion for a declaration on unlawful detention and stay of proceedings”, 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp-AnxC, pp. 1-2.

<sup>296</sup> T. 5, pp. 18-19.

<sup>297</sup> Registry, [“Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga”, 22 October 2007, ICC-01/04-01/07-40](#), p. 3.

## E. DETERMINATION OF THE SENTENCE TO IMPOSE

141. In its closing statement on the determination of the sentence, the Prosecution requested the imposition of an prison term of between 22 and 25 years,<sup>298</sup> arguing that it was a reasonable sentence, in the light of the seriousness of the crimes committed in Bogoro, the aggravating circumstances which the Chamber should take into account and Germain Katanga's individual circumstances.<sup>299</sup>

142. In keeping with article 77(1) of the Statute and rule 145(3) of the Rules, the Chamber may impose a sentence of imprisonment that may not exceed 30 years, unless "the extreme gravity of the crime and the individual circumstances of the convicted person" warrant a term of life imprisonment.

143. Germain Katanga was found guilty of being an accessory through a contribution made "in any other way" to the commission of several very serious crimes under particularly cruel conditions and in a discriminatory manner: namely, the crime of murder as a war crime and as a crime against humanity, the crimes of attacks against a civilian population as a war crime and the crimes of destruction and pillaging as a war crime. His contribution spanned several months (from November 2002 to 24 February 2003) and the attack on Bogoro was one of the most significant attacks in Ituri in 2003. It was, however, made as part of a criminal purpose shared by many persons without it being established that Germain Katanga was present in person at the scenes of the crimes.

144. As the Chamber is not taking any aggravating circumstance into account against Germain Katanga, the imposition of life imprisonment is uncalled for. In fact, the Chamber is taking into account two mitigating circumstances of varying importance. The first, to which the Chamber lends

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<sup>298</sup> [Prosecution Closing Statement, T. 344](#), p. 59.

<sup>299</sup> [Prosecution Closing Statement, T. 344](#), p. 71.

only limited weight, relates to Germain Katanga's young age at the material time and to his family situation, both of which the Court considers likely to make rehabilitation and reintegration easier. The second factor, which the Chamber considers to be by far weightier, relates to Germain Katanga's personal and active support to the process of disarming and demobilising child soldiers which was rolled out in Ituri and which demonstrates his undisputed sense of responsibility in that respect. In the view of the Chamber this warrants a reduction of the sentence imposed.

145. The Chamber emphasises that it will distinguish between the crimes of murder and attack against a civilian population on the one hand, and the crimes of destruction and pillaging on the other, as the former amount to violence to life whereas the latter, although significant, amount to threat to property. The Chamber considers that, in the instant case, there should be a more severe penalty for the former.

146. Pursuant to the provisions of article 78(3) of the Statute "[w]hen 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 [...]". In the light of the factors analysed above, the Chamber sentences Germain Katanga:

- for accessoryship, under article 25(3)(d) of the Statute, to the crime of murder as a crime against humanity, to 12 years' imprisonment;
- for accessoryship, under article 25(3)(d) of the Statute, to the crime of murder as a war crime, to 12 years' imprisonment;
- for accessoryship, under article 25(3)(d) of the Statute, to the crime of attacking a civilian population as a war crime, to 12 years' imprisonment;

- for accessoryship, under article 25(3)(d) of the Statute, to the crime of destruction of property as a war crime, to 10 years' imprisonment; and
- for accessoryship, under article 25(3)(d) of the Statute, to the crime of pillaging as a war crime, to 10 years' imprisonment.

147. In accordance with article 78(3) of the Statute, the Chamber imposes a joint sentence of 12 years' imprisonment.

## F. DEDUCTION OF TIME SPENT IN DETENTION

148. The Defence submits that, pursuant to article 78(2) of the Statute, the time spent in detention in accordance with an order of the Court must be deducted from the sentence imposed by the Court on the convicted person.<sup>300</sup> The Defence contends that, in the instant case, this period of time should be calculated, at the barest minimum, as from the date of transfer of Germain Katanga to the Court, namely 17 October 2007, until the date on which sentence is pronounced.<sup>301</sup> In fact, the Defence further contends that the deduction of time spent in detention should also take into account the time between the date of the warrant of arrest issued against the Accused and the date of his transfer to the Court. The Defence submits that once the Court issued the warrant of arrest against Germain Katanga on 2 July 2007 he was detained on behalf of the Court and in accordance with its order.<sup>302</sup>

149. In respect of the time spent in detention and which may be deducted on a discretionary basis from the sentence imposed, the Defence submits that the entirety of the time spent by Germain Katanga in detention following his arrest in the DRC on 26 February 2005 should be taken into account.<sup>303</sup> The

<sup>300</sup> [Second Defence Observations](#), para. 91.

