

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

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

Date: **26 June 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 on the Defence requests set forth in observations 3379 and 3386 of  
3 and 17 June 2013**

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 Germain Katanga**

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**

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**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 Statute and regulation 55 of the Regulations of the Court, decides the following.

## **I. Procedural background**

1. By decision of 21 November 2012, the Chamber unanimously severed the charges against the Accused Mathieu Ngudjolo (“21 November 2012 Decision”).<sup>1</sup> By judgment of 18 December 2012, the Chamber acquitted him. This decision has been appealed.<sup>2</sup>
2. In the 21 November 2013 Decision, by majority, 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 initial mode of liability under which the Accused Germain Katanga stood charged was amenable to legal recharacterisation on the basis of article 25(3)(d)(ii) of the Statute. The Chamber invited observations from the parties and participants on the proposed recharacterisation, with 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 informed the Defence that were it to seek application of any of the measures adverted to in regulation 55(3)(b), it should so inform the Chamber in its observations, providing justification therefor.

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<sup>1</sup> *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 (“the 21 November 2012 Decision”).

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

3. By decision of 28 December 2012, the Chamber granted the Defence for Germain Katanga leave to appeal the 21 November 2012 Decision.<sup>3</sup>
4. In its judgment of 27 March 2013, the Appeals Chamber upheld the 21 November 2012 Decision.<sup>4</sup> Nonetheless, it invited the Chamber to exercise particular vigilance in ensuring that Germain Katanga is tried without undue delay.<sup>5</sup>
5. The observations of the Office of the Prosecutor and the Legal Representatives of the victims were received on 8 April 2013 within the time limit stipulated by the Chamber. The Legal Representative of child-soldier victims filed observations on a matter specific to the *sui generis* situation of the victims whom he is representing.<sup>6</sup>
6. The Defence for Germain Katanga filed its observations on 15 April 2013.<sup>7</sup> In sum, it stated that it “[i]t is unclear to the defence upon what factual basis the Chamber now intends to rely.”<sup>8</sup> and, in particular, that it had little detail as to “who, among the Ngiti combatants and commanders, belongs the ‘group with a common purpose’”.<sup>9</sup> It further underscored the need to specify to the Defence who was involved in formulating the common purpose,

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

<sup>4</sup> 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 (“Judgment on Appeal”).

<sup>5</sup> *Ibid.*, para. 99.

<sup>6</sup> Legal Representative of 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.

<sup>7</sup> Defence for Germain Katanga, “Defence Observations on Article 25(3)(d)”, 15 April 2013, ICC-01/04-01/07-3369 (“First Defence Observations”).

<sup>8</sup> *Ibid.*, para. 8.

<sup>9</sup> *Ibid.*, para. 9.

how it was planned and put into action and the role Germain Katanga played.<sup>10</sup>

7. Finally, whilst inviting the Chamber to refrain, at this stage of the proceedings, from any alteration of the mode of liability initially charged, the Defence for the Accused made clear that it required further information on the facts and circumstances concerning the new mode of liability contemplated and the evidence upon which the Chamber intended to rely. It also stated that it did not preclude, where necessary, seeking authorisation to conduct further investigations.<sup>11</sup>
8. By decision of 15 May 2013,<sup>12</sup> by majority, the Chamber, Judge Van Den Wyngaert dissenting in an opinion issued on 20 May 2013,<sup>13</sup> provided to the parties and participants additional factual material as well as legal material on the interpretation of article 25(3)(d)(ii) of the Statute. It also invited observations from the parties and participants, if any.
9. On 24 May 2013, the Chamber received the observations of the Prosecution<sup>14</sup> and the Legal Representative of child-soldier victims.<sup>15</sup> In its observations, the Prosecution primarily sought to show that the Ngiti combatants of Walendu Bindi *collectivité* had

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<sup>10</sup> *Ibid.*, para. 16.

<sup>11</sup> *Ibid.*, paras. 192 to 195.

<sup>12</sup> *Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)*, 15 May 2013, ICC-01/04-01/07-3371-tENG ("15 May 2013 Decision").

<sup>13</sup> *Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), Dissenting opinion of Judge Christine Van den Wyngaert*, 20 May 2013, ICC-01/04-01/07-3371-Anx.

<sup>14</sup> Office of the Prosecutor, "Prosecution's Observations on the '*Décision relative à la transmission d'éléments juridiques et factuels complémentaires*'", 24 May 2013, ICC-01/04-01/07-3376 ("Prosecution's Observations").

<sup>15</sup> Legal Representative of child-soldier victims, "*Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3371*", 24 May 2013, ICC-01/04-01/07-3375.

intentionally committed the crimes charged and that Germain Katanga was fully aware of the crimes perpetrated during the attack on Nyankunde.

