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

Date: **15 May 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 Document

**Decision transmitting additional legal and factual material (regulation 55(2) and
55(3) of the Regulations of the Court)**

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for the Defence

Mr David Hooper
Mr Andreas O'Shea

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64 and 67 of the Rome Statute and regulations 36(3) and 55 of the Regulations of the Court, decides the following.

I. Procedural Background

1. By decision of 21 November 2012, the Chamber unanimously decided to sever the charges against Mathieu Ngudjolo.¹ Mr Ngudjolo was acquitted by the Chamber’s 18 December 2013 Judgment, which was appealed.²
2. In its 21 November 2013 Decision, a majority of the Chamber, Judge Van den Wyngaert dissenting, also decided to implement regulation 55 of the Regulations of the Court and informed the parties and participants that the mode of liability under which Germain Katanga was initially charged might be subject to legal recharacterisation on the basis of article 25(3)(d)(i) of the Statute. The Chamber also invited the parties and participants to file submissions on the proposed recharacterisation, in regard to points both of law (article 25(3)(d)(ii) of the Statute) and of fact (consistency between the facts and the law). The Chamber further instructed the Defence that if it wished to seek any of the measures described at regulation 55(3)(b), it was incumbent upon it to include a reasoned request to that end in its submissions to the Chamber .
3. By decision of 28 December 2013, the Chamber granted the Defence for Germain Katanga leave to appeal against the 21 November 2012 Decision.³
4. In its Judgment of 27 March 2013, the Appeals Chamber upheld the 21 November 2012 Decision.⁴ Responding therein to the argument by the

¹ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA (“21 November 2012 Decision”).

² *The Prosecutor v. Mathieu Ngudjolo, Judgment pursuant to Article 74 of the Statute*, 18 December 2012, ICC-01/04-02/12-3-tENG.

³ *Decision on the “Defence Request for Leave to Appeal the Decision 3319”*, 28 December 2012, ICC-01/04-01/07-3327.

Defence for Germain Katanga that the 21 November 2012 Decision did not clearly inform Mr Katanga of the facts upon which the Trial Chamber intended to rely, the Appeals Chamber noted that, “if a Trial Chamber gives notice under regulation 55(2) of the Regulations of the Court, the Trial Chamber may also need to indicate upon which specific facts, within the ‘facts and circumstances described in the charges’, it intends to rely.”⁵ It also stated, “Such information [...] may be provided not only at the time of giving notice under regulation 55(2) of the Regulations of the Court, but also, in an adequate manner, subsequently in the proceedings.”⁶ Finally, it drew the Trial Chamber’s attention to the need to be particularly vigilant in ensuring Mr Katanga’s right to be tried without undue delay.⁷

5. The submissions of the Office of the Prosecutor and the participants were received on 8 April 2013, within the time limit set by the Chamber. However, the Legal Representative of the child-soldier victims filed submissions on a point relating to the very particular situation of the victims he is assisting.⁸ The Prosecution⁹ and the Legal Representative of the main group of victims¹⁰ essentially argued that, in light of the evidence tendered into the record of the case, the legal requirements stipulated in article 25(3)(d) had been met.

⁴ Appeals Chamber, *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”*, 27 March 2013, ICC-01/04-01/07-3363 (“Appeals Chamber Judgment”).

⁵ *Ibid.*, para. 101.

⁶ *Ibidem.*

⁷ *Ibid.*, para. 99.

⁸ Legal Representative of the child-soldier victims, “*Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3319 relative à la mise en œuvre de la norme 55 du Règlement de la Cour et à la disjonction des charges*”, 8 April 2013, ICC-01/04-01/07-3366.

⁹ Office of the Prosecutor, *Prosecution’s observations on Article 25(3)(d)*, 8 April 2013, ICC-01/04-01/07-3367 (“Prosecution Submissions”).

¹⁰ Legal Representative of the main group of victims, “*Observations du représentant légal quant à la responsabilité de G. Katanga en vertu de l’article 25-3-d) du Statut*”, 8 April 2013, ICC-01/04-01/07-3365 (“Victims’ Submissions”).

