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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

**Décision relative à la transmission d'éléments juridiques et factuels
complémentaires (norme 55-2 et 3 du Règlement de la Cour)**

Dissenting Opinion of Judge Christine Van den Wyngaert

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Victims Participation and Reparations
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Others

I. INTRODUCTION

1. On 21 November 2012, the Majority gave the Accused notice of a possible modification of the characterization of facts under Regulation 55(2) of the Regulations of the Court (“Regulation 55 Notice Decision”).¹ I dissented from this decision because I believed that (1) the Regulation 55 Notice Decision exceeded the ‘facts and circumstances’ of the case and (2) the decision was unfair to the Accused. The Appeals Chamber upheld the decision in its Judgment of 27 March 2013.² It decided that whether a change of narrative exceeds the ‘facts and circumstances’ described in the charges is something that it can only assess if and when the Trial Chamber has changed the legal characterization in its decision under article 74 of the Statute.³ In the same vein, it held that it was premature to decide about the fairness of the proceedings. However, the Appeals Chamber clearly emphasised that the Trial Chamber will have to ensure that the proceedings, taken as a whole, are fair and expeditious.⁴
2. On 15 April, in its observations on article 25(3)(d), the Defence for Mr Katanga requested the Chamber, should it be minded to contemplate altering the mode of liability, to give further and better notice of the ‘facts and circumstances’ that may be relied upon.⁵ Following this request, the Trial Chamber has rendered its “*Décision relative à la transmission d’éléments juridiques et factuels complémentaires* (norme

¹ “*Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés*”, 21 November 2012, ICC-01/04-01/07-3319 (“Regulation 55 Notice Decision”).

² “*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, para. 56.

³ ICC-01/04-01/07-3363, para. 58.

⁴ ICC-01/04-01/07-3363, paras 91, 96, 99, and 102.

⁵ “*Defence Observations on Article 25(3)(d)*”, 15 April 2013, ICC-01/04-01/07-3369, para. 193.

55-2 et 3 du Règlement de la Cour”) (“Further Notice Decision”).⁶ In this decision, the Majority gives the Defence (a) directions as to its interpretation of article 25(3)(d)(ii) and (b) “information” referenced under four (lists of) “factual elements” relating to: (1) the group (2) the group’s common purpose (3) Germain Katanga’s contribution and (4) his awareness of the intention of the group to commit the crimes confirmed by the Pre-Trial Chamber.

3. The Majority believes the communication of these ‘complementary’ factual elements⁷ will allow the Defence to prepare itself effectively.⁸ It considers that the factual elements and the underlying allegations are not new and are all based on the Confirmation Decision and the Summary of the Charges.⁹
4. I respectfully disagree with both propositions. I do not think the additional information is sufficiently specific in order to satisfy the requirements of article 67(1)(a) of the Statute and I therefore believe that the Defence is not in a position to defend itself effectively. In addition, I have serious doubts as to whether the ‘factual elements’ supplied in the Further Notice Decision are within the ‘facts and circumstances’ that have been confirmed by the Pre-Trial Chamber in its decision confirming the charges. I do not think it is possible to apply article 25(3)(d)(ii) liability to this case as the Majority has done

⁶ “Décision relative à la transmission d’éléments juridiques et factuels complémentaires (norme 55-2 et 3 du Règlement de la Cour”, 15 May 2013, ICC-01/04-01/07-3371.

⁷ See the title of the Further Notice Decision.

⁸ Further Notice Decision, para. 9.

⁹ Further Notice Decision, para. 12. I note, in passing, that this Trial Chamber has held that the only authoritative document defining the charges is the Confirmation Decision (“Decision on the Confirmation of Charges”, 30 September 2008, ICC-01/04-01/07-717) and not the Summary of the Charges (“Décision relative au dépôt d’un résumé des charges par le Procureur”, 21 October 2009, ICC-01/04-01/07-1547). Unlike other Trial Chambers, which have asked the Prosecutor to produce an updated and definitive Document Containing the Charges after confirmation, Trial Chamber II has only requested a Summary of the Charges. It is therefore noteworthy that the Majority relies on the Summary of the Charges in this Further Notice Decision.

without exceeding the 'facts and circumstances' of the charges. I would therefore refrain from altering the mode of liability and proceed immediately to the Article 74 Decision.

