Minority Opinion of Judge Christine Van den Wyngaert

I. INTRODUCTION

1. Today, 444 days after his co-defendant was acquitted, Germain Katanga is now also acquitted of the only charges that were levelled against him by the Prosecutor at trial. Although I think this decision comes unjustifiably late, I do concur with the Majority's conclusion: the charges under article 25(3)(a) of the Statute have not been proved beyond reasonable doubt. However, this is as far as our unanimity goes. As concerns the rest of the Majority's Opinion, I find myself in disagreement with almost every aspect of it. Not only do I believe that the timing and manner in which the recharacterisation has been implemented is fundamentally unfair and has violated several of the accused's most fundamental rights, I am also of the view that the evidence in this case simply does not support the charges against him.

2. For the reasons set out in this Minority Opinion,[1] I do not believe that it was open to the Majority to recharacterise the charges as they were confirmed by the Pre-Trial Chamber and to enter a conviction under article 25(3)(d)(ii) of the Statute. The new charges exceed the facts and circumstances of the case, contrary to article 74. In addition, the recharacterisation was made in repeated violation of the accused's fair trial rights under article 67 of the Statute and regulation 55 (2) and (3) of the Regulations of the Court. I therefore believe that it was impossible for the Majority to adjudicate the case on the basis of the newly formulated charges.

3. As I will further explain in this Opinion, even supposing it was legally

[1] Article 74(5) provides: "The Trial Chamber shall issue one decision. Where there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority." As such, this constitutes the Minority Opinion and forms an integral part of Trial Chamber II's judgment on the charges pursuant to article 74.

possible for the Trial Chamber to adjudicate the case on these new charges, I do not believe that the evidence in support of the charges under article 25(3)(d)(ii) is sufficient to warrant a finding of guilt beyond a reasonable doubt.

4. There is no doubt that the village of Bogoro was attacked on 24 February 2003 and that innocent people died and suffered as a result of this attack. However, the crucial factual allegation in this case is that this attack was directed against the civilian population of Bogoro. Indeed, the Prosecutor's case is that the objective of the attackers of Bogoro was to "wipe out" the village and its Hema population.[2] While it is not contested that civilians were killed during the attack it has not, I believe, been established to the necessary threshold that the civilians in Bogoro were targeted 'as such' in the attack. Bogoro was a UPC-stronghold with a military base, which occupied a strategic position on the road that connects Bunia with Kasenyi and, by extension, Uganda. In order to satisfy the evidentiary standard, the inference that the Bogoro attack was aimed at the civilian population should be the only possible inference on the evidence produced at trial. Whereas I do not claim that it is unreasonable to think, from a first look at some of the evidence about what happened in Bogoro, that the attackers made no distinction between UPC combatants and civilians, I strongly reject that this is the only reasonable interpretation of the evidence.

[2] See Office of the Prosecutor, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Annex 1 to "Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute", 21 April 2008, ICC-01/04-01/07-436-Anx1, paras 63 and 93; Office of the Prosecutor, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Mémoire final", 24 February 2012, ICC-01/04-01/07-3251-Corr-Red, ("Prosecution Closing Brief"), para. 38; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07-717, ("Confirmation Decision"), para. 33.

5. In my view, an objective and dispassionate reading of the evidence leads to the conclusion that the attack, as such, was intended to dislodge the UPC camp and that the harm inflicted on the civilian population was incidental to this objective. It may well be that among the attackers there was a sizeable group of persons who held a strong grudge against the Hema people and who used the opportunity of the attack to 'settle scores'. However, I do not believe the evidence shows that the attack was conceived and planned with this purpose in mind. In fact, I believe that it is entirely plausible to assume that, if the military position in Bogoro had still been held by the UPDF and if no Hema civilians had been present in the village, the Ngiti fighters of Walendu-Bindi would still have participated in the attack if they thought that by doing so they could win control over Bogoro and the strategically important Bunia-Kasenyi route.[3] Several witnesses testified that persons other than the combatants who attacked the UPC positions committed crimes in Bogoro. Whether these people were motivated by ethnic hatred, a thirst for revenge or purely opportunistic reasons, it is clear that their conduct cannot be relied upon to draw any inferences whatsoever about the purpose of the attackers under article 25(3)(d)(ii) of the Statute. It must be acknowledged that poorly trained combatants, especially in situations such as the one at hand, do not behave as a monolithic, well-organised and highly disciplined unit. On the contrary, I think the evidence quite clearly shows that the aftermath of the attack on the UPC positions was rather chaotic and that combatants and others alike had free reign to engage in whatever conduct they wanted. I think it impossible to infer much, if anything, about the purpose of the attackers prior to this attack

[3] I note that there is ample evidence of other – unsuccessful – attacks on Bogoro in 2001 and 2002, i.e. when the village was in the hands of other forces (APC and UPDF).

from how some of them may have behaved afterwards, either alone, or in collaboration with others with whom they had no prior agreement about the attack.