10. The Defence for Germain Katanga filed its own observations<sup>16</sup> on 3 June 2013. It emphasised that 15 May 2013 Decision did not provide sufficient detail on the factual elements on which the Chamber intended to rely if it were to amend the mode of liability held against Germain Katanga. It noted that the factual elements adverted to were based on the statements of witnesses considered unreliable or witnesses whom the Chamber had considered necessary to disregard. The Defence argued that in spite of the factual material transmitted on 15 May 2013, the Accused, in its view, had not been afforded sufficient notice of the charges against him, as required by article 67(1)(a) of the Statute. It further stated that the factual elements furnished by the Chamber exceeded the factual scope set forth in the *Decision on the confirmation of charges*.<sup>17</sup>

11. Further, the Defence restated its position that the new mode of liability envisaged against the Accused would require further investigations on its part, whilst stating that it was unable at this stage to provide further details regarding these potential investigations. Nonetheless, it listed those topics on which it considered the investigations should focus. These included elements pertaining to the relationship between Germain Katanga and the members of the alleged group or sub-group, as well as the

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<sup>16</sup> Defence for Germain Katanga, "Defence Observations on the Decision transmitting additional legal and factual material (regulation 55 (2) and 55 (3) of the Regulations of the Court)", 3 June 2013, ICC-01/04-01/07-3379-Conf-Corr ("Second Defence Observations"). See also ICC-01/04-01/07-3379-Red-Corr.

<sup>17</sup> 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").

Accused's knowledge of their criminal intent, Germain Katanga's coordinating role, which under the new mode of liability envisioned is of particular importance; and elements concerning the supply of weapons and the attack on Nyankunde. The Defence also stated that it may need to expound on certain points and to this end it may have to recall some of its witnesses, and some prosecution witnesses, specifically as regards the identification of the perpetrators of the crimes.

12. Finally, in its Second Observations the Defence specified the difficulties it would be likely to encounter were it authorised to conduct fresh investigations. Such difficulties, in its eyes, mainly ensue from the current security situation in Ituri and North Kivu and the composition of its team, and require the Defence to be accorded six months to complete fresh investigations.

13. Once acquainted with the Second Observations of the Defence, and with the Chamber's authorisation, the Prosecution filed a response on 11 June 2013,<sup>18</sup> wherein it mainly addressed the prospect of recalling witnesses. In its view, the recall of witnesses, be they prosecution or defence, for the purpose of revisiting the specific matter of identifying the perpetrators of the crimes is unjustified in that the Defence has already had the opportunity to examine the relevant witnesses on this point.

14. With the Chamber's approval, the Defence filed a reply on 17 June 2013,<sup>19</sup> wherein, as specifically concerned the identification of the

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<sup>18</sup> Office of the Prosecutor, "*Réplique de l'Accusation aux 'Defence Observations on the Decision transmitting additional legal and factual material (regulation 55 (2) and 55 (3) of the Regulations of the Court'*", 11 June 2013, ICC-01/04-01/07-3384-Conf-Red ("Prosecution Response").

<sup>19</sup> Defence for Germain Katanga, "Defence Reply to '*Réplique de l'Accusation aux 'Defence Observations on the Decision transmitting additional legal and factual material (Regulation*

perpetrators of the crimes, it listed those witnesses whom it may need to recall and explained why. The Defence further stated that it would be unable to inform the Chamber of the witnesses whom it wished to recall until it had contacted them.

## II. Discussion

15. With reference to the language used by the Defence for Germain Katanga, the Chamber will identify groups of different topics which the Defence now considers require investigation, given their importance, in its view, to an analysis of the liability of the Accused under article 25(3)(d)(ii) of the Statute:

- a. the relationship between Germain Katanga and the members of the Ngiti group of commanders and combatants<sup>20</sup> and extent of cooperation between the various combatants, commanders and the various camps prior to the attack on Bogoro;<sup>21</sup>
- b. the meetings between group members and Germain Katanga's presence or absence at meetings where a criminal plan was discussed;<sup>22</sup>
- c. the behaviour of the group members prior to the battle of Bogoro and Germain Katanga's particular knowledge thereof;<sup>23</sup> in particular the battle of Nyankunde (ethnic composition of the victims, the role of the APC during combat, particularly in relation to pillaging, and the absence of Germain Katanga);<sup>24</sup>

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55 (2) and 55 (3) of the Regulations of the Court)""", 17 June 2013, ICC-01/04-01/07-3386-Red ("Defence Reply").

<sup>20</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 182.

<sup>21</sup> Second Defence Observations, para. 49.

<sup>22</sup> Second Defence Observations, para. 49. See also First Defence Observations, paras. 182 and 183.

<sup>23</sup> Second Defence Observations, para. 49. See also First Defence Observations, paras. 182 and 183.

<sup>24</sup> Second Defence Observations, para. 50.