II. THE FURTHER NOTICE DECISION EXCEEDS THE 'FACTS AND CIRCUMSTANCES' OF THE CHARGES

5. I am mindful that the Appeals Chamber was not persuaded by the usefulness of analysing the scope of the concept 'facts and circumstances' contained in article 74 in terms of 'material facts' and 'subsidiary facts'. Yet it is beyond dispute that 'facts and circumstances' is not a boundless legal concept and must therefore be defined and circumscribed in some way.
6. Unfortunately, the Majority does not engage with the crucial legal question of how to interpret the concept of 'facts and circumstances'. Instead, my colleagues seem to believe that every single sentence of the Confirmation Decision, including footnotes containing references to evidence, qualifies for recharacterization. The Majority entirely ignores the issue whether the passages from the Confirmation Decision it relies upon in the Further Notice Decision were actually part of the 'facts and circumstances', or whether they merely contained part of the Pre-Trial Chamber's reasoning about the evidence.
7. I accept that the manner in which the Confirmation Decision is structured and drafted does not make the task of distinguishing between the 'facts and circumstances' and other factual references contained in it very easy. However, this reality does not discharge the Majority from at least explaining why it is entitled to rely upon certain factual information contained in the Confirmation Decision or indeed whether it considers that nothing is out of bounds.

8. In order to assess whether the additional information contained in paragraphs 18-25 of the Further Notice Decision is within or outside the 'facts and circumstances' confirmed by the Pre-Trial Chamber, these paragraphs must be compared with the Pre-Trial Chamber's findings relating to the Accused's responsibility under article 25(3)(a). The test should be whether the factual allegations, cited in support of a charge under article 25(3)(d), correspond to the 'facts and circumstances' as they were confirmed by the Pre-Trial Chamber. Whereas Regulation 55 allows for a change in the legal characterization of the factual allegations, such a change should be confined to facts already confirmed by the Pre-Trial Chamber. Those facts cannot be changed, either by radical rearrangement or by deletion of essential parts to form a fundamentally different narrative. Moreover, no new facts can be added and references to evidence sustaining a fact (e.g. in a footnote)¹⁰ cannot be upgraded to confirmed factual allegations.
9. I believe that each of the four groups of factual elements listed by the Majority in the Further Notice Decision contains factual allegations that go beyond the charges as they were confirmed by the Pre-Trial Chamber. I will provide a few examples.

1. First factual element

10. In relation to the first 'factual element', it is argued that the group of persons acting with a common purpose is composed of "Ngiti combatants of the collectivité Walendu Bindi, sometimes referred to under the denomination FRPI",¹¹ as opposed to the "FNI-FRPI combatants" that are mentioned in the Confirmation Decision paragraphs referenced in footnote 27 of the Further Notice Decision.

¹⁰ See, for example, footnote 33 of the Further Notice Decision.

¹¹ Further Notice Decision, para. 19.

11. The Majority gives no explanation as to why it omits the reference to the FNI/FRPI, even though the Pre-Trial Chamber clearly treats them as one coalition of two groups acting in concert on the basis of a common plan. This allegation was central to the Prosecution's case as confirmed, and the Defence understandably focused a lot of its attention on it. By simply ignoring this in the new narrative, the Majority essentially annuls all the Defence's efforts and presents them with a new, fundamentally different case they must now answer - one year after closing arguments were heard.¹²
12. Furthermore, the Majority adds significant new elements to the 'facts and circumstances' as confirmed by the Pre-Trial Chamber. One such addition is the totally new allegation that a group of commanders and combatants from Walendu-Bindi collectively decided, of their own volition, to attack Bogoro and to commit crimes against the civilians present there. The fact that the commanders and combatants referred to by the Majority are probably, by and large, the same individuals who were previously alleged to have been Mr Katanga's blindly obedient subordinates does not diminish the fact that the Majority now ascribes a totally different role to them. I am aware that, as a matter of principle, the Prosecutor may propose alternative charges on the basis of articles 25(3)(a) and (d) for the same underlying 'facts and circumstances'. However, in such cases, the Pre-Trial Chamber would have to be satisfied that the evidence supports a set of allegations that is broad enough to satisfy the legal requirements of both 25(3)(a) and (d) before it confirmed such charges in the alternative. It should be stressed that in this case the Pre-Trial Chamber explicitly refrained

