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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 the "*Décision relative à la transmission d'éléments juridiques et factuels complémentaires*"

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Introduction

1. On 15 May 2013, by majority, Trial Chamber II (“Chamber”) issued its “*Décision relative à la transmission d’éléments juridiques et factuels complémentaires*”¹ (“Complementary Notice”) and invited the Prosecution and Participants to submit further observations to complement their prior submissions on the recharacterisation of the mode of liability.²
2. In its Complementary Notice, the Chamber provides additional information to the Defence as to its interpretation of Article 25(3)(d)(ii) of the Statute. The Chamber also provides guidance on four main “factual elements”: (1) the evidence the Chamber intends to consider when assessing if Ngiti combatants intentionally committed crimes, as confirmed by the Pre-Trial Chamber, during and after the Bogoro attack, (2) the identity of the group and its common purpose, (3) Germain Katanga’s contribution to the commission of the crimes, and (4) Germain Katanga’s awareness of the intention of the group to commit the crimes confirmed by the Pre-Trial Chamber.³
3. The Prosecution hereby files further observations on two specific issues, namely that (1) Ngiti combatants from Walendu-Bindi intentionally committed the crimes as charged, and (2) Germain Katanga was aware of the crimes committed during the Nyankunde attack, which supports the conclusion that he intentionally and knowingly contributed to the crimes subsequently committed in Bogoro.

¹ ICC-01/04-01/07-3371. Judge Van den Wyngaert dissenting, see ICC-01/04-01/07-3371-Anx.

² See ICC-01/04-01/07-3365 and ICC-01/04-01/07-3366 for the observations of the Legal Representatives and ICC-01/04-01/07-3367 for the Prosecution’s earlier observations.

³ See ICC-01/04-01/07-3371, paras 18-25.

Observations

The Ngiti combatants from Walendu-Bindi intentionally committed the crimes as charged

4. In its closing brief,⁴ the Prosecution did not deal with the issue of the “identity” of the physical perpetrators of the crimes committed during the attack. The reason was because the mode of liability originally charged, joint co-perpetration, meant that the crimes committed by the Bedu-Ezekere and Walendu-Bindi combatants were mutually attributable to both Germain Katanga and Mathieu Ngudjolo.⁵ It was therefore not necessary to distinguish between members of the groups on the ground. However, the Chamber states, in its Complementary Notice, that it does not intend to rely, for the purposes of determining Germain Katanga’s liability under Article 25(3)(d), on evidence that would demonstrate that crimes may have been committed by Lendu combatants from Bedu-Ezekere *groupement*.⁶ It added further that “it will rely only on evidence held against him which establishes that some of the crimes were allegedly committed by Ngiti combatants from the Walendu-Bindi *collectivité*, including in instances where, according to witness statements, the crimes were allegedly committed by both Lendu and Ngiti combatants.”⁷ It now becomes necessary to deal with the evidence on record that establishes the membership of the attackers involved in crimes.
5. The Prosecution submits that when witnesses testify that both Lendu and Ngiti combatants committed crimes, this should indeed be taken into account for the purpose of Germain Katanga’s criminal liability. To do otherwise would result in a distortion of the evidence and the Chamber would be prohibiting itself from

⁴ See Prosecution’s Closing Brief, ICC-01/04-01/07-3251-Corr-Red.

⁵ See for instance the Confirmation Decision at ICC-01/04-01/07-717, paras 492-493.

⁶ ICC-01/04-01/07-3371, para. 19.

⁷ *Ibid.*, Citation from the original French version of the Complementary Notice.

relying on relevant evidence in its determination of the truth. For instance, Witness P-323 testified that the Ngiti combatants, mixed with Lendu,⁸ were killing without any distinction between UPC soldiers or civilians. The combatants would kill anyone they found in their way.⁹ In this example, it is clear that both the Lendu and Ngiti were jointly committing murders. The testimony of witness P-323 also demonstrates the intent of the Ngiti combatants.

6. The Chamber must take into consideration the totality of the evidence when determining whether Ngiti combatants committed the crimes charged. Consequently, the Chamber's assessment must not only consider the direct evidence¹⁰ but also the circumstantial evidence, such as the motive of the Ngiti combatants, their preparation, and their presence and conduct during and after the attack.

The motive of the Ngiti combatants

7. The Prosecution recalls that both Lendu and Ngiti were driven by the same intent – and with the same hatred¹¹ - to “wipe out” the village of Bogoro.¹² The Chamber can rely on the evidence of motive in order to draw the inference that Ngiti combatants who participated in the attack also committed the crimes charged.¹³ For example, and as described further below, when the Ngiti combatants found witness P-132 in her hiding place, they intended to kill her (see *infra* para. 12).