- d. excesses by combatant groups other than the Ngiti (the Lendu, the Bira and the APC soldiers) during the attack on Bogoro, in particular as concerns the commission of the crimes of pillaging,<sup>25</sup> rape<sup>26</sup> and the crimes committed at the Institute;<sup>27</sup> propensity of the Lendu to commit crimes,<sup>28</sup> having particular regard to the massacres of Tchomia and Kasenyi (which, according to the Defence, were the work of Lendu and not Ngiti combatants);<sup>29</sup> the manner in which the crimes were committed in Bogoro,<sup>30</sup> in particular at the Institute, and the identification of the Ngiti who purportedly committed crimes;<sup>31</sup>
  - e. Germain Katanga's coordinating role;<sup>32</sup> and
  - f. the supply of weapons, in particular, who controlled<sup>33</sup> it and whether the weapons provided were used in Bogoro.<sup>34</sup>
16. As the Prosecution notes, the Defence requests are for most of the topics listed above, articulated in somewhat vague terms and without reference to a specific list of witnesses, save in respect of the identification of the perpetrators of crimes, which was the subject a series of specific filings. As matters now stand, the Chamber can therefore only issue a provisional ruling.
17. As previously stated in the 15 May 2013 Decision, the Chamber accepts that, although addressed at trial, some topics are of particular salience to the analysis of Germain Katanga's liability

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<sup>25</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 184.

<sup>26</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 184.

<sup>27</sup> Second Defence Observations, para. 49. See also First Defence Observations, paras. 180 and 184.

<sup>28</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 184.

<sup>29</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 186.

<sup>30</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 185.

<sup>31</sup> Second Defence Observations, para. 51.

<sup>32</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 187.

<sup>33</sup> Second Defence Observations, para. 49. See also First Defence Observations, para. 185.

<sup>34</sup> First Defence Observations, para. 185.

under article 25(3)(d)(ii) of the Statute. The Chamber considers this to hold particularly true for (1) the attack on Nyankunde and/or other attacks predating the attack on Bogoro; (2) the identification of the perpetrators of the crimes; and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.

18. In principle, therefore, the Chamber is agreeable to further investigations by the Defence for the purposes of a final list of those witnesses whom it intends to recall or call for the first time. Only subsequently will the Chamber rule on the need to grant more detailed requests brought before it.

19. As to the ascertainment of whether certain elements which enable a determination on the criminal liability of Germain Katanga within the meaning of article 25(3)(d) of the Statute fall outwith the facts and circumstances contained in the charges, the Chamber wishes to emphasise that it has already stated its position on this point, and will dispose of the matter its judgment rendered pursuant to article 74 of the Statute. Accordingly, save where clarification on this point is necessary, it will not revisit the merits of the matter in future decisions. The Chamber considers that at the current stage of the proceedings, the prime consideration is to define the conditions which will allow the Defence to exercise its rights to the full.

20. At this juncture, the Chamber considers a number of observations opportune, which, if heeded by the Defence, may assist its further investigations. From the outset, the Chamber must note that the scrutiny of some topics appears more crucial than others.

**Topic 1: the relationship between Germain Katanga and the members of the Ngiti group of commanders and combatants and**

**the extent of the cooperation between the various combatants, commanders and camps prior to the attack on Bogoro**

21. As regards this first topic, it bears recalling that the Pre-Trial Chamber seized of the case at bar opted for a mode of liability based on control over the organisation, which, in its view, was the FRPI (article 25(3)(a) of the Statute). The Pre-Trial Chamber cast the FRPI as an apparatus of power based on hierarchical relationships between superiors and subordinates.<sup>35</sup> In factual terms, the trial essentially concerned – to use the Pre-Trial Chamber’s precise words – ascertainment of (1) whether the FRPI, which Germain Katanga commanded, was a hierarchically organised group, whether its members were organised into camps within Irumu territory in Walendu-Bindi *collectivité* and whether each of these camps had a commander; (2) whether Germain Katanga was the commander of the Aveba camp, which served as the headquarters of the FRPI, whether the FRPI was a military structured organisation, whether the commanders had the ability to communicate with each other and whether Germain Katanga, by virtue of his powers as a superior leader, had the ability to try and punish combatants.<sup>36</sup>
22. Relying on the factual description thus furnished by the Pre-Trial Chamber, the parties and participants canvassed (1) the relationship between Germain Katanga and the members of the Ngiti group of commanders and combatants of Walendu-Bindi and (2) how the group members performed their activities and in particular, whether they composed a homogenous group of combatants.

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<sup>35</sup> *Decision on the confirmation of charges*, paras. 500 *et seq.*

<sup>36</sup> *Decision on the confirmation of charges*, para. 543.