6. None of the above is intended to diminish the gravity of what allegedly took place in Bogoro on 24 February 2003. I fully accept that civilians were killed and otherwise harmed during the attack. However, it is my view that the infliction of harm on civilians was not the reason for the attack, the real purpose of which was to chase the UPC soldiers from Bogoro.[4] As there is no reliable evidence that Germain Katanga played any role in the execution of the attack of the 24th, much less in any of the crimes that were committed in Bogoro on that day,[5] his potential criminal responsibility under article 25(3)(d)(ii) is inevitably tied to what he may have done in support of the attack *before* it took place. However, in order to assess Germain Katanga's responsibility under article 25(3)(d)(ii), whatever he may or may not have done in the months, weeks and days leading up to the attack on Bogoro must be analysed in light of what he knew the purpose of the attackers to be. As I do not believe that it has been demonstrated that the purpose of the attackers was to harm civilians, it cannot be sustainably argued, in my view, that Germain Katanga made a criminal contribution to the crimes that were committed against civilians in Bogoro.

7. When it comes to deciding about the guilt or innocence of the accused,

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[4] It is, of course, possible under article 25(3)(d) that the common purpose is primarily aimed at achieving a legitimate objective and that the crimes are only the inevitable consequence of this (*dolus directus* 2nd degree). I note, in this regard, that the Majority does not argue that the crimes committed against civilians were a consequence of the attack on the UPC. Instead, it is argued that the Hema civilian population was targeted as such (*dolus directus* 1st degree). See, for example, Majority Opinion, paras 1155, 1665.

[5] See Majority Opinion, para. 752.

the only question that a Trial Chamber must address is whether, on the evidence adduced at trial, the charges as confirmed by the Pre-Trial Chamber (or, in appropriate cases, as modified by the Trial Chamber under regulation 55) have been established beyond a reasonable doubt. I do not consider this has been the case, either in relation to the original charges under article 25(3)(a) or the new charges of the Majority under article 25(3)(d)(ii), for the reasons explained below (see part III of this Opinion). But, first and foremost, I do not think it was open to the Majority to recharacterise the facts and to enter a verdict based on article 25(3)(d)(ii) (see part II of this Opinion). I am therefore in complete dissent with the Majority Opinion.

8. Instead, I would have acquitted the accused because the Prosecution failed to prove Germain Katanga's responsibility as initially charged, i.e. as an "indirect co-perpetrator" to the Bogoro attack under article 25(3)(a) of the Statute. I would have decided this acquittal a long time ago, i.e. within a reasonable time after the Chamber had retired to deliberate, in accordance with Rule 142 of the Rules of the Court.

II. THE RECHARACTERISATION OF THE FACTS VIOLATES ARTICLES 74 AND 67 OF THE STATUTE

9. I am of the view that it was not open to the Majority to recharacterise the facts in this case for two reasons. First, it was not possible to change the mode of liability from "commission" (article 25(3)(a)) to "common purpose liability" (article 25(3)(d)) without substantially transforming the charges (see *infra*, A). Second, the recharacterisation process in this case occurred in violation of various fair trial rights under article 67 of the Statute (see *infra*, B). Before developing these points, I will briefly explain my understanding of regulation 55.

10. Regulation 55 of the Regulations of the Court[6] is said to serve two broad purposes. The first is to allow more focused trials on clearly delineated charges.[7] The second is to avoid "impunity gaps" that may be caused by technical acquittals in the "fight against impunity".[8]

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[6] Regulation 55 of the Regulations provides:

> *1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.*
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> *2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.*
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> *3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:*
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> *a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and*
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> *b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)".*

[7] Hans-Peter Kaul, "Construction Site for More Justice: The International Criminal Court After Two Years", 99 *American Journal of International Law* (2005), p. 370, at p. 377.

[8] See Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision

11. While the Appeals Chamber has upheld the validity of the regulation generally, it has stressed the need to ensure the rights of the accused to a fair and impartial trial are "fully" protected, and has suggested that safeguards in addition to those outlined in regulation 55(2) and (3) may be required depending on the circumstances of the case.[9] The Appeals Chamber has indeed emphasised that recharacterisation must not render the trial unfair.[10] As such, when making a regulation 55(2) assessment, the Chamber must remain mindful of the rights of the accused. The Chamber must ensure that the accused: (i) receives prompt notice of the specific facts within the 'facts and circumstances described in the charges' which may be relied upon;[11] (ii) is given adequate time and facilities for the effective preparation of his or her defence;[12] (iii) is afforded the right to examine and have witnesses examined;[13] and (iv) that the accused's right not to be compelled to testify is not infringed.[14]

12. Through the invocation of regulation 55 at this late stage, the Majority has "mould[ed] the case against the accused"[15] in order to reach a conviction on the basis of a form of criminal responsibility that was never charged by the Prosecution. In doing so, and contrary to article 74 and

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giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"", 8 December 2009, ICC-01/04-01/06-2205, ("*Lubanga* Regulation 55 Appeals Judgment"), para. 77: "a principal purpose of Regulation 55 is to close accountability gaps".

[9] *Lubanga* Regulation 55 Appeals Judgment, para. 85.

[10] *Lubanga* Regulation 55 Appeals Judgment, para. 85; Appeals Chamber, *Prosecutor v. Germain Katanga*, "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, ("*Katanga* Regulation 55 Appeals Decision"), para. 95.

[11] *Katanga* Regulation 55 Appeals Decision, paras 100-01. See also article 67(l)(a) of the Statute.

[12] Regulation 55(3)(a) of the Regulations; article 67(l)(b) of the Statute.

[13] Regulation 55(3)(b) of the Regulations; article 67(1)(e) of the Statute.

[14] Article 67(1)(g) of the Statute.

[15] ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, "Judgment", 17 October 2003, IT-95-9-T, para. 110.

regulation 55(1), the Majority has substantially exceeded the scope of the facts and circumstances as confirmed by the Pre-Trial Chamber. For this reason alone, I consider the judgment to be invalid as a matter of law (see *infra*, II.A).

