



Original: **English**

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

Date: **8 April 2013**

**TRIAL CHAMBER II**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
THE PROSECUTOR  
v. GERMAIN KATANGA**

**Public**

**Prosecution's observations on Article 25(3)(d)**

**Source:** Office of the Prosecutor

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

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## **REGISTRY**

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1. On 21 November 2012, Trial Chamber II (“Chamber”) issued its “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons” (“Notice Decision”) and notified the parties and participants that the mode of liability under which Germain Katanga was currently charged was subject to a legal recharacterisation on the basis of Article 25(3)(d) of the Statute.<sup>1</sup>
2. On 28 December 2012, the Chamber granted the Defence leave to appeal the Notice Decision.<sup>2</sup>
3. On 27 March 2013, the Appeals Chamber rejected the Defence’s appeal<sup>3</sup> and that same day, the Chamber ordered the Prosecution and Legal Representatives to file their Observations “on the proposed change, in regard to points both of law (article 25(3)(d) of the Statute) and of fact (consistency between the facts and the law)”<sup>4</sup> by 8 April 2013 and the Defence by 15 April 2013.<sup>5</sup>
4. The Prosecution submits that the evidence in the record of the case clearly meets the legal requirement of Article 25(3)(d). The evidence demonstrates that the Ngitu combatants from the Walendu-Bindi *Collectivité* attacked the village of Bogoro in a planned and coordinated manner which led to the commission of the crimes against humanity of murder, rape and sexual slavery, and war crimes of wilful killing, intentionally directing an attack against a civilian population, rape, sexual slavery, destruction and pillaging of property. Germain Katanga contributed to the commission of crimes committed at Bogoro including by, organising and participating with other Ngitu commanders in the discussions that led to the plan to attack Bogoro; procuring and distributing weapons and ammunition to the group of Ngitu combatants that committed the crimes.

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<sup>1</sup> ICC-01/04-01/07-3319, p.31.

<sup>2</sup> ICC-01/04- 01/07-3327.

<sup>3</sup> ICC-01/04-01/07-3363.

<sup>4</sup> Notice Decision, ICC-01/04-01/07-3319, para.55.

<sup>5</sup> Order sent to the Parties and Participants by email at 4.50pm by a Legal Officer of the Chamber.

Consequently, if the Chamber were to recharacterise the charges, the Prosecution submits that it has proven beyond reasonable doubt the guilt of Germain Katanga also pursuant to the mode of liability of Article 25(3)(d)(ii).

### **The elements of Article 25(3)(d)(ii)**

5. Individual criminal responsibility pursuant to Article 25(3)(d)(ii) entails the following elements: (i) a crime within the jurisdiction of the Court was attempted or committed; (ii) a group of persons acting with a common purpose attempted to commit or committed this crime; (iii) the accused contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c) of the Statute; (iv) the contribution was intentional; and (v) the contribution was made in the knowledge of the intention of the group to commit the crime.<sup>6</sup>

#### *A crime within the jurisdiction of the Court was attempted or committed*

6. This element requires that any of the crimes under Articles 6, 7 or 8 of the Rome Statute was carried out or attempted. It is not necessary that the material elements of the crime be completed, as long as an attempt to commit a crime pursuant to Article 25(3)(f) was made.

#### *A group of persons acting with a common purpose attempted to commit or committed this crime*

7. As found by Pre-Trial Chamber II, the “concept of ‘common plan’ is functionally identical to the statutory requirement of Article 25(3)(d) [...] that there be a ‘group of persons acting with a common purpose’. A common purpose must

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<sup>6</sup> ICC-01/09-01/11-373, para. 351; ICC-01/09-01/11-1, para.51; ICC-01/09-02/11-1, para.47; ICC-01/04-01/10-465-Red, paras. 268-289; ICC-01/04-01/10-1-US, para.39, re-classified as public pursuant to ICC-01/04-01/10-7. See also Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, hereinafter Appeal's Chamber Regulation 55 Decision.

include an element of criminality, but does not need to be specifically directed at the commission of a crime.”<sup>7</sup>

8. The common purpose does not need to be explicit, and its existence can be inferred from the concerted action of the group of persons.<sup>8</sup> It can also be inferred from the intention of the leader or the leaders of the group, provided they played a major role in that group, such as being significantly involved in creating the group, leading the group, or organizing its criminal activities.<sup>9</sup> Moreover, the common purpose may materialise extemporaneously and does not need to have been previously arranged or formulated.<sup>10</sup>
9. Article 25(3)(d) applies irrespective of whether the accused is a member of the group acting with a common purpose.<sup>11</sup> However, a plain reading of the language of Article 25(3)(d)<sup>12</sup> suggests that the persons who physically perform the material elements of the crime or attempt its commission are members of the group and espouse the common purpose.
10. By analogy to the concept of joint criminal enterprise adopted by the UN *ad hoc* Tribunals, the Prosecution submits that the group acting with common purpose need not be organised in a military, political or administrative structure.<sup>13</sup>

*The accused contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c) of the Statute*

11. Article 25(3)(d) is a residual form of liability, which applies when the accused contributes to the commission or attempted commission of the crime “in any

<sup>7</sup> ICC-01/04-01/10-465-Red, para.271.

<sup>8</sup> ICC-01/04-01/10-465-Red, para.271; see also *Prosecutor v. Duško Tadi* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.

<sup>9</sup> ICC-01/09-01/11-373, para.352.

<sup>10</sup> *Prosecutor v. Duško Tadi* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.

<sup>11</sup> ICC-01/04-01/10-465-Red, para.275.

<sup>12</sup> [...] the commission or attempted commission of such crimes by a group of persons acting with a common purpose. [...]

<sup>13</sup> *Prosecutor v. Duško Tadi* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.

other way” that is not encapsulated under Articles 25(3)(a)-(c).<sup>14</sup> Accordingly, *any contribution to the crime* is sufficient to satisfy this element.<sup>15</sup>

12. Where the conduct of an accused is so trivial that no relation between that conduct and any of the elements of the crime can be established, the contribution may be considered to be “neutral”,<sup>16</sup> which is insufficient for criminal liability under Article 25(3)(d). According to the Notice Decision of the Majority, any *real* contribution to the crime must be understood to be sufficiently “*significative ou importante*”.<sup>17</sup>

13. Therefore, Article 25(3)(d) only requires the existence of a link or *nexus* between the act and conduct of an accused and the commission of a crime by a group of persons acting with a common purpose. While it is necessary that the act and conduct of the accused *contribute* to the commission of the crime, *any* such contribution will suffice. The relevant contribution may be linked to a material element of a crime (for instance by facilitating in any way the commission of the material elements of the crime),<sup>18</sup> but it may also be linked to any of the subjective elements of the crime (for instance, by encouraging troop morale of those who commit the material elements of the crime).<sup>19</sup> Moreover, the wording of Article 25(3)(d) does not require that a contribution is provided directly to the physical perpetrators of a crime. It is sufficient that it is provided to “a group of

<sup>14</sup> ICC-01/09-01/11-373, para. 354; ICC-01/04-01/10-465-Red, para.278. See also Kai Ambos, “Article 25”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, “Individual Criminal Responsibility”, in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford, Oxford University Press, 2002), pp.802-803.

