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Date: **17 March 2014**

TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA**

Public

Defence Observations on the Proceedings and Principles Relevant to Sentence

Source: Defence for Mr Germain Katanga

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

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REGISTRY

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1. On March 7th 2014, Trial Chamber II, subsequent to its decision under Article 74, issued the *Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut)*,¹ ordering, as to part, 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 ;

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. The defence for Germain Katanga ('the defence') requests the Chamber to order an expedited and authoritative translation of the *Ordonnance* and all subsequent decisions that may be provided in French.
3. The defence, consequent to that order, hereby submits written observations, due by 16 00 on 17 March, 'on the procedure to adopt to determine sentence and the principles to be applied as to mitigation of sentence.'² The defence is unclear as to what exactly is being required of it and has difficulty in distinguishing 'principles to be applied as to mitigation' from the mitigating aspect of Rule 145 of the Rules of Procedure and Evidence ("Rules"), to which the the defence has been ordered to submit its observations a week later. These present observations deal with general principles and are without prejudice to such later submissions that will be made by the defence relating to the specific features of the case. The defence will welcome further clarification as to the expected extent of the submissions due by the 24th March.
4. As observed in the *Lubanga* judgement,³ when passing sentence the Chamber should apply, pursuant to Article 21(1) of the Statute, Articles 23, 76, 77 and 78 and 81(2)(a) of the Statute and Rules 143,145 and 146 of the Rules.

¹ ICC-01/04-01/07-3437, 7 March 2014.

² Being the defence's understanding / translation of the relevant part of the order.

³ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012.

5. Article 23 of the Statute reflects the *nulla poena sine lege* principle, namely the convicted person can only be punished in accordance with the Statute.
6. Article 76(1) of the Statute establishes that the Chamber, when considering the appropriate sentence, "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence".
7. The Chamber is required to hold a sentencing hearing under Article 76(2) of the Statute if this step is requested by the prosecution or the defence and the Chamber can also order a hearing of its own motion.
8. Pursuant to Article 77(1) of the Statute and Rule 145(3) of the Rules, the Chamber may impose a sentence of imprisonment that does not exceed 30 years, unless the extreme gravity of the crime and the individual circumstances of the convicted person" warrant a term of life imprisonment.
9. In addition, the Chamber may order a fine or the forfeiture of proceeds, property and assets derived directly or indirectly from the crime, or both, pursuant to Article 77(2) of the Statute.
10. Article 78 of the Statute and Rule 145 of the Rules govern the Chamber's determination of the sentence, whereby the Chamber must take into account such factors as the gravity of the crime and the individual circumstances of the convicted person, as well as any mitigating and aggravating circumstances.
11. Article 78(2) of the Statute provides that where the sentence is one of imprisonment the Court must deduct the time, if any, spent in detention in accordance with an order of the Court. Additionally, it "may deduct any time otherwise spent in detention in connection with conduct underlying the crime".
12. Rules 145(1)(a) and (b) of the Rules require that the sentence must reflect the culpability of the convicted person and the Chamber needs to balance all the relevant factors, including any mitigating and aggravating factors and taking into account the circumstances of the convicted person and the crime. Additional

factors and circumstances that are to be considered are listed in Rules 145(l)(c) and (2) of the Rules.

13. Finally, pursuant to Article 81(2)(a) of the Statute, the Chamber must ensure that the sentence is in proportion to the crime.

The Procedure

14. The relevant Article and Rules are to be found at Article 76 and Rules 143, 144 and 145 which are reproduced below;

Article 76 of the Statute, Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Rule 143 of the Rules, Additional hearings on matters related to sentence or reparations

Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91 and, in respect of reparations hearings, those victims who have made a request under rule 94.