13. Even if there were no concerns regarding the ambit of the confirmed charges, I still believe that a series of Germain Katanga's rights have been fundamentally violated. Although the mere fact of activating regulation 55 at this late stage may not, in itself, have given rise to an appearance of bias, I believe that the manner in which the ensuing proceedings have been handled infringe upon the accused's right to a fair and impartial hearing. I believe there has been a serious misapprehension of Germain Katanga's right to remain silent pursuant to article 67(1)(g). In addition, I consider that the Majority's determined refusal to provide the accused with clear and precise notice of the altered charges was in flagrant violation of article 67(1)(a). This, in itself, has made the entire procedure under regulation 55 unfair and, moreover, caused unnecessary delays. Potentially the most troublesome denial of Germain Katanga's rights is the failure to afford the Defence a reasonable opportunity to conduct further investigations to respond to the new form of criminal responsibility, instead restricting the Defence to providing submissions on article 25(3)(d)(ii) on the basis of the existing record. This was hardly a meaningful alternative to fresh investigations, particularly considering that the Defence was afforded no insight into how the Majority would formulate its case under article 25(3)(d)(ii). Accordingly, the accused could do little more than proffer general denials. Given that the Defence never had any reasonable opportunity to conduct meaningful investigations under the prevailing conditions of insecurity in Eastern Democratic Republic of the Congo ("DRC"), I consider that the accused

was not afforded a fair chance to defend himself against the charges under article 25(3)(d)(ii), which constitutes a clear violation of article 67(1)(b)[16] and (e) (see *infra*, II.B).[17]

14. Finally, I strongly believe that the length of these proceedings is incompatible with the Chamber's obligation under article 64(2) to conduct the trial expeditiously and with the accused's right to be tried without undue delay under article 67(1)(c). The delays have been severe yet almost entirely avoidable and, most importantly, attributable exclusively to the Majority. We must not lose sight of the fact that German Katanga, who has endured these delays whilst in detention awaiting verdict, has in no way contributed to them (see *infra*, II.C).

15. Any one of these infringements alone would suffice to cast serious doubts upon the validity of today's judgment. In view of their cumulative effect, they present a case of overwhelming strength against the legality and legitimacy of this judgment.

A. The Judgment substantially transforms the facts and circumstances described in the charges

16. Regulation 55(1) stipulates that the Chamber may only change the legal characterisation of facts and circumstances described in the charges. This provision mirrors article 74(2), which provides that the judgment "shall not exceed the facts and circumstances described in the charges and any amendments to the charges". As the Appeals Chamber pointed out, the

[16] Article 67(1)(b) of the Statute provides for the right of the accused "to have adequate time and facilities for the preparation of the defence…".
[17] Article 67(1)(e) of the Statute provides for the right of the accused to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute".

Trial Chamber is thus bound to the factual allegations in the charges and any application of regulation 55 must be confined to those facts.[18] Crucially, the Appeals Chamber stated that the text of regulation 55 "only refers to a change in the legal characterisation of the facts, but *not to a change in the statement of the facts*."[19]

17. The question then arises as to whether the facts upon which the Majority has relied for the conviction of Germain Katanga under article 25(3)(d)(ii), are indeed part of the facts and circumstances described in the charges. As I see it, there are two aspects to this question. First, the Majority can only rely on allegations which are specifically mentioned in the Confirmation Decision as part of the factual narrative supporting the legal elements of the crimes charged,[20] or which are part thereof by necessary implication. Accordingly, references to evidence put forward by the Prosecutor in support of the factual allegations do not constitute part of the 'facts and circumstances'. *A fortiori* it is also impermissible to introduce entirely new facts (see *infra*, II.A.1). Second, the Majority may not change the narrative of the facts underlying the charges so fundamentally that it exceeds the facts and circumstances described in the charges (see *infra*, II.A.2) I consider the Majority erred on both points, which I will address in turn.

1. The Judgment relies on facts that clearly fall outside the 'facts and circumstances' of the Confirmation Decision

18. Whereas regulation 55 allows for a change in the legal characterisation of the factual allegations, such a change should be confined to facts already

[18] *Lubanga* Regulation 55 Appeals Judgment, paras 91, 93.
[19] *Lubanga* Regulation 55 Appeals Judgment, para. 97 (emphasis added).
[20] *Lubanga* Regulation 55 Appeals Judgment, para. 90, note 163.

confirmed by the Pre-Trial Chamber. The factual allegations cited in support of a charge under article 25(3)(d)(ii) must thus be the same 'facts and circumstances' as were relied upon by the Pre-Trial Chamber for the confirmation of the charges under article 25(3)(a). It might, under certain conditions, be permissible to rely on fewer elements of the 'facts and circumstances', but it is strictly forbidden to introduce any new factual elements or to rely on facts that are mentioned in the Confirmation Decision, but which do not form part of the 'facts and circumstances' of the charges. The key question is thus where to draw the line between the 'facts and circumstances' on the one hand, and other factual references contained in the confirmation decision.