<sup>15</sup> ICC-01/09-01/11-373, para.354. This is also corroborated by Judge Fernandez, the only judge from the Appeals Chamber who expressed herself on the merits of the matter (see ICC-01/04-01/10-514 OA4, Dissenting Opinion Judge Fernandez, paras.8-15). See *a contrario*, ICC-01/04-01/10-465-Red, paras.276-285, requiring the level of contribution under Article 25(3)(d) to be “significant”.

<sup>16</sup>ICC-01/04-01/10-514 OA4, Dissenting Opinion Judge Fernandez, para.12. The Prosecution notes that the Majority of the Appeals Chamber did not pronounce itself on the question whether the contribution under Article 25(3)(d) must be significant, as found by Pre-Trial Chamber I in the Mbarushimana case. The Prosecution therefore relies on the findings of Judge Fernandez for the correct statement of the law.

<sup>17</sup>ICC-01/04-01/07-3319, para.33.

<sup>18</sup> ICC-01/04-01/10-465-Red, Dissenting Opinion Judge Monageng, para.101.

<sup>19</sup> ICC-01/04-01/10-465-Red, paras.330, 339 (even if in this case the Chamber found that the evidence was insufficient to establish the contribution); see also Dissenting Opinion Judge Monageng, paras.82, 100.

persons acting with a common purpose”, and can therefore be provided to any member of the group, regardless of whether that member commits the material elements of the crime.<sup>20</sup>

14. Any further qualification of the level of contribution under Article 25(3)(d) is inconsistent with a grammatical interpretation of the provision, as well as its object and purpose as a residual mode of liability, which is to ensure that all contributions to the most serious crimes of international concern are punishable.<sup>21</sup>

*The contribution was intentional*

15. Article 25(3)(d) provides that the accused’s “*contribution shall be intentional*”.<sup>22</sup> Hence, the definition of intent under Article 30(2) applies only with respect to the accused’s conduct that constitutes such contribution, and not to the consequence of such a contribution.<sup>23</sup> Accordingly, the Prosecution must prove that the accused meant to engage in the relevant conduct.<sup>24</sup>
16. Article 25(3)(d) includes additional subjective requirements that in part overlap with,<sup>25</sup> and in part deviate from<sup>26</sup> the normal intent in relation to the consequence as set out in Article 30(2)(b). Article 30(1) clarifies that the provision only applies “unless otherwise provided”, which is precisely the case in relation to Article 25(3)(d) liability. Thus, the notion of intent in relation to a consequence

<sup>20</sup> ICC-01/04-01/10-465-Red, Dissenting Opinion Judge Monageng, para.103; see also paras.86, 78.

<sup>21</sup> ICC-01/04-01/06-803-tEN, para.337; ICC-01/04-01/07-1497 OA8, para.79; ICC-01/04-01/06-2205 OA15 OA16, para.77. As the Prosecution has argued previously, the drafting history of Article 25(3)(d) corroborates that “any” contribution suffices to give rise to criminal responsibility (see ICC-01/04-01/10-499-Corr OA 4, paras.59-60).

<sup>22</sup> Emphasis added.

<sup>23</sup> ICC-01/04-01/10-465-Red, para.288.

<sup>24</sup> Article 30(2)(a).

<sup>25</sup> See Article 25(3)(d)(i) referring to the contribution being made “with the aim of furthering the criminal activity or criminal purpose of the group”.

<sup>26</sup> See Article 25(3)(d)(ii) which requires only “knowledge of the intention of the group to commit the crime”.

enshrined in Article 30(2)(b) is not applicable to establish the relevant *mens rea* under that mode of liability.<sup>27</sup>

*The contribution was made in the knowledge of the intention of the group to commit the crime*

17. The Prosecution must establish that the accused had knowledge of the intention of the group to commit the crime. Under Article 25(3)(d)(ii) "it is [...] not required for the [accused] to have the intent to commit any specific crime and [it is] not necessary for him or her to satisfy the mental element of the crimes charged".<sup>28</sup>

**The facts and circumstances described in the charges and the evidence before the Chamber establish all elements under Article 25(3)(d)(ii)**

*Preliminary remarks*

18. On 24 February 2012, the Prosecution filed its written closing brief in the case against Germain Katanga which details all the evidence demonstrating the guilt of the Accused beyond reasonable doubt.<sup>29</sup> The Prosecution incorporates in these observations, all the facts and circumstances described in the charges as well as its analysis of the evidence admitted in the record of the case as submitted in its written closing brief.
19. On 18 December 2012, the Chamber acquitted Mathieu Ngudjolo, the former co-accused of Germain Katanga, of all charges.<sup>30</sup> This decision is currently being

<sup>27</sup> ICC-01/04-01/10-465-Red, para.288. See also Barbara Goy, *Individual Criminal Responsibility before the International Criminal Court – A Comparison with the Ad Hoc Tribunals*, International Criminal Law Review 12 (2012) 1-70, at 68; see also additional authorities quoted in this article at footnote 483.

<sup>28</sup> ICC-01/04-01/10-465-Red, para.289.

<sup>29</sup> ICC-01/04-01/07-3251-Conf-Corr. A public redacted version was made available on 3 July 2012.

<sup>30</sup> *Jugement rendu en application de l'article 74 du Statut*, ICC-01/04-02/12-3, hereinafter "Article 74 Judgment".

appealed by the Prosecution.<sup>31</sup> The Prosecution, to all extent possible, has taken into consideration the findings of the Chamber in its Article 74 Judgment.

20. The Prosecution relies below on the most salient facts and items of evidence that meet the legal requirements of Article 25(3)(d)(ii). However, the Prosecution does not exclude any of the facts and circumstances described in the charges; the proposed recharacterisation merely changes the focus that is given to certain facts.<sup>32</sup> Moreover, as pointed out by the Chamber, a Judgment pursuant to Article 74(2) must be based on “« *l'ensemble des procédures* » et sur « *l'appréciation des preuves* »”.<sup>33</sup> Consequently, the Chamber must take into consideration all the “facts and circumstances included in the charges” and the totality of the evidence “submitted and discussed before it at the trial”<sup>34</sup> in rendering its judgment and not limit itself solely to the evidence referred to in these observations. Consistent with the decision of the Chamber, the Prosecution focuses these submissions on the proposed change of the mode of liability<sup>35</sup> and therefore includes by reference its earlier submissions regarding the *chapeau* elements of Articles 7 and 8, and the material elements of the crimes.