<sup>301</sup> [Second Defence Observations](#), para. 92.

<sup>302</sup> [Second Defence Observations](#), para. 93.

<sup>303</sup> [Second Defence Observations](#), para. 94.

Defence considers that he was detained by the Congolese authorities in connection with “conduct underlying the crime”.<sup>304</sup> The Defence further submits that it is unnecessary to establish that the period spent in detention was for exactly the same conduct as that upon which the ICC charges are founded.<sup>305</sup>

150. According to the Defence, citing submissions in previous observations, Germain Katanga’s detention in the DRC concerned offences committed in Ituri against the civilian population, constituting crimes against humanity including charges relating to the “Bogoro attack”<sup>306</sup> and war crimes with respect to the destruction and appropriation of property protected under the Geneva Conventions.<sup>307</sup> Regarding the specific charges against Germain Katanga as part of the proceedings in the DRC, the Defence condemns their lack of precision or clarity and submits that this should not be detrimental to the accused person.<sup>308</sup>

151. The Defence notes that, in fact, the proceedings against Germain Katanga in the DRC had been dropped partly to comply with the principle of *ne bis in idem*, and hence the Defence submits that the proceedings were identical to the proceedings before the Court.<sup>309</sup>

152. Therefore, according to the Defence, the two years and eight months spent in detention in the DRC (from March 2005 to October 2007) as well as the six years and seven months spent in the Court’s detention centre in

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<sup>304</sup> [Second Defence Observations](#), para. 96.

<sup>305</sup> [Second Defence Observations](#), paras. 100-101.

<sup>306</sup> [Second Defence Observations](#), paras. 102-105 and 110. See also, Defence “Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute”, 10 February 2009, ICC-01/04-01/07-891-Conf-Exp, para. 11, in particular, ICC-01/04-01/07-891-conf-AnxH1.

<sup>307</sup> [Second Defence Observations](#), para. 106.

<sup>308</sup> [Second Defence Observations](#), para. 102.

<sup>309</sup> [Second Defence Observations](#), para. 107. See also, para. 103(2); ICC-01/04-01/07-40-Anx3.6.

The Hague (from November 2007 to May 2014) should be deducted from the sentence to be pronounced against Germain Katanga.

153. In the alternative, the Defence contends that the deduction from the sentence should be based on the period of time immediately following the date from which Germain Katanga became the main target of the investigation by the Office of the Prosecutor into the attack on Bogoro, which, according to it, apparently commenced in November 2005.<sup>310</sup>

154. In accordance with article 78(2) of the Statute,

In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

The Chamber will, therefore, first determine the time previously spent in prison by the convicted person in accordance with an “order of the Court” and then consider whether in this case there is any time to be deducted in accordance with the second sentence of article 78(2).

155. With respect to the time spent in detention in accordance with an order of the Court, the Chamber notes that the warrant of arrest against Germain Katanga was issued under seal on 2 July 2007<sup>311</sup> and notified to the Congolese authorities on 18 September 2007<sup>312</sup> before Germain Katanga’s subsequent transfer to the Court’s detention centre on 18 October 2007.<sup>313</sup>

The Chamber further notes that he was arrested by the Congolese authorities

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<sup>310</sup> [Second Defence Observations](#), para. 114.

<sup>311</sup> [Pre-Trial Chamber I, “Warrant of arrest for Germain Katanga”, 2 July 2007, ICC-01/04-01/07-1-US, reclassified as public on 18 October 2007 \(“Warrant of arrest”\)](#).

<sup>312</sup> Registry, “Report of the Registrar on the execution of the warrant of arrest for Germain Katanga pursuant to the ‘Decision on Request of the Defence of Germain Katanga to Issue an Order to the Registrar issued on 19 May 2008’”, 22 May 2008, ICC-01/04-01/07-497-Conf-Exp, para. 8, p. 7.