19. The Majority has, since the Notice Decision,[21] still not engaged with the crucial legal question of how to interpret the concept of 'facts and circumstances'. Indeed, it makes no effort to explain on what basis it considers that the passages from the Confirmation Decision it now relies on were actually part of the 'facts and circumstances' or whether they merely contained part of the Pre-Trial Chamber's reasoning about the evidence. Instead, my colleagues seem to maintain the belief that every single sentence of the Confirmation Decision, including footnotes containing references to evidence, qualifies for recharacterisation. Yet, it seems unassailable that not every word, sentence or phrase that may be contained in the Confirmation Decision qualifies as 'facts and circumstances'. More importantly, the Majority has introduced totally new factual elements into the charges under article 25(3)(d)(ii). A prominent example is the Majority's crucial allegation that members of

[21] "Décision relative à la mise en oeuvre 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, ("Notice Decision")._

the Ngiti fighters of Walendu-Bindi were filled with a desire for revenge towards the Hema population and motivated by a so-called "anti-Hema ideology".[22] However, this allegation is nowhere stated as such in the Confirmation Decision. Indeed, apart from a reference to the hate-filled lyrics, neither the Confirmation Decision, nor the Prosecutor's Document Containing the Charges for that matter, made any explicit reference to ethnic hatred or a desire for vengeance on the part of the Ngiti fighters of Walendu-Bindi. In fact, the words "hatred", "vengeance" or "revenge" simply do not appear in the Confirmation Decision.[23] The same is true for the Prosecutor's Document Containing the Charges.

20. In an effort to read this new allegation into the Confirmation Decision, the Majority mentions, first, that the Pre-Trial Chamber confirmed that the physical perpetrators committed their alleged crimes with the requisite *mens rea* (see *infra*, II.A.1.(a)) and, second, that the Confirmation Decision mentioned that both FRPI and FNI fighters sung hate-filled lyrics prior to the attack (see *infra*, II.A.1.(b)).[24] Another "new fact", in

[22] Majority Opinion, paras 717, 1143-45.

[23] I note that none of the footnotes of the Confirmation Decision to which the Majority refers in paragraph 1463 mentions ethnic hatred or anti-Hema ideology as a motive: 275 ("[the attack] was also intended to target the civilian population or individual civilians not taking direct part in the hostilities […] as a way to secure control over the village and to be a reprisal against the Hema population there"), 279 ("the attacks [sic] on Bogoro were not aimed at military targets but at the wilful killing and/or expulsion of the Hema population, the destruction of the village, and the consequent Lendu/Ngiti assumption of control over the village"), 403 ("the attack was not only directed against the military target but also against the predominantly Hema civilian population"), 406 ("the attack was intended to "wipe out" or "raze" Bogoro village by killing the predominantly Hema civilian population and destroying the homes of civilian inhabitants during and in the aftermath of the attack" and 411-413 ("the violent acts which occurred in Bogoro village on 24 February 2003 were not random acts of violence against the civilian population but were committed pursuant to a common policy and an organised common plan which was, *inter alia*, (i) part of a larger campaign of reprisals directed against the predominantly Hema civilians living in villages in the Ituri region […] (iii) a means to "wipe out" the village of Bogoro so as to ensure FNI/FRPI control over the route to Bunia and to facilitate the transit of goods along the Bunia-Lake Albert axis.")

[24] Majority Opinion, para. 1463.

my assessment, is the Majority's allegation that Germain Katanga had knowledge of the group's common purpose (see *infra*, II.A.1.(b)). In the following paragraphs, I will explain why I am not persuaded by these arguments.

a) The *mens rea* of the physical perpetrators

21. In paragraph 1462 of the Majority Opinion, it is argued that the "intention" of the Ngiti fighters of Walendu-Bindi was – implicitly – confirmed by the Pre-Trial Chamber, because the latter found that the physical perpetrators of the crimes in Bogoro acted with the requisite *mens rea.*

22. First, I observe that the Majority does not demonstrate that the Pre-Trial Chamber actually made any findings regarding the individual *mens rea* of the different physical perpetrators. Although the Confirmation Decision mentions the Pre-Trial Chamber's intention in this respect,[25] I have not been able to identify any paragraph where such findings are actually made. It is worth noting, in this regard, that according to the 'indirect co-perpetration' doctrine of the Pre-Trial Chamber (article 25(3)(a)), the individual motives or intent of the physical perpetrators were entirely irrelevant, because they were – so it was claimed – under the total control of the two co-accused. Moreover, article 25(3)(a) allows someone to commit a crime through another person "regardless of whether that other person is criminally responsible". Accordingly, it cannot be assumed that the Pre-Trial Chamber somehow took it for granted that the physical perpetrators acted with the requisite *mens rea*.

[25] Confirmation Decision, para. 245: "The Chamber will analyse the objective elements of each charge, and, […] the subjective elements to be attributed to the FNI/FRPI combatants as direct perpetrators of the crimes." However, in what follows the Pre-Trial Chamber does not actually enter any findings with regard to the *mens rea* of the physical perpetrators.

On the contrary, given the Pre-Trial Chamber's strong emphasis on the complete control which the co-accused allegedly exercised over the members of their respective "organisations",[26] it is difficult, in my view, to assume that the Pre-Trial Chamber somehow implicitly confirmed that the individual physical perpetrators acted with the requisite *mens rea*.