¹² See also *infra*, para. 23.

from doing so.¹³ It therefore cannot be maintained that the Pre-Trial Chamber implicitly confirmed allegations about the criminal intent of the Ngiti commanders and combatants, especially considering that such allegations were never made.

13. Paragraph 20(iv) of the Further Notice Decision specifies the location of the commanders and combatants who were present in the different camps in Walendu-Bindi. The factual elements quoted in this paragraph go well beyond the ‘facts and circumstances’ in the Confirmation Decision. The paragraph lists the names of a number of camps, which, according to the Majority, housed the commanders and combatants belonging to a group located in Walendu-Bindi. Of the ten named camps, four are not mentioned at all in the Confirmation Decision and one is referred to by a different name.¹⁴ Two of the places that are mentioned appear only in footnotes containing verbatim quotations from previously recorded statements of two witnesses.¹⁵ It cannot, in my view, be maintained that direct quotations from witness statements in a footnote supporting particular findings form part of the ‘facts and circumstances’ of the charges, as envisaged by the Appeals Chamber or indeed the Statute, Rules or Regulations. The Trial Chamber is thus not allowed to rely on footnotes paraphrasing or quoting the evidence of certain witnesses and treat these as ‘facts and circumstances’. The Pre-Trial Chamber does not confirm evidence; it

¹³ Confirmation Decision, para. 471.

¹⁴ While the Majority uses the name “Olongba”, the Confirmation Decision refers to what is probably the same location as “Bavi”. However Bavi is mentioned only four times in the Confirmation, including twice as the alleged location of a meeting which the Prosecutor now no longer alleges ever took place. The other place where the name “Bavi” appears in the Confirmation Decision is in footnote 709, which contains quotations from a previous statement of Witness P-28, whose credibility is still to be determined. The Pre-Trial Chamber’s reference – in a footnote – to a witness statement clearly cannot be said to be part of the ‘facts and circumstances’.

¹⁵ One of these witnesses, P-159, was withdrawn by the Prosecutor and the credibility of the other one, P-28, is still to be determined.

only confirms allegations. Any reference to evidence therefore cannot be understood as being part of the 'facts and circumstances'.

14. Finally, apart from Aveba, the only two locations that are referred to in the actual body of the Confirmation Decision are mentioned merely as assembly points where the troops who attacked Bogoro on 24 February 2003 allegedly gathered prior to the attack.¹⁶
15. Crucially, at no point in the Confirmation Decision does the Pre-Trial Chamber link the people from these ten locations, let alone consider them as being components of a 'group' or 'network'. This example clearly demonstrates the extent to which the Majority engages in what can only be described as cherry-picking random factual references from the Confirmation Decision. Moreover, it shows that the Majority does not even hesitate to introduce the names of locations that are not even mentioned in the Confirmation Decision and proclaim them to be part of the new charges.

2. Second factual element

16. In relation to the second 'factual element', which purports to define the common purpose, one of the points in the list is that the members of the group were filled with hatred towards the Hema population (Paragraph 20(iii) of the Further Notice Decision). This, however, is a new factual allegation which is introduced by taking certain factual allegations mentioned in the Confirmation Decision out of their context and recycling them into something new and different. There is simply no mention of such hatred in the Confirmation Decision. To support this crucial new allegation, the Majority makes reference to a number

¹⁶ See para. 548 of the Confirmation Decision. I note, in passing, that footnote 739 to this paragraph contains a quotation of a witness who was never called to testify (P-157).

of paragraphs of the Confirmation Decision which mention the singing of songs with hate-filled lyrics,¹⁷ the alleged desire to exact revenge against the Hema,¹⁸ and their characterization as "enemies".¹⁹ The only way the Majority can therefore claim that ethnic hatred was an important motivating factor for the group acting with a common purpose is by *inferring* such hatred from the elements just mentioned.