⁸ T-117-CONF-FRA, p. 31, l. 13-16, p. 60, l. 11.

⁹ T-117-CONF-FRA, p. 37, l. 14-15.

¹⁰ See for instance the testimony of witnesses P-323, P-353 and P-161. Defence witness D02-148 confirmed that Ngiti combatants pillaged Bogoro after the attack, T-280-CONF-FRA, p. 32, l. 9-11.

¹¹ This hatred clearly forms part of the facts and circumstances as confirmed by the Pre-Trial Chamber when it stated that combatants from both groups sang songs with “hate-filled lyrics”, Confirmation Decision at ICC-01/04-01/07-717, paras 280 and 555(iii) and (v). The Prosecution recalls that the evidence presented at the confirmation hearing clearly established that the combatants sang these songs as they were moving towards the direction of and to attack Bogoro.

¹² ICC-01/04-01/07-717, paras 283, 406 and 555(i).

¹³ This is exemplified by witness P-268 who states that the day after his capture (on 25 February), a mixed group of Lendu and Ngiti combatants escorted him to the location where he had been hiding (on the day of the attack – 24 February). At that location, he was requested to “lure” civilians to come out by speaking Hema. This mixed group of combatants started shooting at the civilians, see T-107-CONF-FRA, p. 66, l. 10-p. 67, l. 8 and T-108-CONF-FRA, p. 73, l. 5-p.75, l. 22.

Preparation: the Ngiti combatants from Walendu-Bindi gathered in Medhu and Kagaba prior to launching their attack on Bogoro

8. The Chamber notified the Defence that it will examine the facts that would tend to establish that “*la veille de l’attaque, plusieurs commandants ont, avec leurs troupes, pris leurs positions respectives à Medhu et à Kagaba afin de lancer l’opération contre Bogoro.*”¹⁴ The fact that Ngiti combatants assembled at these locations can be relied upon by the Chamber to infer that they subsequently participated in the attack on Bogoro.
9. This factual element is supported by the testimony of witness P-28¹⁵ and Defence witness D02-148.¹⁶ Witness P-28 testified that according to a pre-agreed plan, the Ngiti combatants divided into two lines of attack: one line in Kagaba, the other in Medhu.¹⁷ The attack on Bogoro was to be launched simultaneously from these two locations.¹⁸ The troops gathered in Kagaba and carried out their preparations for the battle on the eve of the attack.¹⁹ Witness P-28’s testimony on the assembly of Ngiti troops at Kagaba is corroborated by Defence witness D02-148²⁰ who testified that he was present at the gathering in Kagaba²¹ and that a coalition of troops from the same *collectivité* (Walendu-Bindi) came together to carry out the attack on Bogoro.²² D02-148 specified that during the attack combatants also came from the direction of Medhu.²³

¹⁴ ICC-01/04-01/07-3371, para. 20(vi).

¹⁵ In its Judgment in the *Ngudjolo* case, the Chamber found that it can rely on parts of P-28’s testimony concerning the militia based in Aveba, its activities and operations that took place during that relevant time; it accepted that P-28 was well-informed about these events as he was present in Aveba as of February 2003 and he had close ties with Germain Katanga and another Aveba commander. See ICC-01/04-02/12-3, para. 252; T-217-CONF-FRA, p. 35, l. 23-p. 36, l. 10, p. 49, l. 27-p. 50, l. 23.

¹⁶ See Prosecution’s Closing Brief ICC-01/04-01/07-3251, paras 552-557; T-279-CONF-FRA, p. 15, l. 22-p.18, l. 6; T-281-CONF-FRA, p. 18, l. 19-28.

¹⁷ T-217-CONF-FRA, p. 35, l. 23-p. 36, l. 10, p. 49, l. 27-p. 50, l. 23; T-219-CONF-FRA, p. 17, l. 18-28.

¹⁸ T-219-CONF-FRA, p. 17, l. 19-25.

¹⁹ T-217-CONF-FRA, p. 36, l. 9-28, p. 48, l. 13-p. 50, l. 8.

²⁰ T-279-CONF-FRA, p. 15, l. 22 - p.18, l. 6; T-281-CONF-FRA, p. 18, l. 19-28.

²¹ T-279-CONF-FRA, p. 16, l. 12-p. 18, l. 3; T-281-CONF-FRA, p. 18, l. 19-28.

²² T-279-CONF-FRA, p. 15, l. 22 - p. 17, l. 21, and p. 18, l. 1-6.

²³ T-279-CONF-FRA, p. 16, l. 7-9.