*A crime within the jurisdiction of the Court was attempted or committed*

21. The facts on record prove beyond reasonable doubt that *crimes* within the jurisdiction of the Court were committed during the Bogoro attack of 24 February 2003.
22. As submitted in Part 5 of the Prosecution’s closing brief, the attack on Bogoro began before dawn on 24 February when hundreds of combatants from the Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement* overran the village,

<sup>31</sup> The Prosecution’s Document in Support of Appeal against the “Jugement rendu en application de l’article 74 du Statut”, ICC-01/04-02/12-39-Conf-Exp was filed on 19 March 2013. A public redacted version was made available on 3 April 2013.

<sup>32</sup> ICC-01/04-01/07-3319, para.23; ICC-01/04-01/07-3363 OA13, para.58.

<sup>33</sup> ICC-01/04-02/12-3, para.43.

<sup>34</sup> Article 74(2) of the Statute. See also the Lubanga Judgment, ICC-01/04-01/06-2842, para.94.

<sup>35</sup> ICC-01/04-01/07-3319-tENG/FRA, para.55.

killing civilians, pillaging and setting houses – and their occupants – on fire. The evidence demonstrates that the attackers blocked the exit routes from Bogoro and killed civilians without distinction. Those who had sought refuge in the Bogoro Institute, a former school building in the centre of the UPC camp within the village, were massacred with machetes or gunshots.<sup>36</sup>

23. Some women, when captured, concealed that they were Hema; though allowed to live, they were raped, forced to “marry” soldiers or made to act as sex slaves for the soldiers. Several women suffered repeated rapes during months after the attack.<sup>37</sup> Later that same day, once Bogoro was under their control, the attackers continued to hunt down, capture, and kill civilian occupants of Bogoro. More than 200 civilian victims perished in the attack, including women who were killed because of their Hema origins.<sup>38</sup>
24. The attackers also destroyed a significant number of houses and burned down some of them. Other civilian buildings, such as schools and churches of Bogoro, were destroyed.<sup>39</sup> The Lendu and Ngiti combatants pillaged the village. They looted belongings in houses, rooftops, cattle and crops in the fields surrounding Bogoro.<sup>40</sup>
25. These facts clearly demonstrate that the crimes against humanity of murder, rape and sexual slavery, and war crimes of wilful killing, intentionally directing an attack against a civilian population, rape, sexual slavery, destruction and pillaging of property were committed during the attack or in its aftermath.<sup>41</sup>

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<sup>36</sup> Prosecution’s “*Mémoire final*”, para. 40 and following.

<sup>37</sup> ICC-01/04-01/07-3251-Conf, paras.76-90.

<sup>38</sup> ICC-01/04-01/07-3251-Conf, paras.47-65.

<sup>39</sup> ICC-01/04-01/07-3251-Conf, paras.91-95.

<sup>40</sup> ICC-01/04-01/07-3251-Conf, paras.96-105.

<sup>41</sup> The Prosecution takes note that the Chamber “will not examine the crime of using children under the age of fifteen years to participate actively in hostilities” since Germain Katanga is being charged of this crime as direct co-perpetrator, see Notice Decision, majority opinion, para.7 *in fine*. Therefore, the Prosecution is not addressing this question in its Observations.

26. The Defence argued in its Document in support of appeal of the Notice Decision that “Among issues that may have been addressed in more detail ... which group or persons committed excesses which went beyond anticipated behaviour. That is an area that is not only relevant to the issues raised by the re-characterisation but which would now be addressed in the context of a severed trial where the co-accused has been acquitted.”<sup>42</sup>
27. The Prosecution submits that the issue of *excesses* was, as early as the opening statement of the Defence at the Confirmation Hearing, identified as a possible “strategy”.<sup>43</sup> It was raised again during the opening statement of the Defence at trial.<sup>44</sup> Germain Katanga was examined on the issue by his counsel and while he did not refer to excesses, he seemed to qualify the deaths of civilians as collateral damage: *“Ce que vous allez retenir est qu’un militaire, un soldat, ne peut pas s’accuser. Ça, c’est un. De deux, concernant la mort des civils, je n’étais pas sûr si les civils pourraient... pouvaient mourir dans cette condition-là. Pourquoi je dis que les civils ne pouvaient pas mourir ? Monsieur le juge Président, Mesdames les juges, ce sont des professionnels qui ont dirigé les opérations. Ce sont des militaires professionnels. À moins que l’obus puisse rater les cibles pour tomber dans une... sur une maison, et puis tuer les gens à l’intérieur, dans ce sens-là, j’allais comprendre qu’il y avait morts de civils dans des tirs non orientés, parce qu’ils n’ont pas orienté sur les civils. Là, on pourrait comprendre.”*<sup>45</sup>
28. Defence witness D02-148, who alleged being present at the attack, was questioned on the death of civilians and never mentioned anything about any *excesses*.<sup>46</sup> Other Defence witnesses simply denied having any information on the attack itself,<sup>47</sup> or about the death of civilians.<sup>48</sup> Defence witness D02-176 (a UPC

<sup>42</sup> ICC-01/04-01/07-3339, para.93.

<sup>43</sup> ICC-01/04-01/07-T-39-ENG CT, page 15, line 3 and following.

<sup>44</sup> ICC-01/04-01/07-T-80-ENG ET, page 49, line 20 and following, see also page 52.

<sup>45</sup> ICC-01/04-01/07-T-318-FRA CT, page 29, line 18 and following. The Prosecution is citing to the French transcript since that was the language of the testimony of the Accused.

<sup>46</sup> He admitted that civilians were killed with machetes, D02-148, T-280-Conf-FRA, p.22, l.28-p.27, l.1.

<sup>47</sup> See for instance the testimony of witnesses D02-146/D03-340, D02-134, D02-147/D03-236, and D03-66.

soldier based at the camp at the time of the attack) corroborated Prosecution witnesses<sup>49</sup> by unequivocally stating that from the very beginning, the attackers “were shooting at all civilians who tried to leave their homes, and some of them would hack down their victims. Even women had machetes, and they started cutting down people. And when we went to the school premises, we found blood in the classrooms. Many people died, civilians who had been killed within the classrooms.”<sup>50</sup> The Defence, in its written closing brief, came back on this issue in detail.<sup>51</sup> It is not because the Chamber may now recharacterise the mode of liability that suddenly “excesses” committed during the attack at Bogoro become more relevant or become now one of the central features of a possible defence.