23. Even if the Pre-Trial Chamber had entered a finding about the *mens rea* of the physical perpetrators, I consider the Majority's argument to be wrong as a matter of law, because it confuses a finding that a number of *individuals* acted with intent and knowledge with finding that a *group* had a common plan to commit crimes, which is a requirement under the newly charged mode of criminal responsibility (article 25(3)(d)). This is not to say that, in certain circumstances, it may not be possible to *infer* the existence of a group acting with a common purpose from the fact that a number of people simultaneously committed crimes at a certain time and location. However, it does not follow from the *possibility* of making such an inference that the Pre-Trial Chamber actually did so. I certainly do not believe that the Majority is allowed to make any assumptions in this regard. Moreover, even if it were possible in this case to infer from the fact that a number of Ngiti fighters intentionally committed crimes in Bogoro on 24 February 2003 that they constituted a group acting with a common purpose, such an inference could only result in a finding that those specific individuals formed a group acting with a common purpose. However, it would not be possible to infer anything about the criminal purpose (or otherwise) of other members of the Ngiti fighters of

[26] See Confirmation Decision, para. 547: "because the soldiers were young, were subjected to a brutal military training regime and had allegiance to the military leaders of their ethnic groups, they were likely to comply with the orders of those leaders almost automatically, without asking any questions."

Walendu-Bindi, who were not present at the scene(s) of the crime(s). More importantly, such an inference could only warrant a finding that there was a common purpose among the perpetrators of the crimes in question *at the time* when the crimes were committed. It is not possible to infer from the mere fact that physical perpetrators acted with *mens rea* on the day the crimes were committed that they shared a common purpose to commit these crimes *beforehand*.

24. As it is required by article 25(3)(d)(ii) that it must be established that the accused's contribution was "made in the knowledge of the intention of the group to commit the crime",[27] this can only mean that the common purpose of the group must exist *prior* to the accused's contribution. From my reading of the Confirmation Decision, there is nothing that would permit one to infer from the alleged *mens rea* of the physical perpetrators that there already existed a criminal common purpose at the time when Germain Katanga made his alleged contribution to the group,[28] much less that he knew about it.

b) Germain Katanga's alleged knowledge of the group's common purpose

25. With regard to the crucial question as to whether the Confirmation Decision contained any allegations regarding Germain Katanga's knowledge of the group's common purpose (a question which is indeed relevant under the newly charged mode of liability (article 25(3)(d)), my colleagues refer in general to their earlier decisions, which contain a number of references to the Confirmation Decision.[29] However, I do not

[27] See *infra*, III.G.1 The law on article 25(3)(d)(ii).
[28] I.e. as from December 2002, see Majority Opinion, para. 1690 and *infra* III.G.2.b) Germain Katanga's alleged contribution to the crimes.
[29] See Majority Opinion, para. 1473.

believe that these paragraphs of the Confirmation Decision contain any reference that specifically relates to Germain Katanga's knowledge of the criminal common purpose of the Ngiti fighters of Walendu-Bindi as a group acting on its own volition.[30] This should come as no surprise, since the Pre-Trial Chamber held that the three 'subjective elements' for 'indirect co-perpetration' under the initial charge (article 25(3)(a)) are: (a) "the suspect must carry out the subjective elements of the crimes";[31] (b) "the suspects must be mutually aware and mutually accept that implementing their [i.e. Germain Katanga's and Mathieu Ngudjolo's] common plan will result in the realisation of the objective elements of the crimes";[32] and (c) "the suspects must be aware of the factual circumstances enabling them to control crimes jointly".[33] There is no mention of the mental state of the physical perpetrators, let alone of the accused's knowledge thereof. Significantly, even in relation to the charges of pillaging, rape and sexual slavery, which the Pre-Trial Chamber found to have been foreseeable consequences (*dolus directus* 2nd degree) of the execution of the common plan under article 25(3)(a), the Confirmation Decision makes no mention whatsoever of an alleged common purpose of the physical perpetrators.[34]

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[30] I note, in this regard, that the specific paragraphs of the Confirmation Decision referred to by the Majority in their previous decisions, cited in paragraph 1473, were taken exclusively from chapters dealing with the substantive crimes or the contextual elements. There is, in other words, no reference to any paragraph of the Confirmation Decision dealing with Germain Katanga's *mens rea.* Neither the Majority Opinion, nor the procedural decisions to which paragraph 1473 refers contain an explanation about how the paragraphs from the Confirmation Decision establish that Germain Katanga could have known about the alleged common purpose of the Ngiti fighters of Walendu-Bindi by December 2002, as claimed by the Majority. See Majority Opinion, para. 1690.

[31] Confirmation Decision, paras 527-532.

[32] Confirmation Decision, paras 533-537.

[33] Confirmation Decision, paras 538-539.

[34] Instead, paragraph 567 of the Confirmation Decision refers to the fact that rape and sexual slavery was a "common practice", which was "widely acknowledged" etc.

26. Accordingly, I think it is perfectly clear that the introduction of Germain Katanga's alleged knowledge of the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi is a completely new fact. This is so, even if it were based on an inference from 'facts and circumstances' that were contained in the Confirmation Decision. Indeed, it is probably possible to propose quite a number of different inferences on the basis of the raw facts of the Confirmation Decision. However, the purpose of formulating charges is precisely to make clear which inferences are being alleged, so that the accused knows against what he has to defend himself. It cannot reasonably be argued that an accused is put on notice of every possible inference that can be made from the raw facts of the Confirmation Decision. Such a position would render trials entirely unfocused and the charges would be nothing more than a moving target for the accused. It follows that the allegation about Germain Katanga's alleged knowledge of the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi is new and falls squarely outside the scope of the 'facts and circumstances' of the charges as confirmed by the Pre-Trial Chamber. At the very least it fundamentally changes the narrative of the charges, which is also impermissible under regulation 55, as will be discussed next.