6. The Defence for Germain Katanga filed its own submissions on 15 April 2013.¹¹ In the main, it stated that it was “unclear to the defence upon what factual basis the Chamber now intends to rely”¹² and in particular that it had little detail as to “who, among the Ngiti combatants and commanders, belongs to the ‘group’ with a common purpose.”¹³ It therefore argued that it was “entitled to know the identity of the group or groups of individuals coming from Walendu Bindi, where they were located prior to the attack and who were their commanders at the time of the attack, as well as who it is alleged planned the attack.”¹⁴ It further averred that it should be informed who was involved in formulating the common purpose, how it was planned and put into action, and the role Germain Katanga played.¹⁵
7. The Defence for Germain Katanga also decried that the paucity of factual details currently available to it regarding the new mode of liability under which the Accused may be tried prevented it from identifying sufficiently which further investigations it might need to carry out in the Democratic Republic of the Congo pursuant to regulation 55(3) of the Regulations of the Court. As such, it has prepared an initial list of matters which it considered would require clarification or further investigation having regard to article 25(3)(d)(ii).¹⁶
8. Finally, whilst inviting the Chamber to refrain from any change to the original mode of liability at this stage of the proceedings, the Defence for Germain Katanga expressed its desire to receive additional information on the facts and circumstances relating to the new mode of liability being considered and the evidence upon which the Chamber intended to rely. It

¹¹ Defence for Germain Katanga, “Defence Observations on Article 25(3)(d)”, 15 April 2013, ICC-01/04-01/07-3369 (“Defence Submissions”). The Chamber recalls that submissions must comply with the requirements of regulation 36(3) of the Regulations of the Court, including that a page shall not exceed 300 words.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 9.

¹⁴ *Ibid.*, para. 15.

¹⁵ *Ibid.*, para. 16.

¹⁶ *Ibid.*, paras. 181-189.

also stated that it was not ruling out the possibility, if necessary, of seeking leave to make further investigations.¹⁷

II. Analysis

9. In light, *inter alia*, of the arguments advanced at paragraphs 50, 58, 95, 101 and 102 of the Appeals Chamber Judgment, the Chamber will grant the request for the transmission of additional factual material made by the Defence for Germain Katanga to allow it to prepare effectively. To this end, it felt it appropriate to include in the *Document on the confirmation of charges* certain factual elements on which it could rely if it were to effect a legal recharacterisation. They are set out *infra* together with the factual allegations which may be relied on in support.

The Chamber's approach

10. In preparing the list, the Chamber referred to the *Decision on the confirmation of charges*¹⁸ and the *Document Summarising the Charges Confirmed by the Pre-Trial Chamber*¹⁹ and, for each factual element, adverted to the relevant paragraphs of the said Decision and, where appropriate, to the Summary of the Charges. Nonetheless, desirous of ensuring that its position is fully understood and the proceedings are conducted fairly and expeditiously, it considered it necessary first to provide the following additional explanations.
11. Firstly, to enable the Defence to appreciate fully the meaning and significance of the factual details with which it is being provided, the Chamber considers it useful to enlighten the Defence as to how it will interpret article 25(3)(d)(ii) of the Statute, whilst nevertheless noting that its justification for this interpretation will only be provided in its Judgment

¹⁷ *Ibid.*, paras. 192-195.

¹⁸ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 30 September 2008, ICC-01/04-01/07-717 (*"Decision on the confirmation of charges"* or *"DCC"*).

¹⁹ Office of the Prosecutor, *Document Summarising the Charges Confirmed by the Pre-Trial Chamber*, 3 November 2009, ICC-01/04-01/07-1588-Anx1 (*"Summary of the Charges"*).

pursuant to article 74. It is in light of this decision and at this stage alone that the Defence may challenge the decision if it considers it necessary. Nonetheless, this information, however concise, should now enable the Defence for Germain Katanga to prepare more appropriately and thus more effectively by grounding its arguments not in purely hypothetical foundations but in the law which the Chamber will apply.

12. Secondly, neither the facts nor their underlying allegations are new – they are all found in the *Decision on the confirmation of charges* and, where appropriate, the Summary of the Charges. They should not be treated as factual findings beyond reasonable doubt already made by the Chamber under the provisions of article 25(3)(d)(ii) given that, as the Chamber has already affirmed in the 12 November 2012 Decision, it has not yet deliberated specifically regarding this aspect of the case against Germain Katanga.²⁰

13. The Defence for Germain Katanga argues that the 21 November 2012 Decision does not provide any specific details either of the exact nature or of the scope of the new allegations or the underlying evidence. In the Defence's view, without these details, it can only speculate as to what the Chamber has in mind.²¹ In this regard, the Chamber considers that it is not possible at this time for the Defence to be provided with all of the evidence which may be presented in support of one or other aspect of the factual allegations under consideration. To do so would in effect be to anticipate the deliberations which, it should be recalled, have not yet taken place. Furthermore, the Chamber notes that the Appeals Chamber did not specifically request it to disclose to the Defence the evidence supporting the facts or factual allegations but, rather, clearly stated that it is for the

²⁰ 21 November 2012 Decision, para. 19.