17. In my view, Trial Chambers are not allowed to 'read into' the Confirmation Decision (by inference or otherwise) new allegations that are not contained in the 'facts and circumstances' by necessary implication. This is even more the case when dealing with allegations that would have been of little relevance under the original charges, but which are central to the alternative charges as framed by the Chamber itself. Indeed, the fact that the Confirmation Decision does not develop an ethnic hatred thesis is precisely because this would have been largely irrelevant under the theory of the case as confirmed by the Pre-Trial Chamber.²⁰

3. *Third factual element*

18. The third 'factual element' in the Further Notice Decision relates to Mr Katanga's alleged contribution to the group acting with a common purpose. Here again we find another example of the Majority's introduction of new factual allegations. In paragraph 22(ii), reference is made to Mr Katanga's alleged facilitation of communication between different members of the group acting with a common purpose among themselves, as well as between certain members of this group (we are not told which ones) and "local and regional authorities" (a reference

¹⁷ Confirmation Decision, paras 280 and 555.

¹⁸ Confirmation Decision, para. 426.

¹⁹ Confirmation Decision, para. 386.

²⁰ See also *infra*, para. 22.

to “Beni” is supposed to clarify which authorities are intended here). The sole reference to the Confirmation Decision that is provided by the Majority is to paragraph 540, which deals with Mr Katanga’s *de jure* and *de facto* position as supreme commander of the FRPI. There simply is no mention of Mr Katanga’s alleged role as facilitator of communication, let alone that such communication would have facilitated the perpetration of crimes in Bogoro.

4. *Fourth factual element*

19. The fourth ‘factual element’ pertains to Mr Katanga’s awareness of the intention of the commanders. Here, the Majority clearly takes certain factual allegations contained in the Confirmation Decision out of their original context. For example, in paragraph 24(i), the Majority presents evidence of the alleged existence of a “strategic common plan to secure control over the village [i.e. Bogoro]” as proof of Mr Katanga’s personal knowledge of the intention of the Ngiti commanders and combatants to commit the crimes charged. However, it suffices to read this paragraph in the context of where it appears in the Confirmation Decision – i.e. in the chapter dealing with Mr Katanga’s and Mr Ngudjolo’s awareness of the factual circumstances that establish the existence of an armed conflict – to understand that the Pre-Trial Chamber never considered this allegation in relation to the mental state of the Ngiti commanders, let alone their subordinates.

20. Another example illustrates how the Majority, by altering the language used in the Confirmation Decision, actually introduces new allegations. Under paragraph 25, the Majority makes the allegation that Mr Katanga would have “participated” in the attack against the village of Nyankunde. The reference provided for this new allegation is to

paragraph 552 of the Confirmation Decision. However, upon inspection of this paragraph – which appears under the heading “*Germain Katanga and Mathieu Ngudjolo Chui agreed on common plans*” – it transpires that the Pre-Trial Chamber merely stated that Mr Katanga and Mr Ngudjolo were “each involved in some way” in a series of attacks, including the one on Nyankunde. There is a substantial difference between the vague allegation that two people knew each other because they were both involved *in some way* in a series of attacks, and the accusation that someone actually participated in one specific attack. It should be noted, in this regard, that the reference to Nyankunde in the Confirmation Decision is made in relation to a finding that Mr Katanga and Mr Ngudjolo had known each other and had worked together since the creation of the FNI and FRPI, which the Pre-Trial Chamber found to be established on the basis of their alleged involvement in a *series* of alleged attacks.²¹ It is thus not possible to determine, on the basis of the Confirmation Decision, whether Mr Katanga was specifically alleged to have participated in the attack on Nyankunde. The Majority thus exceeds the ‘facts and circumstances’ of the Confirmation Decision by introducing a new allegation.