2. The Judgment changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges

27. Even assuming that the Majority Opinion had not formally exceeded the 'facts and circumstances' of the Confirmation Decision, I strongly believe that the charges under article 25(3)(d)(ii) involve such a fundamental change in the narrative that this violates the requirements of article 74 and regulation 55.

28. Whether or not the narrative has changed impermissibly can be ascertained on the basis of two considerations. First, when the defendant would have (had) to significantly adjust his or her line of defence to address the changed narrative. Second, when certain factual elements that were part of the original narrative play a significantly different role in the new narrative.

a) Prohibition to change the narrative to such an extent that the accused has to adjust his or her line of defence

29. As the Majority rightly observes, it is not prohibited for there to be *any* change in the narrative.[35] Whether or not there is a violation of article 74 is, as Judge Fulford has observed, a question of fact and degree.[36] Nevertheless, it is beyond dispute that it is impermissible to fundamentally change the narrative of the charges in order to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution.

30. Understandably, the Majority tries to minimise the significance of the change in narrative by claiming that:

> *[TRANSLATION] Instead it is a matter of bringing to the fore the commission of crimes by some of the physical perpetrators identified in the Decision on the confirmation of charges (such as the FRPI members and Ngiti combatants) and to undertake only an analysis of the contribution of the Accused, and his contribution alone, to their commission of the crimes,*

[35] Majority Opinion, para. 1472.

[36] Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "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, ("Dissenting Opinion of Judge Fulford"), para. 19.

such contribution no longer being essential but significant.[37]

31. However, a closer look at the way in which the Majority proceeds with this ''bringing to the fore" exercise shows that the narrative has been changed to such an extent that the narrative of the charges is substantially altered, in violation of article 74 of the Statute, as I believe the following examples demonstrate:

    a. The single common plan between Germain Katanga (FRPI) and Mathieu Ngudjolo (FNI – situated in Bedu Ezekere), which encompassed a combination of goals (i.e. to take control over Bogoro, to re-open the Bunia-Kasenyi route, to exact reprisal, etc.) no longer exists. Instead, there are now two separate plans: (a) a coalition between the Ngiti fighters of Walendu-Bindi and the Integrated Operational Military Staff (Etat-Major Opérationnel Intégré, or "EMOI") (situated in Beni and comprising APC, the DRC central government and other groups, including the Ngiti fighters of Walendu-Bindi) to reconquer Ituri and (b) a common purpose of the Ngiti fighters of Walendu-Bindi alone to commit crimes against the Hema civilian population. The two new plans are said to be separate and independent of each other.

    b. The Ngiti fighters of Walendu-Bindi – formerly members of the hierarchically structured FRPI – are promoted from being

[37] See Majority Opinion, para. 1476: "Il s'agit plutôt de mettre en relief la commission de crimes par une partie des auteurs matériels identifiés dans la Décision relative à la confirmation des charges (tels les membres de la FRPI / combattants ngiti) et de se livrer seulement à l'analyse de ce qu'a été la contribution de l'accusé, et de lui seul, à la commission de ces crimes par ces derniers, une contribution qui ne serait plus essentielle mais significative" (footnote omitted).

Germain Katanga's blindly obedient subordinates[38] to independent and autonomous actors.

c. Whereas the Ngiti fighters of Walendu-Bindi were originally said to have been mere gears in a giant machine[39] and, as such, to have been merely fungible individuals,[40] they are now said to have collectively decided, of their own volition, to attack Bogoro for the sole purpose of committing crimes against the Hema civilians present there.

d. Germain Katanga is no longer the ultimate authority who commanded blind obedience over the FRPI.[41] Instead, he is now the "autorité de référence" of the militia of Walendu-Bindi and the person other commanders would refer to in order to settle important matters. Rather than focusing on Germain Katanga's alleged exercise of effective control over the commanders and combatants of Walendu-Bindi, the 25(3)(d)(ii) charges now focus on Germain Katanga's alleged "authority in matters relating to the distribution of weapons and ammunition".[42]

e. Germain Katanga is no longer alleged to be the (co-)architect of

[38] Confirmation Decision, para. 545 et seq.
[39] Confirmation Decision, para. 515
[40] Confirmation Decision, para. 516.
[41] Majority Opinion, para. 1363: [TRANSLATION] "the Chamber is unable to conclude beyond reasonable doubt that Germain Katanga wielded, in every aspect of military life in Aveba and over all Walendu Bindi *collectivité* troops, *de facto* respected authority or that he issued orders of an operational nature which were then executed" ("la Chambre ne se trouve pas en mesure de conclure, au-delà de tout doute raisonnable, que Germain Katanga avait, dans tous les domaines de la vie militaire et à l'égard de l'ensemble des commandants et des combattants de la collectivité de Walendu Bindi, des pouvoirs de commandement et de contrôle").
[42] Majority Opinion, para. 1279 et seq.

the attack on Bogoro. To the contrary, he is now said to have merely known about the criminal common purpose of the Ngiti fighters of Walendu-Bindi[43] and to have made a contribution (article 25(3)(d)).

