



Original: **English**

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

Date: **11 April 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 CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA**

Public Redacted Version

**CORRIGENDUM to
Defence Observations on Sentencing**

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Ms Fatouma Bensouda, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain

Katanga
Mr David Hooper Q.C.

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Mr Herman von Hebel

PROCEDURAL BACKGROUND

1. On 7th March 2014, the Trial Chamber issued its Article 74 Judgement (“judgement”),¹ and ordered the following:

ORDONNE aux parties et au Représentant légal de lui adresser avant le 17 mars 2014 à 16h leurs observations écrites sur la procédure à adopter aux fins de fixation de la peine ainsi que sur les principes devant être retenus pour arrêter la peine appropriée ;

ORDONNE aux parties et au Représentant légal de lui faire parvenir avant le 24 mars à 16 h leurs observations écrites mentionnées au paragraphe 5 de la présente Ordonnance ;

(Paragraphe 5: Il appartiendra également aux parties et au Représentant légal d'adresser à la Chambre avant le 24 mars 2014 toutes observations qu'ils jugeront nécessaires pour qu'elle puisse se prononcer utilement au regard de la règle 145 du Règlement.)

INVITE le Procureur et la Défense de Germain Katanga à lui préciser dès à présent et au plus tard le 24 mars 2014 à 16 h s'ils entendent voir citer un ou des témoins et, si tel est le cas, d'en faire parvenir la liste en joignant toutes justifications et précisions utiles.²

2. On 17th March 2014, the defence for Germain Katanga (‘the defence’) submitted the *Defence Observations on the Proceedings and Principles Relevant to Sentence* (“*Sentencing Principles Observations*”).³ The defence now submits, the period of time within which to do so having been extended to 7th April, its observations relevant to Rule 145 of the Rules of Procedure of Evidence, ‘Determination of Sentence’.
3. The defence submits this filing, including all annexes, as confidential since it refers to a confidential report from the Registry and to confidential evidence from the prosecution and the defence and includes the name of potential defence witnesses. A public redacted version will be submitted in due course.

SUBMISSIONS

I- Mr Katanga’s personal history (Rule 145(1)(c))

¹ ICC-01/04-01/07-3436.

² ICC-01/04-01/07-3437, *Ordonnance portant calendrier de la procédure relative à la fixation de la peine* (article 76 du Statut).

³ ICC-01/04-01/07-3443.

4. The principle matters in mitigation of sentence are his age, the nature of his role, the exceptional circumstances in which he found himself, his capacity for reform, co-operation with the court, and his family life.
5. Germain Katanga's personal history appears not to be in dispute. It was reviewed in the defence closing brief⁴ and referred to in the judgement⁵.
6. As stated in the closing brief; 'Germain Katanga was born on 28th of April 1978 in Mambasa.⁶ He lived there until the age of 14.⁷ He was raised by his uncle and aunt and considered them as his parents.⁸ His uncle was a soldier in the National Army of Zaire. They moved to Isiro, Upper Uele when he was fourteen.⁹ He attended school and trained in the civil guard in 1996.¹⁰ His uncle was killed in 1996 during the AFDL advance.¹¹,
7. There is nothing remarkable about his life until that event in 1996, when Germain was just 18. Having lost the man he considered to be his father, and being, at best, distant from his biological mother, Germain sought out his family in Ituri. He met his father and his brothers and sister for the first time in Aveba in October 1998.¹² He remained at secondary school, starting his fourth year in humanities in Aveba in November 1998.¹³ He did not obtain his school certificate until 2004.¹⁴ He was not particularly well placed to lead the Ngiti – he did not speak the language and had little or no contact with the community until he joined his father in 1998. Perhaps there may be an element of his seeking to be accepted as a son of that community in his subsequent behaviour.
8. There is nothing here to suggest what was to lie ahead for him. Despite the Second Congo War there was no militia in Aveba at the time,¹⁵ but with the unfolding of

⁴ Second Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Conf-Corr2, 23 April 2012, para. 555.

⁵ 3436-tENG-Jugt-Section X-A. Criminal respty of GK-paras1235-1365 at paragraphs 1246 et seq.

⁶ D2-300-T-314-p.21 (FRA-p.19); EVD-D02-00118/Map indicating Mambasa.

⁷ D2-300-T-314-p.23 (FRA-p.20).

⁸ D2-300-T-314-pp.37-38 (FRA-p.33).

⁹ D2-300-T-314-pp.31-32 (FRA-pp.27-28).

¹⁰ D2-300-T-314-pp.35-36 (FRA-pp.31-32); D2-300-T-320-p.46 (FRA-pp.47-48).

¹¹ D2-300-T-314-p.34 (FRA-p.30).

¹² D2-300-T-314-pp.41-42 (FRA-p.36).

¹³ D2-300-T-314-pp.42-43 (FRA-pp.36-37).

¹⁴ Annex2, DRC-D02-0001-0465.

¹⁵ D2-136-T-240-p.20-l.19 (FRA-p.18-l.21).

events it was not long before resistance to the Ugandan occupiers became an obligation. There can be no doubt that Germain demonstrated that he was an exceptionally brave and resourceful young man in the following few years, distinguished by his courage, and thereby becoming a significant figure within his community by 2003. Courage has a moral value, and he has continued to demonstrate it in his conduct up to this day.

9. Germain Katanga was only 24 at the time of the Bogoro attack. His being so young is a major mitigating factor, particularly when set within the context of the times. Again, there is no dispute as to the severe degradations inflicted on the Ngiti community at that time. As referred to in the *Katanga* judgement, “regard must first be had to the Prosecution’s reference to the encirclement of Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement* and the resultant impossibility of securing supplies in food and goods. Both the Prosecution and Defence drew attention to repeated attacks by the UPDF and later the UPC against both territorial entities”.¹⁶ The Chamber acknowledged that ‘between August and November 2002 the UPC militia and its then allies launched multiple offensives against that *collectivité*’,¹⁷ and made reference to both evidence and to the MONUC report¹⁸ on the events in Ituri, concluding that “the suffering then endured by the Ngiti civilian population of Walendu-Bindi is therefore undeniable”.¹⁹
10. The Chamber also noted that “the 15 November 2002 Grievance Letter paints a very vivid picture of the sheer turmoil and utter abandonment afflicting the grassroots Lendu community”.²⁰ The turmoil brought about by several years of war imposed on an already failing State led to its ‘abandonment’ of its Eastern territory in face of invasion by Uganda and Rwanda. Faced with repeated attacks there was no option but for the peasant community to take up arms, whether traditional arms or the firearms necessary for them to confront the Ugandan Army and its militia, the UPC. The fact that such resistance was ‘jus ad bellum’ justifies participation. Defending the community against such hurt and hardship became a necessity.

¹⁶ *Katanga* judgement, para. 569.

¹⁷ *Katanga* judgement, para. 570.

¹⁸ EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0340, para. 21).

¹⁹ *Katanga* judgement, para. 570.

²⁰ *Katanga* judgement, para. 573.

11. Unhappily, in discharging that necessity the militia - a largely untrained, ill-educated and undisciplined group - committed the excesses reflected in the present charges. Germain Katanga's contribution to that situation, his role and responsibility, is reviewed further below.
12. There is a difficult moral paradox presented by the situation that confronted Germain Katanga. The supply of weapons in a situation where the supplier is aware of the propensity or intent for the supplied persons to commit crimes raises difficulties as to where the line should be drawn. This is particularly so if the supplier lacks effective control over the excesses committed. Should Katanga not have helped facilitate the supply of weapons, despite the repeated attacks and excesses committed on his community? The defence takes the example of supplies to either side in the present Syrian conflict. Political necessity may drive that supply, but the suppliers surely know that some part of the arms will be used in committing excesses. What responsibility arises for others, the principle suppliers? Are they more, or are they less, to blame? How is the moral wrong to be measured?
13. Certainly it is difficult for us to put ourselves in Germain Katanga's shoes in early 2003. What would we have done, aged 24, if placed in his situation, with his background, in anarchic circumstances, subjected to the manipulation of others, and the influence of mystics and *féticheurs* ?

II- Mr Katanga's degree of participation and intent (Rule 145(1)(c))

14. In its Defence Observations on the Proceedings and Principles Relevant to Sentence,²¹ the defence informed the Trial Chamber of the position taken by the *ad hoc* tribunals in respect of the manner in which the role of the perpetrator is taken into account as a mitigating factor in the event of a conviction. Both the ICTY and ICTR have held that 'aiding and abetting' or 'being an accomplice in other ways in the commission of a crime' deserves, in most cases, a lower sentence than co-perpetration.²² This is particularly apposite when the ingredient of control over the crime, and over the perpetrators of the crime, is given such prominence as in Article 25(3)(a).

²¹ ICC-01/04-01/07-3443.

²² *Ibid*, paras. 48-49. See also *Vasiljevid*, AJ ¶ 182; Juvenal Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgement, 1 Dec. 2003, ¶ 963. See also http://wcjp.unicri.it/deliverables/docs/Module_13_Sentencing_and_penalties.pdf, para. 13.2.2.2.

15. Most importantly, the Chamber must always apply the principle of proportionality with regard to the role played in the commission of the crime and the sentence eventually imposed.²³ In this regard, it is worth mentioning that:²⁴

A finding of mitigating circumstances relates to the assessment of sentence and in no way derogates from the gravity of crime nor diminishes the responsibility of the convicted person or lessens the degree of condemnation of his/her actions. It mitigates punishment, not the crime.

16. Not only is the role significant in determining the appropriate sentence, the intent is equally important. The commission of a crime with direct intent is considered graver than assisting the commission of a crime with awareness that the crime will, in the ordinary course of events, be committed without personally having the intent that the crimes be committed.²⁵ This was also the position of Trial Chamber I in determining Mr. Lubanga's sentence. The Chamber took into account the fact that it had not concluded that Mr. Lubanga "meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities".²⁶ Rather, the Chamber had found that he "was aware that, in the ordinary course of events, this would occur",²⁷ which distinction it treated as "an important foundation for the sentence to be passed by the Chamber".²⁸
17. In terms of the ranking and position of the convicted person, the Chamber in *Lubanga* noted that, if such factors were already considered in reaching a conclusion on the factual ingredients of the charges, then they should "not be "double-counted" for the purpose of sentence".²⁹

²³ *Sentencing Principles Observations*, para. 48.

²⁴ B. Holá et al, 'International Sentencing Facts and Figures Sentencing Practice at the ICTY and ICTR', 411 JICJ 9 (2011), 419, available at: <http://www.corteidh.or.cr/tablas/r26620.pdf>, with reference to: Judgment, Milutinovic et al. (IT-05-87), Trial Chamber, 26 February 2009, § 1150; Judgment, Elizaphan & Gerard Ntakirutimana (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, § 781.

²⁵ *Ibid*, 423, with reference to: O. Olusanya: *Sentencing War Crimes and Crimes against Humanity under the International Tribunal for the Former Yugoslavia* (Groningen: Europa Law Publishing, 2005).

²⁶ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 52.

²⁷ *Ibid*, para. 52.

²⁸ *Ibid*, para. 53.

²⁹ *Ibid*, para. 51.

18. In addition, the defence reiterates that, “where the role of the convicted person is limited, his or her position of authority is not an aggravating factor”.³⁰ Also, “[t]he degree to which a leadership position may increase the relative seriousness of crimes and sentence severity depends on the actual level of authority of a defendant.”³¹ Indeed, both the lack of actual authority over the alleged perpetrators, and the lack of personal participation in the commission of the crime, can mitigate the sentence.³²

19. In applying these principles to Germain Katanga, the defence requests the Chamber to consider, in particular, the following facts established in its judgment:

- (1) The Chamber did not find that Germain Katanga was present at the crime scene when the crimes were committed;
- (2) The Chamber did not find that Germain Katanga had effective control over the perpetrators;
- (3) The Chamber did not find that Germain Katanga led or planned the attack on Bogoro;
- (4) The Chamber found that his role was limited to helping the delivery, and distribution of fire-arms before the attack on Bogoro;
- (5) The Chamber found that the majority of the crimes were committed with traditional weapons;
- (6) The Chamber did not find that Germain Katanga intended that the crimes be committed, but rather that he had knowledge that the crimes would be committed.