Rule 144 of the Rules, Delivery of the decisions of the Trial Chamber

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.
2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:
 - (a) All those who participated in the proceedings, in a working language of the Court;
 - (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f)

Rule 145 of the Rules, Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

15. The defence maintains its request made in its closing submissions that, in the event of a conviction in respect of any offence or offences, the Chamber holds a further hearing 'to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence'.⁴

16. The general principles of sentencing and procedure were reviewed in the *Lubanga* case.⁵ The defence submits that there is no good reason why the basic procedure

⁴ ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, 2 July 2012, para. 1333.

⁵ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012.

adopted in the *Lubanga* case⁶ should not be followed, despite the fact that that case was concerned with a different and narrower charge than the present case. By ‘basic procedure’ the defence means the procedure whereby written submissions were presented by the prosecution and the victim’s representative, then by the defence, followed by any oral testimony and then final submissions in the same order as for closing submissions, with the defence having ‘the last word’. This would also be in harmony with Rule 141, governing closure of evidence and closing statements, pursuant to which “[t]he defence shall always have the opportunity to speak last” applies equally to the sentencing hearing.

17. The Trial Chamber, departing from the practice in *Lubanga*, has ordered the defence to present these observations on procedure and principles by the same day and time as the prosecution and victim’s representative. The defence submits that it would have been fairer to have allowed the defence the opportunity to view their submissions before making its filing.
18. The Trial chamber has further ordered the parties and the Legal Representative to present, by 24th March, ‘*leurs observations écrites mentionnées au paragraphe 5 de la présente Ordonnance*’, which paragraph refers to ‘*toutes observations qu'ils jugeront nécessaires pour qu'elle puisse se prononcer utilement au regard de la règle 145 du Règlement*’.
19. The defence requests the Chamber to defer the time within which it has to provide observations relating to Rule 145 by a further two weeks (that is until Monday 7th April) in order, firstly, that the defence may have further time to consider its position and to frame its submissions, secondly, to enable the defence to have notice of the submissions made by the prosecution and the victim’s representative before submitting its written observations. It is only fair that the defence has the last word in this regard and can make the fullest observations in light of those submitted by the prosecution and legal representative of the victims.

⁶ See ICC-01/04-01/06-2844, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, and ICC-01/04-01/06-2871, Order fixing the date for the sentencing hearing, 24 April 2012.

20. The defence will necessarily require further time to address the third limb of the Chambers Order, namely that portion stating; *‘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.’* The defence is not in a position to give such precision at this stage and will require further time to do so. The defence proposes to make a written submission to this effect after it has received relevant information from its investigator who is in course of being re-engaged following the conviction. The Chamber will be aware of the difficulties arising from the continued conflict in the Ituri region.
21. The defence has requested an oral hearing in any event. The timing of the hearing will be at the discretion of the Chamber but the defence requests that it not be earlier than 25th May. In *Lubanga*, the Chamber granted approximately two months from the date of its order on the procedure to be adopted regarding sentencing.⁷ The defence suggests that a similar time frame be adopted in the present proceedings. The defence has a significant amount of preparation to do and is currently also addressing the Appeal against the conviction. Only when the position in respect of the calling of further evidence is decided, the availability of such witnesses, if any, determined, and their method of testifying defined, will it be possible to settle on a firm date for such a hearing.
22. While this case has taken a considerable time, and mindful of the court's duty to ensure an expeditious trial, the defence is concerned that the interests of the accused continue to be fully and adequately reflected by his having sufficient time to address the significant issues involved in the post Article 74 procedure. It is no fault of Mr Katanga that the Article 74 decision was delayed. Confronted with the fact of that decision, and the particular charges upon which he has been convicted, it is fair and reasonable to give him a proper period of time to consider his position.

⁷ Cf. ICC-01/04-01/06-2844, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, asking the Office of the Prosecutor and the legal representatives of victims to file written submissions on the procedure to be adopted for sentencing under Article 76 of the Statute and the principles to be applied by the Chamber when it is considering the appropriate sentence to be imposed, by 16.00 on 18 April 2012 (para. 3); ICC-01/04-01/06-2871, Order fixing the date for the sentencing hearing, 24 April 2012; ICC-01/04-01/06-T-360-Red-FRA, sentencing hearing, 13 June 2012.