32. As already indicated, charges are more than a list of atomic facts and a corresponding list of legal elements. Instead, charges allege the existence of specific relations between different facts and construct a particular narrative on this basis which, if true, would cover all the legal elements of the charges with which it corresponds. Like with a Tangram or a Lego set, it would, in theory, be possible to combine the individual pieces that are contained in the narrative in many different ways so that different shapes appear. However, I am of the view that it is not permissible under regulation 55(1) to rearrange the pieces of the charges to construct a different shape or to take away certain pieces when this results in the original shape becoming unrecognisable. In other words, charges are not merely a loose collection of names, places and events which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context. Charges therefore constitute a narrative in which each fact belonging to the 'facts and circumstances' has a particular place. Indeed, the reason why facts are included in the 'facts and circumstances' is precisely because of how they are relevant to the narrative in a particular way. Taking an isolated fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "change in the statement

[43] Note that the Majority does not claim that Germain Katanga had the aim of furthering this criminal purpose (article 25(3)(d)(i)), as the charges are based on (ii) of article 25(3)(d)).

of facts", something the Appeals Chamber has found to be clearly prohibited by regulation 55(1).[44]

33. It is crucial to note that it is insufficient to simply compare 'stories' in order to see to what extent they contain some of the same elements. 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 him or herself 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. Accordingly, a defendant may 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, as I address later in this Opinion.

34. If the accused could reasonably believe that he was mounting a full and meaningful defence against the charges as a whole by challenging a particular allegation or set of allegations from the original charges, it requires little explanation as to why a recharacterisation 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

[44] *Lubanga* Regulation 55 Appeals Judgment, para. 97.

last point because it would be grossly unfair to ignore the standpoint of the accused in this regard. Moreover, doing so would have as an unfair and undesirable consequence that all accused before this Court would henceforth have to defend themselves against all possible narratives that could be construed on the basis of the raw factual allegations contained in the charges.

35. In sum, the key factor in evaluating whether the narrative has changed fundamentally is the question of whether a reasonably diligent accused would have conducted substantially the same line of defence against both the old and the new charge. If this is not the case, then this constitutes a clear indication that the narrative of the recharacterised charges has changed so much that it goes beyond the 'facts and circumstances' as confirmed.

36. The Majority seems to recognise that, in this case, the Defence for Germain Katanga focused its efforts during the trial on challenging the central element of the charges under article 25(3)(a) but which is irrelevant for the charges under 25(3)(d)(ii), namely, the alleged common plan between Mathieu Ngudjolo and himself.[45] However, the Majority brushes off any concerns in relation to the change in narrative this has had by stating that the original charges *also* included the question of the alleged essential contribution to the common plan, in particular Germain Katanga's role in obtaining weapons and ammunition from Beni and his *de facto* control over the commanders and combatants of Walendu-Bindi.[46] Indeed, as already indicated, the Majority believes that all it did was to "bring to the fore" ("mettre en relief") the commission of crimes

[45] Majority Opinion, para. 1477.
[46] Majority Opinion, para. 1477.

by *some* physical perpetrators and to analyse only the contribution which the accused made to the commission of those crimes.[47] However, what the Majority fails to acknowledge is that the facts "brought to the fore" were never the subject of much attention during the trial and that this was perfectly normal, because they were relatively insignificant under article 25(3)(a).

37. By concentrating its efforts on disproving the common plan to 'wipe out' Bogoro (in the sense of article 25(3)(a)), the Katanga Defence sought primarily to refute the Prosecution's allegation that Germain Katanga had organisational control over the FRPI and that he made essential contributions to the implementation of a common plan between himself and Mathieu Ngudjolo that would result in the commission of crimes.[48] The Defence only summarily addressed whether the commission of the charged crime was foreseeable, and did so only in relation to an alternative common plan that it advanced, namely that of EMOI's objective of retaking control over Ituri, of which the attack on the UPC military base at Bogoro was an important part.[49] Had the Katanga Defence been able to reasonably foresee the possibility that the charges would be recharacterised under article 25(3)(d)(ii), it may well have adopted a different strategy.

38. This brings me to a crucial point for the determination of whether or not the Majority has fundamentally changed the narrative of the original charges. Under the Pre-Trial Chamber theory, article 25(3)(a) requires a

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[47] See *supra*, para. 30.

[48] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Second Corrigendum to the Defence Closing Brief", 29 June 2012, ICC-01/04-01/07-3266-Corr-2-Red ("Defence Closing Brief"), paras 1130-1320.

[49] Defence Closing Brief, paras 1318-1320.

contribution to the common plan,[50] whereas article 25(3)(d)(ii) requires a contribution to a specific crime.[51] The Majority brushes over this problem by making the obvious point that if essential contributions are proven, less-than-essential contributions are proven as well.[52] However, what the Majority fails to recognise is that proof of an essential contribution *to a plan* (article 25(3)(a)) does not necessarily mean proof of a non-essential contribution *to a specific crime* (article 25(3)(d)(ii)). Accordingly, article 25(3)(a) liability can be proven without proving article 25(3)(d)(ii) liability; the latter provision is therefore not a "lesser included" form of criminal responsibility.

39. I note, in this regard, that the Majority misconstrues what Pre-Trial Chamber I said in paragraphs 524 and 525 of the Confirmation Decision.[53] Read in context, these paragraphs explain that under the Pre-Trial Chamber's interpretation of 'indirect co-perpetration', the co-accused must exercise control over the crime by making coordinated essential contributions to the implementation *of a common plan*, which they know will *result in* the realisation of the objective elements of the crime. It can hardly be disputed that there is a fundamental difference between making a contribution (essential or otherwise) to a common plan, which may have broader goals than just the commission of crimes (such as defeating the UPC and opening the road between Bunia and Kasenyi), and contributing directly to the commission of a specific crime.