29. Finally, in its Article 74 Judgment, the Chamber stated that many items of evidence attest that during and in the aftermath of the attack: “*des habitants de Bogoro auraient été tués, des femmes auraient été violées, certaines étant maintenues en captivité par les attaquants, des biens auraient été pillés, et enfin que des bâtiments auraient été attaqués et détruits.*”<sup>52</sup>

*A group of persons acting with a common purpose attempted to commit or committed this crime*

30. The Chamber in its Notice Decision emphasised that a recharacterisation “would also result in the analysis of the role played by the group of Ngiti combatants based in Walendu-Bindi *collectivité*, as set out by the afore-mentioned Decision. This recharacterisation should also pertain to local commanders who were members of that group, as described in the Pre-Trial Chamber’s Decision”.<sup>53</sup> The Prosecution in addressing the identity of the “group of persons” is also mindful

<sup>48</sup> See D02-160 only learnt about it once Katanga was charged, D02-001 also only learnt about this upon the transfer of Katanga to the Court, D02-228, and D03-88.

<sup>49</sup> See for instance the testimony of Prosecution witnesses P-268, P-323, P-132, P-249 and P-287.

<sup>50</sup> ICC-01/04-01/07-T-256-CONF-ENG ET, page 39, line 14 and following.

<sup>51</sup> ICC-01/04-01/07-3266-Conf, paras.773, 784 to 787 and 857.

<sup>52</sup> ICC-01/04-02/12-3, para.338. The Prosecution notes that the Chamber used the conditional “*auraient*”. It is presumed that the Chamber, when using the conditional, did so in order not to be seen as biased or as having prejudged the guilt or innocence of Germain Katanga when delivering its Article 74 Judgment in the Nugdjo case.

<sup>53</sup> Notice Decision, para.27 *in fine*.

of the observations of the Appeals Chamber in its Regulation 55 Decision, which stated that additional details may have to be provided “in relation to the ‘group of persons’ acting with a common purpose” .<sup>54</sup>

31. The Defence argued in its Document in support of appeal of the Notice Decision that “not only is the group unidentified but nowhere in the prosecution summaries of the charges or the Confirmation Decision is the common purpose of this other group identified.”<sup>55</sup>
  
32. The Defence’s argument is premised on the erroneous assumption that the Notice Decision would have created a new group which necessarily implies that this “other group” had a different common purpose. The Prosecution submits that the facts and circumstances of the charges throughout the case never changed. It was always alleged that two groups of combatants united their efforts to wipe out Bogoro, namely the group of Ngiti combatants from Walendu-Bindi *collectivité*, and the group of combatants based in the Bedu-Ezekere *groupement* - who through their leaders - Germain Katanga and Mathieu Ngudjolo, planned, organised and executed the attack on Bogoro.<sup>56</sup>
  
33. In its Article 74 Judgment in the Ngudjolo case, the Chamber made a number of findings regarding the Bogoro attack: “*Au terme de ce développement, la Chambre est en mesure de constater que l’attaque de Bogoro a débuté vers cinq heures du matin le 24 février 2003. Les attaquants, parmi lesquels se trouvaient des enfants, sont arrivés de plusieurs directions, par des routes et chemins venant de localités majoritairement habitées par des Ngiti et des Lendu. Les différents témoignages recueillis permettent donc d’affirmer qu’étaient présents ce jour là, à Bogoro, des combattants ngiti de la collectivité de Walendu-Bindi et lendu du groupement de Bedu-Ezekere.*”<sup>57</sup>

<sup>54</sup> Appeals Chamber Regulation 55 Decision, para.102.

<sup>55</sup> ICC-01/04-01/07-3339, para.83.

<sup>56</sup> See Amended DCC, ICC-01/04-01/07-649-Anx1A, notably para.78. See also Document Summarising the Charges, ICC-01/04-01/7-1588-Anx1, the title before para.64, and para.68 and following.

<sup>57</sup> ICC-01/04-02/12-3, para.337 (emphasis added).

The Ngiti combatants from Walendu-Bindi form the "group of persons"<sup>58</sup>

34. The evidence demonstrates beyond reasonable doubt that, during the relevant time period, the Ngiti combatants were organised into a defined military group within the Walendu-Bindi *collectivité*.<sup>59</sup>
35. From 2000-2001, the Walendu-Bindi *collectivité* began to organise itself into a self-defence group.<sup>60</sup> At the outset, each village or locality had its own defence force.<sup>61</sup> By the end of 2001, the names of some of the Ngiti commanders - including Kandro, Cobra, Kisoro, Nyamulongi and Move - were already "known to everyone" in the *collectivité*.<sup>62</sup>
36. The on-going hostilities and an exacerbated ethnic conflict between the Hema and the Lendu/Ngiti, resulted in an increased number of attacks and required a higher level of cooperation and solidarity among the Ngiti fighters in order to fight against the enemy.<sup>63</sup> When Bunia fell in August 2002, the Ngiti combatants of Walendu-Bindi were organised under a unified command,<sup>64</sup> and led by Kandro, their supreme commander.<sup>65</sup> After Kandro's death in September 2002,<sup>66</sup> Germain Katanga became the overall leader of the combatants of Walendu-Bindi.<sup>67</sup>

<sup>58</sup> Prior notice was provided in the Amended DCC, ICC-01/04-01/07-649-Anx1A, paras.24-26, 36-39, 40, 42-53, 65, 68, 70-73 and 78 and the Document Summarising the Charges, ICC-01/04-01/7-1588-Anx1, paras.66 and following and notably footnote 131.

<sup>59</sup> A detailed analysis of FRPI's structure is provided in Chapter 7.1 of the Prosecution's "*Memoire final*" at ICC-01/04-01/07-3251-Conf-Corr, para.126 and following.

<sup>60</sup> ICC-01/04-01/07-3251-Conf-Corr, para.126.

<sup>61</sup> ICC-01/04-01/07-3251-Conf-Corr, para.127.

<sup>62</sup> D02-160, T-272-ENG, p.63, l.1-8 and T-273-ENG, p.81, l.6-19; D02-148, T-278-ENG, p.65, l.13-p. 67, l.11 and l.24-25.

<sup>63</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.128.

<sup>64</sup> ICC-01/04-01/07-3251-Conf-Corr, para.129.

<sup>65</sup> D02-148, T-279-ENG, p.52, l.13-17; D02-501, T-260-ENG, p.31, l.7-24; D02-134, T-259-ENG, p.22, l.20-p.23, l.1; D01-161, T-269-ENG, p.43, l.1-2.

<sup>66</sup> The Prosecution submits that it is not in issue that Kandro died a few weeks after the Nyankunde attack of 5 September 2002, see for instance D02-160, T-269-ENG, p. 43-l. 3.