<sup>313</sup> [Registry, “Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga”, 22 October 2007, ICC-01/04-01/07-40-Conf-Exp, reclassified as public on 14 December 2007](#), pp. 3-4.

on 26 February 2005 and held in detention by them at the Kinshasa prison from March 2005.<sup>314</sup>

156. The Defence submission that Germain Katanga was detained on behalf of the Court upon the issuance of the warrant of arrest fails to convince the Chamber.

157. Following the Appeals Chamber ruling in *The Prosecutor v. Thomas Lubanga Dyilo*, the Chamber in fact considers that “issues regarding prior detention are relevant where they are part of the ‘process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.’”<sup>315</sup>

158. The Chamber therefore considers that, in the instant case, Germain Katanga’s detention on behalf of the Court began only once the Congolese authorities were notified of the fact that he was named in the warrant of arrest which it had issued, that is to say on 18 September 2007, which is the date on which the Registry notified the Congolese authorities that a warrant of arrest had been issued against Germain Katanga.<sup>316</sup> Evidently, he arrived at the Court only on 18 October 2007, after having been served the warrant of arrest by the competent Congolese authorities on 17 October 2007.<sup>317</sup> The Chamber considers, however, that the one month that elapsed between the notification to the Congolese authorities and Germain

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<sup>314</sup> Registry, “[Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga](#)” 22 October 2007, ICC-01/04-01/07-40, p. 2; [Second Defence Observations](#), paras. 77 and 95, citing “Defence motion for a declaration on unlawful detention and stay of proceedings”, 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp, para. 12.

<sup>315</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “[Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’](#)”, 13 February 2007, ICC-01/04-01/06 OA 7 (“[Judgment of 13 February 2007 in Lubanga](#)”), para. 121.

<sup>316</sup> Registry, “Report of the Registrar on the execution of the warrant of arrest for Germain Katanga pursuant to the ‘Decision on Request of the Defence of Germain Katanga to Issue an Order to the Registrar’” issued on 19 May 2008”, 22 May 2008, ICC-01/04-01/07-497-Conf-Exp, para. 8, p. 7.

<sup>317</sup> See, in particular, [ICC-01/04-01/07-40-Anx 3.6](#), p. 3.

Katanga's transfer to the Court "[TRANSLATION] was part of the process of bringing [Germain Katanga] to justice [...] before the Court".<sup>318</sup> In fact, during that period, the Congolese authorities expressed no intention of trying him and, on the contrary, made known their readiness to cooperate with the Court,<sup>319</sup> which is what happened, one month being a reasonable amount of time to effect the transfer.

159. Regarding the deduction of any other time spent in detention in relation to conduct underlying the crimes, the Chamber considers, in particular in the light of a combined reading of the English, French and Spanish versions of article 78(2) of the Statute, that only a period of detention for acts constituting the same crimes of which the accused person is convicted may be deducted from the sentence pronounced.<sup>320</sup>

160. With respect to the period of time during which Germain Katanga was detained in the DRC after his arrest, before examining it in substance, it is worth recalling some of the Chamber's findings in its rejection of the Defence's admissibility challenge. Regarding, in particular, the request by the *Auditeur général* [Chief Military Prosecutor] of 2 March 2007 for an extension of the preventive detention, cited by the Defence to demonstrate that he was being investigated for the Bogoro attack of 24 February 2003,<sup>321</sup> the Chamber considered that "this document does not specify the exact date of the acts allegedly committed in that location [Bogoro]" nor was it conducive as to whether the acts allegedly committed there could be attributed to Germain

<sup>318</sup> [Arrêt du 13 février 2007 dans l'affaire Lubanga](#), para. 121.

<sup>319</sup> Registry, "Report of the Registrar on the execution of the warrant of arrest for Germain Katanga pursuant to the 'Decision on Request of the Defence of Germain Katanga to Issue an Order to the Registrar' issued on 19 May 2008", 22 May 2008, ICC-01/04-01/07-497-Conf-Exp, paras. 3, 8 and 12, pp. 6-8.

<sup>320</sup> The English version of article 78(2) of the Statute reads as follows: "[...] The Court may deduct any time otherwise spent in detention in connection with *conduct underlying the crime*." The Spanish version provides that "[...] *La Corte podrá abonar cualquier otro período de detención cumplido en relación con la conducta constitutiva del delito*" [emphasis added].