23. The parties' and participants' views on these two issues were amply explained in their respective closing briefs and closing statements.
24. The Chamber cannot therefore endorse the Defence submission that the close collaboration noted between the camps and commanders in Walendu-Bindi *collectivité*, which were listed in the 15 May 2013 Decision, constitutes a "new fact", which "appears nowhere"<sup>37</sup> in the *Decision on the confirmation of charges*. In fact, at the close of the trial, the Defence had the opportunity to speak to the structural links which may have existed between the various camps and commanders of Walendu-Bindi *collectivité*, and the manner of their collaboration, when responding to Prosecution allegations as to the existence of an organisation within the meaning of article 25(3)(a) in Walendu-Bindi *collectivité* on the eve of the attack on Bogoro.
25. Moreover, as concerns the names of the camps and commanders, neither can the Chamber consider that the 15 May 2013 Decision adds "new" facts to those set forth in the *Decision on the confirmation of charges*.<sup>38</sup> Between the issuance of this decision on 26 September 2008 and the Trial Chamber's 15 May 2013 Decision, a host of questions, repeatedly put to witnesses throughout the trial, were specifically aimed at identifying the commanders and camps of Walendu-Bindi, with the evident intention of discerning and understanding who was a member of these camps and who led the group of combatants in the run-up to the attack on Bogoro. New names and places not expressly adverted to by the Pre-Trial Chamber – whose objective, it must be recalled, was not to conduct an exhaustive trial before the trial proper – were volunteered by the

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<sup>37</sup> Second Defence Observations, para. 23.

<sup>38</sup> Second Defence Observations, para. 23.

witnesses heard by the Chamber. In any event, the Chamber underscores that the names of commanders and camps listed in the 15 May 2013 decision were all mentioned at trial and in the closing briefs of the parties and participants and, moreover, without any contestation as to whether they fell within the factual narrative contained in the *Decision on the confirmation of charges*. Finally, such names and locations enabled the Defence at the close of the trial to arrive at its own typology of the camps in Walendu-Bindi *collectivité*.

**Topic 2: the meetings between group members and Germain Katanga's presence or absence at meetings where a criminal plan was discussed**

26. Having regard to the second topic, the Defence considers it now necessary to highlight the existence of particular meetings or specific situations during which the Accused allegedly became aware that an identified group harboured a criminal intent, and to examine the nature of these meetings. In its Second Observations, the Defence therefore prays the Chamber for further information on the group's common purpose.<sup>39</sup>

27. On this point, it appears to the Chamber that the Defence conceives the common purpose as essentially formal in that, in the Defence view, it would entail scouring the record of the case for proof of planning (the existence of formal meetings or gatherings), an express statement of the group's ambitions and/or the communication of a decision taken formally within the group.<sup>40</sup>

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<sup>39</sup> Second Defence Observations, paras. 30 and 33.

<sup>40</sup> First Defence Observations, paras. 14, 15, 16, 90 and 183; Second Defence Observations, paras. 30 and 33.

28. In this regard, the Chamber can only point out, as it did in the 15 May 2013 Decision, that, in its opinion, under article 25(3)(d) of the Statute, a common plan devised by members of the group of persons acting in pursuance of a common purpose need not be established.<sup>41</sup> The Chamber must also emphasise that to prove the common purpose within the meaning of article 25(3)(d), recourse may be had both to direct and to circumstantial evidence, by, for example, having regard to the conduct and previous practices of the members of the group; action taken by them on their own initiative; the dominant ideology within the group during the commission of the crimes; the manner of combatant mobilisation prior to combat; the organisation and mustering of troops; and the manner in which the attack took place.

29. As concerns the group's criminal intent, the Defence further argues that the contention that a group of Ngiti commanders and combatants from Walendu-Bindi *collectivité* decided on its own initiative to attack Bogoro and commit the crimes "finds no basis" in the *Decision on the confirmation of charges*.<sup>42</sup>

30. The Chamber cannot concur with the interpretation of the charges advanced by the Defence. It recalls that the Pre-Trial Chamber made express reference in the Decision to its analysis of "the subjective elements to be attributed to the FNI/FRPI combatants as direct perpetrators of the crimes",<sup>43</sup> and was therefore perfectly

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<sup>41</sup> 15 May 2013 Decision, para. 16, footnote 26.

<sup>42</sup> Second Defence Observations, para. 23.

<sup>43</sup> *Decision on the confirmation of charges*, para. 245.

within reason to specify in relation to every crime committed, that the FRPI combatants had the intent to commit them.<sup>44</sup>

31. Of further note is that although the Prosecution's closing brief focused primarily on an analysis of the Accused's intent and knowledge of the commission of the crimes within the meaning of article 30 of the Statute,<sup>45</sup> its allegations in this regard are somewhat general. In effect, they point to the objectives pursued by the group of commanders and combatants through whom, in the Prosecution view, Germain Katanga committed the crimes; the allegations are not therefore confined to the Accused alone. The Prosecution also refers to the attacks predating the Bogoro attack – in particular the Nyankunde attack, in which the Accused's "forces" allegedly took part – to establish that they constituted a "practice" and conduct driven by vengeance and hatred towards the Hema.<sup>46</sup> Finally, in a section of its closing brief entitled "[TRANSLATION] subsequent attacks: continuous practice and permanent intent", the Prosecution further highlights conduct that could be attributed to the group of combatants and not the Accused alone.<sup>47</sup>

32. That being recalled, it must also be observed that in its closing brief, the Defence did not consider it necessary to argue and expound on its position concerning the intentionality of the crimes committed by the Ngiti combatants and commanders, but concentrated more on the intent of Germain Katanga himself or his lack of control over the crimes. The Chamber does not take issue with this decision by the Defence, given that the Accused's intent was indeed an essential

<sup>44</sup> See in this regard, *inter alia*, *Decision on the confirmation of charges*, 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.