²¹ Defence Submissions, para. 16.

Chamber, if deemed necessary, to provide detailed information on these facts – or allegations – themselves, and on them alone.²²

14. The Chamber cannot at this point, as requested by the Defence, indicate “[t]he position or view of the judges of the remaining evidence” and the factual allegations which the Chamber now considers to be established.²³ “Without adequate notice”, the Defence argues, it “is left guessing as to the evidential parameters within which it must base its submissions.”²⁴ In this regard, it is important to stress that, in the present case and as an exception, the Defence has already benefitted from the initial, detailed analysis of the credibility of various Prosecution witnesses, most importantly, and Defence witnesses. This analysis by the Chamber in its *Ngudjolo* Judgment is clearly relevant in the instant case. Moreover, it is precisely with a view to providing the Defence with the necessary time and facilities to prepare its defence that the Chamber stated as early as 21 November 2012, prior to delivering its *Ngudjolo* Judgment, that it would not rely on the testimony of two Prosecution witnesses regarding the criminal responsibility of Germain Katanga.²⁵
15. Ultimately, the list provided is only intended to circumscribe more clearly the factual basis (the factual elements and the main factual allegations) on which the Chamber may carry out a recharacterisation. Moreover, this information was already largely present in the 21 November 2012 Decision. Any recharacterisation would therefore be based on the facts and circumstances of the case which the parties and participants have discussed during the substantive proceedings and, as appropriate, on any evidence arising from the implementation of regulation 55(3)(b) of the Regulations of the Court. It is on this material that the Chamber would

²² Appeals Chamber Judgment, paras. 101 and 102.

²³ Defence Submissions, paras. 141 and 142.

²⁴ *Ibid.*, para. 142 .

²⁵ 21 November 2012 Decision, para. 39.

rely in examining Germain Katanga's potential liability under article 25(3)(d)(ii) of the Statute.

Information conveyed to the Defence

16. Regarding the constituent elements of article 25(3)(d)(ii) of the Statute, the Defence should note that in the Chamber's view, implementation of this provision assumes, in the instant case, that

- a crime under the jurisdiction of the Court was committed;
- the persons who committed the crime belong to a group with a common purpose which was to commit the crime or involved in its commission, including in the ordinary course of events;²⁶
- the Accused made a significant contribution to the commission of the crime;
- the contribution was made with intent, insofar as the Accused meant to engage in the conduct and was aware that such conduct contributed to the activities of the group acting with a common purpose; and
- the Accused's contribution was made in the knowledge of the intention of the group to commit the crime forming part of the common purpose.

17. The Chamber is mindful that certain factual issues are now decisive in evaluating Germain Katanga's responsibility under article 25(3)(d)(ii). It must be noted that whilst these issues have already been addressed during the proceedings on the liability of this Accused as a principal in the context of a common plan devised with Mathieu Ngudjolo (article 25(3)(a)), they were not all of paramount importance. The Chamber will give ear to the Defence's requests and concerns and wishes to provide it, as well as to the Prosecution and the Legal Representatives of Victims, with the following factual elements:

²⁶ The Chamber considers that in order to establish the existence of a group acting with a common purpose, article 25(3)(d) of the Statute does not require the demonstration of the existence of a common plan between the members of the said group, such as may have been defined as an objective element of joint commission within the meaning of article 25(3)(a) of the Statute.

First factual element

18. *Ngiti combatants intentionally committed crimes confirmed by the Pre-Trial Chamber, during and after the 24 February 2003 attack on Bogoro.*²⁷

19. In this regard, the Defence is invited to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants from Walendu-Bindi *collectivité*, sometimes identified by the name FRPI. The Chamber clearly does not intend to rely on the evidence held against Germain Katanga showing that crimes may have been committed by Lendu combatants from Bedu-Ezekere *groupement*. It will rely only on evidence held against him which establishes that some of the crimes were allegedly committed by Ngiti combatants from Walendu-Bindi *collectivité*, including in instances where, according to witness statements, the crimes were allegedly committed by both Lendu and Ngiti combatants.

Second factual element

20. *The Ngiti combatants who committed the crimes belonged to the Ngiti group of commanders and combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI, which acted with a common purpose. Ngiti combatants who committed the crimes shared the group's common purpose.*

i. This purpose, carried out during the second part of 2002 and early 2003, consisted of

a) attacking UPC military elements in Bogoro, as well as the village itself, in order to “wipe [it] out”, involving the commission of the crimes confirmed by the Pre-Trial

²⁷ See, *inter alia*, DCC, paras. 275-284 (attack against the civilian population), paras. 298-307 (wilful killing), paras. 319-326 (destruction of property), paras. 334-338 (pillaging), paras. 347-354 (sexual slavery and rape), paras. 385-388 (subjective elements of war crimes), paras. 424-427 (murder), paras. 434-436 (sexual slavery) and paras. 442-444 (rape).