III. THE FURTHER NOTICE DECISION CHANGES THE NARRATIVE IN SUCH A WAY THAT IT EXCEEDS THE ‘FACTS AND CIRCUMSTANCES’ DESCRIBED IN THE CHARGES

21. In my dissenting opinion of 21 November 2012, I held the view that the Regulation 55 Notice Decision changes the narrative of the charges so fundamentally that it exceeds the ‘facts and circumstances’ described in the charges.²² By this, I did not mean to suggest that a change in the narrative, no matter how minute, exceeds *per se* the ‘facts and

²¹ Confirmation Decision, para. 552.

²² Regulation 55 Notice Decision, Dissenting Opinion of Judge Christine Van den Wyngaert, paras 18–22.

circumstances' described in the charges. Whether this is the case is, as Judge Fulford has observed, a question of fact and degree.²³ Having regard to the Further Notice Decision, I am persuaded that, in this case, the narrative has been changed to such an extent that the 'facts and circumstances' in the charges are exceeded.

22. It is crucial to note, in this regard, that it does not suffice to simply compare 'stories' in order to see to what extent they overlap or differ. It is equally important to analyse the legal significance of each fact within the framework of each narrative, because this determines how an accused would defend himself against the charges as formulated. It matters a great deal, in this respect, how important certain parts of the story are within each narrative. A similar fact may be a mere detail in one narrative, but constitute the linchpin of another one.²⁴ Accordingly, a defendant may well have chosen not to devote scarce resources to such a fact, because it could not be expected to have any tangible effect on the outcome of the case, whereas he or she would in all likelihood concentrate all his or her investigative efforts on that same fact if that fact were to perform a different function in an alternative narrative. The same is true for trial time spent on such issues, the number and type of questions posed during cross-examination, the evidence called to rebut the allegation, or indeed the facts admitted or agreed to. Crucially, it may affect the accused's decision whether or not to testify.
23. Similar considerations apply to changes in narrative that omit important elements of the initial charges. Although it is clearly permissible for a Regulation 55 (Further) Notice Decision to put more

²³ Trial Chamber I, *Prosecutor v. Lubanga*, Minority Opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 17 July 2009, ICC-01/04-01/06-2054, para. 19.

²⁴ See, for example, *supra*, para. 16.

emphasis on a particular fact and less on another, it is a different story when crucial parts of the original narrative are excised from the recharacterized narrative.²⁵ Indeed, if the accused could reasonably believe that he was mounting a full and meaningful defence against the charges as a whole against him by challenging a particular allegation or set of allegations from the original charges, it requires little explanation as to why a recharacterization that no longer takes into consideration these allegations radically alters the 'facts and circumstances' as viewed from the position of the accused. I stress this last point because it would be grossly unfair to ignore the standpoint of the accused in this regard. Doing so would have as an unfair and undesirable consequence that the accused would have to defend himself against all possible narratives that could be construed on the basis of the raw factual allegations contained in the charges.

24. Another indication of an impermissible shift in narrative is when the relevance and significance of the evidence changes considerably between the two narratives. For example, when an item of evidence that was initially used to demonstrate the accused's general knowledge of the contextual circumstances suddenly becomes alleged proof of the criminal intent of a group acting with a common purpose,²⁶ it is safe to conclude that a fundamental change in narrative has taken place. Indeed, the accused may not have had any interest in challenging the trustworthiness of such evidence under the original narrative, whereas this would become essential under the new one.²⁷

25. Judged by that standard, I have no doubt that the Majority is fundamentally changing the nature of the case against Mr Katanga,

²⁵ See, for example, *supra*, para. 11.

²⁶ See, for example, *supra*, para 19.

²⁷ See also *supra*, para. 17.

thereby exceeding the 'facts and circumstances' as confirmed by the Pre-Trial Chamber. I refer to the examples mentioned in paragraphs 11, 12, 16, 18, 19 and 20 above.