23. In respect to the provision of further evidence, the defence may request the Chamber to permit it to submit mitigating material in written form rather than by calling the person to testify orally. This is not the preferred way for the defence to present any mitigation evidence and it will make all efforts to present the Chamber with oral testimony. However, whilst not ideal, this may be the only way of persuading witnesses to contribute to the sentencing process. Given continuing security problems in the region, potential witnesses may be more reluctant to travel to The Hague to give *viva voce* testimony than to sign a written statement. The defence will inform the Chamber as soon as it has more information as to the situation and may submit further legal arguments in support of its position, if necessary.

24. It is common practice at other tribunals to consult with the defence as to the most suitable location for the sentence to be served. Factors, such as Mr. Katanga's preference, the proximity to his family, language spoken and cultural familiarity should be taken into account in determining the most suitable location for Mr. Katanga to serve his sentence. The defence requests that it be consulted as soon as possible by the Registrar as to the location where Mr Katanga will serve his sentence.

Evidentiary Issues

25. In determining the sentence, pursuant to Article 76(1), the Chamber "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence." The defence accepts the view taken in *Lubanga* that "mitigating factors are not limited to the facts and circumstances described in the Confirmation Decision". Similarly, at the *ad hoc* tribunals, it has been held that mitigating factors need not necessarily be related to the offence.⁸ However, the *ad hoc* tribunals considered that only those facts pleaded in the indictment could be considered as aggravating factors for sentencing.⁹

⁸ *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 125

⁹ *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement*, 28 November 2007, para. 82; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement*, 20 October 2010, para. 46; *Renzaho v Prosecutor*, No. 97-

Standard of Proof

26. Regarding the standard of proof for the purposes of sentencing, the *Lubanga* Trial Chamber held that “[s]ince any aggravating factors established by the Chamber may have a significant effect on the overall length of the sentence Mr Lubanga will serve, it is necessary that they are established to the criminal standard of proof, namely “beyond a reasonable doubt””.¹⁰ In addition, it considered that since “the *in dubio pro reo* principle applies at the sentencing stage of the proceedings, [...] any mitigating circumstances are to be established on a balance of probabilities.”¹¹

27. The defence submits that, as stated in *Lubanga*¹² and reflecting practice at other Tribunals,¹³ the standard of proof in respect of aggravating matters is that of proof to the criminal standard of proof beyond a reasonable doubt and, for mitigating factors, proof on a balance of probabilities.

Multiple Convictions

28. Pursuant to Article 78(3),

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. 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).

General Principles to Determine Appropriate Sentence

31-A, Judgement, 1 April 2011, para. 615; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement*, 16 November 2007, para.29; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2069.

¹⁰ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para.33.

¹¹ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para.34.

¹² ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, paras 33 and 34.

¹³ *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence*, 12 June 2006, para. 40; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 763; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 592; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement*, 23 May 2005, para. 294; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement*; 13 December 2005, para 438; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence*, 13 April 2006, para. 111.

29. Article 23 of the Statute, reflecting the principle *nulla poena sine lege*, states that a convicted person can only be sentenced in accordance with the Statute. The Statute is concise in its references to sentencing, stating in Article 76 (1) that ‘In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.’ Article 77 deals with the possible penalties the Chamber may impose, up to and including a life sentence “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” In addition to imprisonment, the Court may order a fine (Article 77(2)(a). Article 78 (1), dealing with how the sentence is to be determined, states, “[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”

30. In light of these provisions, it is submitted that the Statute provides the sentencing Chamber with a wide margin of discretion in addressing the particular circumstances of a given case. In *Lubanga*, the prosecution proposed that the gravity of the crimes over which the ICC has jurisdiction required a fixed starting point (suggested to be 80% of the 30 year maximum) around which the various aggravating or mitigating factors could be viewed.¹⁴ The Chamber robustly rejected this notion, finding that it had no basis in law and constituted a derogation from the principle contained in Article 81(a) of maintaining proportion between the crime and the sentence.¹⁵

31. While the sentence is to be determined by taking into account the gravity of the crime and the person’s individual circumstances according to Article 78, neither ‘gravity’ nor ‘individual circumstances’ are further defined in the Statute. The *Lubanga* Decision considered that:

36. The "gravity of the crime", as set out in Article 78(1) of the Statute and in Rule 145 of the Rules, is one of the principal factors to be considered in the determination

¹⁴ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 92.