(1) Lack of presence at the crime scene

20. At paragraphs 752 and 753 of the judgment, the Majority states that the evidence neither shows that Katanga was present during the attack on Bogoro, nor at any

³⁰ *Sentencing Principles Observations*, para. 50. See also *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.848; *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 67.

³¹ B. Holá et al, ‘International Sentencing Facts and Figures Sentencing Practice at the ICTY and ICTR’, 411 JICJ 9 (2011), 418, with reference to: Judgment, Krajisnik (IT-00-39), Trial Chamber, 27 September 2006, § 1156.

³² *Sentencing Principles Observations*, para. 50.

celebratory events thereafter, nor that he claimed victory for the ‘successful’ Bogoro attack.

21. It remains the defence submission that Katanga was not at Bogoro but in Aveba, fifty kilometres away.³³ There is no evidence that he was in communication with the attackers during the attack, or directing events.
22. That he was far away when the crimes were committed shows that he did not directly participate in them, and had no direct control over their commission. Indeed, there is no evidence that Germain Katanga personally committed murder, destruction or pillage. As aforementioned, this has been treated by other international criminal tribunals as a mitigating factor.³⁴ The defence submits that his absence from the crime scene should, in the particular circumstances of this case, substantially mitigate sentence. Indeed, his level of participation in the Bogoro attack, as established by the Chamber, is relatively indirect and remote. Such participation must be treated in a significantly different manner from that of commanders and combatants who participated in the attack.

(2) Lack of effective control

23. The Majority found that Germain Katanga was the most important commander in Aveba at the time that the Bogoro attack took place, and that he had a rank superior to Mbadu and Garimbaya.³⁵ However, it concluded that the evidence did not show that Katanga had *de facto* control over either of them, or the men under their authority.³⁶
24. The Majority also found that, at least as of 9th February 2003, he was the President, in name, of all Ngiti militiamen of the Walendu-Bindi *collectivité*.³⁷ However, the Chamber recognized that the essential question is not his position on paper but rather whether he had effective control over the Ngiti militiamen of the Walendu-Bindi

³³ Closing Brief, para. 277.

³⁴ See above, para. 18.

³⁵ *Katanga* Judgment, paras. 1295-1306.

³⁶ *Katanga* Judgment, paras. 1305-1306.

³⁷ *Katanga* Judgment, paras. 1314-1334, in particular para. 1334.

collectivité.³⁸ It concluded that the evidence did not demonstrate that Katanga had such effective control at the time of the Bogoro attack.³⁹

25. In this regard, the defence repeats its submission that the Ngiti commanders acted autonomously, each being in charge of his own fief, and that it was difficult, if not impossible, to exercise control over any of the commanders based elsewhere. The Ngiti militia did not have the sophisticated organisation of the UPC, and only few of them received any level of training.⁴⁰ Indeed, the Majority found it impossible to conclude that there was a centralized command structure among the Ngiti militia in Walendu-Bindi.⁴¹ It further found that Katanga's position as commander was limited to Aveba and to effective control over only the 60 militiamen in Atele-2.⁴² None of the men under Katanga's effective control have been found to have participated in the Bogoro attack.

26. It is also noteworthy that the Chamber found that the *féticheurs* had an important role to play vis-à-vis the Ngiti militia and their activities. In this regard, the Majority cited the testimonies of D02-148, D02-228 and other evidence, including that of Katanga, which emphasised the direct, incontestable authority exercised by the *féticheurs* over the militia.⁴³ Katanga, a 24-year-old young man who himself believed strongly in the magical powers of the *féticheurs*, acted under the authority of the *féticheurs* and would not act without their approval. While the Majority concluded that Katanga had close relations with Kasaki, based on mutual respect and confidence,⁴⁴ it also found that the *féticheurs* were directly involved in military issues and played an essential role "*dans la mesure où leur intervention avait pour ces derniers une incidence directe sur le déroulement que pourraient avoir les combats*".⁴⁵ This further undermined Katanga's position over the militia.

27. Accordingly, the defence submits that Katanga's lack of effective control over any of the perpetrators should be treated as a mitigating factor. The defence requests the Chamber to do so despite its observation that it cannot be denied that Katanga had a

³⁸ *Katanga Judgment*, paras. 1238, 1335.

³⁹ *Katanga Judgment*, paras. 1347, 1350, 1358, 1359, 1364, 1365.

⁴⁰ Closing Brief, paras. 663-678.

⁴¹ *Katanga Judgment*, para. 1365.

⁴² *Katanga Judgment*, paras. 1305-1306.

⁴³ *Katanga Judgment*, paras. 1253 - 1258.

⁴⁴ *Katanga Judgment*, paras. 1257-1258.

⁴⁵ *Katanga Judgment*, para. 1258.

certain level of authority over the Ngiti combatants and enjoyed respect and recognition.⁴⁶ In the view of the Majority, this is evidenced in part by the fact that the military authorities in Beni assigned Katanga the important task of distributing the weapons transported to Aveba.⁴⁷ However, the Majority relied upon this position in its finding that Katanga's role in distributing weapons amounted to a significant contribution, necessary for a finding of guilt under article 25(3)(d). The defence submits that this finding should not then be used to undermine the conclusion concerning his lack of effective control over any of the Ngiti fighters at Bogoro, which is clearly of a mitigating nature.

(3) No leading role in the attack

28. The Chamber acquitted Katanga on all charges under article 25(3)(a).⁴⁸ It considered that the prosecution failed to prove that Katanga played a leading role in the Bogoro attack. The evidence did not demonstrate a leading role before, during or after the attack, for instance, by giving orders or instructions. He did not order his troops to participate in the attack, nor did he lead anyone in the attack.
29. The Chamber further found it was not proven that Katanga played a role in organizing or planning the attack on Bogoro. The Chamber accepted that the attack was formulated by EMOI and RCD-KML in Beni with the intention of ridding Bogoro of the UPC military base. Katanga collaborated with the authorities in Beni, and played a certain role in discussions about the shared military objective to reconquer Ituri.⁴⁹
30. The Majority also found that there was another plan of the Ngiti militia, which went further than attacking the UPC military base. Their plan was to eliminate the enemy, which included both the UPC soldiers and Hema civilians still residing at Bogoro.⁵⁰
31. Although the Majority found that Katanga was aware of, and contributed to both plans,⁵¹ it held that the evidence failed to establish that he played a role in formulating or implementing it.⁵² Accordingly, notwithstanding the Majority's finding that

⁴⁶ *Katanga Judgment*, paras. 1342, 1343, 1359.

⁴⁷ *Katanga Judgment*, paras. 1341-1343.

⁴⁸ *Katanga Judgment*, para. 1421.

⁴⁹ *Katanga Judgment*, paras. 578-590, 1269.

⁵⁰ *Katanga Judgment*, para. 602. *See also* paras. 695-718, emphasising the ethnic nature of the conflict.

⁵¹ *Katanga Judgment*, paras. 1672-1675.

⁵² *Katanga Judgment*, para. 1420.

Katanga had a position of command in Aveba and was President of the Ngiti combatants,⁵³ it has not been established that he used his position of authority in any way to lead the attack. In accordance with the jurisprudence of other international tribunals, this fact should mitigate his sentence.⁵⁴

(4) Role limited to weapons distribution prior to the attack

32. The Majority found that Katanga acted as an intermediary between the RCD/KML, APC and EMOI authorities in Beni, and the Ngiti militia in Walendu-Bindi,⁵⁵ and, in that position, facilitated the receipt of firearms and ammunition prior to, and in preparation for, the Bogoro attack.⁵⁶ The Majority found that at least part of the weapons were stored at Katanga's residence.⁵⁷ The Majority also found that the weapons and ammunition were subsequently distributed among several Ngiti camps in Walendu-Bindi, and that Katanga, as an essential interlocutory, had control over this distribution.⁵⁸ Finally, the Majority found that Katanga knew that the recipient Ngiti commanders would use the firearms in the Bogoro attack and that they would kill the Hema civilians found there and destroy their property.⁵⁹ This is the extent of Katanga's established involvement. The Majority did not find that Katanga instructed the commanders to use them for the purpose of killing civilians. Nor did the Majority find that Katanga made any other contribution.

33. Although the Majority found Katanga's involvement sufficiently significant to reach a finding of guilt under article 25(3)(d), the role is far more limited than that ascribed to him by the confirmation decision. Indeed, the Pre-Trial Chamber found substantial grounds to believe that Katanga, together with Ngudjolo, through the troops under their control, jointly planned and orchestrated the attack.⁶⁰ There is a considerable difference in practice between the two modes of liability. Though the defence agrees with the prosecution's submission that, as a general proposition, "there should be no automatically lower sentence for criminal responsibility as an accessory or under

⁵³ *Katanga Judgment*, paras. 1314-1334.

⁵⁴ See above, paras. 14, 18.

⁵⁵ *Katanga Judgment*, paras. 1269, 1671.

⁵⁶ *Katanga Judgment*, paras. 1278, 1671.

⁵⁷ *Katanga Judgment*, para. 1278.

⁵⁸ *Katanga Judgment*, paras. 1279-1293, in particular para. 1291.

⁵⁹ *Katanga Judgment*, paras. 1672-1675, 1684-1691.

⁶⁰ ICC-01/04-01/07-717, Decision on the Confirmation of Charges, paras. 573-580.

Article 25(3)(d)”,⁶¹ the circumstances of the present case makes a lower sentence entirely appropriate. While Katanga’s combined role, contribution and position have been found to be sufficiently significant to justify conviction under article 25(3)(d),⁶² it is not, in the submission of the defence, and in light of the matters referred to above and elsewhere, of such a quality to demand a severe sentence.⁶³

(5) The firearms he distributed only contributed to the crimes in part

34. The Majority accepts that most of the Ngiti militiamen had only limited experience in the use of firearms and carried principally traditional weapons.⁶⁴ It also finds in its judgment that, undoubtedly, most of the crimes were committed with such traditional weapons, and not the firearms which Katanga has been found to have distributed.⁶⁵ Whilst in no way ignoring the Majority’s finding that the firearms made these crimes possible,⁶⁶ the defence submits that their limited use in the direct commission of crimes should have some mitigating effect. It reduces the direct nature of Katanga’s contribution to the crimes, and demonstrates that these firearms may well have been intended to be used mainly for the legitimate purpose of attacking the UPC army base.

(6) Katanga did not have the intent, but only knowledge of the commission of crimes

35. The Majority did not find that Katanga intended the crimes to be committed even though it found that Katanga shared the anti-Hema ideology.⁶⁷ It concluded that Katanga knew of the plan of the Ngiti militiamen to attack the Hema civilian population in Bogoro with the weapons he distributed.⁶⁸ The Majority drew that conclusion principally on the ground that Katanga knew the methods usually employed in war in Eastern Congo.⁶⁹ In particular, it relied on Katanga’s knowledge of the civilian casualties, caused by Ngiti combatants at Nyakunde five months earlier.⁷⁰ However, the Majority did not find that Katanga participated in the

⁶¹ ICC-01/04-01/07-3444, para. 38.

⁶² *Katanga* Judgment, paras. 1679-1681.

⁶³ Contrary to the prosecution’s proposition at para. 42, *ibid.*

⁶⁴ *Katanga* Judgment, para. 1674.

⁶⁵ *Katanga* Judgment, para. 1677.

⁶⁶ *Katanga* Judgment, para. 1676-1678.

⁶⁷ *Katanga* Judgment, para. 1688.

⁶⁸ *Katanga* Judgment, 1684-1691.

⁶⁹ *Katanga* Judgment, paras. 1685, 1689.

⁷⁰ *Katanga* Judgment, paras. 1686, 1687, 1689.

Nyakunde attack, nor that he had ever employed the war methods to which he had referred, even though he was a seasoned combatant. They relied only on his knowledge thereof. The defence submits that, similarly to *Lubanga*, the Chamber should take into account, as a mitigating circumstance, the fact that no intent to murder, destroy and pillage on the part of Katanga has been established. Even though liability under article 25(3)(d), as the Prosecutor has rightly pointed out,⁷¹ and contrary to aiding and abetting, requires a purposeful contribution to a group with a common purpose, this element is clearly compensated for by the lack of direct intent and/or participation.