10. Further corroboration can be inferred from the testimony of Defence witness D02-176²⁴ and Prosecution witnesses P-161²⁵ and P-323²⁶, who confirm that the Ngiti attacked Bogoro from the general directions of Kagaba and Medhu. Witness D02-176, who was near the Waka mountain during the attack, confirmed that the Ngiti combatants attacked Bogoro from the direction of the Medhu and Geti roads.²⁷

The conduct of the Ngiti combatants

11. The following examples of the conduct of the Ngiti combatants during and after the attack on Bogoro illustrate their intent to target and kill Hema civilians.
12. Witness P-132 testified that while she was hiding, a group of combatants found her and intended to kill her.²⁸ She pleaded for her life and instead, the combatants raped her.²⁹ Although she testified that she was unable to distinguish the ethnicity of the combatants who assaulted her,³⁰ she nonetheless provided a vital element from which it can be inferred that at least some of these individuals were indeed Ngiti. The witness testified that the same combatants, who found and raped her, forcibly brought her to the Ngiti camp of Kagaba.³¹ It is submitted that it is because they were themselves Ngiti combatants from that camp returning to their camp with the spoils of war. It is important to recall that P-132 was subsequently sexually enslaved at the camp.³² Defence witness D02-148 confirms that P-132 was at Kagaba camp.³³ Further, it is submitted that the Chamber can also take into consideration the evidence indicating that Ngiti

²⁴ T-256-CONF-FRA, p 8, l. 8-15; p. 50, l. 17-p. 51, l. 16; p. 21, l. 17-p. 22, l. 7

²⁵ T-109-CONF-FRA, p. 34, l. 7-9 ; T-111-CONF-FRA, p. 13, l. 1-3, p. 50, l. 22-p. 51, l. 3. P-161 testified that the Ngiti came from the direction of Geti and Songolo [which is the same direction as Medhu] roads.

²⁶ T-117-CONF-FRA, p. 28, l. 14-22: P-323 testified that the attackers were numerous and they entered Bogoro from all the directions (“ligne de Waka”, “ligne de Geti”).

²⁷ T-256-CONF-FRA, p. 8, l. 8-15, and p. 21, l. 17-p. 22, l. 7.

²⁸ T-139-CONF-FRA, p. 11, l. 2-p. 12, l. 7.

²⁹ T-139-CONF-FRA, p. 13, l. 13-p. 14, l. 8.

³⁰ T-139-CONF-FRA, p.12, l. 15-19.

³¹ T-139-CONF-FRA, p. 21-l. 14-p. 22, l. 5.

³² T-139-CONF-FRA, p. 26, l. 21-24, p. 48, l. 8-14.

³³ T-279-CONF-FRA, p. 20, l. 28-p. 21, l. 19, T-280-FRA-CONF CT, p. 40, l. 23-p. 42, l. 23.

combatants from Kagaba did indeed take part in the attack on Bogoro (see paras 9 and 10 above).

13. Prosecution Witness P-268 explained that on the day of the attack he could tell that the attackers were Lendu and Ngiti by their language.³⁴ Upon leaving his hiding place on the evening of 24 February, he was arrested by combatants and brought to the *Institut de Bogoro* and detained in a room filled with dead bodies. The next morning, on 25 February, while being taken out of the classroom, the witness saw about 400 Lendu and Ngiti combatants at the location of the *Institut*.³⁵ P-268 is specific and makes clear that a mixed group of Lendu and Ngiti combatants then escorted P-268 to the location where he had been hiding (on the day of the attack – 24 February). At that location, he was ordered to “lure” civilians to come out of their hiding place by speaking Hema. This mixed group of combatants then started shooting. Witness P-268 saw a number of civilians that came out being taken away by the combatants. Witness P-233 corroborates witness P-268’s account about civilians being lured out of the bush and shots being heard thereafter. P-233 who knew that the village was being attacked by both Lendu and Ngiti was able to distinguish them when speaking Swahili or Hema, including when the combatants lured civilians out of hiding. Witness P-233 testified about a civilian who came out of hiding, gunshots were heard and he was never to be seen again.³⁶ Witness P-233 stated that it must have been the Ngiti that had called the civilians to come out of the bush.³⁷

³⁴ T-107-CONF-FRA, p. 27, l. 3-14.

³⁵ T-107-CONF-FRA, p. 40, l. 19-p. 42, l. 22, p. 44, l. 22-p. 47, l. 4, p. 57, l. 17-p. 61, l. 24.