Chamber²⁸ in an attack which targeted the predominantly Hema civilian population, as such;²⁹ and

- b) implementing a common policy which was part of a larger campaign of reprisals specifically directed against the predominantly Hema civilians living in villages in the Ituri region, a demonstration of the opposition of the group from Walendu-Bindi *collectivité* to any alliance with the UPC (Hema) and a means to “wipe out” the village of Bogoro so as to ensure control over the road to Bunia, thereby facilitating the transit of goods between Bunia and Lake Albert;³⁰
- ii. the members of the group, in particular those who committed crimes, felt hatred towards the Hema population;³¹
- iii. amongst the group were the commanders and combatants from the network of different camps in Walendu-Bindi *collectivité* established throughout its five *groupements*,³² including those in Aveba, Kagaba, Olongba, Medhu, Lakpa, Nyabiri, Bukiringi, Gety, Mandre, Bavi and Bulanzabo;
- iv. the commanders who were members of this group included German Katanga, Garimbaya, Mbadu, Yuda, Dark, Ngorima, Cobra Matata, Oudo Mbafele, Lobho Tchamangere, Move, Alpha Bebi, Joel Androso, Joel Anguluma and Kisoro³³;

²⁸ See, *inter alia*, DCC, paras. 284, 298, 302, 306, 307, 319, 325, 326, 334, 338, 347, 354, 387, 424, 425, 426, 427, 434, 435, 436, 442, 443 and 444.

²⁹ See, *inter alia*, DCC, paras. 275 and 403; Summary of the Charges, para. 18.

³⁰ See, *inter alia*, DCC, para. 413; Summary of the Charges, paras. 15, 20 and 24.

³¹ DCC, paras. 275, 280, 386, 426 and 555 (iii).

³² DCC, paras. 6 and 543.

³³ DCC, para. 413, footnote 546; para. 540, footnote 698; para. 543, footnote 709; Summary of the Charges, para. 68, footnote 131. See also Appeals Chamber Judgment, para. 28, footnote 66.

- v. these camps had a military structure, and the commanders could communicate with each other;³⁴ arms and ammunition obtained in Beni were distributed to the commanders ahead of the attack on Bogoro;³⁵ and
- vi. on the eve of the attack, several commanders took up positions with their troops in Medhu or Kagaba in order to launch the Bogoro operation.³⁶

21. Regarding the second factual element, the Chamber underscores that the involvement of several commanders from Walendu-Bindi in devising the plan to “wipe out” Bogoro was already set forth in the *Decision on the confirmation of charges*. Moreover, the Defence would do well, for example, to refer in the first instance to all of the evidence presented in support of the Prosecution allegation of the existence of an organised, hierarchical structure in Walendu-Bindi *collectivité* prior to the attack on Bogoro.³⁷ With specific reference to the criminal aspect of the common purpose, the Defence is invited to respond in regard to the factual allegations made at paragraph 20(i)(a), 20(i)(b) and 20(ii).

Third factual element

22. *Germain Katanga intentionally made a significant contribution to the commission of the crimes, by*

- i. seeking to contribute to the attack carried out against the civilian population of the village of Bogoro;³⁸
- ii. facilitating communication amongst the members of the group themselves, by providing the liaison between them and other local or regional authorities (Beni) and by enabling effective preparation for

³⁴ DCC, para. 543.

³⁵ DCC, para. 555 (ii).

³⁶ DCC, para. 548.

³⁷ See, *inter alia*, part 7.1 of the Prosecution’s written submissions (Office of the Prosecutor, “*Corrigendum du Mémoire final*”, 16 March 2012, ICC-01/04-01/07-3251-Conf).

³⁸ Summary of the Charges, para. 27.

the attack, by means of his position of authority in Aveba and Walendu-Bindi *collectivité* on the eve of the battle of Bogoro;³⁹

- iii. travelling to Beni to obtain arms and ammunition and distributing them to the various camps in Walendu-Bindi *collectivité*.⁴⁰

23. Regarding the third factual element, the Chamber notes that Germain Katanga's position of authority over the commanders and combatants in Aveba and in Walendu-Bindi *collectivité* on the eve of the battle of Bogoro and, more so than the title of coordinator which he claimed, the functions which he allegedly assumed as part of the "overall coordinating role"⁴¹ he played are particularly important.