¹⁵ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 93.

of the sentence, which should be in proportion to the crime (Article 81(2)(a) of the Statute), and it should reflect the culpability of the convicted person (Rule 145(l)(a) of the Rules).¹⁶

32. In the submission of the defence, ‘gravity’ is an amalgam of the seriousness of the crime and the nature of the role played by the accused in its commission. Indeed, it has been held that the determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.¹⁷
33. Article 78(1) is further addressed in Rule 145(1)(c), which lists additional factors to which consideration is to be given; “*inter alia*, the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location and the age, education, social and economic condition of the convicted person.”
34. By Rule 145(1)(a) the totality of sentence “must reflect the culpability of the convicted person”. By Rule 145(1)(b) the Chamber is invoked to “balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.” By Rule 145 (1)(c) the Court must give consideration to the personal circumstances of the convicted person, including his or her age, education, and social and economic condition. This list is not exhaustive and the Chamber has discretion to consider any other individual circumstances.
35. By Rule 145 (2) the Court, in addition to the factors mentioned in Rule 145(1), “shall take into account, as appropriate” mitigating and aggravating circumstances. It is to be noted that Rule 145(2), in listing mitigating circumstances, refers to ‘mitigating circumstances such as’, while when referring to aggravating circumstances omits the words ‘such as’, thereby limiting those circumstances to those listed.

¹⁶ ICC-01/04-01/06-2901. See also para. 26.

¹⁷ *Prosecutor v. Kupreskic*, No. IT-95-16-T, *Judgement* (14 January 2000) at para 852; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 731.

36. In the defence submission ‘mitigating’ means factors that justify lowering the sentence and ‘aggravating’ those factors that justify an increase. The existence of aggravating circumstances is required before a life sentence can be considered “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person,” according to Rule 145(3).
37. It is accepted sentencing policy that ‘double counting’ is impermissible. A factor that is taken into account in determining the gravity of the crime is not then to be further invoked as an aggravating circumstance. As stated in *Lubanga*, “any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and *vice versa*.”¹⁸ The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and for Rwanda (“ICTR”) adopted a similar position.¹⁹ For instance, the ICTR ruled that a Trial Chamber erred in considering number of victims for the gravity of the offence and again as an aggravating factor.²⁰
38. A factor which is an element of the crime similarly cannot be also taken into account as an aggravating factor. In *Lubanga*, for example, the fact that the children were young - even as young as five - could not qualify as an aggravating factor²¹ given that their age was already an intrinsic element of the crime:

78. As already indicated, the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances. Therefore, the age of the children does not both define the gravity of the crime and act as an aggravating factor. Accordingly, the age of the children does not constitute an aggravating factor as regard these offences.²²

39. Similarly, while the prosecution argued that Mr Lubanga’s position as President and commander-in-chief of the UPC constituted an aggravating circumstance, Trial Chamber I stressed that these factors should not be “double-counted” for the

¹⁸ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 35.

¹⁹ ICTY, *Prosecutor v. Nikolic*, Case No. IT-02-60/1-A, Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, para. 58; *Prosecutor v Simba*, No. ICTR-2001-76-T, Judgement, 13 December 2005, para. 438; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, Sentencing Judgement, 16 November 2007, para. 22.

²⁰ *Gatete v Prosecutor*, No. ICTR-00-61-A, Judgement, 9 October 2012, para. 275

²¹ See Lubanga prosecution submission - ICC-01/04-01/06-2881 ‘The Prosecution recognises that the age of the **victims cannot be considered** an aggravating factor because it is an element of the crime’ And ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 35 .

²² ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 78.

purposes of sentence.²³ The ICTR also considered that an accused's abuse of his role as an influential authority was an element of the crime for which he was convicted (under Article 6 (1) and Article 6 (3) of the ICTR Statute) and therefore, it could not be considered as an aggravating factor.²⁴

40. Even when the conditions are met for taking into account aggravating circumstances, the Trial Chamber has the discretionary power to attach only limited weight to those circumstances.²⁵

41. The ICC jurisprudence on the application of mitigating factors is very limited given that only the *Lubanga* case falls to be considered.

42. In *Lubanga*, it was held that the accused's contribution to establishing peace should be taken into account as a mitigating factor,²⁶ as well as his consistent respect and cooperation with the Court "notwithstanding some particularly onerous circumstances".²⁷

43. In the absence of further ICC jurisprudence and guidelines, the defence submits that it would be appropriate for the Chamber to consider the jurisprudence of the *ad hoc* tribunals on sentencing. The defence lists here some potentially relevant factors that the *ad hoc* tribunals considered as capable of mitigating a sentence. The defence emphasises that it is not exhaustive and reserves the right to further elaborate upon, and expand them in subsequent submissions. It is further submitted that the Chamber has a wide discretion in determining what circumstances may be considered as mitigating Mr. Katanga's sentence. The principles discussed here are intended to serve as guiding principles only.

²³ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 51. See also *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 610, 626; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 320.

²⁴ *Prosecutor v Ndahimana*, No. ICTR-01-68-T, *Judgement and Sentence*, 30 December 2011, para. 859

²⁵ *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2069

²⁶ SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Trial Chamber, Sentencing Judgment, 9 October 2007, para. 94, quoted by ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 15.

²⁷ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, paras 91, 97.

44. The ICTY Appeals Chamber summarized as follows some of the main mitigating circumstances :

Factors that have previously been taken into account by the International Tribunal as evidence in mitigation include: (1) co-operation with the Prosecution; (2) the admission of guilt or a guilty plea; (3) the expression of remorse; (4) voluntary surrender; (5) good character with no prior criminal convictions; (6) comportment in detention; (7) personal and family circumstances; (8) the character of the accused subsequent to the conflict; (9) duress and indirect participation; (10) diminished mental responsibility; (11) age; and (12) assistance to detainees or victims.²⁸

Personal and Family Circumstances

45. The *ad hoc* tribunals have determined that social factors such as the social, professional, and family background of the convicted person may be mitigating factors in showing the likelihood of rehabilitation.²⁹ It should not be forgotten that the purpose of sentence is not only retribution and deterrence but also rehabilitation.³⁰

46. The fact that the convicted person is married and has children, particularly if they are young, can be a mitigating factor.³¹ This is particularly so because of the hardship on the family when the convicted person serves a long sentence, particularly when far away.³²

²⁸ *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43. See also *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2140.

²⁹ *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 143-44

³⁰ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 817; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1073

³¹ *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 143 ; *Kumarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 362 ; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 300; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 39; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 396.

³² *Strugar*, Trial Judgment, 31 January 2005, par 469 ; *Mrda*, Sentencing Judgment, 31 March 2004, pars 105-109.

47. The young age of the convicted person has been considered a mitigating factor.³³

In the ICTY case of *Erdemovic*, the Chamber held that «the combination of [Erdemovic's] young age [26 years old], evidence that he is “not a dangerous person for his environment,” and “his circumstances and character indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so.”³⁴ Similarly, in *Blaskic*, the ICTY Trial Chamber held :

“The case-law of the two *ad hoc* criminal Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance. The assessment of youth varies – whilst the ICTY considers accused aged between 19 and 23 at the time of the facts as being young, the ICTR selects ages from 32 to 37.”³⁵

Degree of Participation

48. The *ad hoc* tribunals held that a sentence must be proportionate to both the seriousness of the crimes committed and the degree of participation of the accused.³⁶ A higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice, and on one who orders, rather than one who merely aids and abets the commission of crimes.³⁷

49. The Trial Chamber in *Krstic* defined the rationale for this as follows:

Indirect participation is one circumstance which may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal, and may, depending on the circumstances, warrant a lighter sentence than that imposed for commission.³⁸

³³ *Serushago*, (Trial Chamber), February 5, 1999, Sentencing Judgment para. 31-42 ; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43.

