

Dissenting opinion of Judge Christine Van den Wyngaert

1. Considering that I disagree with the conviction of Germain Katanga, both from a procedural and from a substantive point of view,¹ I also distance myself from the sentence being imposed by the Majority today. I therefore take no position as to the appropriateness of reasoning adopted by the Majority or the sentence itself, even on the assumption that the factual and legal basis for the conviction was correct.
2. Nevertheless, I wish to express my views in relation to one specific point. In particular, I think that it is possible to deduct the time between Germain Katanga's arrest by the Congolese authorities (26 February 2005) and the notification of the arrest warrant by the Court (18 September 2007) from the sentence imposed by the Majority.
3. According to the Majority, the available evidence allows it to determine with confidence that Germain Katanga was not detained by the Congolese authorities for the crimes committed in Bogoro on 24 February 2003.² I respectfully disagree. In my view, the available documents are far from clear with regard to the reason(s) for detention and it would be unfair to hold this ambiguity against Germain Katanga. I observe, in this regard, that the "*Requête aux fins de prorogation de la détention provisoire*"³ states very clearly that "*l'Officier du Ministère Public près de la Haute Cour Militaire*" asks for the *prolongation* of the detention of Germain Katanga (and others) in the context of a criminal investigation concerning crimes against humanity allegedly committed in the territory of Ituri in the period between July 2002 and

¹ Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, ICC-01/04-01/07-3436-AnxI.

² See "Décision relative à la peine (article 76 du Statut)", para. 166.

³ DRC-OTP-1010-0364; also available as ICC-01/04-01/07-891-Conf-Exp-AnxH1

December 2005. Bogoro is specifically mentioned as one of the localities where such crimes are alleged to have been committed.⁴

4. I am aware that this Chamber – albeit in a different composition – rejected this document as insufficiently precise for the purposes of an admissibility challenge.⁵ However, I cannot fail to note that, although the Chamber found, at the time, that there was insufficient evidence that the Congolese authorities were actively *investigating* Germain Katanga’s alleged involvement in the attack on Bogoro of 24 February 2003, it did not find that Germain Katanga was not being *detained* by those same authorities on the basis of, *inter alia*, his alleged involvement in this attack.⁶ In other words, while it may be true that this document did not show that the Congolese authorities were proactively investigating Germain Katanga with regard to the attack on Bogoro (the only question that was relevant for the purposes of complementarity), it is difficult to deny that they were at least justifying his prolonged detention (in part) on this basis. It is noteworthy, in this regard, that the documents relied upon by the Majority⁷ – which all pertain to specific investigative steps, not to the reason for detention – all predate the only document in the Chamber’s possession which explicitly mentions the grounds for detention.⁸ Accordingly, unless it is suggested that the attack on Bogoro was added to the investigation later (a proposition which clearly conflicts with the position taken by the Congolese government and the previous conclusions of this

⁴ *Idem*.

⁵ “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, 16 June 2009, ICC-01/04-01/07-1213, para. 71.

⁶ This is acknowledged clearly in paragraph 71 of the aforementioned Decision, where it is stated that: “The Chamber can therefore but note the significantly vague nature of the document in question, which is after all simply *a request to extend provisional detention*.” [emphasis mine]

⁷ See “Décision relative à la peine (article 76 du Statut)”, para. 162. These documents are: ICC-01/04-01/07-891-Conf-Exp-AnxB1 [Commission Rogatoire] dd. 15 December 2006; ICC-01/04-01/07-891-Conf-Exp-AnxD1 [Demande de renseignements complémentaires] dd. 22 January 2007; ICC-01/04-01/07-891-Conf-Exp-AnxI [Note synoptique sur état de la procédure – Dossier de l’Ituri] dd. 10 August 2005; ICC-01/04-01/07-891-Conf-Exp-AnxQ1 [P.V. d’Audition] dd. 20 January 2006.

⁸ DRC-OTP-1010-0364; also available as ICC-01/04-01/07-891-Conf-Exp-AnxH1.

Chamber), it can be assumed that “Bogoro” was always part of the reasons for which Germain Katanga was detained.

5. Even if it were true that Germain Katanga was initially detained for reasons that were not (yet) specifically linked to the attack on Bogoro of 24 February 2003, I do not think this would necessarily prevent the Chamber from applying its discretion under article 78(2) *in fine*. It is normal that a criminal investigation spanning a vast region such as Ituri, covering a period of several years, and involving multiple suspects, requires time before it is possible to identify specific charges against an individual suspect.⁹ It is not the fault of the suspect, who is under no obligation to cooperate with the criminal investigation, that the local authorities were not sufficiently diligent in this regard.¹⁰ Therefore, as long as the “conduct underlying the crime”, in the sense of article 78(2) *in fine*, is in principle covered by the national investigation which justifies the detention, I believe this suffices for exercising the Chamber’s discretion to deduct the time spent from the sentence imposed.

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



Judge Christine Van den Wyngaert

Dated this 23 May 2014
At The Hague, The Netherlands

⁹ This situation is not dissimilar from when the Prosecutor commences an investigation into a new situation. One may wonder whether it is appropriate to issue an arrest warrant on the basis of the suspicion that a person may be criminally responsible for an as yet unspecified crime that is part of the situation, but this is a matter of Congolese law about which the Court is not in a position to express itself. The facts are that Germain Katanga was detained on this basis.

¹⁰ It may be noted, in this regard, that Germain Katanga himself mentioned the attack on Bogoro when being interviewed by the investigating authorities in Kinshasa on 20 January 2006. See, ICC-01/04-01/07-891-Conf-Exp-AnxQ. It is unclear whether this declaration had any influence on the ongoing investigation or on the grounds for his detention.