Fourth factual element

24. *Germain Katanga's contribution was made in the knowledge of the intention of the Ngiti commanders and combatants from Walendu-Bindi collectivité to commit the crimes confirmed by the Pre-Trial Chamber:*

- i. Germain Katanga was fully aware of the existence of an armed conflict and knew that the attack on the village of Bogoro and the offences committed during and in the aftermath of the attack were part of the strategic common plan to secure control over the village;⁴²
- ii. Germain Katanga knew that there would be an attack on the civilian population of the village of Bogoro in February 2003.⁴³ He knew that the conduct of the members of the group in that *localité* on 24 February 2003 was part of a series of widespread or systematic attacks committed against the predominantly Hema civilian population living in the Ituri region;⁴⁴

³⁹ DCC, para. 540; Summary of the Charges, para. 61.

⁴⁰ DCC, para. 555 (ii).

⁴¹ *Decision on the confirmation of charges*, para. 555 (ii).

⁴² DCC, paras. 387 and 388.

⁴³ DCC, para. 417.

⁴⁴ DCC, para. 417 ; Summary of the Charges, para. 27.

iii. Germain Katanga intended to commit the crimes of attacking the civilian population, wilful killing and murder and destruction of property,⁴⁵ and he knew that other crimes would be committed in the ordinary course of events;⁴⁶ the members of the group intended to commit the crimes confirmed by the Pre-Trial Chamber.⁴⁷

25. Regarding this fourth factual element and the factual allegation made at paragraph 24(i), the Chamber notes that, in considering Germain Katanga's knowledge of the factual circumstances surrounding the existence of an armed conflict, the Pre-Trial Chamber expressly stated that he knew that the attack launched on the village of Bogoro and the crimes committed on that occasion were part of the strategic common plan to secure control over the village. Factual allegation 24(ii) is more directly related to the Accused's knowledge of the fact that the conduct of the group was part of a large-scale operation directed against the civilian population. As for factual allegation 24(iii), this refers to the thesis that, as the Pre-Trial Chamber explained, both Germain Katanga and the commanders and combatants from Walendu-Bindi *collectivité* intended to commit the crimes. This cumulation of intentions in the present case is, in the Chamber's view, relevant to a demonstration that Germain Katanga had knowledge of the intention of the group, as a result of his closeness to it as well as of his possible membership of it. In this regard, the Chamber wishes to highlight that the Accused's alleged involvement in, *inter alia*, the battle of Nyakunde and his knowledge of it constitute one of the essential points of this element.⁴⁸ The Chamber is therefore of the view that these three factual allegations may be relevant to establishing Germain Katanga's knowledge of the group's criminal intent.

⁴⁵ DCC, para. 565.

⁴⁶ DCC, paras. 566-569.

⁴⁷ See, *inter alia*, DCC paras. 284, 298, 302, 306, 307, 319, 325, 326, 334, 338, 347, 354, 387, 424, 425, 426, 427, 434, 435, 436, 442, 443 and 444.

⁴⁸ DCC, para. 552; Summary of the Charges, para. 72.

26. In light of the foregoing, the Chamber invites the Prosecutor and the Legal Representatives of Victims, if they wish, to file submissions in addition to those that have already made, by 4 p.m. on 22 May 2013. It orders the Defence to file its new submissions by 4 p.m. on 29 May 2013.
27. In the event that the Defence maintains its request to carry out further investigations,⁴⁹ or if it seeks leave, for example, to recall witnesses, it should, following the order of the factual elements, provide all the evidence in support of such a request, indicating, *inter alia*, whether these measures are necessary for it to be able to adopt any particular line of defence and how the evidence already in the record does not allow it to do so.
28. In light of the very specific information thus conveyed and, if necessary, filed in part *ex parte*, the Chamber will be able to rule on any requests made by the Defence for Germain Katanga on the basis of paragraph 3(b) of regulation 55 and make a decision on the next steps in the proceedings.

FOR THESE REASONS,

DECIDES to transmit additional factual material as well as information of legal interest on the interpretation of article 25(3)(d)(ii) of the Statute;

INVITES the Prosecution and the Legal Representatives of Victims to file, if desired, additional observations by 4 p.m. on 22 May 2013; and

⁴⁹ Defence Submissions, paras. 177-189 and 194.

ORDERS the Defence to file its additional observations, in accordance with regulation 36 of the Regulations of the Court, by 4 p.m. on 29 May 2013.

Judge Van den Wyngaert intends to issue a dissenting opinion, to be filed at a later date.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 15 May 2013

At The Hague, The Netherlands