³⁴ *Erdemovic*, (Trial Chamber), March 5, 1998, para. 16.

³⁵ *Blaskic*, (Trial Chamber), March 3, 2000, para. 778.

³⁶ *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 591

³⁷ *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 388 ; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-S, Sentencing Judgment, 17 November 2009, para. 42 ; *Vasiljevic*, Appeal Judgment, 25 February 2004, par 182.

³⁸ *Krstic*, IT-98-33-T Judgment, 2 August 2001, par 714

50. Abuse of authority, playing an « important leading role » and influencing others to participate are considered as aggravating factors.³⁹ However, where the role of the convicted person is limited, his or her position of authority is not an aggravating factor.⁴⁰ It has similarly been accepted that lack of authority or a high ranking official position can be a mitigating factor.⁴¹ It has also been held that mitigating circumstances may include the lack of a *de jure* position,⁴² as well as the fact that the convicted person did not personally participate in the commission of the crimes.⁴³ In addition, difficulties in exercising authority to stop killings (in light of prevailing situation in Rwanda during the genocide), has been considered as a mitigating factor.⁴⁴

Good Conduct of the Convicted Person

51. Saving lives or providing assistance to individuals in other ways during the conflict can be considered a mitigating factor.⁴⁵ For instance, it was held that the provision of assistance to Tutsis, by sheltering them at one's home and trying to arrest wrongdoers, is a mitigating factor.⁴⁶

52. Also, the convicted person's moral character during, before and after the commission of the crimes can be mitigating. For instance, the lack of a criminal

³⁹ *Rutaganda*, (Trial Chamber), December 6, 1999, para. 468-470 ; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 499 ; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 80; *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 106 ; *Simic*, (Trial Chamber), October 17, 2002, para. 67 ; *Sikirica et al.*, (Trial Chamber), November 13, 2001, para. 172.

⁴⁰ *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

⁴¹ *Akayesu*, (Trial Chamber), October 2, 1998.

⁴² *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, *Sentencing Judgment* para. 19- 23.

⁴³ *Ruggiu*, (Trial Chamber), June 1, 2000, para. 53-80 ; *Dragomir Milosevic*, *Appeal Judgment*, 12 November 2009.

⁴⁴ *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 47

⁴⁵ *Rutaganda*, (Trial Chamber), December 6, 1999, para. 471-473 ; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 495-498 ; *Sikirica et al.*, (Trial Chamber), November 13, 2001, paras. 195 and 229 ; *Blaskic*, (Trial Chamber), March 3, 2000, para. 781.; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 77 *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 37.

⁴⁵ *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 36

⁴⁶ *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement*, 14 July 2009, para 824.

record has been held to be mitigating factor.⁴⁷ Similarly, the fact that the accused acted more out of concern for the safety of himself and his family rather than out of hatred for a certain community was taken into account as a mitigating factor.⁴⁸ Achievements in bringing prosperity and development to the region,⁴⁹ and advocating democracy,⁵⁰ contributions to peace and reconciliation after the crimes,⁵¹ the expression of sympathy for, or assistance to the victims have all been considered mitigating factors.⁵²

53. Similarly, the convicted person's conduct in prison,⁵³ as well as his or her conduct during trial proceedings, « ascertained primarily through the Trial Judges' perception of an accused », ⁵⁴ can be a mitigating factor. Indeed, in the ICTY case of *Simic*, the Trial Chamber found « Milan Simic's comportment in the Detention Unit and his general co-operation with the Trial Chamber and the Prosecution during the proceedings against him to be a mitigating factor. »⁵⁵ As stated above, this was also deemed a mitigating factor in the *Lubanga* case.