<sup>45</sup> Prosecution Closing Brief, section 9.3.

<sup>46</sup> Prosecution Closing Brief, paras. 654 *et seq.*

<sup>47</sup> Prosecution Closing Brief, paras. 659 *et seq.*

ingredient of his liability as envisaged under article 25(3)(a). It notes, however, that the Defence did set out its views on all of the attacks predating and following the attack on Bogoro, in particular the Nyankunde attack, to establish that although Ngiti combatants participated in the latter attack, none of its leaders took part in the Bogoro attack.<sup>48</sup>

**Topic 3: The behaviour of the group members prior to the battle of Bogoro and Germain Katanga's particular knowledge thereof; in particular the battle of Nyankunde**

33. The Chamber takes the view that this third topic is undeniably material to an examination of the criminal liability of Germain Katanga on the basis of article 25(3)(d)(ii): it is indeed relevant not only to an analysis of the common purpose of the group and its intent to commit the crimes (see *supra*) but also to an evaluation of the Accused's knowledge of such intent, in particular through the previous activities of the group.
34. The Chamber is aware that the legal criterion of knowledge of the group's intent was not, as such, a constituent element of the criminal liability of Germain Katanga within the meaning of article 25(3)(a) of the Statute. It readily acknowledges this aspect of the case is particularly important in respect of article 25(3)(d)(ii), whereas it was undoubtedly less so for article 25(3)(a) of the Statute. The Chamber therefore considers that the Defence is justified in wishing to delve more deeply into this issue.

**Topic 4: excesses by combatant groups other than the Ngiti (the Lendu, the Bira and the APC soldiers) during the attack on Bogoro; and propensity of the Lendu to commit crimes; the manner in which the crimes were committed in Bogoro, in**

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<sup>48</sup> Defence Closing Brief, para. 804.



**particular at the Institute; the identification of the Ngiti who purportedly committed crimes**

35. On the specific point of the identification of the perpetrators of the crimes, the Prosecution recalls in its Response that the Defence had the opportunity to examine the Prosecution witnesses who were present in Bogoro during the attack as to the identity of the assailants, and to verify the reliability of this identification.<sup>49</sup> It emphasises that the Defence “[TRANSLATION] has already addressed the issue of the identification of the assailants” by examining witnesses on this topic and the Prosecution considers that in any event, it had the opportunity to do so.<sup>50</sup>

36. In its Reply, the Defence first underscores the potential importance to its case of recalling the Prosecution’s witnesses to the crimes: P-132, P-161, P-233, P-249, P-353, P-268, P-323 and P-287. The Defence then notes that in its view, only Witnesses P-233, P-268 and P-323 would be worth contacting and interviewing in the presence of representatives of the Office of the Prosecutor in order to determine whether recalling them before the Chamber is necessary to the defence of Germain Katanga. The Defence further states its intention to do so, and the Chamber sees no impediment thereto. The Chamber acknowledges that the identification of the perpetrators of the crime was touched upon briefly in the examination of the witnesses, particularly the Prosecution’s witnesses to the crimes. It also notes that this issue was not much discussed in the closing briefs and closing statements of the parties and participants.

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<sup>49</sup> Prosecution Response, para. 7.

<sup>50</sup> Prosecution Response, paras. 8 and 9.

37. As concerns Witnesses D02-148 and D02-176 – both present in Bogoro during the attack – since the Defence no longer adverts to them in its Reply, it must make clear whether or not it intends to seek their recall, after contacting them anew, if necessary.

**Topic 5: Germain Katanga’s coordinating role**

38. In its First Observations, the Defence stated that it wished to explore further the exact nature of the coordinating role, not only with Germain Katanga himself, who would then testify to the Chamber in greater detail, but also with others in his community so as to circumscribe the concrete ambit of this activity.<sup>51</sup> The Second Observations make clear that this aspect of the case had not appeared essential at trial, and the Defence reiterates its request to conduct further investigations.<sup>52</sup>

39. The Chamber recalls that this topic was already addressed at trial. The Defence sought, in particular through the Accused, *viva voce*, to challenge the Prosecution argument of Germain Katanga’s overall coordinating role within his group in the implementation of the plan to wipe out Bogoro. The Defence considered it necessary to present a more nuanced picture of his role and to advance an alternative theory: the central government, with insufficient troops in Ituri, had turned to the APC, the armed wing of the RCD-ML, and local combatant groups to regain territory. Accordingly, the Defence argued that Germain Katanga had merely played a coordinating role, requiring him to liaise between these local

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<sup>51</sup> First Defence Observations, para. 187.