26. I therefore conclude that the Majority did not heed the Appeals Chamber's clear statement of principle that, although changes in the narrative are permissible to a certain extent, there are clear limitations to what is appropriate under Regulation 55. In so doing, the Majority not only violated the letter and spirit of this provision, but it also created the need to reopen the case in order to give Mr Katanga an opportunity to respond to the new charges. As will be discussed in the next part of my opinion, the needlessly open-ended nature of these new charges exacerbates the problem, because the Defence is faced with an entirely different case that is not clearly circumscribed.

IV. THE NOTICE PROVIDED IS NOT SUFFICIENTLY SPECIFIC AS REQUIRED BY ARTICLE 67(1)(A) OF THE STATUTE

27. Even if it could be assumed that the Majority is allowed to engage in this exercise and that its 'factual elements' could be said to fall within the ambit of the confirmed charges, I remain concerned that the Majority's efforts still provide insufficient notice to the accused. Article 67(1)(a) of the Statute requires an accused "[t]o be informed promptly and in detail of the nature, cause and content of the charge [...]". Accordingly, there must be a minimum amount of detail in the 'facts and circumstances' described in the charges in order for Mr Katanga's right under article 67(1)(a) of the Statute to be fully respected.

28. The Majority's factual exposition in paragraphs 18-25 of the Further Notice Decision provides insufficient detail in order to afford

Mr Katanga an adequate opportunity to defend himself against these allegations formulated under article 25(3)(d) of the Statute. A few examples suffice in demonstrating this lack of specificity. For the purposes of these examples, I am evaluating the Majority's allegations as pleading language. Whenever cross-references are provided, any additional details in these references will also be considered to evaluate specificity, even though, as explained above, I believe the Majority is not allowed to rely upon references to evidence contained in footnotes.²⁸

29. First, it is entirely unclear from the Majority's description in paragraph 20 as to how the common purpose of the relevant group was formulated. The Majority provides some indications as to the contours of the group itself, but how they interacted with each other or developed a common plan to attack Bogoro is largely unexplained.²⁹

30. For example, no detail is described as to: (i) exactly which of the commanders allegedly leading the common purpose group took part in formulating the common purpose, (ii) whether and how the remainder of the group members were informed of the common purpose and if they all voluntarily subscribed to it, and (iii) how the tasks involved in the preparation and execution of the common purpose were divided among the group members.

31. Second, the Majority indicates that one of Mr Katanga's contributions to the crimes committed is providing arms from Beni (paragraph 23(iii)). When alleging that arms provided by an accused

²⁸ See, *supra*, para. 13.

²⁹ I am aware that the Majority makes reference in footnotes 43 and 44 of the Further Notice Decision to para. 417 of the Confirmation Decision, which mentions a meeting between Mr Katanga and Mr Ngudjolo and others under their command, during which the attack Bogoro was allegedly planned. However, it is totally unclear whether the Majority considers this meeting as the moment when the common purpose was formulated or whether it believes this happened at another time and/or location.

contributed to the crimes alleged under Article 25(3)(d) of the Statute, it is only natural to explain whether and how these weapons were actually used on the alleged Bogoro victims. However, no detail is provided in this regard by the Majority. Absent specific allegations as to which arms were obtained and which were alleged to have actually been used, the Defence is unable to contest this allegation adequately.

32. Third, the Majority alleges that Mr Katanga was aware that the crimes committed in Bogoro would occur in the “ordinary course of events” (paragraph 24(iii)). However, the Majority provides no detail as to when Mr Katanga became aware that such crimes would be committed in the ordinary course of events. In order for Mr Katanga to be criminally responsible under Article 25(3)(d)(ii) of the Statute, he would need to have made his alleged contributions to the crime in the knowledge of the intention of the group to commit the crime. Because the Majority does not explain when the common purpose of the alleged group was formulated, it is impossible to determine whether Mr Katanga’s alleged communication facilitation and arms distribution were done before or after the criminal intention of the group had been formulated. The Majority makes reference to alleged crimes committed at Nyankunde (paragraph 25), which is an allegation which could have provided additional detail in this regard, but if this is intended then it would be reasonable to see the following additional details in the Majority’s decision: (i) the basics of the planning and execution of the attack on Nyankunde, (ii) whether the attack was conducted by the same group which is alleged to have attacked Bogoro and (iii) that Mr Katanga was aware that crimes were committed at Nyankunde pursuant to a common purpose of the group. Any additional incidents referenced in the Majority’s cross-references are similarly lacking in

detail and moreover seem to have taken place *after* the attack on Bogoro. Their relevance in relation to Mr Katanga's alleged awareness *before* the attack on Bogoro is unexplained.