³⁶ T-83-CONF-FRA, p. 77, l. 23-p. 78, l. 10. Note that witness P-233 confirmed that some looting was committed by Lendu as he recognised them speaking Lendu, T-84-CONF-FRA, p. 34, l. 22-p. 36, l. 5.

³⁷ T-83-CONF-FRA, p. 79, l. 7-11.

Germain Katanga was aware of the crimes committed during the Nyankunde attack.

14. There is evidence that Germain Katanga himself was involved in the attack on Nyankunde. Witness P-12 testified that Germain Katanga mentioned that he was involved in and present at the Nyankunde attack when he was asking him about the circumstances in which he succeeded to Kandro at such a young age.³⁸
15. However, even if Germain Katanga did not participate in the attack on Nyankunde, he must have been aware of it and of the crimes that were committed: first, Nyakunde was the largest attack that took place during the conflict in Ituri; second, Germain Katanga was involved in the defence of his community in 2002; and third, his extended family was from Nyankunde. Witness P-28 confirms that the Nyankunde attack was a well-known event recounted by those who participated in the attack,³⁹ and that Ngiti from Walendu-Bindi led by commander Kandro participated in that attack.⁴⁰ Defence witnesses D02-148 (Kandro's bodyguard),⁴¹ D02-136,⁴² D02-161,⁴³ D02-129,⁴⁴ and D02-134⁴⁵ support P-28's account. Witness D02-129 confirms, as reported in the UN Special Report, that during the Nyankunde attack one of the biggest hospitals in Ituri was destroyed⁴⁶ and that civilians were massacred.⁴⁷

³⁸ T-197-CONF-FRA, p. 33, l. 10-27. They did not discuss the details. See also T-201-CONF-FRA, p. 19, l. 16-p. 21, l. 7. In cross-examination, P-12 reiterated that the discussion concerning Nyankunde was in the context of asking Katanga how he was chosen to be the leader so young; that he did not pro-actively seek information about Nyankunde, and no details were discussed.

³⁹ T-218-CONF-FRA, p. 7, l. 3-p. 8, l. 8 and p. 8, l. 21-p. 9, l. 1.

⁴⁰ T-218-CONF-FRA, p.7, l. 19-27.

⁴¹ See T-279-CONF-FRA, p. 7, l. 7-p. 8, l. 14.

⁴² See T-240-CONF-FRA, p. 22, l.25-p. 23, l. 7. Although, he stated it was the APC rather than Ngiti who launched that attack (T-241-CONF-FRA, p. 19, l. 21-25).

⁴³ See T-268-CONF-FRA CT, p.19, l.19-21.

⁴⁴ See T-271-CONF-FRA, p. 21, l. 1 -7.

⁴⁵ See T-259-CONF-FRA, p. 65, l. 5-20.

⁴⁶ D02-149, T-271-CONF-FRA, p. 47, l. 1-7.

⁴⁷ EVD-OTP-00206, para. 26 : in the report it is stated that "several hundred civilians" were killed and one of the largest health structures destroyed. See D02-149, T-271-CONF-FRA, p. 46, l. 25-28, p. 47, l. 1-7.

16. Witness D02-148 who participated in the attack on Nyankunde,⁴⁸ confirmed that they attacked Nyankunde in revenge for the UPC attack on Songolo.⁴⁹ His account is corroborated by the letter signed by Lendu leaders, including D03-0088.⁵⁰
17. Germain Katanga himself admitted that the UPC attacked Songolo,⁵¹ and that subsequently combatants led by Kandro and Cobra Matata attacked Nyankunde together with APC forces.⁵² He confirmed that women, children, and elderly were killed during both the Songolo and Nyankunde attacks.⁵³ Although he denies participating in the Nyankunde attack,⁵⁴ he testified that he visited Nyankunde in October 2002, when he learnt of the attack, and admits it was a “disaster” where people died and the medical centre was “swept away”.⁵⁵
18. Contrary to the assertions of the Defence, the attack on Nyankunde is relevant to the subsequent attack on Bogoro, in that (a) there were Ngiti and Lendu combatants involved in the Nyankunde attack who were subsequently involved in the Bogoro attack⁵⁶ and (b) the Ngiti’s hatred at Nyankunde was not limited to the Bira but also targeted the Hema civilian population present and the UPC forces who had attacked Songolo.⁵⁷
19. The evidence itself demonstrates that the Ngiti and Lendu combatants involved in the Nyankunde attack were subsequently involved in the Bogoro attack. For instance, witness D02-148 who admitted that he participated in both attacks,⁵⁸ confirmed that Kandro’s Garrison battalion⁵⁹ which attacked Nyankunde⁶⁰ was

⁴⁸ T-279-CONF-FRA, p. 7, l. 18-21.