36. While the Majority established Germain Katanga's intent for the purposes of accessoryship through the knowledge of preceding events,⁷² the defence stresses that the legal notion of *mens rea*/intent is not necessarily the same as meaning; that is, of *wanting* something to happen. Whilst the Majority found that Germain Katanga provided fire-power weapons and ammunition, such weapons would be the weapons of choice for an attack on a military object, which in the present case, was the UPC military base.

37. In fact, the Majority concluded that the Ngiti militia primarily bore bladed weapons (machetes, arrows, and spears), and that "much criminality" was "undoubtedly" perpetrated directly by machete and by bladed weapons.⁷³ Furthermore, it found that most of the men had limited experience of firearms and that the relevant physical perpetrators bore guns recovered during earlier battles, albeit to a limited extent.⁷⁴ The defence in no way downplays the effect and suffering of the civilian population. At the same time, however, this different, i.e., legal form of intent, as found by the Majority, from that of *wanting* something to happen, should be reflected in the sentence.

38. Specifically, the intent of a person standing in front of a civilian who he then kills with a machete, making the choice, i.e., *wanting* to kill said civilian there and then, is a different form of *mens rea* as found by the Majority. The defence submits that this difference should be clearly reflected in sentencing.

⁷¹ ICC-01/04-01/07-3444, para. 44.

⁷² See *Katanga* Judgment, paras 1685-1687.

⁷³ *Katanga* Judgment, para 1676. Defence translation of relevant excerpt.

⁷⁴ *Katanga* Judgment, para. 1673.

39. As indicated in the defence's 'Sentencing Principles Observations', a convicted person's sentence may be mitigated where he or she provides information, which assists the Chamber to establish the facts and ascertain the truth.⁷⁵ It is thereby not necessary for him or her to plead guilty.⁷⁶
40. Germain Katanga has given the Chamber ample information, which it relied on in establishing the facts. He did so at a high personal expense. Not only did Katanga testify for eleven days, he also answered all questions posed by the judges to the best of his ability and in great detail. The Majority acknowledges that Katanga provided it with many unsolicited explanations.⁷⁷ He testified about many facts upon which the Chamber based its finding of guilt, such as that he knew that the Nyakunde attack led to many civilian casualties, or that he was the coordinator between EMOI /RCD-KML and the militia. He also volunteered that he played a role in the transport, receipt and distribution of weapons from Beni. These and other concessions made by him have been employed to prove his culpability under article 25(3)(d).
41. His testimony was cited more than the testimony of any other witness. In addition, other defence witnesses have provided the Chamber with a considerable amount of information relied on in establishing the facts. Most notably, D02-228, D02-236, and D02-350 have provided significant details on what occurred in Ituri before, during and after the Bogoro attack. Reading through the judgment, there is very little left of the prosecution witnesses evidence.
42. It is the facts provided by the defence, which led to Katanga's conviction. But for his admissions, Katanga would have been acquitted. In fact, he was acquitted of the crimes charged, but was found guilty under a different mode of liability. In particular, given that the Majority holds the view that Katanga was fully informed of the risks of testifying and that he did so at his free will and in the presence of counsel,⁷⁸ the fact that he nonetheless provided these self-incriminating details should mitigate his sentence.

III- Aggravating factors

⁷⁵ *Sentencing Principles Observations*, para. 54, citing *Musema*, (Trial Chamber), January 27, 2000, para. 1005-1008 ; *Plavsic*, (Trial Chamber), February 27, 2003, para. 66-81.

⁷⁶ *Musema*, (Trial Chamber), January 27, 2000, para. 1005-1008 .

⁷⁷ *Katanga Judgment*, para. 1531.

⁷⁸ *Katanga Judgment*, paras 1529-1531.

(1) Impermissible Double Counting

a. *Element(s) of the Crime(s)*

43. As noted by the defence previously,⁷⁹ a factor that is an element of the crime cannot be also taken into account as an aggravating factor. With regard to the elements of the relevant crimes in the present case, the chapeau of crimes against humanity (Article 7) includes, in relevant part, “acts when committed as part of a widespread or systematic attack directed against any civilian population.” For the purposes of this chapeau element, in relevant part, “‘Attack directed against any civilian population’ means a course of conduct involving multiple commission of acts against any civilian population.”⁸⁰ The “course of conduct involving multiple acts” against the civilian population means necessarily that numerous acts against the population is an element of crimes against humanity and that therefore, the scale of such acts cannot be taken into account as an aggravating factor.

44. Indeed, as so found by the Majority, an attack signifies a campaign, an operation, or a series of actions directed against the civilian population; that is, a line of conduct and not a single and isolated act.⁸¹ Also in this regard, in determining whether the civilian population was the object of attack, the said population must be targeted in “sufficient number.”⁸² Alternatively, the means and methods of that attack, the status of the victims, their numbers, the discriminatory nature of the attack, and the nature of the crimes committed during the attack are determinative facts, amongst others, as to whether the civilian population was the primary target of that attack.⁸³ These facts are inherent in the relevant chapeau requirement and not additional elements to be taken into account as aggravating circumstances.⁸⁴

⁷⁹ *Sentencing Principles Observations*, para. 38. See also *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014, para. 936; *Ndindabahizi v. The Prosecutor*, Case No ICTR-01-71-A, Judgement, 16 January 2007, para. 137; *Prosecutor v. Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para. 583.

⁸⁰ See Article 7(2)(a).

⁸¹ *Katanga* Judgment, para. 1101. Defence translation of the relevant excerpt. See also *ibid.*, paras 1097 (“La première étape de ce raisonnement [regarding the application of Article 7 of the Statute] a trait à l’analyse de l’existence d’une attaque, ce qui signifie, au sens de l’article 7-2-a du Statut : 1° que soit établie l’existence d’une opération ou ligne de conduite, impliquant notamment la commission multiple d’actes mentionnés à l’article 7-1 précité”) and 1115, 1124.

⁸² *Katanga* Judgment, para. 1105. Defence translation of the relevant excerpt.

⁸³ *Katanga* Judgment, para. 1104. Defence translation of the relevant excerpt.

⁸⁴ See *Prosecutor v. Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 (“*Deronjić Judgement on Sentencing Appeal*”), para. 127.

45. Nor can the findings by the Majority that the plan was a criminal one⁸⁵, or its determination that it was carried out in an organised and coordinated manner⁸⁶, be taken into account as aggravating circumstances. For these too, are constituents of the Article 7 chapeau organisational policy and systematic requirements, respectively.

b. Gravity of the Crime(s)

46. Another accepted sentencing policy with regard to the impermissibility of double counting, is that no factor that was taken into account as an aspect of the gravity of the crime may additionally be taken into account as a separate aggravating circumstance.⁸⁷ Relying on different aspects of the same fact is also impermissible.⁸⁸

47. Thus, if considering the number of victims when assessing the gravity of the offence(s), this same factor cannot be taken into consideration as an aggravating factor.⁸⁹ Similarly, the vulnerability of the victims,⁹⁰ discriminatory intent⁹¹, and

⁸⁵ *Katanga* Judgement, para. 1164. See also *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, paras 523, 549; *Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 301, 302; *Prosecutor v. Muthaura et al.*, Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras 399, 400.

⁸⁶ *Katanga* Judgment, para. 1158.

⁸⁷ See ICC-02/04-02/07, *Prosecutor v. Katanga*, Defence Observations on the Proceedings and Principles Relevant to Sentence, 17 March 2014, para. 37. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 (“*Dragomir Milošević* Appeal Judgment”) para. 309; *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, para. 686; *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, Judgment, 22 February 2008 ([W]here a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor [...]. This prohibition is well established in the case law of the international criminal tribunals.”); Holá et al., *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR, J Int Criminal Justice* (2011) 9(2): 411-439, 420 (“In practice, it should not play a decisive role for sentence determination whether a certain factor is considered under the heading of crime gravity or under aggravating circumstances. The most important principle remains that no factor should be counted twice to the detriment of an accused.”).

⁸⁸ *Dragomir Milošević* Appeal Judgment, para. 309 (“In weighing a fact, either as an aspect of the gravity of the crime or as an aggravating circumstance, the Trial Chamber is required to consider and account all of its aspects and implications on the sentence to ensure that no double-counting occurs. The Appeals Chamber thus finds that the said facts could only be taken into consideration once – either as factors relevant to the gravity of the crimes or as aggravating circumstances.”).

⁸⁹ *Prosecutor v. Gatete*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 275. See also *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, para. 31 (Holding, in determining gravity as part of the admissibility requirement under Article 17(1)(d), that “[...] the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.”).

⁹⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 78; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 142.

abuse of authority⁹², when taken into consideration when determining the gravity of the offence(s), cannot be aggravating factors.⁹³

48. Furthermore, it has been held that the legal nature of the crimes, their scale and means in which they were carried out, and their impact and effect on the victims, are subsumed in the notion of gravity itself, and therefore cannot be taken into account as separate aggravating circumstances.⁹⁴
49. With regard to the victims of the relevant crimes, the defence recalls that the international humanitarian law (IHL) principle of distinction, on which the prohibition to attack civilians and/or the civilian population is based, follows from the rationale of IHL to limit in times of war, the suffering of those not or no longer participating in the fighting, as much as possible. Distinction ought to be made, when possible and subject to the proportionate collateral damage as a result of attacks on military objects, between combatants/fighters (or persons directly participating in hostilities) and “civilians”. No differentiation is made between “civilians”. The corresponding war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (article 8(2)(e)(i)), therefore does also not differentiate between various categories of civilians. Any such distinction should therefore not be made with regard either, to any aggravating circumstances or to the gravity of the crimes.

(2) The Specific Crimes

50. With regard, in particular, to murder as a crime against humanity (article 7(1)(a)(a)) and as a war crime (article 8(2)(c)(i)), the Chamber found, by Majority, that these crimes constituted an integral part of the attack directed against the civilian population.⁹⁵ As such, these crimes are subsumed within the conviction of directing an attack against a civilian population (article 8(2)(e)(i)), for which a single sentence should thus be entered. If the Chamber were to consider that separate sentences

⁹¹ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 142; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para. 500.

⁹² Where such authority has been established. See *Prosecutor v. Rajić*, Case No. IT-95-12-S, Sentencing Judgement, 8 May 2006, paras 106-108.

⁹³ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 142; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para. 500.

⁹⁴ *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 729.

⁹⁵ *Katanga* Judgment, para. 1164.

should be entered for the above-mentioned crimes, the sentences should similarly be subsumed within the sentence for directing an attack against a civilian population. Any joint sentence should therefore be set at the same level as that for directing an attack against a civilian population, and not result in a higher one due to the existence of multiple sentences.

51. Turning next to the issue of sexual violence, the Majority found that it too, formed part of the attack directed against the civilian population.⁹⁶ That being said, the Chamber acquitted Mr. Katanga of rape and sexual slavery as a crime against humanity (article 7(1)(g)) and as a war crime (article 8(2)(e)(vi)).⁹⁷ As such, these crimes cannot be attributed to him in a way that reflects his culpability, and so cannot then be considered in the determination of sentence.⁹⁸ This reflects the general principle of individual responsibility that underlies criminal law, as explained by the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia, that

[...] a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, individuals are not held responsible – either for the conviction or sentencing, for the unforeseeable acts of others involved in carrying out a plan.⁹⁹

52. Significantly, the Majority found that the specific crimes proscribed, in relevant part, by articles 7(1)(g) and 8(2)(e)(vi) of the Statute, comprised unforeseeable acts of those involved in carrying out the common plan.¹⁰⁰

IV-Mitigating factors

(1) General observations

53. The defence stresses that the prosecution case against Germain Katanga, as confirmed¹⁰¹ and as argued throughout the trial, differs significantly from the actual

⁹⁶ *Katanga Judgment*, paras 876, 1165, 1663.

⁹⁷ *Katanga Judgment*, paras 1663-1664.

⁹⁸ See *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 74.

⁹⁹ *Deronjić Judgement on Sentencing Appeal*, para. 124.