<sup>67</sup> See ICC-01/04-01/07-3251-Conf-Corr, paras.188 and following. See admission of Katanga to P-12, T-195-ENG-p.16-l.20-25. See also testimony of Defence witnesses D02-161 and D02-129.

37. Pursuant to a meeting between the Lendu and Ngiti representatives in Beni in December 2002, the Ngiti combatants of Walendu-Bindi became officially known as the *Forces de Résistance Patriotique en Ituri* (“FRPI”).<sup>68</sup> Germain Katanga testified that “*Pour nous, les combattants, c’était très bien d’être appelé sous un nom. Comme ce nom FRPI, on l’a entendu, que ça nous représentait, nous nous sommes accaparés de ce nom. Nous nous sommes accaparés de ce nom pour dire que « bon, à partir de maintenant, on s’appelle FRPI, c’est comme ça ». Ce n’est pas... veut dire qu’on avait une idée pour dire que « non, le rôle de telle personne, c’est ceci, ou telle personne, c’est cela », non, on a récupéré seulement. On nous appelait avant les « cultivateurs »; ça a changé, c’est devenu « l’autodéfense », et après ça « combattants », on a récupéré un nom qui s’appelait « les FRPI ». Nous l’avons récupéré, Monsieur le Président.*”<sup>69</sup>
38. Before the Bogoro attack, the Ngiti combatants (now the FRPI)<sup>70</sup> of Walendu-Bindi were an organised structure with a network of camps present in each of the five *groupements* of the *collectivité*. It was a hierarchically organised group with a military command structure.<sup>71</sup> It had sections, platoons, companies and battalions led by assigned commanders.<sup>72</sup> The existence of this hierarchical military structure is clearly established by documents EVD-OTP-00238 and EVD-OTP-00278. In addition to their military functions, the combatants had also *de facto* replaced the civil authorities within the *collectivité*.<sup>73</sup>
39. The evidence on record demonstrates further that the group of Ngiti combatants had its headquarters in Aveba.<sup>74</sup> Aside from Germain Katanga, the most

<sup>68</sup> ICC-01/04-01/07-3251-Conf-Corr, paras 136 and 138; EVD-D02-00063.

<sup>69</sup> D02-300, T-317-FRA CT, p. 20, l. 25 and following.

<sup>70</sup> As noted by the Prosecution : “au fond, ce n’est que l’appellation de ce groupe qui a changée, les composantes restant les mêmes. Structurellement, la FRPI n’a pas imposé de changement à la hiérarchie existante des groupes de combattants qu’elle cherchait à regrouper.”, ICC-01/04-01/07-3251-Conf-Corr, para.139. The Prosecution submits that the name of the group itself, in this context, is not an essential element of the charges, see Article 74 Judgment in the Ngudjolo case and the Chamber’s conclusion at para.351 on the identity of the Bedu-Ezekere combatants.

<sup>71</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.133, 142 and 152.

<sup>72</sup> ICC-01/04-01/07-3251-Conf-Corr, para.141.

<sup>73</sup> See the testimony of P-28, T-218-ENG, p.54, l.4-11 which is corroborated by EVD-OTP-00278. See also EVD-OTP-00275, p.0207.

<sup>74</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.144 and 152.

prominent commanders at the Aveba camp included Garimbaya, Mbadu and Move.<sup>75</sup> Other camps within the Walendu-Bindi included Cobra Matata's base at camp Omiama in Olongba/Bavi;<sup>76</sup> the Medhu camp headed by Moise Oudo Mbafefe;<sup>77</sup> the "*garrison mobile*" based at camp Kagaba under the command of Yuda<sup>78</sup> and his deputy Androzo Zaba Dark;<sup>79</sup> a military position at Nyabiri led by commander Move;<sup>80</sup> the camp at Bukiringi headed by Bebi Alpha;<sup>81</sup> the Gety camp supervised by Androzo Joël;<sup>82</sup> the Golgota camp situated in Lakpa and led by Lobho Tchamangere;<sup>83</sup> and the Mandre camp headed by commander Anguluma.<sup>84</sup> The Ngiti combatants also disposed of means of communication facilitating exchanges of information between the different camps.<sup>85</sup>

40. EVD-OTP-00239 and 00236 demonstrate that the identity of the group, its commanders and military structure were also the same immediately after the Bogoro attack and well into the year 2004.<sup>86</sup>
41. The evidence clearly demonstrates that the group of Ngiti combatants from Walendu-Bindi attacked the village of Bogoro and committed the crimes described above (paras. 21-29).<sup>87</sup> Defence witnesses D02-148 and D02-176 also corroborate this. Last, P-28, who according to the Article 74 Judgment was

<sup>75</sup> P-28, T-217-ENG, p.5, l.25-p.6, l.15; D02-300, T-317-ENG, p.27, l.23-24: corroborates Mbadu's position; T-315-ENG-p.31-l.17, p.60-l.20-23: Katanga admitted that Garimbaya was with him in Aveba.

<sup>76</sup> EVD-OTP-00239/see stamp; P-28, T-217-ENG, p.7, l.18-23; D02-001, T-277-ENG, p.56, l.6-14; D02-300, T-315-ENG, p.55-l.14-23, p.56, l.17-p.57-l.5, p.58, l.14-18, p.61, l.18-23.

<sup>77</sup> P-28, T-217-ENG, p.8-l.14-p.9-l.4; D02-001, T-277-ENG, p.56, l.18-p.57, l.3; EVD-OTP-00025. See also D02-148, T-279-ENG, p. 37, l. 19 and following.

<sup>78</sup> P-28, T-217-ENG, p.11, l.16-21; EVD-OTP-00278; D02-148, T-279-ENG, p.36, l.3-4.

<sup>79</sup> P-28, T-217-ENG, p.10, l.19-p.11, l.2; D02-001, T-277-ENG, p.56, l.6-14; D02-300, T-318-ENG, p.36, l.8-13.

<sup>80</sup> D02-001, T-277-ENG, p.10-l.17; D02-300, T-320-ENG, p.66-l.19-20.

<sup>81</sup> P-28, T-217-ENG, p.9, l.8-15. See also D02-148, T-280, p. 22, l. 14 and following.

<sup>82</sup> P-28, T-217-ENG, p.14, l.3-11; D02-300, T-324-ENG, p.86-l.15-24; D02-148, T-279-ENG, p.34-l.13-22; D02-001, T-277-ENG, p.57-l.19-24.

<sup>83</sup> P-28, T-217-ENG, p.11, l.22-p.12, l.5. See also D02-148, T-280, p. 22, l. 5 and following.

<sup>84</sup> P-28, T-217-ENG, p.12-l.6-p.13-l.10 corroborated by D02-300, T-324-ENG, p.86, l.15-24. See also D02-148, T-280, p. 21, l. 18 and following.