33. In highlighting the absence of these details, I wish to emphasise that these concerns do not necessarily mean that the Confirmation Decision is insufficiently developed. The Confirmation Decision is responding to allegations that Mr Katanga committed these crimes as a principal perpetrator and conducts its reasoning on a theory of 'indirect co-perpetration'. Regardless of my own reservations vis a vis this mode of participation under Article 25(3)(a) of the Statute,³⁰ when presenting the facts necessary to prove a case on this theory, certain details become less important than they would be under an article 25(3)(d) case. It is understandable why the intentions of the group of persons directly contributing to the crimes would not be explained in an indirect co-perpetration case, as the intentions of the direct perpetrators in such a case are irrelevant.³¹ It may also not be as necessary to explain what arms Mr Katanga provided to the group, as an indirect co-perpetration case, under the current jurisprudence,³² only requires contributions to the criminal plan, and not to the crimes themselves. The Confirmation Decision was describing what it

³⁰ *Prosecutor v. Ngudjolo*, "Judgment pursuant to Article 74 of the Statute", Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4.

³¹ In this regard, I note that, under Article 25(3)(a) of the Statute, indirect perpetrators are responsible for committing crimes "through another person, *regardless of whether that other person is criminally responsible*" (emphasis added).

³² See Confirmation Decision, para. 480 et. seq.; Pre-Trial Chamber I, *Prosecutor v. Lubanga*, "Decision on the Confirmation of Charges", 29 January 2007, ICC-01/04-01/06-803-tEN, paras 326-41; Pre-Trial Chamber II, *Prosecutor v. Ruto et. al.*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373, paras 291-92; Pre-Trial Chamber II, *Prosecutor v. Muthaura et. al.*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11-382-Red, para. 296; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, "Corrigendum of the Decision on the Confirmation of Charges", 7 March 2011, ICC-02/05-03/09-121-Conf-Corr, (ICC-02/05-03/09-121-Corr-Red), para. 126; Pre-Trial Chamber II, *Prosecutor v. Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 348.

considered to be adequate detail for the case it was confirming. The fact that these facts do not describe a 25(3)(d) case as adequately can be easily explained: this was not the mode of participation the Pre-Trial Chamber was considering at the time.

34. In sum, I consider the Majority's additional details to provide insufficient specificity to the accused, as is required by Article 67(1)(a) of the Statute.

V. SOME FURTHER OBSERVATIONS

1. Interpretation of article 25(3)(d)(ii)

35. On the subject of the interpretation of article 25(3)(d)(ii), the Majority, despite having asked the parties' and participants' observations on the interpretation of this article,³³ limits itself to the considerations given in paragraph 16 of the Further Notice Decision, while indicating that further reasoning will be given in the stage of its article 74 decision. Only then, the Majority declares, will the Defence be able to understand and, if necessary, contest this interpretation.³⁴ Accordingly, the Further Notice Decision does not discuss the Defence's argument, for example, that article 30(2)(b) does not apply to article 25(3)(d).³⁵ This is an unfortunate continuation of Trial Chamber II's earlier policy in this case: in 2009, it asked the parties to make submissions on article 25(3)(a),³⁶ but never ruled on its interpretation.

36. At this point in time, I wish to make it clear that I neither accept nor reject the Majority's interpretation of article 25(3)(d). I do, however, express my surprise about the fact that the Majority has not limited the

³³ Regulation 55 Notice Decision, paras 55 and 57 and disposition.

³⁴ Further Notice Decision, para. 11.

³⁵ ICC-01/04-01/07-3369, para. 110.