¹⁰⁰ *Katanga Judgment*, paras 1663-1664.

findings of the judgement. So too, does the overall threshold of gravity, at least insofar as the scale and the nature of the crimes are concerned.¹⁰² Ultimately, the prosecution allegations that Germain Katanga and Mathieu Ngudjolo, as direct perpetrators, “[...] used children as soldiers” and that as co-perpetrators, that “[t]hey killed more than 200 civilians in a few hours[,] [t]hey raped women, girls and elderly”, and that they “transformed” them into sexual slaves¹⁰³, were dismissed. Throughout the case, the defence contested this view of the prosecution and indeed, in the judgment, the number of 200 was reduced to 70, 30 of those were attributed, by means of accessoryship, to Germain Katanga.¹⁰⁴ The majority of these 30 were killed by machetes; the Majority found too, that the relevant physical perpetrators were already in possession of at least some of the weapons used¹⁰⁵, and thus that Germain Katanga did not contribute in this way. He was acquitted of the child soldier and rape and sexual slavery charges.

54. It would therefore be fair and logical that the substantial difference in the prosecution’s initial view of the case, including the number of victims and Germain Katanga’s role, leads to a greatly reduced proposed sentence. Notwithstanding the proposal by the prosecution, and on the basis of the foregoing, the defence recalls the finding by the Majority that Germain Katanga was far removed from the actual crimes insofar as his individual criminal responsibility is concerned.¹⁰⁶

(2) Mr Katanga’s conduct after the act

55. Pursuant to Rule 145(2)(ii) of the Rules, the Chamber shall take into account, as mitigating factors, “the convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.”

a. Support to the peace, disarmament and demobilization process

¹⁰¹ See generally *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008.

¹⁰² Cf. e.g., *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-80-ENG ET WT, 24 November 2009, pp 21-22.

¹⁰³ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-80-ENG ET WT, 24 November 2009, p. 22.

¹⁰⁴ *Katanga* Judgment, para. 869.

¹⁰⁵ See *Katanga* Judgment, paras 858-866.

¹⁰⁶ See e.g., *Katanga* Judgment, para. 1683.

56. There are very few examples, in the various cases brought before an international court, where an accused is said to have played such a constructive role in participating in the peace process and in the demobilization of men and children. This is all the more striking when one considers the suspicion and obstruction of other commanders in the area and the prejudices and isolation of the Ngiti community.

b. Support to the peace process

57. Mr Katanga was a supporter of the pacification process. On 22 March 2003, he signed a ceasefire agreement facilitated by MONUC.¹⁰⁷ He is listed as one of the participant in the *Commission de Pacification de l'Ituri*, held in April 2003.¹⁰⁸ On 21 November 2003, an *Accord politique entre les forces politiques et militaires de l'Ituri* was signed between the FAPC, FNI/FRPI (by Pitchou, ai President), and UPC/RP, according to which they agreed to « *Sceller un mariage entre les Forces politico-militaires de l'Ituri en vue d'y favoriser et renforcer la réconciliation, la pacification [...], Demander au Comité International d'Accompagnement de la Transition (CIAT) de prendre en considération [leurs] aspirations [...] en vue de leur intégration dans les Institutions de la Transition [...].* »¹⁰⁹

c. Disarmament and demobilization of both militiamen and child soldiers.

58. Mr Katanga encouraged the disarmament and demobilization of both militiamen and child soldiers. Several MONUC reports noted the cooperation of Mr Katanga with MONUC regarding the disarmament and demobilization process. For example, the MONUC Bunia Situation Report ('Sitrep') of 20 June 2003 refers to a meeting on 19th May 2003, including commanders of IEMF¹¹⁰, MONUC and representatives of the FNI/FRPI, including Mr Katanga, where the IEMF asked that Bunia be made a weapons free town. The FNI/FRPI leaders asked the IEMF to bring all armed groups

¹⁰⁷ EVD-D03-00044/*Accord de Cessation des hostilités en Ituri*.

¹⁰⁸ EVD-OTP-00195/*Rapport final de la Commission de pacification de l'Ituri*, 14 April 2003, p. 0107-0285.

¹⁰⁹ EVD-OTP-00244/*Accord politique entre les forces politiques et militaires de l'Ituri*, 21 November 2003.

¹¹⁰ On 30th May 2003, the UN Security Council authorised the deployment of an *Interim Emergency Multinational Force (IEMF)* in Bunia.

to negotiations and to ensure a lasting solution. It was noted that the FNI/FRPI leaders expressed willingness to cooperate with MONUC and IEMF.¹¹¹

59. Similarly, MONUC '*Compte rendu sur la reconnaissance du 12 septembre 2003 dans la région de Aveba*', dated 19 September 2003, reported that "commander GERMAIN says he is ready to cooperate with the MONUC and the international community to regroup his militia and waits for the help of the MONUC to do so".¹¹²
60. Several meetings were then held between the Ngiti combatants and MONUC to put in place the demobilization and disarmament process; in December 2003, MONUC noted that the "*leadership renewed their commitments to cooperate with MONUC*", even if it was aware that it was "*likely to face problem while dealing with militias on the ground as political and military leadership have little or lack of control over their combatants.*"¹¹³
61. Aveba became host to the transit centre for the demobilization of soldiers and child soldiers, organized, *inter alia*, by MONUC, CONADER, Save the Children, AJEDEC, AMDC, and *Terre des Enfants*. Aveba would not have hosted the centre had it not been for the support of Germain Katanga.
62. P-267 said that Mr Katanga approved his demobilization mission and welcomed him.¹¹⁴ He acknowledged that Mr Katanga facilitated the creation of the transit site since "*he gave a large part of [the camp of the HQ of Mr. Katanga] and he gave the order for the destruction of the Manyatas, these little houses, so there would be enough area, enough space for the transit centre to be built there.*"¹¹⁵ P-267 stated that he "*found a responsible attitude on the part of those responsible, and over time when we installed ourselves, there were the efforts that were made. There was awareness-raising that was carried out with regard to the children, and there was a team, a CONADER team, who was dealing with awareness-raising for adults, and this was an action that was done by way of synergy, so that they could adhere to the*

¹¹¹ EVD-D02-00236/Bunia Sitrep.

¹¹² EVD-OTP-00220/*Compte rendu sur la reconnaissance du 12 septembre 2003 dans la région de Aveba*.

¹¹³ EVD-OTP-00219/MONUC Bunia-Ituri Bde - G2 Mil Info, Weekly Report (6-12 Dec 2003), paras. 14, 18

¹¹⁴ P-267, ICC-01/04-01/07-T-163, p. 86.

¹¹⁵ P-267, ICC-01/04-01/07-T-165, pp. 10-11.

*process. Now, when he gave a green light, the process started without any difficulty.”*¹¹⁶

63. P-267 stressed that Mr Katanga “officially demobilised himself. He was the first person responsible in the FRPI to go through the demobilisation, and that was a condition for all the members of the armed groups to go through the process which offered options.”¹¹⁷ P-267 confirmed that Mr Katanga was fully cooperative in the demobilising process. He “made no obstruction to the demobilisation process.”¹¹⁸ P-267 noted that once Mr Katanga “seized the opportunity and had understood the justification for this process, he subscribed to it”.¹¹⁹ The Chamber also took note of Mr Katanga’s collaboration in this process.¹²⁰

64. P-267 underlined that others, such as Cobra Matata, Dark, Oudo, and Dodova, were resistant at the start of the process. Cobra Matata himself personally threatened about fifteen of P-267’s agents, who gave him money under the threat of being killed.¹²¹ This was confirmed by D2-196, who testified that their staff was threatened by Cobra’s group. He concluded that “even whilst we were there at the time of Germain Katanga, Cobra was not very happy about this, whereas with him we did not have a problem. If he had been there right up to the end of the operation, we would not have had the problems we had,”¹²² thereby demonstrating the commitment Mr Katanga made to supporting the demobilisation process and the likelihood that the process would not have succeeded but for that support.

65. D2-196 further confirmed that Mr Katanga “cooperated very well. He understood things very well. He did not complicate matters for us.”¹²³ On the contrary, “since the two camps were side by side, there were times when militiamen would throw stones at the children in our premises and he would intervene. He would intervene. That is why

¹¹⁶ P-267, ICC-01/04-01/07-T-171, p. 11, l. 23 to p. 12, l. 5.

¹¹⁷ P-267, ICC-01/04-01/07-T-171, p. 12, l. 11-14.

¹¹⁸ P-267, ICC-01/04-01/07-T-171, pp. 14-15.

¹¹⁹ P-267, ICC-01/04-01/07-T-171, p.15, l. 14-16.

¹²⁰ ICC-01/04-01/07-3436, para. 1068.

¹²¹ P-267, ICC-01/04-01/07-T-171, pp. 15-16.

¹²² D2-196, ICC-01/04-01/07-T-283, p. 45, l. 12-15.

¹²³ D2-196, ICC-01/04-01/07-T-282, p. 34, l. 15-17 ; see also p. 49, l. 18-19.

I would say we had good relations with Germain Katanga whilst we were in the transit site.”¹²⁴

66. Thanks to Mr Katanga’s efforts, regardless of the numbers involved, the demobilization process was successful. P-267 stressed that looking *“at the statistics of the five sites, it is my site which provided, other than the other sites in the north, the most children who were demobilised. That proves sufficiently the involvement that there was in this process.”¹²⁵*

67. Mr Katanga maintained his cooperation with MONUC and the other relevant organizations though the entire process. In February 2004, while MONUC was leading a mission in Aveba to assess the security and humanitarian situation, it noted that *“GERMAIN seemed very cooperative. [...] He approved the DRC and ready to go in the process ASAP.”¹²⁶*

d. Support to the reconciliation process and to the victims of war

68. Mr Katanga encouraged reconciliation among the population, by supporting the peace process, engaging in dialogue with other groups and interests, and by lending support to victims of the war.

69. After the fall of Bunia in May 2003, Mr Katanga welcomed numerous refugees to Aveba, including Hema, without distinction.¹²⁷ Mr Katanga stressed that *“now somebody who is fleeing away from his own home to come and seek refuge in your place, how can you chase him away? You cannot chase someone who is fleeing from the house of his brother to come to your house and you are supposed to be his enemy, because people were saying that it was an interethnic war between the Hemas and the Lendus, so how could the Hemas flee Bunia to come and take refuge in Aveba? This is questions we might -- these are questions we might ask ourselves, but this is what happened.”¹²⁸*

70. P-267 confirmed that following the fall of Bunia, and until Artemis and MONUC were able to restore a degree of law and order in Bunia, many thousands of people

¹²⁴ D2-196, ICC-01/04-01/07-T-282, p. 49, l. 19-23.

¹²⁵ P-267, ICC-01/04-01/07-T-171, p. 15.

¹²⁶ EVD-OTP-00221/MONUC Summary of Team Reports-Sector 6, 26 February 2004, para. 9-e.

¹²⁷ D2-300, ICC-01/04-01/07-T-319, pp. 21-22.

¹²⁸ D2-300, ICC-01/04-01/07-T-319, p. 22, l. 7-13.

from Bunia found sanctuary in Walendu-Bindi. *“The salvation of all those people who sought refuge in the south was due to the fact they were taken in. I have talked about people who could not continue to Beni 200 kilometres away. So they found refuge amongst the Ngiti population. That is why they are liked in that area. They provided great assistance during that period, and it did not stop there. Even afterwards a corridor was open so that the members of the population could go and fetch cassava and other basic commodities in the Walendu-Bindi collectivity. And the Walendu-Bindi did a lot of agricultural work and they produced a lot, which made it possible for the members of the population to survive.”*¹²⁹

71. In particular, P-267 was impressed by the hospitality provided to unaccompanied children.¹³⁰ In this regards, Mr Katanga explained that if some children were living in the BCA camp, this was simply because of *“the problem of poverty and the families could not welcome in many more people.”*¹³¹

72. P-219 stated that Mr Katanga made a declaration saying that the Hema that lived in the Lendu-Bindi collectivity should not be killed: *“When the refugees left Bunia, they arrived Medhu, and they were on their way to Beni. In Medhu they started killing refugees, that is, Hema refugees. One day a young girl was abducted and taken to Aveba. Germain was informed immediately, and then he said, “You should not kill the Hemas. The Hemas who are here are fleeing. They fled Bunia because the Hemas attacked Bunia. You have to protect the Hemas who are here in our area.”*¹³²

73. When the Chamber put to Mr Katanga the fact that P-219 had stated that he had given an order that Hema were not to be killed, Mr Katanga confirmed that *“it is true that in our community there are people who have very bad memories of the Hemas. That is true. And so to prevent similar things from happening in an area where we had started becoming civilised, you had to prohibit such acts. So imagine someone fleeing from Bunia right to Aveba. This is more than 70 kilometres, your Honour. If you kill him again where he came and took refuge, that would be inhuman and even immoral.*

¹²⁹ ICC-01/04-01/07-T-171, p. 54.