⁴⁹ T-279-CONF-FRA, p. 7, l. 7-17.

⁵⁰ EVD-D03-00098.

⁵¹ T-315-CONF-FRA CT, p. 26, l. 19-28.

⁵² T-321-CONF-FRA CT, p. 71, l. 6-24.

⁵³ T-320-CONF-FRA CT, p. 27, l. 6-9.

⁵⁴ T-315-CONF-FRA CT, p. 39, l. 24-25.

⁵⁵ T-315-CONF-FRA CT, p. 39, l. 26-28, p. 40, l. 1-6 ; T-320-CONF-FRA CT, p. 25, l. 17-25.

⁵⁶ ICC-01/04-01/07-3369, para. 70.

⁵⁷ *Ibid.*

⁵⁸ T-279-CONF-FRA, p. 7, l. 18-21, p. 15, l. 27-p. 16, l. 3.

⁵⁹ T-279-CONF-FRA, p. 46, l. 15-22.

subsequently led by Yuda and Dark,⁶¹ and that their group attacked Bogoro.⁶² He testified that Cobra Matata also led Ngiti combatants that attacked Nyankunde.⁶³ Other witnesses confirm that forces under Cobra's command,⁶⁴ including from Medhu, attacked Bogoro.⁶⁵

20. Accordingly, as Germain Katanga admitted that he was aware that Kandro and Cobra Matata were involved in the Nyankunde attack⁶⁶ and he knew of the types of crimes perpetrated by that group at Nyankunde⁶⁷, he therefore must have known, when he made his contributions to the Bogoro attack, what crimes, the same group that attacked Nyankunde would in the ordinary course of events perpetrate at Bogoro. He therefore clearly would have had the knowledge of the intention of this group to commit those crimes.
21. There is evidence indicating that the Ngiti hatred when carrying out the Nyankunde attack was not limited to the Bira, but also targeted the Hema. Defence witness D02-148 and Germain Katanga admitted that it was the UPC who attacked Songolo, not just the Bira;⁶⁸ so that the subsequent revenge attack on Nyankunde was also directed against the Hema UPC based at Nyankunde.⁶⁹ And as regards the Bira, Germain Katanga testified that it was the Hema who influenced the Bira to act against the Lendu in any event.⁷⁰

⁶⁰ See e.g. T-279-CONF-FRA, p. 7, l. 18-p. 8, l. 14.

⁶¹ See e.g. T-281-CONF-FRA, p. 13, l. 27-p.14, l. 19.

⁶² See e.g. T-281-CONF-FRA, p. 17, l. 19-p. 18, l. 3.

⁶³ See e.g. T-279-CONF-FRA, p. 8, ll. 15-19, p. 52, l. 26-p. 53, l. 15.

⁶⁴ P-28, T-217-CONF-FRA CT, p. 7, ll. 4-27.

⁶⁵ See e.g. D02-148, T-279-CONF-FRA, p. 16, l. 1-9, p. 33, l. 6-16, T-280-CONF-FRA CT, p. 18, l. 13-25.

⁶⁶ T-321-CONF-FRA CT, p. 71, l. 7-24.

⁶⁷ T-315-CONF-FRA CT, p.39, l.26-p. 40, l. 6 ; T-320-CONF-FRA CT, p. 25, l. 17-25.

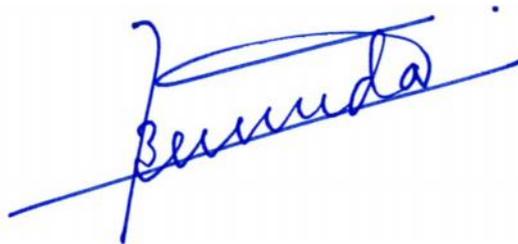
⁶⁸ D02-300, T-315-CONF-FRA CT, p. 26, l. 19-28; D02-148, T-279-CONF-FRA, p. 7, l. 7-17.

⁶⁹ D02-148, T-279-CONF-FRA, p. 7, l. 7-17.

⁷⁰ D02-300, T-315-CONF-FRA CT, p. 18, l. 18-22.

Conclusion

22. The Prosecution reiterates that the evidence in this case establishes all the legal requirements of liability under Article 25(3)(d)(ii). Accordingly, if the Chamber was to recharacterise the charges, the Prosecution submits that the evidence proves beyond reasonable doubt the guilt of Germain Katanga also pursuant to the mode of liability of Article 25(3)(d)(ii).



Fatou Bensouda, Prosecutor

Dated this 24th day of May 2013
At The Hague, The Netherlands