³⁶ Transcript of 1 October 2009, ICC-01/04-01/07-T-71-Red-FRA (WT), p. 8, line 11 to p. 9, line 4; Transcript of 1 October 2009, ICC-01/04-01/07-T-71-Red-ENG (WT), p. 7, line 21 to p. 8, line 14.

charges under article 25(3)(d) to those crimes that could potentially be linked to the alleged contributions by Mr Katanga.³⁷ I fail to see how the alleged contributions by Mr Katanga that are mentioned in paragraph 22 of the Further Notice Decision have any bearing on the charges of pillaging, destruction of property, or indeed the crimes of sexual slavery and rape as they are described in the Confirmation Decision. By not narrowing down the article 25(3)(d) charges to those crimes that could plausibly be said to have been furthered by Mr Katanga's alleged contributions, the Majority raises many questions about the limits of its interpretation of article 25(3)(d). Moreover, I fear that this lack of discernment will needlessly prolong the current proceedings.

2. Appearance of bias

37. In my dissenting opinion of 21 November 2012, I expressed the view that the Decision to notify the accused of a possible recharacterization of the facts more than one year after the last evidence was presented (11 November 2011) and several months after the formal closing of the evidence (7 February 2012) and the hearing of closing arguments (15 to 23 May 2012) created a perception of judicial bias. I was of the view that the Majority had at least created a perception that they would have had to acquit Mr Katanga on the indirect co-perpetration charges which he was facing and that article 25(3)(d)(ii) was seen as a provision that could sustain a conviction.

38. The Appeals Chamber did not agree: it considered that the Trial Chamber did not risk being seen as performing a prosecutorial function and it specifically found that the stage of the proceedings in

³⁷ See paragraph 18 and particularly footnotes 27 and 28 in the Further Notice Decision.

which Regulation 55 of the Regulations of the Court was invoked also did not give rise to an appearance of bias.³⁸ This view is undoubtedly correct when Regulation 55 is applied appropriately. Indeed, under normal circumstances, the giving of notice should not involve the Chamber having to explain at length to the accused what the ‘facts and circumstances’ are that the Chamber is contemplating relying upon for recharacterization.

39. In this case, however, the Majority acknowledges the need to give considerable further clarifications in order to allow the Defence to defend itself effectively.³⁹ By listing the supplementary factual elements in its Further Notice Decision, the Majority in fact also acknowledges that it is impossible for the Accused to understand the charges under 25(3)(d) against him without providing a lot of further explanation (although still not enough is provided). By having to formulate what can only be described as new charges, the Majority finds itself in the uncomfortable position of being accuser and judge at the same time. The fact that judges have started these proceedings down a path so unclear that new charges had to be formulated at the end of a trial, after all the Prosecution’s evidence has been heard, inevitably creates an appearance of bias. The mere existence of Regulation 55 does not, in and of itself, provide a justification for this. This provision must, after all, be interpreted and applied in conformity with the Statute and the Rules, especially having regard to the rights of the accused.

VI. CONCLUSION

40. This Further Notice Decision clearly shows that, in the given circumstances of this case, the proposed recharacterization of the

³⁸ ICC-01/04-01/07-3363, paras 103–105.

³⁹ Further Notice Decision, para. 9.

charges against Mr. Katanga under article 25(3)(d)(ii) would be incompatible with regulation 55(1) of the Regulations of the Court because it would exceed the 'facts and circumstances' described in the charges as confirmed by the Pre-Trial Chamber in its Confirmation Decision.

41. The Further Notice decision lacks the necessary specificity to allow the Defence to fully exercise its rights under article 67(1)(a) of the Statute. This lack of precision may moreover lead to an unnecessary prolongation of the trial, which would be incompatible with article 67(1)(c) and the Trial Chamber's duties to ensure that the trial is fair and expeditious under article 64(2).

42. For these reasons, I believe that the Trial Chamber should refrain from considering an alteration to the mode of responsibility and should immediately proceed to its decision under article 74 of the Statute.

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



Judge Christine Van den Wyngaert

Dated this 20 May 2013

At The Hague, The Netherlands