¹³⁰ ICC-01/04-01/07-T-171, p. 59.

¹³¹ D2-300, ICC-01/04-01/07-T-324, p. 2, l. 23, to p. 3., l. 2..

¹³² ICC-01/04-01/07-T-208, p. 13, l. 14-22.

That is why we could not accept that. We could not allow even a single Hema to be killed who was under our control.”¹³³

74. Mr Katanga’s testimony is supported by D2-129 who confirmed that he saw two Hema taken as prisoners during the Bogoro attack, who were in Kagaba and then went to Aveba. He saw them just as they were leaving Aveba and getting the plane to Beni. He clarified that when they took the plane, they were no longer prisoners and had been released.¹³⁴

e. Integration into the DRC army

75. Mr Katanga, as part of the peace process, agreed to be integrated into the national army. On 11 December 2004, age 26, Germain Katanga was nominated *Brigadier Général* by President Kabila.¹³⁵ He agreed to leave the territory of Walendu Bindi and his base and supporters and to travel far away to Kinshasa with the object of integration into the national army and training at the officer staff college. In doing so he was effectively severing his connection with any remaining militia in Walendu Bindi. This must have been seen by those in Walendu Bindi as a very significant indication of Katanga’s commitment to the peace process and to the necessity of putting aside any thought of continuing an armed struggle.

76. It is tragic then to learn that in the next few years the Walendu Bindi area was subjected to substantial attacks by the FARDC forces. In 2006, for example, attacks led to destruction of property, killings and widespread rape of women in Aveba by the national army troops. Unfortunately for the local people they no longer had the protection of a Katanga to help them. One can only speculate what the position might be today (the FARDC forces are currently attacking the Aveba area) had Germain remained an active member of the National Army with his skills and knowledge and having the support of the Ngiti population.

(3) History of Mr Katanga’s arrest and subsequent proceedings

¹³³ D2-300, ICC-01/04-01/07-T-319, p. 22, l. 14-22.

¹³⁴ D2-129, ICC-01/04-01/07-T-272, pp. 37-38.

¹³⁵ EVD-OTP-00242/Décret n° 04/094 du 11 Déc. 2004 portant nomination dans la catégorie des officiers généraux des Forces armées de la République Démocratique du Congo, 11 December 2004.

77. Mr Katanga has been detained since 26th February 2005 following his arrest in DRC.¹³⁶ That is plainly a very long time by any standards and some part, or all of it, will or may be deducted from the sentence thought appropriate in all the circumstances of the case. However, in addition to that relief Mr Katanga should further benefit from the court taking into account features of his detention history both in the DRC and at the ICC. The defence has submitted in its previous filing that violations of the rights of the convicted person have the potential of mitigating the sentence imposed.¹³⁷ The defence submits that irregularities have occurred, the totality of which should mitigate Mr Katanga's sentence.
78. In respect of proceedings and detention in the DRC, the defence filed a motion for a declaration on unlawful detention and stay of proceedings ("unlawful detention motion") on the ground of irregularities that occurred during Mr. Katanga's detention and imprisonment. That imprisonment, from 26th February 2005 was spent mainly in the Kinshasa central prison between 10th March 2005 and 18th October 2007.¹³⁸
79. The prison conditions at the 'PCK' (Prison Central de Kinshasa), which defence team members have visited, are far below minimum standards and a prolonged stay in such conditions merits being taken into account over and above any subsequent deduction in sentence that the court may determine when sentencing. His imprisonment there was further aggravated by his distance from family and loved ones, with no access to them.
80. Mr Katanga's detention in DRC was also attended by multiple violations of his rights, most notably his right to personal liberty, to be brought promptly before the judicial authorities, to be informed of the reasons for his arrest and the charges, as well as his right to the assistance of counsel.¹³⁹ The defence relies on the arguments set out in detail in the motion concerning unlawful detention.¹⁴⁰

¹³⁶ ICC-01/04-01/07-1258-Conf-Exp. A public redacted version was filed on 2 July 2009: ICC-01/04-01/07-1263.

¹³⁷ Sentencing Principles Observations, para. 56, citing *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 255.

¹³⁸ ICC-01/04-01/07-1258-Conf-Exp. A public redacted version was filed on 2 July 2009: ICC-01/04-01/07-1263.

¹³⁹ *Ibid*, paras. 40-77.

¹⁴⁰ ¹⁴⁰ ICC-01/04-01/07-1258-Conf-Exp. A public redacted version was filed on 2 July 2009: ICC-01/04-01/07-1263.

81. In particular, Mr Katanga's right to be brought promptly before judicial authorities with a view to challenge his detention, which is a right both recognized under DRC law and international human rights law,¹⁴¹ has also been seriously infringed. Katanga's first proper appearance before a judge was on 1st December 2006, twenty-one months after he was first detained, as opposed to within 48 hours, which is the general requirement under international norms.¹⁴²
82. Nor did he have the assistance of counsel, other than on very few occasions. He was not represented by counsel at either his first interview on 20th January 2006, nor at his last interview prior to his transfer on 17th October 2007.¹⁴³ Such disregard for his right to counsel similarly violates both international human rights, and DRC law.¹⁴⁴ Nor was he provided with documents specifying with appropriate clarity the reason for his detention, as required by both DRC law and human rights law.¹⁴⁵ The Court should also take into account that his time in custody was spent under threat of capital punishment.
83. The defence maintains the position, expressed in its motion concerning unlawful detention¹⁴⁶, that such violations should be imputed to the Court. Once the arrest warrant was issued by the ICC, on 2nd July 2007, Katanga was under the constructive custody of the ICC until his transfer to the Hague on 18th October 2007.¹⁴⁷ The defence also reiterates that, irrespective of knowledge, impropriety or duty of care, as of 2nd July 2007, "any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC by virtue of this constructive custody."¹⁴⁸ Indeed, by issuing an arrest warrant, the Court took a definite and official step in the proceedings with a view to his prosecution before it. His continued detention in the DRC then served the direct interests of the Court. As such, the Court had an obligation to review and supervise any occurring violations and provide an appropriate remedy.¹⁴⁹

¹⁴¹ *Ibid*, in particular, paras. 43, 44, 49, 54, 57.

¹⁴² *Ibid*, para. 70. He had been interviewed before on 20th January 2006, which if considered as being brought before judicial authorities also occurred at a delay of eleven months. See para. 71.

¹⁴³ *Ibid*, para. 77.

¹⁴⁴ *Ibid*, paras. 48, 55.

¹⁴⁵ *Ibid*, in particular, paras. 45-47, 49, 52.

¹⁴⁶ *Ibid*, paras. 78-120.

¹⁴⁷ *Ibid*, para. 101.

¹⁴⁸ *Ibid*, para. 101. See also para. 106.

¹⁴⁹ *Ibid*, paras. 102-106.

84. Further, even before the issuing of an arrest warrant, Katanga's situation should have been of concern to the Court. More precisely, the defence submits that, from the moment that the prosecution identified Katanga as a principal suspect in the Bogoro attack, it assumed a duty of care in respect of him and should not have ignored the continued flagrant violations of Katanga's rights as it carried out its investigations.¹⁵⁰ It is thereby irrelevant that he was held in detention by an entity not itself attached to the Court.¹⁵¹ It suffices that the Prosecutor was, or should have been, aware that Katanga's conditions in detention violated domestic and international human rights standards.¹⁵² Indeed, the principles of complementarity and cooperation ensure that the national and international processes are narrowly intertwined and require that the national and international authorities work closely together in bringing alleged perpetrators to justice.¹⁵³
85. It would appear that the Prosecutor treated Katanga as a suspect as early as November 2005, one year and seven months before the Prosecutor asked his transfer.¹⁵⁴ It appears that, from a point in time during the ICC investigations, the DRC authorities did not take any action in respect of the Ituri detainees because they were waiting for the ICC prosecution to complete its investigation.¹⁵⁵
86. This suggests that the Prosecutor failed to act with due diligence by taking reasonable steps to ensure a speedy transfer to the ICC detention unit, which would have ended Katanga's unlawful detention in the DRC.¹⁵⁶ The Prosecutor also failed to inform the Pre-Trial Chamber of Katanga's situation and to apply for appropriate orders from the Court to ensure that Katanga's rights were respected while the prosecution continued its investigations.¹⁵⁷ The defence reiterates that these failures make the ICC

¹⁵⁰ *Ibid*, paras. 78-80, 90.

¹⁵¹ *See Prosecutor v Bayaragwiza*, Decision of 3 November 1999, para 73 (ICTR Appeals Chamber), also cited in *ibid*, para. 79.

¹⁵² *Ibid*, paras. 83-85.

¹⁵³ *Ibid*, paras. 81-82.

¹⁵⁴ Assembly of States Parties, Fourth session, 28 November to 3 December 2005, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 28 November 2005: <http://www.icc-cpi>. See also *ibid*, para. 91.

¹⁵⁵ Human Rights Watch: D.R. Congo: ICC Arrest First Step to Justice, at: <http://hrw.org/english/docs/2006/03/17/congo13026.htm>, cited in *ibid*, para. 67. See also para. 68.

¹⁵⁶ *Ibid*, paras. 86-92.

¹⁵⁷ *Ibid*, paras. 94-100.

responsible, at least in part, for the violations of Katanga's rights while in custody in the DRC.¹⁵⁸

87. Neither the Trial Chamber, nor the Appeals Chamber considered the merits of the unlawful detention motion, but dismissed it on the procedural grounds that it was filed out of time.¹⁵⁹ The Chamber has, therefore, not yet ruled on any of these arguments. As a result, Mr. Katanga has not had an opportunity to seek compensation for the alleged human rights violations.¹⁶⁰

88. The defence submits that these same observations concerning the irregularities of Mr. Katanga's detention in the DRC remain relevant to the determination of sentence. To this end, the observations are not filed out-of-time. In fact, in the unlawful detention motion, the defence requested that the Chamber consider these fundamental human rights violations as mitigating circumstances in the event of a conviction.¹⁶¹ Accordingly, the defence relies on its observations set out in its unlawful detention motion in addition to the observations presented here and submits that these irregularities should be considered as mitigating circumstances in determining Mr. Katanga's sentence.

(4) Proceedings at the ICC

89. The length of proceedings at the ICC has been long and onerous for Mr Katanga. By October 2007, when transferred to The Hague, he had already been in prison in DRC since February 2005. Six and half years on he awaits sentence. The course of the proceedings has been onerous for everybody involved, but for Germain Katanga it has been attended by great anxiety and uncertainty. There have been delays that could have been avoided. The delay in order to transfer and join Ngudjolo could have been avoided with proper management of the case by the OTP. The situation brought about by collapse of the primary case could and should have been avoided by proper

¹⁵⁸ *Ibid*, para. 100.

¹⁵⁹ See ICC-01/04-01/07-1666-Conf-Exp, Décision relative à la requête de la Défense de Germain Katanga en illégalité de détention et en suspension de la procédure, 20th November 2009. A public redacted version was issued on 3 December 2009: ICC-01/04-01/07-1666-Red. See also ICC-01/04-01/07-2259, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010.

¹⁶⁰ As requested in paras. 132-135 as well as the Relief Sought in ICC-01/04-01/07-1258-Conf-Exp 30-06-2009

¹⁶¹ ICC-01/04-01/07-1258-Conf-Exp 30-06-2009, paras 136-138.

investigation of their witnesses by the prosecution and the late notice of change of charge avoided. The effect on Germain Katanga of all these delays and a protracted trial is obvious and a matter that in fairness has to be taken into account. It is to be noted that he continues to cooperate fully with the court.

(5) Mr Katanga's time spent in detention

90. Article 78(2) of the Rome Statute provides:

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.

91. Thus, any time previously spent in detention in accordance with a court order must always be deducted. This is not discretionary matter. In addition, the Court has discretion to deduct any time otherwise spent in detention "in connection with conduct underlying the crime" (emphasis added).