<sup>85</sup> ICC-01/04-01/07-3251-Conf-Corr, para.167.

<sup>86</sup> See for instance, the testimony of witness P-267.

<sup>87</sup> P-268-T-107-FRA-p.27-l.7-14, p.40-l.12-15, T-108-FRA-p.64-l.11-p.65-l.7 ; P-233-T-84-FRA-p.36-l.1-5; P-323-T-117-FRA-p.31-l.13-16; P-287-T-129-FRA-p.30-l.22-p.31-l.2; V19-004-T-233-FRA-p.69-l.22-p.70-l.13.

present in Aveba in the days prior to the attack, also confirms that Ngiti combatants from Walendu-Bindi participated in the attack on Bogoro.<sup>88</sup>

42. In sum, the Ngiti combatants from Walendu-Bindi constituted a group of persons acting with a common purpose within the meaning of Article 25(3)(d), however that provision is defined. The group is clearly defined both in terms of the factors that make it a group as such and in terms of the identity of its members. The group had a defined structure and organization that far exceeds anything required by Article 25(3)(d).

*The common purpose*

43. As submitted above (para. 7), the concept of common plan is “functionally identical” to that of a “group of persons acting with a common purpose”.
44. The Prosecution submits that the facts and circumstances, as alleged in the Amended DCC and confirmed by Pre-Trial Chamber I, equally apply to the common purpose as defined in Article 25(3)(d). In Part 9.1 of its written closing brief, the Prosecution analysed at length, the evidence related to the common plan.<sup>89</sup> This evidence demonstrates the same unaltered facts as confirmed by the Pre-Trial Chamber to which the new legal label of Article 25(3)(d) is being attached.
45. On 24 February 2003, an army of Ngiti commanders and combatants descended on Bogoro, in a coordinated manner and with the plan to wipe out the village by targeting the predominantly Hema civilian population, killing indiscriminately women, children and elderly, raping and sexually enslaving women, destroying

<sup>88</sup> See in general the testimony of witness P-28.

<sup>89</sup> ICC-01/04-01/07-3251-Conf-Corr, para.500 and following.

and looting the property of civilians. The plan as executed had a clear criminal intent.<sup>90</sup>

46. Taking Bogoro was a vital goal for the Ngiti of Walendu-Bindi and the Lendu based in Bedu-Ezekere. Their survival was at stake because of their geographical isolation and the massacres suffered at the hands of the UPC.<sup>91</sup>
47. The repeated UPC attacks against the predominantly Ngiti civilian population of Walendu-Bindi fuelled the hatred of the Ngiti and their desire for revenge.<sup>92</sup> In addition, the population of Walendu-Bindi was isolated, they no longer had access to important sources of supplies in Bunia and Bogoro<sup>93</sup> and their families could not travel from and to the north of the *collectivité*.<sup>94</sup>
48. Bogoro is located at the strategic crossroads of Kasenyi (on Lake Albert), Gety and Bunia. Goods were imported from Uganda and weapons transited through Bogoro. Bogoro also had its own cattle market.<sup>95</sup> The UPC's control of Bogoro posed such a problem to the Ngiti community that Commander Dark admitted that they were blocked and did not even have food.<sup>96</sup>
49. Consequently, driven by their hatred and determined to find a solution to their situation, the Ngiti and Lendu combatants devised a plan to attack Bogoro and eliminate the presence of its predominantly Hema population and UPC soldiers.<sup>97</sup>

<sup>90</sup> See ICC-01/04-01/07-3339, para.84. The Prosecution submits that the same facts confirmed by the Pre-Trial Chamber, as referred by the Defence in its Document in support of appeal the Notice Decision, were proven at trial.

<sup>91</sup> ICC-01/04-01/07-3251-Conf-Corr, para.500.

<sup>92</sup> ICC-01/04-01/07-3251-Conf-Corr, para.507. See EVD-OTP-00206 and EVD-D03-00098 (this last document was disclosed by the Prosecution to the Defence but authenticated by witness D03-88 when he came to testify – his signature appears on the document. See also P-28-T-219-FRA, p.8-1.1.

<sup>93</sup> ICC-01/04-01/07-3251-Conf-Corr, para.508.

<sup>94</sup> P-267, T-171-FRA, p. 55, l. 18 à p. 57, l. 3. See ICC-01/04-01/07-3251-Conf-Corr, para.507.

<sup>95</sup> ICC-01/04-01/07-3251-Conf-Corr, para.508.

<sup>96</sup> EVD-OTP-00167 (until minute 1:32), Transcript DRC-OTP-1045-0027, l. 1157-1175; ICC-01/04-01/07-3251-Conf-Corr, para.509. T-186-Conf-FRA, p.21, ll.11-19. See also EVD-OTP-00173 at minute 01'15''. Dark stated that they were “harcelé” and “enclavé”.

<sup>97</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.504, 511 and 513.

*The accused contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c) of the Statute*

50. As set out in detail in the Prosecution's Closing Brief, the evidence presented at trial demonstrates that Germain Katanga helped coordinate the attack by providing logistical support in obtaining and distributing weapons and ammunition for the Bogoro attack and organising and participating in pre-planning meetings. This evidence demonstrates that Germain Katanga contributed to the commission of the crimes.<sup>98</sup>
51. The Prosecution recalls that Aveba camp was an important strategic position. It was Germain Katanga's base and thus the headquarters of the FRPI,<sup>99</sup> and it had a functioning landing strip<sup>100</sup> that proved crucial in facilitating the transport of weapons and ammunition from Beni. Germain Katanga used his own residence as his headquarters. He was receiving visits and important strategic meetings were held there. The weapons and ammunitions were stored in his residence before being distributed to other FRPI camps.<sup>101</sup>
52. In November 2002, an important meeting between the Lendu and Ngiti notables was held in Aveba.<sup>102</sup> It is not a coincidence that this meeting was held in Aveba. As previously mentioned, by that time Germain Katanga was the leader of the Ngitis combatants of Walendu-Bindi.<sup>103</sup> Germain Katanga, in his military capacity, led the delegation of Lendu and Ngiti notables and Ngiti combatants to Beni, with the admitted purpose to inform the representatives of the RCD-K/ML

<sup>98</sup> ICC-01/04-01/07-3251-Conf-Corr, para.626.

<sup>99</sup> ICC-01/04-01/07-3251-Conf-Corr, para.153.

<sup>100</sup> ICC-01/04-01/07-3251-Conf-Corr, para.144.

<sup>101</sup> ICC-01/04-01/07-3251-Conf-Corr, para.153.

<sup>102</sup> ICC-01/04-01/07-3251-Conf-Corr, para.209.