<sup>321</sup> ICC-01/04-01/07-891-Conf-AnxH1. See also, [Second Defence Observations](#), para. 103(1).

Katanga rather than to one or both of the seven people also mentioned in the document”.<sup>322</sup> Furthermore, regarding the written record of Germain Katanga’s interview by an officer of the prosecuting authority on 20 January 2006, the Chamber refers to its previous finding that it “is simply a transcript of what Germain Katanga said during the interview” and that it “does not constitute evidence to the effect that the judicial authorities of the DRC were conducting an investigation into the events under consideration by the Pre-Trial Chamber”.<sup>323</sup>

161. The Defence further relies on numerous documents which state the nature of the crimes for which Germain Katanga was detained in the DRC.<sup>324</sup> In the view of the Chamber, such documents, which are too general in nature,<sup>325</sup> cannot in fairness be relied on to submit that the latter was detained at the time in connection with conduct underlying the crimes for which the Chamber found him guilty on 7 March 2014.

162. The documents must, furthermore, be read in the light and context of the whole file. In fact, it is worth noting that, on the basis of other more detailed evidence and documentation, which clearly identifies the charges against each accused person in the Congolese proceedings, it can be argued that the foremost concern of the charges against Germain Katanga was the murder of MONUC peacekeepers in Ndoki on 25 February 2005, the attacks

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<sup>322</sup> “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 70. See also, [Registry, “Transmission par le Greffier des ‘Observations de la RDC sur le mémoire d’appel soumis à la Cour pénale internationale par la Défense’”, 1 September 2009, ICC-01/04-01/07-1449-Anx](#), p. 3.

<sup>323</sup> “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, 16 June 2009, ICC-01/04-01/1213-tENG, para. 71. See also, [Registry, “Transmission par le Greffier des ‘Observations de la RDC sur le mémoire d’appel soumis à la Cour pénale internationale par la Défense’”, 1 September 2009, ICC-01/04-01/07-1449-Anx](#), p. 4.

<sup>324</sup> [Second Defence Observations](#), para. 104 and footnote 170.

<sup>325</sup> In particular, documents ICC-01/04-01/07-891-Conf-AnxC1; ICC-01/04-01/07-891-Conf-AnxC2; ICC-01/04-01/07-891-Conf-AnxA1; ICC-01/04-01/07-891-Conf-AnxA2; ICC-01/04-01/07-891-Conf-AnxN. The Chamber notes that these documents either do not state the date or location or the type of crimes allegedly committed by Germain Katanga, or refer to a period between May 2003 and December 2005, i.e. not including the battle of Bogoro.

on civilians in Tchomia on 31 March 2003 and on civilians in Lengabo on 20 September 2004, as well as “[TRANSLATION] [h]is involvement in the abduction and murder of approximately a hundred Hema civilians, and the enslavement of hundreds of other persons abducted on Lake Albert between 2002 and 2004”.<sup>326</sup>

163. Such documents, including a summary of the status of the proceedings drafted by the investigating magistrate on 10 August 2005<sup>327</sup> and a request for additional information addressed to the Prosecutor of the ICC by the Chief Military Prosecutor at the Military High Court dated 22 January 2007,<sup>328</sup> show rather that, during the entire detention period under consideration, the attack on Bogoro of 24 February was neither explicitly nor implicitly included in the matters under investigation concerning Germain Katanga in the DRC. The Chamber can therefore conclude that the latter was detained in the DRC for crimes other than those before the Court.

164. Furthermore, regarding the DRC’s investigation of the convicted person, the Chamber notes that the *Directeur de cabinet* [Chief of Staff] of the Chief Military Prosecutor at the Military High Court clearly stated that the Office of the Chief Military Prosecutor had opened no investigation against Germain Katanga relating to the attack on Bogoro of 24 February 2003.

165. Apart from a single and, in fact, very imprecise document concerning seven people, not Germain Katanga alone, there is a coherent collection of other pieces of evidence concerning the latter and which provide clearer information about the exact reason for the proceedings against him in the DRC and the grounds for the prosecution. Nonetheless, the Chamber

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<sup>326</sup> ICC-01/04-01/07-891-Conf-AnxD1, p. 3; ICC-01/04-01/07-11-891-Conf-AnxI, p.9; ICC-01/04-01/07-891-Conf-AnxQ (DRC-OTP-0155-0319); ICC-01/04-01/07-891-Conf-AnxB1.