92. In respect of the mandatory deduction for time spent in detention in accordance with a court order, at the latest, this period commences from the time that Germain Katanga was transferred into the custody of the ICC, which was on 17th October 2007, and continues until the date on which sentence is pronounced.

93. However, the defence submits that this mandatory deduction period starts even earlier, and runs from the moment that Katanga was under constructive custody of the ICC, which is from the moment an arrest warrant against him was issued, which was on 2nd July 2007. From then onwards, Katanga's detention in the DRC was for the benefit of the Court and in compliance with the arrest warrant. That it took another three and a half months to effect his transfer to The Hague does not, in the defence submission, change the starting date of 2nd July 2005, for purposes of the first part of article 78(2).

94. In respect of the discretionary deduction for 'time otherwise spent in detention in connection with conduct underlying the crime' the defence submits that the entirety of the time spent by Germain Katanga in the DRC following his arrest on 26th February 2005 should be deducted.

95. The Chamber is aware that he was first placed under house arrest at the Grand Hotel in Kinshasa and confined to its premises. Then on 9th March 2005, Katanga was taken to the DEMIAP (*Détection Militaire des Activités Anti Patrie*) in Kinshasa, and then on 10th March 2005 to the Central Prison Kigali, where he remained in detention until his transfer to the ICC on 18th October 2007, a period of approximately two years and eight months. The defence submits it is in keeping with the Statute and Rules, and fair and just, that that length of detention be deducted from any sentence he may receive.
96. The defence submits that the reason Mr Katanga was detained was ‘in connection with conduct underlying the crime’ in that it directly concerned his alleged activities in Ituri, including events at Bogoro on 24th February 2003.
97. The matter was raised and dealt with briefly in *Lubanga* as follows:

101. Under this provision the defence submits that the Chamber should deduct the period of Mr Lubanga's house arrest and detention by the DRC authorities between 2003 and 2006. The defence argues that the detention of Mr Lubanga in the DRC was imposed as a result of the same conduct underlying the crimes for which he has been convicted at the Court, namely his activities as President of the UPC/FPLC in 2002-2003. On this basis, the defence requests that the Chamber deducts this period of domestic detention from Mr Lubanga's sentence.

*102. In the judgment of the Chamber, there is insufficient evidence that Mr Lubanga was detained in the DRC for conduct underlying the crimes for which he was convicted at the Court, namely the conscription and enlistment of children under the age of 15 and using them to participate actively in hostilities. This contention has not been established on the balance of probabilities, and as a result the Chamber declines to deduct this period of time from Mr Lubanga's sentence.*¹⁶²

98. It is clear that there was no evidence that Lubanga’s detention related to those activities. The defence had merely argued that, as he was detained as leader of the UPC, that such status somehow embraced such activities.¹⁶³
99. The term ‘conduct underlying the crime’ under article 78(2) has yet to be defined. ‘Conduct underlying the crime’ should, in accordance with 31(1) of the Vienna Convention, be interpreted “in good faith in accordance with the ordinary meaning to

¹⁶² Lubanga Sentencing Decision, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, paras. 100-102.

¹⁶³ *Ibid*, paras. 100-102.

be given to the terms of the treaty in their context and in the light of their object and purpose.”¹⁶⁴

100. The defence submits that, for the purposes of satisfying the test under article 78(2), it is unnecessary for a person convicted to prove that his prior detention was for exactly the same conduct as that upon which the ICC charge or charges are founded.

101. The defence submits that “conduct underlying the crime” should also include conduct of a similar nature, even if not identical. It could refer to different types of conduct, which are all part of the same transaction. ‘Conduct underlying the crime’ could also refer to a broader crime-range with multiple aspects, each covered by this term. For instance, when dealing with a crime against humanity, it must be demonstrated that there was “a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (article 7(1) Rome Statute). To demonstrate, in particular, the widespread or systematic nature of the attack, various similar attacks may have to be investigated. The defence submits that all such similar attacks be covered by the term ‘conduct underlying the crime’ as long as they are investigated jointly with the conduct eventually charged by the ICC Prosecutor, or with the purpose of arriving at the ICC charges. Basically, the defence submits that any time spent in detention in connection with conduct, which is either covered directly or indirectly by the conduct charged; or covers directly or indirectly the conduct charged, should be deducted from the sentence to be imposed by the ICC under article 78(2).

102. The defence submits that the Chamber should deduct the time Katanga served in detention in DRC. Katanga’s case is plainly different from that of Lubanga and there is sufficient material before the Chamber to show that, on a balance of probabilities, Katanga was detained in connection with conduct similar to that which underlies the ICC crimes charged. Despite the failings of the system under which he was detained, including some lack of precision, there is sufficient material for this court to conclude that the primary or substantial reason for his detention was due to alleged offences committed against the civilian population of Ituri, including offences of Crimes Against Humanity, including attack on Bogoro. Any lack of clarity alleged to surround his detention in DRC should not operate against him but should be

¹⁶⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S* 331.

interpreted in his favour. An accused should not be unduly disadvantaged by failure of a State to ensure he was subject to due process.

103. The material relating to Katanga's detention before the Chamber has been extensively referred to in the course of defence previous submissions on admissibility of the case,¹⁶⁵ unlawful detention and stay of proceedings.¹⁶⁶ They are not repeated here and available to be taken into account as 'evidence presented and submissions made during the trial that are relevant to the sentence'. In particular the defence refers to:

(1) *Requête aux fins de prorogation de la détention provisoire* of Mr Katanga *et al.*, N°AG/0187/D5/2007, dated 2 March 2007, submitted by the Auditeur Général près la Haute Cour Militaire;

- Mr Katanga *et al.* are prosecuted for crimes against humanity for having:

□ Deliberately caused the killing of men as part of systematic attacks directed deliberately against the civilian population of Bogoro, Kasenyi, Nyakunde, Bunia, Mongwalu, Kafe, Ndoki, Kpandruma, Songolo, Lengabo, Gobu, facts punished by the Articles 165 and 169-1 of the *Code de Procédure Militaire*;

□ Caused during these attacks the destruction or appropriation of property protected under the Geneva Conventions, in the current case schools, buildings dedicated to religion, hospitals; acts not justified by the military necessity as admitted by the 'droit des gens', and executed on a large scale in an illegal and arbitrary way, facts punished by the Articles 165, 166-7 and 167 of the *Code de Procédure Militaire*;

-In requesting further detention the military prosecutor stated: "According to its preliminary response, the Office of the Prosecution of the ICC is currently trying to gather evidence which could assist in the consolidation of the facts under instruction";¹⁶⁷

(2) A 'PV' of notification of the ICC request, from the Avocat Général of the Haute Cour Militaire, dated 17 October 2007;

□ Specifying that since 19 March 2005, Mr Katanga is the object of an instruction RMP n° 0123/NBT/05, charged with crimes of genocide, crimes against humanity, murder, illegal detention and tortures, infractions punished by the Congolese Military Criminal Code;

□ Deciding to close the proceedings opened against Mr Katanga by the Auditorat Général, in order to facilitate the joinder of the proceedings at the level of the ICC, as well as the application of the principle *ne bis in idem*;¹⁶⁸

(3) On 15 August 2007 the Congolese authorities requested a postponement of the notification without elaborating on the reasons for this request nor giving any indications as to a time frame.¹⁶⁹

¹⁶⁵ ICC-01/04-01/07-949, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, (11 March 2009) ("Admissibility Motion").

¹⁶⁶ ICC-01/04-01/07-1258-Conf-Exp. A public redacted version was filed on 2 July 2009: ICC-01/04-01/07-1263.

¹⁶⁷ Admissibility Motion hh – fn 49 (emphasis added).

¹⁶⁸ Admissibility Motion vv (emphasis added).

¹⁶⁹ Admissibility Motion Eee.

104. Further, many of the other documents, including all court documents dealing explicitly with the prolongation of his detention when he still received such documents, refer to Katanga being charged with crimes against humanity.¹⁷⁰

105. The defence submits that these and other documents annexed to the Admissibility Motion demonstrate that Katanga was detained in connection with conduct underlying the charges relating to the Bogoro attack. Indeed, he was investigated for his alleged involvement in crimes against humanity, including the deliberate killing of civilians as part of systematic attacks directed deliberately against the civilian populations, amongst others of Bogoro.

106. These documents also show that Katanga was investigated for war crimes relating to destruction or appropriation of property protected under the Geneva Convention. These alleged acts are precisely part of the crimes for which Katanga has been convicted by the ICC. The conduct for which the ICC convicted Katanga is in fact covered by these wider allegations made against him in the DRC. This indicates that the conduct for which Katanga was seemingly detained in the DRC is sufficiently connected with the conduct for which Katanga was charged and convicted by the ICC to qualify it as ‘conduct underlying the crime’.

107. In addition, the totality of these documents demonstrates that the *Auditeur Général* of the DRC was counting on the ICC Prosecutor to gather useful evidence in support of these allegations. It is also worthy to note that the proceedings against Katanga in DRC were closed, in part, out of respect for the principle of *ne bis in idem*, which suggests that these proceedings were of a similar nature to the proceedings opened against Katanga by the ICC.

108. The defence is aware that the Chamber previously noted that the document referring to Bogoro lacks precision as it does not include the date of the alleged attack.¹⁷¹ The Chamber also observed that the allegations referred to were not necessarily attributable to Katanga, but could instead be attributable to one of the other people mentioned as alleged perpetrators.¹⁷² However, the Chamber made these

¹⁷⁰ Admissibility Motion, paras. 11, 15, documents c-n, q, aa.

¹⁷¹ ICC-01/04-01/07-1213-tENG, Decision on Admissibility, (16 June 2009) paras. 70-71 (“Admissibility Decision”).

¹⁷² *Ibid.*

observations in a different context and where the only question it sought to answer was whether the document contained “decisive information [...] which ought to have been brought to the attention of the Pre-Trial Chamber”.¹⁷³ The Chamber did not consider whether the document would or could have led the Pre-Trial Chamber to exercise its discretion differently in its assessment of the admissibility of Katanga’s case.¹⁷⁴

109. Significantly, the Trial Chamber rejected the admissibility challenge, not on the ground that no investigation had been carried out into Katanga’s case at any time, but rather that, at the time of the Chamber’s assessment of the admissibility challenge, the DRC demonstrated a ‘clear and explicit’ unwillingness to prosecute Katanga.¹⁷⁵ The Appeals Chamber confirmed the Chamber’s decision on similar grounds, namely that the inaction on the part of the DRC at the time of the admissibility challenge rendered the case admissible before the Court.¹⁷⁶

110. The defence further submits that the Bogoro document by itself is highly significant even if no exact date has been mentioned. As previously indicated,¹⁷⁷ the investigative stage is uncertain and is intended to clarify matters. It is then not surprising that the document does not mention a specific date. In any event, it is most probable that it refers to the attack on 24th February 2003 because that was the main attack and certainly the best-known attack. The evidence suggests that none of the earlier attacks would have attained the level of seriousness necessary to qualify as a crime against humanity. Indeed, the Chamber has emphasized that it was due to the firearms that attack and crimes could have been carried out on such a large-scale basis. Therefore, it would be highly surprising if the Bogoro attack referred to in the said document was in fact one of the earlier attacks. But even if it were, the defence submits that it would still be sufficiently linked to the crimes for which Katanga has been convicted to qualify under article 78(2).

¹⁷³ Appeals Chamber’s decision on Admissibility, ICC-01/04-01/07-1497, (25 September 2009), para. 43, citing the Chamber’s Admissibility Decision, para. 72.

¹⁷⁴ Appeals Chamber’s decision on Admissibility, *ibid*, para. 43; Chamber’s Admissibility Decision, para. 73.

¹⁷⁵ Chamber’s Admissibility Decision, paras. 74-81, 91-95.

¹⁷⁶ Appeals Chamber’s Decision on Admissibility, paras. 60, 75-82.

¹⁷⁷ ICC-01/04-01/07-1279 08-07-2009, para. 48.