<sup>103</sup> See para. 36 above.

of the problems faced by the Lendu of Bedu-Ezekere and the Ngiti of the whole of Walendu-Bindi.<sup>104</sup>

53. Germain Katanga admitted he had high-level meetings in Beni with Mbusa Nyiamwisi, the President of RCD-K/ML, with Dr. Adirodou (initiator of the creation of the FRPI), with the Chief of Staff of the APC, and even with the Chief of Staff of the EMOI.<sup>105</sup> He also admitted that the plane he took to return from Beni transported an important amount of ammunition for AK-47s. He also admitted that after this first shipment, at least six others came from Beni prior to the Bogoro attack, transporting weapons and ammunition for the combatants.<sup>106</sup>
  
54. These facts demonstrate the contribution of Germain Katanga in securing the procurement of weapons and ammunition. Germain Katanga also contributed to the commission of the crimes by allowing these weapons and ammunition to be stored at his residence (or his military camp – the BCA)<sup>107</sup> and also by overseeing their distribution.
  
55. When planes would land, Ngiti camp commanders would travel to Aveba to obtain their share of the weapons and ammunition.<sup>108</sup> Germain Katanga's secretary, Manono, was in charge of sending out letters inviting the commanders that had not come on their own, to travel to Aveba to pick up their share.<sup>109</sup>

<sup>104</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.210, 519, and EVD-D03-00098.

<sup>105</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.211, 520.

<sup>106</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.162, 521. See D02-300-T-317-FRA-p.42-l.17-27. See also D02-148 who confirmed in cross-examination that weapons arrived from Beni at Aveba. See D02-148, T-280-Conf-FRA, p.13, l.25-p.14, l.20. He also admitted that Katanga and other FRPI commanders such as Yuda went to Beni. D02-148, T-280-Conf-FRA, p.12,l.12-21.

<sup>107</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.212, 521, 523. See also D03-88-T-304-FRA, p. 62, l. 7; D02-161-T-269, p. 39, l. 13 and following.

<sup>108</sup> D02-161-T-269, p. 45, l. 16-20. D03-88-T-304-FRA-p.63, l. 8-11.

<sup>109</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.213, 522, 523.

56. These weapons and ammunition were destined to be used for the Bogoro attack. P-28 confirmed that if they were able to attack Bogoro it was because of the weapons received.<sup>110</sup>
57. Germain Katanga provided ammunition to the Lendu combatants as well. D03-88 testified having received ammunition from Katanga, upon their return from their trip to Beni.<sup>111</sup>
58. The evidence on record also demonstrates that Germain Katanga contributed to the commission of the crimes by conducting preparatory meetings in Aveba prior to the Bogoro attack.
59. A delegation from Bedu-Ezekere travelled to Aveba in the weeks prior to the attack<sup>112</sup> to discuss with Germain Katanga and other Ngiti commanders the plan to attack Bogoro.<sup>113</sup>
60. In the days prior to the attack, Ngiti commanders as well as Blaise Koka of the APC met at Germain Katanga's residence in order to discuss the plan to attack Bogoro. The Ngiti commanders present included, amongst others, Yuda, Dark, Cobra Matata, Oudo, Angulumu, Bebi and the commander from Gety.<sup>114</sup> The fact that this meeting was hosted at Germain Katanga's residence in Aveba is an indication of Katanga's role as commander of Ngiti combatants in Aveba, the overall commander of Ngiti militia of Walendu-Bindi, and his important role in the planning of the Bogoro attack.<sup>115</sup>

<sup>110</sup> P-28-T-217-FRA, p. 34, l. 4 – p. 35, l. 15. See also D02-148 who was put in cross-examination his prior statement that different FRPI commanders came to Aveba to collect weapons and ammunition. D02-148, T-280-Conf-FRA, p.16, l.4–22.

<sup>111</sup> D03-88-T-301-FRA-p.61-l.1-8.

<sup>112</sup> EVD-OTP-00025 is dated 4 January 2003. Bolo and Aveba are synonymous.

<sup>113</sup> ICC-01/04-01/07-3251-Conf-Corr, paras. 525 and following. The Chamber rejected the testimony of both witnesses P-250- and P-28 in relation to this visit and meeting in its Article 74 Judgment in the Ngudjolo case. The Prosecution is appealing the Judgment and the second ground of appeal raises the correctness of the Chamber's conclusions in relation to the credibility of witnesses P-250 and P-28.

<sup>114</sup> P-28-T-218-FRA-p.10-l.6-20.

<sup>115</sup> ICC-01/04-01/07-3251-Conf-Corr, para.536.

61. The Prosecution submits that the Accused's conduct, as just described, meets the requirement of "in any other way contributes" to the commission of a crime. It is also the same conduct as demonstrated by the facts and circumstances of the Prosecution's Amended DDC confirmed by Pre-Trial Chamber I.<sup>116</sup> The Accused's contribution was clearly significant, and therefore satisfies any requirement regarding the degree of contribution that the Chamber might require.<sup>117</sup>

*The contribution was intentional*

62. As described in paras. 15-16 above, pursuant to Article 25(3)(d), the Prosecution must prove that the accused meant to engage in the relevant conduct. This can be inferred from the following facts and circumstances described in paragraphs 30 to 60 above: a) Germain Katanga provided his contribution in the form of multiple acts and over a prolonged period of time; b) Germain Katanga provided different forms of contribution, which require preparation and concentration; c) Germain Katanga had a leading position within the group and he frequently interacted with members of the group when providing his contribution; d) Germain Katanga knew that his conduct would contribute to the common purpose of the group of Ngiti combatants which was to wipe out Bogoro (see paras. 43-49).

63. In addition, it can also be inferred from the same facts and circumstances relied upon to establish that his contribution was made in the knowledge of the intention of the group to commit the crime (see below) that Germain Katanga's contribution was intentional.

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<sup>116</sup> ICC-01/04-01/07-716-Conf, paras.548 and 555.

<sup>117</sup> ICC-01/04-01/10-465-Red, paras.276-285; ICC-01/09-01/11-373, para.354; ICC-01/04-01/10-514, see separate opinion of Judge Fernandez de Gurmendi, para. 12.