<sup>52</sup> Second Defence Observations, para. 49.

combatant groups and those in Beni, so as to make quite clear to the combatants in Aveba their alliance with the APC.<sup>53</sup>

40. The Chamber considers it necessary to further recall that the Defence brought several motions on the subject, seeking the cooperation of the Democratic Republic of the Congo to, *inter alia*, authorise the transfer to The Hague of three persons detained in the DRC in order to hear their testimony.

**Topic 6: the supply of weapons, in particular, who controlled it and whether the weapons were used in Bogoro**

41. The Defence considers that the supply of weapons was broached at trial, but that the precise history of the weapons – to whom they were provided, whether they were used at Bogoro and for what purpose or with what result — was not examined in detail. In the Defence’s view, these various questions are nonetheless relevant to an analysis of the new mode of liability proposed, but were immaterial to the common plan. The Defence recalls that, in fact, little evidence was tendered in relation to the number of gunshot victims as opposed to those killed by machete.<sup>54</sup>
42. This topic is of manifest interest to the consideration of Germain Katanga’s criminal liability under article 25(3)(d)(ii) of the Statute; indeed, it is paramount to an assessment of the precise effect of any contribution by the Accused on the commission of the crimes by the group.
43. Although this topic is undoubtedly not new, the Chamber recognises that that which concerns the nexus between the weapons and the crimes committed in Bogoro is indeed a key point to the

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<sup>53</sup> Defence Closing Brief paras. 599 and 600.

<sup>54</sup> Second Defence Observations, para. 185.

analysis of Germain Katanga's criminal liability under article 25(3)(d)(ii) of the Statute; such topic was uncanvassed at trial.

### **III. Subsequent steps**

44. First, the Chamber would recall that it must, as emphasised by the Appeals Chamber,<sup>55</sup> reconcile the requisite respect for the rights of the Defence with the absolute necessity for proceedings to be completed expeditiously. The Chamber also recalls that since the 21 November 2012 Decision, and, further, since the 27 March 2013 Judgment on Appeal, the Defence has been aware of a prospective recharacterisation of the mode of liability and was in a position to devise a strategy for further investigations and promptly take any necessary action. Hence, it behoves the Chamber to determine a timeframe to which the parties and participants must conform. So that the Defence for Germain Katanga may so conform, the Registry and the Office of the Prosecutor, in due discharge of their respective mandates, must now do their utmost to enable the Defence to conduct promptly the further investigations which it considers necessary.

45. Further, notwithstanding the time limits to be prescribed, were the Defence to consider it necessary either to seek an extension of time or to amend the final list of witnesses to be requested by the Chamber, the Defence must, in accordance with regulation 35 of the Regulations of the Court, so move the Chamber forthwith, by reasoned request. The Chamber will then adjudge any such request, on the understanding that it can only grant such requests in exceptional circumstances.

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<sup>55</sup> 27 March 2013 Judgment on Appeal, para. 99.

46. In the light of the foregoing, and, in particular, given that the topics raised by the Defence are, in its view, not all of equal importance in respect of article 25(3)(d)(ii) of the Statute, the Chamber will proceed as follows.

*Strengthening of Germain Katanga's Defence Team*

47. In its Second Observations, as in its reply of 17 June 2013, Germain Katanga's Defence team drew the Chamber's attention to the changes to its funding and the ensuing difficulties it faces.<sup>56</sup>

48. In this regard, the Chamber recalls that in May and June 2012, following the close of trial, the Registry (Counsel Support Section), by Decision CSS/2012/237 of 25 May 2012, effectively notified both Defence teams, which were parties in the case at the time, of the reduction in the resources available to them.

49. In adjudication of a request by counsel for both Accused for review of the decision, the Chamber, by oral decision of 18 June 2012,<sup>57</sup> *inter alia*, set aside said decision and enjoined the Registrar to continue providing each defence team with either one legal assistant or two part-time legal assistants, in accordance with the applicable conditions of remuneration.

50. As the Registrar had stated at the time, the Chamber emphasised that, should new developments in the case so require, Lead Counsel may apply to the Registry for additional resources, which they would then be required to justify.

51. The further investigations contemplated should therefore prompt the Defence for Germain Katanga to contact the Registry to this end. In such eventuality, the Chamber directs the Defence to submit to

<sup>56</sup> Second Defence Observations, para. 56; Defence Reply, para. 4.

<sup>57</sup> ICC-01/04-01/07-T-341-ENG ET WT of 18-06-2012.

the Registrar, as a matter of urgency, any requests to this end and enjoins the competent services of the Registry to respond promptly and such as to allow the Defence to fully and properly exercise its rights.