111. Accordingly, the crucial question in the present context is ‘does the ‘Bogoro’ document demonstrate that Katanga was detained in connection with conduct underlying the crimes for which Katanga has been convicted?’ The defence submits that the answer can only be ‘yes’, particularly in light of the other documents previously submitted.
112. Katanga’s detention in the DRC, plainly in connection with his militia activities in Ituri, and including Bogoro, should therefore be deducted from his sentence.
113. As a final observation in this area, the defence submits that ‘conduct underlying the crime’ is to be clearly distinguished from the ‘same conduct’ test applied to admissibility challenges under article 17,¹⁷⁸ where the Appeals Chamber referred to ‘same conduct’ as ‘substantially the same conduct’¹⁷⁹. This is so even though the present circumstances do satisfy that criterion. This test should not apply to article 78(2). This term is clearly of a different nature than the term ‘case’ under article 17. The object and purpose of article 78(2) plainly differ significantly from the object and purpose of article 17. Indeed, in giving a wider interpretation to article 17 than proposed, the Appeals Chamber emphasized the Rome Statute’s overall objective of “to put an end to impunity” and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished”.¹⁸⁰ Here, there is no risk that perpetrators escape punishment. A conviction has already been secured. The issue here is one of fairness in determining the appropriate sentence of a convicted person who already spent a significant period of time for similar conduct.
114. In the alternative, the defence submits that, from the moment that Katanga became a target of the ICC prosecution’s investigation, which appears to be in November 2005, the detention was for the benefit of the Prosecutor. From then onwards, the Prosecutor assumed a duty of care vis-à-vis him. In particular given the

¹⁷⁸ ICC-01/04-01/07-4, para. 20. *See also* ICC-01/04-01/07-262, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, para. 21; ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor’s Application for warrants of arrest under Article 58, 12 July 2005, p. 2; ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 21.

¹⁷⁹ Kenya AC Judgment on Admissibility, 307, para. 42. Note that the defence suggested previously that the ‘same conduct’ test should not apply to admissibility challenges. The Appeals Chamber has, to date, not made an explicit finding on the correctness of that test.

¹⁸⁰ Appeals Chamber’s Decision on Admissibility, paras 79, 83.

flagrant human rights violations Katanga fell victim of during that detention period, it is then only fair that this period count towards the total length of his sentence.

(6) Mr Katanga's reputation

115. Germain Katanga was very well considered, and not only within his community. P-267 noted that Mr Katanga *“was highly thought of because he defended his community, and that is why he was so well known and respected.”*¹⁸¹ The community thought he *“was brave”*.¹⁸² P-28 himself testified that *“Germain is a good person. He has never done me any wrong. He's someone upstanding, in my opinion.”*¹⁸³ D2-134 also testified that during the entire time that he was living in Aveba, *“Germain Katanga had good relations with the civilian population.”*¹⁸⁴ D2-161 also indicated that *“Germain lived in harmony with the civilian population, in great harmony. Germain did not wish to have problems with anybody whomsoever. He did not beat anyone and he could not confiscate anyone's property.”*¹⁸⁵ Mr Katanga himself stressed that *« the purpose of self-defence is to provide protection for all categories of civilians. »*¹⁸⁶ He helped his own community. He noted that *“I, for example, did not have a child of school-going age, but I already had five to ten people under my responsibility that I was sending to school.”*¹⁸⁷

116. Germain Katanga has not had an easy life. Much of it has been spent in a country at war. Now 35 he has been in prison since he was 26. His accommodation of MONUC and CONADER in 2004 and his activities in the pacification process, referred to above, show not only a constructive quality but also a capacity for change. The defence has seen him from the time of his arrival in the Hague and there can be no doubt that he has further changed in that time.

(7) Mr Katanga's family life

117. Germain Katanga was married to Denise on 18 November 2002. They are plainly a close and affectionate couple. They have three children of their own –

¹⁸¹ P-267-ICC-01/04-01/07-T-166, p. 31, l. 20-21.

¹⁸² P-267-ICC-01/04-01/07-T-170, p. 9, l. 16-19.

¹⁸³ P-28-ICC-01/04-01/07-T-222, p. 53, l. 16-17.

¹⁸⁴ D2-134-ICC-01/04-01/07-T-257, p. 52, l. 8-9.

¹⁸⁵ D2-161-ICC-01/04-01/07-T-268, p. 24, l. 1-2.

¹⁸⁶ D2-300, ICC-01/04-01/07-T-316, p. 43, l. 18-19.

¹⁸⁷ D2-300, ICC-01/04-01/07-T-324, p. 4, l. 18-21.

Samson, Anita and Carolina, and two adopted children. By the time he moved to Kinshasa he had been married only two years and, having been detained in Kinshasa in February 2005, has been largely deprived of his right to family life since then. He did not see his wife or children until 2008 when the Registry organised a family visit. Indeed, he had never met his son, his second child, until they came to the Hague. The efforts made by the Registry, and in particular Mr Dubuisson, to ensure continued contact between him and his family have been commendable. Visits have since taken place twice yearly. It is apparent that Mr Katanga looks forward to the visits and very much enjoys his time sharing family life. His separation from his wife and children obviously remains a great burden for him, particularly given that he has missed seeing his children growing up. He nevertheless takes a keen interest in his family's welfare and in the education of all the children, on which he places great emphasis. The family live in Aru, on the Uganda border. When free to do so it is Katanga's wish to join them there. It is an undoubted hardship on his family that he has been in detention for so long and particularly so far away.

(8) Mr Katanga's cooperation with the Court

118. Throughout the trial, Mr Katanga demonstrated full cooperation with the Court. He attended the hearings throughout. At all times he treated the Court with utmost respect.
119. He testified himself. He answered all the questions of the Parties, the Legal Representatives, and the Judges. He contributed in a positive way to the material available to the Court.
120. There was no obstructive behavior on his part, whether in court, in transit or in the custody area. He treated court staff and custody officers with respect. It is worth noting that the custody facilities are basic and, in themselves, quite a testing environment to meet on a daily basis.
121. The Trial Chamber I in *Lubanga* considered as mitigating the fact that the accused remained respectful and cooperative throughout the proceedings notwithstanding some "particularly onerous circumstances". The various delays in the present case, which extend from delay over joinder of the accused to the various and

unforeseen delays in the trial process merit being taken into account in mitigation of sentence.

(9) Mr Katanga's conduct in prison

122. The defence has seen the Internal Memorandum¹⁸⁸ annexed to the *Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga* of 4th April 2014.¹⁸⁹ In fact, given that his detention has lasted for almost seven years, [REDACTED], the overall impression is of a man who, despite difficulties in doing so, has adjusted himself very well to conditions that are doubtless very different from the ones he had previously experienced. It is to be borne in mind that he has few, if any visitors, aside from biannual family visits.

123. He has always and unfailingly shown a polite and cheerful disposition when meeting those in his defence team and we have frequently commented amongst ourselves on his strength of character and in bearing up in what have been, at times, difficult circumstances. The court will recall the time when he was kept effectively in solitary following false allegations made by witness P-219, and the recent history of the case has been a burden.

124. The recent war in Ituri has been of grave concern to him as it has involved attacks on his community and loss of life, as well as other excesses. Even today, as we write, news has arrived of further FARDC attacks against Gety.

125. He has improved his French and speaks English quite well, and some Dutch. He has an interest, and some will attest a talent, for cooking. A custody officer, who was a professional chef by training, showed him how to cook and it has developed into something of a passion with regular demands made to his team for recipe books and the like. He has also a keen interest in sport. He has kept himself extremely fit, reads widely and follows current affairs closely. The Detention Centre community of Presidents and others has doubtless been a marked experience. He presents himself as a mature and thoughtful man.

¹⁸⁸ ICC-01/04-01/07-3453-Conf-Anx.

¹⁸⁹ ICC-01/04-01/07-3453.

126. It says a lot for him that at least one of the prison guards has come forward to say that he would be pleased to say a few words on Katanga's behalf. A request to the detention unit Commander for that to happen was, perhaps understandably, refused. The impression given to the defence team on its frequent visits over the past seven years is that the detention staff have an excellent relationship with Mr Katanga and that he appreciates the work that they have done.

V- Request to tender further mitigating evidence

127. The Defence requests leave to tender through the bar the following evidence: DRC-OTP-0006-0281, DRC-OTP-0009-0363, DRC-OTP-0009-0364, DRC-OTP-0106-0482, DRC-OTP-0142-0227, DRC-OTP-1029-0591,¹⁹⁰ DRC-D02-0001-0465,¹⁹¹ DRC-D02-0001-1040,¹⁹² DRC-D02-0001-1045, DRC-D02-0001-1048,¹⁹³ DRC-D02-0001-1052, DRC-D02-0001-1053, DRC-D02-0001-1054, DRC-D02-0001-1057.¹⁹⁴

128. In its Decision on the Prosecutor's Bar Table Motions, the Chamber ruled that:

8. Although the Chamber is not bound to accept exhibits to which there are no objections, it will only decline such exhibits if there are compelling reasons for doing so.

14. In evaluating the Motions, the Chamber will follow the three-step approach adopted by Trial Chamber I. Accordingly, the Chamber will first assess the relevance of the material, then determine whether it has probative value and finally weigh its probative value against its potentially prejudicial effect.¹⁹⁵

129. The defence submits that these criteria are fulfilled with regard to all of the above documents.

130. The defence invites the Chamber to admit these documents only for the purpose defined by the defence. Indeed, as previously noted by the Chamber:

17. [...] If a party has tendered an item of evidence as proof of a particular proposition, the Chamber will in principle admit it only for that purpose, even if the entire exhibit is admitted into evidence. Accordingly, if the same item of evidence could also prove another proposition than the one(s) for which it was tendered, the

¹⁹⁰ See Annex 1.

¹⁹¹ See Annex 2.

¹⁹² See Annex 3.

¹⁹³ See Annex 4.

¹⁹⁴ See Annex 5.

¹⁹⁵ ICC-01/04-01/07-2635, 17 December 2010.

Chamber will not consider the evidence in relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.¹⁹⁶

(1) Relevance

131. The defence contends that the documents listed above are relevant.
132. The prosecution documents¹⁹⁷ are relevant to assess Mr Katanga's conduct after the act pursuant to Rule 145(2)(a)(ii) since they confirm his participation in the pacification, demobilization and disarmament process after the Bogoro attack.
133. The document DRC-D02-0001-0465 is the *Diplôme d'Etat* of Germain Katanga. The defence discloses this document at this stage in order to confirm his level of study, since it is a criteria to be taken into account in the determination of the sentence pursuant to Rule 145(1)(c).
134. The other defence documents are signed statements¹⁹⁸ which are relevant to assess Mr Katanga's reputation and behaviour within his community and outside, as well as regarding his involvement in the demobilization and disarmament process after the Bogoro attack. They are relevant to assess Mr Katanga's conduct after the Bogoro attack pursuant to Rule 145(2)(a)(ii).
135. For the sake of clarity, the defence annexes a table identifying the relevant excerpts of these documents and summarising their interest.¹⁹⁹

(2) Probative Value

136. In its Decision on the Prosecutor's Bar Table Motions, the Chamber considered that "[p]robative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case."²⁰⁰

¹⁹⁶ ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010.

¹⁹⁷ DRC-OTP-0006-0281, DRC-OTP-0009-0363, DRC-OTP-0009-0364, DRC-OTP-0106-0482, DRC-OTP-0142-0227, DRC-OTP-1029-0591.

¹⁹⁸ DRC-D02-0001-1040, DRC-D02-0001-1045, DRC-D02-0001-1048, DRC-D02-0001-1052, DRC-D02-0001-1053, DRC-D02-0001-1054, DRC-D02-0001-1057.

¹⁹⁹ Annex 6.

²⁰⁰ ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 20.

137. To assess the reliability of an exhibit, the Chamber took into account, *inter alia*, the following elements:

24. [...] b. *Official documents*. Official documents that are not publicly available from official sources (e.g. the website of an organisation or official publications) are not self-authenticating and must be certified by the relevant authority. However, when the author of a public document is an identified representative or agent of an official body or organisation, such as a member of the executive, public administration or the judiciary, that document will be presumed authentic if it has been signed by the identified official and the authenticity of that signature is not called into question. [...]

c. *Private documents*. Private documents that can readily be authenticated by the party against whom they are tendered will be presumed authentic, unless such party challenges the authenticity and provides evidence to that effect.

[...]