<sup>327</sup> ICC-01/04-01/07-11-891-Conf-AnxI.

<sup>328</sup> ICC-01/04-01/07-891-Conf-AnxD1.

considers that the scope of those investigations cannot, in the instant case, be completely dissociated from the facts on which the detention decision is grounded. In fact, some of the documents submitted with the Chamber and which specifically relate to this investigation clearly mention the “charges” against Germain Katanga and the six other people charged alongside Germain Katanga.<sup>329</sup>

166. In view of these findings, the information available to the Chamber based on the statements made by the Chief Military Prosecutor in 2009 confirms the fact that Germain Katanga’s detention was not due to his alleged role in the fighting on 24 February 2003. Referring to the two documents relied on by the Defence, the Chief Military Prosecutor stated before the Appeals Chamber that “[TRANSLATION] [b]eyond these two references, no significant procedural step [...] was taken in this regard which could have supported the contention regarding investigations conducted by the Congolese authorities”.<sup>330</sup> In the light of such statements, of particular clarity, by the competent Congolese authorities, the Chamber will not lend more weight than required to the document cited by the Defence, referring to the principle of *ne bis in idem* in the decision to close the proceedings that were ongoing in the DRC.<sup>331</sup>

167. Bearing in mind all the above factors, the Chamber considers that it is in possession of a body of sufficiently clear and consistent information to rule that there is no reason to deduct the period running from February 2005 to September 2007 from the sentence pronounced.

168. The Chamber will therefore deduct from the sentence imposed on Germain Katanga only the period spent in detention from 18 September 2007.

<sup>329</sup> ICC-01/04-01/07-891-Conf-AnxD1, p. 3; ICC-01/04-01/07-11-891-Conf-AnxI, pp. 6-9.

<sup>330</sup> [Registry, “Transmission par le Greffier des ‘Observations de la RDC sur le mémoire d’appel soumis à la Cour pénale internationale par la Défense’”, 1 September 2009, ICC-01/04-01/07-1449-Anx](#), p. 4.

<sup>331</sup> [ICC-01/04-01/07-40-Anx3.6](#). See, in this respect, [Second Defence Observations](#), paras. 103(2) and 107.

## G. FINES

169. According to the provisions of article 77(2) of the Statute, the Court may order a fine and/or forfeiture of property and assets derived directly or indirectly from the crime, while rule 146 sets forth modalities for the imposition of such penalties. Directed by the Chamber to provide it with all useful information in this respect,<sup>332</sup> the Registry reported that in his application for legal assistance dated 14 November 2007, Germain Katanga stated that he owned no property. Investigations conducted by the Registry revealed that he indeed owned no property which he may have failed to disclose and this led to a provisional declaration of indigence in a decision on 23 November 2007.<sup>333</sup> Since then the Registry has received no further information that could lead it to believe that any change could have occurred in Germain Katanga's financial situation and is therefore unable to make a statement about his "[TRANSLATION] solvency with respect to a possible imposition of a fine".<sup>334</sup> In the absence of sufficient information to assess the situation, the Chamber imposes no fine.

## H. OPERATIVE PROVISIONS

170. For the reasons set out above, the Chamber imposes prison sentence of a total of 12 years for accessoryship in any other way to the commission of the crime of murder as a war crime and crime against humanity, the crime of attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime, and the crime of destruction of enemy property as a war crime and the crime of pillaging as a war crime.

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<sup>332</sup> E-mail sent by the President of the Chamber to the parties and the Legal Representative at 15:35 on 20 March 2014.

<sup>333</sup> Registry, "Decision of the Registrar on the applications for legal assistance paid by the Court filed by Mr Germain Katanga", 23 November 2007, ICC-01/04-01/07-79.

<sup>334</sup> "[\*Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga\*](#)", paras. 1-2.

171. In accordance with the provisions of article 78(2), the Chamber orders the deduction from Germain Katanga's sentence of the time spent in detention between 18 September 2007 and this day, 23 May 2014.

Done in both English and French, the French version being authoritative

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**Judge Bruno Cotte**  
**Presiding Judge**

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**Judge Fatoumata Dembele Diarra**

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**Judge Christine Van den Wyngaert**

Judge Christine Van den Wyngaert appends a dissenting opinion to this judgment

**Dated this 23 May 2014**

**At The Hague, the Netherlands**