*Disclosure of the list of witnesses and other evidence*

52. As previously stated, upon receipt of a precise list of those witnesses whom the Defence intends to call or recall, the Chamber will be in a position to determine the necessity of implementation of regulation 55(3)(b) of the Regulations of the Court, in accordance with the discretion vested in it by said provision.
53. The Chamber emphasises that the very terms of the provision, make application of regulation 55(3)(b) of the Regulations of the Court contingent on an assessment of whether it is “necessary”, for the Defence “in particular” to re-examine or have examined again a previous witness, to call a new witness or to present other admissible evidence. Hence the procedure thus defined, which the Chamber must follow, does not find automatic application, but lies within its discretion, in perfect concord with the title of regulation 55.
54. The Chamber will therefore determine whether the measures sought by the Defence under regulation 55(3)(b) of the Regulations of the Court are necessary in the instant case.
55. In the Chamber’s view, this analysis will be undertaken with particular regard to the various arguments that the Defence has already advanced and expounded on during and at the close of the trial, and, where appropriate, subsequent to the consideration of the questions which, during those same proceedings, were put to the

various Prosecution and Defence witnesses, and of course, to the Accused himself. The Chamber will thus determine whether a particular question has already been raised at trial, and whether the parties and participants, particularly the Defence, addressed it in sufficient detail. The Chamber notes, further, that that appears to correspond to the *modus operandi* employed by the Defence to argue that, on certain issues, further investigations are now necessary.

56. In this regard, the Chamber wishes to emphasise that the purpose of the procedure laid down by regulation 55(3) of the Regulations of the Court is not to allow the Defence in particular to resume or pursue certain lines of argument which it has already had the opportunity to present and defend before the Chamber at trial, *simpliciter* on the ground that a new, more thorough examination may be warranted. In the Chamber's view, the prime purpose of the provision contained in the abovementioned regulation 55(3) is to allow the Defence to advance its point of view on certain aspects of the case, which were not addressed during consideration of the legal characterisation initially confirmed by the Pre-Trial Chamber or which were addressed only cursorily at trial. As already stated by the Chamber, reiterating the terms of the 27 March Judgment on Appeal,<sup>58</sup> it may indeed be the case that the narrative of facts and circumstances, as based on the newly proposed legal characterisation, differs markedly from the initial narrative given by the Pre-Trial Chamber in the *Decision on the confirmation of charges*. The Chamber therefore fully accepts that in the light of this new account of the facts, the Defence might consider it necessary to

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<sup>58</sup> 27 March 2013 Judgment on Appeal, para. 58.

scrutinise certain facets of the case record not considered of paramount importance when the initial legal characterisation was considered.<sup>59</sup> However – and this bears underscoring – the objective of the procedure established by regulation 55 is not a retrial or, as the Defence has itself stated, is not to afford the parties and participants a second bite at the cherry.

#### Disclosure of an initial witness list

57. It rests with the Defence to provide the Chamber with an initial list of those witnesses who have already testified in the instant case and whom the Defence would like to recall for further testimony, and those witnesses whom it intends to call for the first time, by 4 p.m. on 29 July 2013. The Chamber is aware that, in light of the constraints related to the schedule of hearings of the various trial chambers, a courtroom should be available during the first and third weeks of September 2013.

#### Investigations and disclosure obligations

58. In this regard, by way of guidance, as noted above, the Chamber emphasises that it considers the following topics to hold particular relevance to the possible re-characterisation of the mode of liability: (1) the attack on Nyankunde and/or other attacks predating the attack on Bogoro, (2) the identification of the perpetrators of the crimes, and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.

59. Firstly, having regard to the witnesses called by the Prosecution, the Defence shall be granted leave to meet them in the presence of a representative of the Office of the Prosecutor. Before any meeting

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<sup>59</sup> Decision of 15 May 2013, para. 17.



with Witness P-268, who is still under the Court's protection programme, the Court's Victims and Witnesses Unit must be afforded notice of and involved in such meeting. Following these interviews, should the Defence confirm its intention to recall any of the witnesses, it must state the specific topic(s) whereon it intends to examine them.

60. As to the possible recall of witnesses whom the Defence had already called, the Defence may meet them in absence of the Prosecution. However, the Chamber wishes to make perfectly clear to the Defence that, during these interviews, on no account must these witnesses be invited to reconsider their prior statements. These meetings must solely encourage them to expand on or clarify their previous testimony on the topics aforementioned. The Prosecution will, in any event, be afforded the opportunity to cross-examine these witnesses and the Chamber will, as it behoves it, carefully assess their credibility. Should they be recalled, the Defence must produce and disclose either a statement signed by the witness(es) or a detailed summary of the subjects likely to arise during their testimony. In this regard, the Chamber refers, in particular, to paragraph 60 of Decision No. 2388 of 14 September 2010.<sup>60</sup>

61. Lastly, the Defence shall specify the necessity of the new witnesses' appearance and shall comply with the requirements of Decision No. 2388 of 14 September 2010 aforementioned, in particular concerning the disclosure of statements or summaries.

#### Disclosure of the final Defence list of evidence

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<sup>60</sup> Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", ICC-01/04-01/07-2388 of 14 September 2010, para. 60.

62. The Defence shall submit to the Chamber, by 17 September 2013, the final list of all of the persons, who, in its view, could potentially provide relevant information and new documentary evidence which it would like to tender during the proceedings. The aforementioned disclosure shall be effected so that any court appearances take place as of October 2013.