(1) *Reports by UN agencies*

29. Insofar as such reports emanate from independent observers who were direct observers of the facts being reported, the Chamber considers them to be *prima facie* reliable. However, if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.²⁰¹

138. To assess the significance of the evidence, the Chamber considered that :

34. In order to be admissible, evidence must, to some significant degree, advance the Chamber's inquiries. There are two ways in which an item of evidence can influence the Chamber's decision: (a) the item of evidence may significantly help the Chamber in reaching a conclusion about the existence or non-existence of a material fact; or (b) the item of evidence may significantly help the Chamber in assessing the reliability of other evidence in the case.

35. [...] The Chamber will thus consider what impact the admission of the evidence would have on the issues before it. If the potential impact is "little to none", then the Chamber will be unlikely to admit it as it will not advance its enquiry. If, on the other hand, the impact ranges from "some to considerable", the evidence will probably be sufficiently significant for admission.²⁰²

a. Reliability

139. The defence submits that the reliability of the prosecution documents result from their author, the MONUC -independent observer who was a direct observer of the facts being reported-, and Mr Katanga himself. All documents are dated, which enhances their authenticity.

²⁰¹ *Ibid.*, para. 24.

²⁰² *Ibid.*, paras 34-35.

140. The reliability of the diploma of Mr Katanga emanates from its appearance.
141. The reliability and authenticity of the seven statements disclosed by the defence emanates from their signature and their content. They were taken by Jean Logo, the defence resource person who the Chamber is familiar with. All the persons interviewed confirm that they issued a statement voluntarily, without pressure, and that it contains what they consider to be the truth. They also confirm that they know that the statement may be used in proceedings before the International Criminal Court, in the case against Mr Katanga. They all confirm that they are ready to testify publicly before the ICC, *ie* to reiterate their statement in person before the Chamber.
142. Though the defence accepts that, in general, the relevance and probative value of any non-contemporaneous document tends to be significantly lower than that of *viva voce* evidence, it submits that the proposed statements are sufficiently reliable to tender them into evidence in this case. They are probative to the sentencing determination.
143. The defence is aware that affidavits or signed statements are mostly inadmissible during the trial. However, it should be recognised that this is a different stage. The parties are no longer allowed to argue the facts. And though the statements go directly to the conduct of Mr. Katanga, this conduct is unrelated to the conduct of which he has been found guilty. Rather, it concerns Mr. Katanga's conduct outside of the contribution he has been found to have made to a group with a criminal purpose. This stage warrants a greater level of flexibility in terms of admissibility of proposed evidence. This is in line with the practice in most domestic jurisdictions. In the United Kingdom, for instance, judges routinely accept into evidence letters and other documents for sentencing purposes. The admissibility gateway is very wide. The weight to be attached to such information is a matter for the sentencing judge. Similarly, the Court should adopt a similar level of flexibility. If the only alternative is to call witnesses to the Hague or have them testify via video-link, the Court would have to spend considerable expense and time at a stage in the proceedings which is subsidiary to the trial itself. Accordingly, allowing the convicted person to admit signed written statements in lieu of oral testimony would provide a fair compromise between the calling of many witnesses or being deprived of an opportunity to use the such material. The defence submits that any concerns relating to reliability and

probative value in this particular situation should go to weight rather than admissibility.

144. Also, it is to be noted that, at the SCSL, the defence have been allowed to tender affidavits for the purpose of sentencing.²⁰³

145. The reliability of all the documents is further demonstrated by their chain of custody, mentioned in Annex 6.

b. Significance of the evidence

146. In addition, the prosecution documents are likely to influence the determination of the mitigating factors relevant for sentence since they fully support the defence's contention that Mr Katanga cooperated voluntarily with the MONUC throughout the entire DDR process, significant element to assess the convicted person's conduct after the act.

147. The diploma support Mr Katanga's testimony regarding his educational background.

148. The defence asks leave to tender through the bar the signed statements of six persons because it has made the choice not to request leave to call all of them as witnesses, for judicial economy, while being aware that the Court requires in principle live testimony. The defence submits that the live testimony of two of the seven persons identified as relevant for mitigation, i.e. [REDACTED] (D2-401) and [REDACTED] (D2-404), is necessary and sufficient to preserve Mr Katanga's rights, in particular his right to obtain the attendance and examination of witnesses on his behalf pursuant to article 67(1)(e) of the Statute. Indeed D2-401 covers the area of Mr Katanga's participation in the demobilization and disarmament process while D2-404 covers the area of Mr Katanga's reputation within the population and of the protection granted to the inhabitants. The five other persons discuss and corroborate these issues.

²⁰³ *Brima Sentencing Judgement* (<http://www.sc-sl.org/LinkClick.aspx?fileticket=v3P%2fxMoNm6U%3d&tabid=173>); *Fofana Sentencing Judgment*, paras. 11-13.

Therefore the defence submits that the admission of their statements through the bar is useful to corroborate the testimony of D2-401 and D2-404.

149. If the Chamber grants the defence request to call D2-401 and D2-404 as witnesses, it will not be necessary to admit their statements through the bar. If the Chamber dismisses the defence request to call them as witnesses, the defence maintains its request to admit their statements through the bar.²⁰⁴

(3) Lack of prejudice

150. Lastly, the defence submits that the prosecution will not suffer any prejudice from the admission at this stage of the prosecution documents, because they emanate from its unit and because the issues discussed therein are not totally new.

151. The document DRC-D02-0001-0465, *Diplôme d'Etat* of Germain Katanga, does not provide new information but is simply disclosed to prove Mr Katanga's educational background.

152. The signed statements that the defence wishes to tender through the bar do not disclose new information, since they relate to issues discussed during the trial, *ie* Mr Katanga's contribution to the demobilization process and his behavior towards the civilian population. They are useful, since they provide more details regarding Mr Katanga's personal involvement in promoting the demobilization process and protecting the population. These are, *a priori*, not contentious areas. The defence submits that it is necessary to develop these issues at the sentencing stage – while it was not during the trial - since they are essentially mitigating factors.

153. The defence is conscious of the fact that the statement in Annex 3 includes details on a number of areas that touch upon areas that have already been ruled upon by the Chamber. The defence has highlighted the relevant parts. The defence places no reliance on them and suggests that these areas be discounted for the purposes of sentencing. The defence is open to any suggestion from the prosecution to exclude any further parts of the statement, indeed the defence are open to any requests of the prosecution in respect of any of the statements. In that manner it can be agreed that

²⁰⁴ Cf. Annex 4, DRC-D02-001-1045 and DRC-D02-0001-1048, *Déclaration [REDACTED]* and its annex, and Annex 5, DRC-D02-0001-1054, *Déclaration [REDACTED]*.

the evidentiary value of the document be limited to the parts not highlighted. This will also be in the interests of judicial economy

154. The defence is minded that this is a different stage than trial and that the facts have been determined. Accordingly, it submits that the Chamber will not be assisted by hearing directly from multiple witnesses who effectively testify to similar issues. This would involve a significant expense on the Court. However, they assist the Chamber to the extent that they depict the overall picture of Mr. Katanga's conduct throughout the relevant period. The defence, therefore, proposes to admit their statements in lieu of their oral testimony.

(4) Conclusion

155. For these reasons, the defence requests the Trial Chamber to admit into evidence the documents DRC-OTP-0006-0281, DRC-OTP-0009-0363, DRC-OTP-0009-0364, DRC-OTP-0106-0482, DRC-OTP-0142-0227, DRC-OTP-1029-0591, DRC-D02-0001-0465, DRC-D02-0001-1040, DRC-D02-0001-1045, DRC-D02-0001-1048, DRC-D02-0001-1052, DRC-D02-0001-1053, DRC-D02-0001-1054, DRC-D02-0001-1057.

VI-Request to call witnesses

156. The defence proposes to call two witnesses (D2-401, D2-404) by video-link. Their statements are attached in Confidential Annexes 3 and 5.
157. The defence submits that the testimony of both witnesses may assist the Chamber in determining Mr Katanga's sentence.
158. D02-401 will testify about the crucial role Mr Katanga played in the DDR (Disarmament, Demobilization, and Reintegration) that was put in place by the DRC government in collaboration with MONUC. The demobilisation of militiamen as well as children was a significant part of that program.
159. The witness who will testify to this [REDACTED] worked closely together with Germain Katanga. He is in a position to inform the Court of all efforts made by

Mr Katanga to give effect to these peace efforts. He will tell the Court that, without Germain Katanga, the demobilisation program would not have been effective and the opposition to the process by other commanders.

160. D02-404 will testify about Mr. Katanga's conduct in his own community. He will provide details as to how he stood up for the civilian people and, where he could, protected them against abuse. He will testify about his conduct generally and give details about the respect he had from the civilian authorities. The witness will also give details about Mr. Katanga's efforts to protect his community against outside aggressors.

VII- Computation of sentence

161. Pursuant to 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 and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)."
162. To determine the length of sentence, the defence invites the Chamber to follow the practice adopted by other international criminal jurisdictions and by the *Lubanga* Trial Chamber, namely that the total sentence does not exceed the highest individual sentence imposed.²⁰⁵

²⁰⁵ See, for instance, Prosecutor v. Tadic, Case N° IT-94-1-T bis-R117, Sentencing judgment, 11 Novembre 1999, para. 32; Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, 28 April 2005, para. 619. See also ICC-01/04-01/06-2891-Red, Observations de la Défense sur la peine, 4 June 2012, paras 110-111, with reference to : *Voir pour le TPIR: Le Procureur c. Kayishema et Ruzindana*, Aff. n° ICTR-95-1-T, *Condamnation*, 21 mai 1999, par. 29 ; *Le Procureur c. Ruggiu*, Aff. n° ICTR-97-32-I, *Jugement et sentence*, 1^{ère} juin 2000 ; *Le Procureur c. Kajelijeli*, Aff. n° ICTR-98-44A-T, *Jugement et sentence*, 1^{er} décembre 2003, par. 968-969 ; *Le Procureur c. Kamuhanda*, Aff. n° ICTR-99-54A-T, *Jugement et sentence*, 22 janvier 2004, par. 770-771 ; *Le Procureur c. Muhimana*, Aff. n° ICTR-95-1B-T, *Jugement et sentence*, 28 avril 2005, par. 618-619 ; pour le TPIY : *Le Procureur c. Tadic*, Aff. n° IT-94-1, *Jugement relatif à la sentence*, 14 juillet 1997, par. 75 ; *Le Procureur c. Tadic*, Aff. n° IT-94-1-T bis-R117, *Jugement relatif à la sentence*, 11 novembre 1999, par. 32 ; *Le Procureur c. Tadic*, Aff. n° IT-94-1-A et 94-1-A bis. *Arrêt concernant les jugements relatifs à la sentence*, 26 janvier 2000, par. 76; *Le Procureur c. Mucic et consorts*, Aff. n° IT-96-21-T, *Jugement*, 16 novembre 1998, par. 1286 ; *Le Procureur c. Furundzija*, Aff. n° IT-95-17/1-T, *Jugement*, 10 décembre 1998, *dispositif* ; *Le Procureur c. Josipovic et consorts*, Aff. n° IT-95-16-T, *Jugement*, 14 janvier 2000, *dispositif* ; pour le

CONCLUSION

163. The defence respectfully requests the Chamber to take into account the observations submitted above in determining sentence.
164. In addition, the defence asks the Chamber to admit into evidence from the Bar the documents DRC-OTP-0006-0281, DRC-OTP-0009-0363, DRC-OTP-0009-0364, DRC-OTP-0106-0482, DRC-OTP-0142-0227, DRC-OTP-1029-0591, DRC-D02-0001-0465, DRC-D02-0001-1040, DRC-D02-0001-1045, DRC-D02-0001-1048, DRC-D02-0001-1052, DRC-D02-0001-1053, DRC-D02-0001-1054, DRC-D02-0001-1057.
165. Lastly, the defence requests leave to call as witnesses [REDACTED] (D2-401) and [REDACTED] (D2-404).

Respectfully submitted,



David Hooper Q.C.

Dated this 11th April 2014

The Hague.

TSSL : The Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment on the sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007, disposition ; The Prosecutor v. Sesay et al. Case No. SCSL-04-15-T, Sentencing Judgment, 8 April 2009, disposition.