⁴⁷ *Rutaganda*, (Trial Chamber), December 6, 1999, para. 471-473 ; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 908-909 ; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement*, 17 December 2004, para.1090; *Prosecutor v Nzabrinda*, No. ICTR-2001-77-T, *Judgement*, 23 February 2007, para. 92 *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement*, 16 November 2007, para.43.

⁴⁸ *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 36

⁴⁹ *Semanza*, (Trial Chamber), May 15, 2003, para. 579-584.

⁵⁰ *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 495-498.

⁵¹ *Blagojevic and Jokic*, Trial judgment, 17 January 2005, pars 858-860 ; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 59 ; *Plavsic*, (Trial Chamber), February 27, 2003, para. 94.

⁵² *Akayesu*, (Trial Chamber), October 2, 1998 ; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43 ; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 470; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 310.

⁵³ *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43 ; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1091; *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 82; *Prosecutor v Nzabrinda*, No. ICTR-2001-77-T, *Judgement*, 23 February 2007, para. 92; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement*, 16 November 2007, para. 43.

⁵⁴ *Mucic et al.*, (Appeals Chamber), February 20, 2001, para. 788.

⁵⁵ *Simic*, (Trial Chamber), October 17, 2002, para. 112. *See also Erdemovic*, (Trial Chamber), March 5, 1998, para. 21.

54. The providing of information by the convicted person, which pertains to the facts for the Chamber to consider, thereby facilitating its task of ascertaining the truth can be a mitigating factor.⁵⁶

55. It is accepted that the expression of remorse is a mitigating factor.⁵⁷ In particular, a sincere expression of regret may constitute a mitigating circumstance, even in the absence of any admission of participation in a crime.⁵⁸ In addition, it has been held that expression of sympathy to the victims by defence counsel during the trial is a mitigating factor even if the accused made no statement.⁵⁹

Violation of the rights of the defendant

56. Where the rights of the convicted person, including his or her right to be informed of charges promptly, have been infringed, a reduction in the sentence may be ordered.⁶⁰ The *Lubanga* Trial Chamber adopted this approach by taking into account the prosecution's failure to disclose exculpatory material and to comply with its order among the mitigating circumstances.⁶¹

Time spent in detention / Prior Imprisonment in the DRC

57. Pursuant to Article 78 (2), “[i]n 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.” Similarly, in the *ad hoc* tribunals, where national criminal proceedings against the convicted person emanated from substantially the same criminal conduct as that for which he or she is convicted by the tribunal, “fairness requires that account be taken of the period the [convicted

⁵⁶ *Musema*, (Trial Chamber), January 27, 2000, para. 1005-1008 ; *Plavsic*, (Trial Chamber), February 27, 2003, para. 66-81.

⁵⁷ *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 64; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 34; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 38

⁵⁸ *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 396 ; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 470

⁵⁹ *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 752

⁶⁰ *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 255

⁶¹ ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, para. 91.

person] spent in custody in [the national jurisdiction] prior to the issuance of the Tribunal's formal request for deferral".⁶²

58. The *Lubanga* Trial Chamber considered that the fact that the accused was detained in the DRC for conduct underlying the crimes for which he was convicted at the Court should be established "on the balance of probabilities". The defence will be submitting in later filings that the time Mr. Katanga spent in the Kinshasa central prison should be deducted from the sentence eventually imposed. In addition, the defence will submit that the irregularities of Mr. Katanga's imprisonment in the DRC constitute a factor to be taken into consideration.

Conclusion

59. The defence respectfully submits these observations pursuant to the Chamber's Order.

Respectfully submitted,



David Hooper Q.C.

Dated this 17 March 2014

The Hague.

⁶² *Tadic*, (Appeals Chamber), January 26, 2000, paras 38, 75.