*The Chamber's Decision*

63. The Chamber will issue an initial ruling on the necessity of implementation of regulation 55(3)(b) of the Regulations of the Court, once apprised of the list submitted on 29 July 2013 and its annexures; it will rule anew in light of the final list to be filed on 17 September 2013.

64. Should the Chamber decide that the new appearances requested are indeed necessary to fully safeguard the rights of the Defence, the Chamber will re-open the presentation of evidence, and, in principle, will proceed as follows. It will instruct the Registry to arrange the appearance of the witnesses concerned in prospect of hearings during the first or third week of September 2013 or in October 2013.

65. The Chamber does also not rule out, pursuant to the provisions of rule 67 of the Rules, hearing these witnesses' testimonies by audio or video link, by virtue of the modalities used on 2 November 2010 when Witness P-323 was recalled.<sup>61</sup> Such modalities for hearing testimony shall be employed where it would prove particularly difficult for a witness to travel to The Hague, or where, for reasons including the witness's availability, he or she is unable to appear when required by the Chamber. Lastly, where manifest that a

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<sup>61</sup> See ICC-01/04-01/07-T-211-CONF-ENG ET, 2 November 2010 pp. 1 *et seq.*

witness is unable to appear within such time as to comply with the duty of celerity cast on the Chamber, the Bench will assess whether recourse must be had to the provisions of rule 68(a) of the Rules. It will then be for the Defence for Germain Katanga and the Prosecution to liaise forthwith so as to take such testimonies within the time frame determined by the Chamber.

*Contact with the witnesses*

66. Lastly, as regards contact sought by the parties with any of the witnesses authorised to testify anew, a distinction must be made between the Prosecution witnesses whom the Defence seeks to recall and those witnesses whom it previously called, but also intends to recall. With regard to the first category, it is the Chamber's view that once a meeting has been held in the presence of the Prosecution, no further contact by any of the parties or participants will be authorised prior to their in-court testimony, save where absolutely necessary; in such eventuality, the matter must be referred to the Chamber, which will then establish the modalities of the meeting. As to the second category, the Defence will be able to meet such witnesses in accordance with the conditions ordinarily set by the Chamber and the Registry, up until the time they prepare to give evidence. The same principle shall apply for any new witnesses whom the Defence is authorised to call.

*Modalities of in-court testimony*

67. Regarding modalities of *viva voce* testimony, the Chamber will proceed as follows. In the case of Prosecution witnesses, the Defence for Germain Katanga shall continue the cross-examination that it led during the witnesses' initial appearance before the Court,

in accordance with the Decision of 1 December 2009 establishing directions for the conduct of the proceedings and testimony in accordance with rule 140 (“Decision on rule 140”).<sup>62</sup> The Prosecution, if it so wishes, may then conduct a re-examination under the conditions laid down by the aforementioned Decision on rule 140; the Legal Representatives shall determine, subject to the Chamber’s approval, whether to question the witnesses, and the Chamber may follow suit. For the witnesses previously called by the Defence, the Defence will resume its initial examination-in-chief, the Prosecution may cross-examine, should it consider it necessary and the Legal Representatives may put questions; in so doing, the parties and participants must also act in accordance with the Decision on rule 140. The Chamber reserves the right to put questions, although the Defence will naturally have the last word.

68. As to the new witnesses, they too shall be examined by the Defence for Germain Katanga and cross-examined by the Office of the Prosecutor; they may be questioned by the Legal Representatives of victims and then by the Chamber, according to the modalities prescribed by the Decision on rule 140.

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<sup>62</sup> *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, ICC-01/04-01/07-1665-Corr, 1 December 2009.

**FOR THESE REASONS, THE CHAMBER**

Partially **GRANTS** the Defence requests, subject to the conditions laid down at paragraphs 44 to 68 of this Decision;

**DIRECTS** the Defence to submit to the Chamber, by 4 p.m. on 29 July 2013, its initial list of witnesses, pursuant to paragraph 57 and **DIRECTS** the Defence to submit to the Chamber, by 17 September 2013, the final list of evidence, whether testimonial or documentary;

**ENJOINS** the Defence, insofar as it considers it necessary, to apply promptly to the Registry for review of the funding arrangements for its team;

**ENJOINS** the Registry to adjudge, as a matter of urgency, any application it may receive for review of the funding arrangements for the Defence team for Germain Katanga.

**INVITES** the Office of the Prosecutor to take forthwith the necessary action so as to respond promptly to any Defence requests to contact its witnesses; and

**INSTRUCTS** the Victims and Witnesses Unit to assist the parties and participants as necessary.

Judge Van den Wyngaert appends a dissenting opinion hereto.

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

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[signed]

**Judge Bruno Cotte**

**Presiding Judge**

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[signed]

**Judge Fatoumata Dembele Diarra**

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[signed]

**Judge Christine Van den Wyngaert**

Dated this 26 June 2013,

At The Hague, The Netherlands