*The contribution was made in the knowledge of the intention of the group to commit the crime*

64. This element can be inferred, among others from the following facts and circumstances described above: a) Germain Katanga was a member of the group and knew that there was a plan to “wipe out” Bogoro as he participated in meetings planning the attack which led to the crimes (see paras. 30-31, 44-45, 49-50, 58); b) Germain Katanga was one of the leaders of the group (see paras. 32, 36, 39); c) the group had a hierarchically organized military command structure, it included trained and well-armed combatants and it had functioning reporting lines (see paras. 34-35, 38); d) Germain Katanga was aware of the ethnic hatred between the Ngiti and the Hema and that the Ngiti had a desire of revenge against the Hema, which were associated with the UPC (see para. 36); e) the group had been involved in an inter-ethnic conflict<sup>118</sup> which resulted in an increased number of attacks prior to and after the crimes charged<sup>119</sup> (para. 36); f) rape and sexual slavery constituted a common practice in the region of Ituri throughout the armed conflict including at Aveba and this was widely acknowledged by the combatants;<sup>120</sup> g) Germain Katanga closely interacted with other members of the group and provided several contributions to the crimes committed by the group (see paras. 56-67); and h) Germain Katanga admitted that he was a coordinator between the APC and the Ngiti combatants;<sup>121</sup> (i) Germain Katanga admitted that pillaging was a form of compensation for Ngiti militia;<sup>122</sup> and (k) Germain Katanga admitted carrying out the attack on Bogoro and described it as a success.<sup>123</sup>

<sup>118</sup> Katanga acknowledged that the prior UPC Hema attacks had caused suffering to the Ngiti community. See ICC-01/04-01/07-3251-Conf-Corr, paras. 633. D02-300, T-316-FRA, p.57, ll.19-23. See also EVD-D03-00098. D02-300-T-325-FRA ET, p. 11, l. 19-27.

<sup>119</sup> See ICC-01/04-01/07-3251-Conf-Corr, paras.654-666. Ngiti were also known for carrying revenge attacks, for example at Nyankunde, see ICC-01/04-01/07-3251-Conf-Corr, para. 632, *See e.g.* D02-148, T-279-FRA, p.6-1.7-p.7, l.17. According to witness P-12, Katanga admitted his participation in the Nyankunde attack.

<sup>120</sup> ICC-01/04-01/07-716-Conf, para.568.

<sup>121</sup> See T-317-FRA, p.20, l.12-15, p.24, l.13-21, p.27, l.18-26 ; T-324-FRA, p.68, l.18-27, p.69, l.8-10 ; p.71, l.5-13.

<sup>122</sup> See ICC-01/04-01/07-3251-Conf-Corr, para.648. D02-300, T-316-FRA, p.39, l.25-p.40, l.4.

<sup>123</sup> See ICC-01/04-01/07-3251-Conf-Corr, para.653. See P-12, T-197-FRA, p.29-1.7-17, p.32, l.7-23; P-160, T-210-FRA, p.63, ll.1-13. The Prosecution has appealed the Chamber’s finding as to credibility of P-12 and P-160 and its assessment of the admission made by Germain Katanga to these two witnesses regarding the Bogoro attack.

65. Moreover, the evidence demonstrates that the Lendu and Ngiti combatants encircled the village of Bogoro and indiscriminately killed UPC combatants and the predominantly Hema population. They deliberately massacred men, women, children and the elderly who clearly did not take part in the hostilities.<sup>124</sup> When entering Bogoro, the perpetrators shouted “We are going to capture you with our hands”<sup>125</sup> which meant, according to witnesses P-233 and P-268, that they would kill civilians without using bullets.<sup>126</sup> The civilians trying to flee and those seeking refuge inside the Bogoro Institute were also massacred by the attackers.<sup>127</sup>
66. The massacre of civilians continued even after the attackers had gained control over Bogoro. It continued even in the days following the attack, when combatants continued seeking out and killing survivors hiding in the vicinity.<sup>128</sup>
67. When conducting this indiscriminate attack on Bogoro the combatants in fact applied their “usual methods”. When describing these “usual methods”, P-28 explained – “That means when a Hema arrives to our part of the world, he takes pity on no one. He takes no pity on women, children, elderly people, and we, too, took no pity on them”.<sup>129</sup> Such indiscriminate targeting of civilians, regardless of their age or gender, was “the principle of war between the Ngiti and the Hema, and that had been the case for a very long time”.<sup>130</sup>
68. As a result, these crimes were committed by the perpetrators intentionally and in accordance with the plan.

<sup>124</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.47 and 640-648.

<sup>125</sup> P-268-T-107-ENG-p.32-l.17-18; ICC-01/04-01/07-3251-Conf-Corr, para.49 and 646. *See also* D02-176-T-256-FRA-p.11, l.18-24/D02-176-T-256-ENG, p.12-l.24-p.13-l.3.

<sup>126</sup> P-233-T-87-ENG-p.24-l.13-15, p.26-l.1-5; [P-268-T-107-ENG-p.32-l.16-p.33-l.20; ICC-01/04-01/07-3251-Conf-Corr, para.49.

<sup>127</sup> ICC-01/04-01/07-3251-Conf-Corr, paras.50-53.

<sup>128</sup> ICC-01/04-01/07-3251-Conf-Corr, para.55.

<sup>129</sup> P-28-T-217-ENG-p.42-l.25-p.43-l.4; ICC-01/04-01/07-3251-Conf-Corr, para.504.

<sup>130</sup> P-28-T-218-ENG-p.57-l.9-15; ICC-01/04-01/07-3251-Conf-Corr, para.527.

69. In its Document in support of appeal of the Notice Decision, the Defence argued that had it known that the Chamber intended to recharacterise the charges, “it is unlikely that Germain Katanga would have been called as a witness had he been charged under the proposed mode of liability or had notice he might be.”<sup>131</sup> The Chamber advised the parties and participants to be alert to the possibility that the facts included in the charges could be subject to re-characterisation.<sup>132</sup> The Chamber’s comments may not have provided direct unequivocal notice of the potential change of legal characterisation of the mode of liability, from Article 25(3)(a) to Article 25(3)(d)(ii), but the principle was clearly stated, and it echoed the plain language of Regulation 55 itself. Thus, the possibility should have been considered when the Appellant made his informed decision to testify.
70. When the Accused chose to testify under oath, the same facts and circumstances were known to him, including the Confirmation Decision and its conclusion that he “played an overall coordinating role in the implementation of the common plan”.<sup>133</sup> Consequently, when he testified that upon his return from Beni he was a *coordonateur*, he did so wittingly and with full knowledge of the Prosecution’s factual case against him.

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<sup>131</sup> ICC-01/04-01/07-3339, para. 92.

<sup>132</sup> ICC-01/04-01/07-1547, para.17; see also paras.19, 21, 28.

<sup>133</sup> ICC-01/04-01/07-716-Conf, para. 555ii.

## Conclusion

71. The Prosecution submits that the evidence in the record of the case meets all the legal requirements of Article 25(3)(d)(ii). Accordingly, if the Chamber was to recharacterise the charges, the Prosecution submits that it has proven beyond reasonable doubt the guilt of Germain Katanga also pursuant to the mode of liability of Article 25(3)(d)(ii).



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Fatou Bensouda, Prosecutor

Dated this 8<sup>th</sup> day of April 2013  
At The Hague, The Netherlands