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[50] Confirmation Decision, paras 525-526. See also Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842 ("*Lubanga* Judgment"), para. 1000.

[51] See Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the confirmation of charges", 16 December 2011, ICC-01/04-01/10-465-Red, ("*Mbarushimana* Confirmation Decision") para. 283.

[52] Majority Opinion, para. 1176.

[53] Majority Opinion, para. 1470.

In fact, under the Pre-Trial Chamber's interpretation of article 25(3)(a), Germain Katanga was considered responsible for the crimes allegedly committed by the troops of Mathieu Ngudjolo (and *vice versa*, as indirect co-perpetrators), which clearly demonstrates that his 'essential contribution' under the original charges did not have to be made directly to the commission of specific crimes by the Ngiti fighters of Walendu-Bindi.

40. In any event, even if the charges under article 25(3)(d)(ii) could be considered as lesser included offences under article 25(3)(a), the fairness in convicting someone of a lesser included offence fundamentally depends on the defence having had sufficient certainty of this possibility.[54] The defence only needs to respond to the elements of the offences charged to secure an acquittal. Unless the defence is put on clear notice that the lesser included offence is in play, it cannot be blamed for concentrating its efforts on rebutting the allegations actually charged.[55] As such, by springing article 25(3)(d)(ii) at the end of the trial, the Katanga Defence may have conceded, or less vigorously contested, certain points of fact that it might have contested differently had it been properly informed. There is nothing "lesser" about any of this; it is nothing short of the Chamber co-opting a valid defence and turning it against the accused.

b) Prohibition to take facts out of context

41. Furthermore, I submit that the concept of 'facts and circumstances' refers to the allegations as formulated in a coherent narrative. The 'facts and circumstances' present a structured evidentiary argument, not just a

[54] See also II.B.2 Right to be informed of the charges and to have adequate time and facilities for the preparation of the defence (article 67(1)(a) and (b)).
[55] See II.B.3.c) The Defence did not have a meaningful opportunity to investigate.

collection of unrelated facts. All references to particular dates, places or persons must be seen in the context of the narrative that is put forward in the narrative of the 'facts and circumstances'. Accordingly, it is not permissible, in my view, to simply lift out a particular factual proposition and use this as part of a significantly different factual claim. Two prominent examples in the Majority Opinion clearly illustrate the problem: Beni and Nyankunde, two places of crucial importance in the Majority's reasoning, but which were all but irrelevant under the original charges.

(1) Beni

42. In the context of the charges under article 25(3)(d)(ii), the Majority Opinion upgrades "Beni" from an insignificant factor to a crucial factual allegation underpinning the new charges under article 25(3)(d).[56] This is impermissible in my view. The only proposition related to Beni that is contained in the 'facts and circumstances' as confirmed by the Pre-Trial Chamber is the allegation that Germain Katanga and Mathieu Ngudjolo went there to obtain weapons and ammunitions in preparation of the attack on Bogoro (article 25(3)(a)).[57] Any other events that allegedly took place in Beni are not part of the charges and were not confirmed by the Pre-Trial Chamber. This is illustrated by the fact that the Prosecutor did not proffer any significant evidence in this respect and that most of these events were introduced by the Defence itself at trial.

43. Accordingly, any reference to meetings held in Beni in the context of the creation of the FRPI or, more importantly, to the operations of the so-called EMOI and its plan to reconquer Ituri and Bogoro– which are not

[56] The Majority Opinion contains over 200 references to Beni.
[57] Confirmation Decision, para. 555 (ii)(b) and (iv)(b).

mentioned at all in the Confirmation Decision – falls outside the scope of the 'facts and circumstances' of the charges.

(2) Nyankunde

44. The second example relates to the attack on the village of Nyankunde of 5 September 2002. This attack is crucial in the Majority's findings about the group acting with a common purpose (article 25(3)(d)).[58] Again, the context in which the Confirmation Decision refers to this attack is very different. In particular, the Confirmation Decision makes reference to the attack on Nyankunde in relation to two propositions.

45. First, the Pre-Trial Chamber relied on the events in Nyankunde in relation to its findings on the contextual elements of crimes against humanity (article 7). More specifically, the Pre-Trial Chamber considered "Nyankunde" as evidence of the claims that the attack on Bogoro (a) was part of a "widespread campaign of military attacks against civilians in the large geographical area of Ituri",[59] (b) that "rape and sexual slavery was committed by the FNI/FRPI frequently and consistently throughout the region of Ituri in the DRC",[60] and (c) that Germain Katanga and Mathieu Ngudjolo "were aware that the crimes committed during and in the aftermath of the 24 February 2003 attack on Bogoro village were part of a widespread and systematic attack against the civilian population".[61]

46. Second, the Pre-Trial Chamber referred to the attack on Nyankunde as

[58] See Majority Opinion, para. 1661.
[59] Confirmation Decision, para. 409.
[60] Confirmation Decision, para. 415.
[61] Confirmation Decision, para. 578.

part of an argument showing that "Germain Katanga and Mathieu Ngudjolo knew each other and had worked together since the creation of the FNI and FRPI".[62] It is to be noted, in this regard, that the Pre-Trial Chamber considered there were substantial grounds to believe that both co-accused "were each involved in some way in the attacks against the village of Nyankunde", a claim which turned out to be totally unsubstantiated during the trial.

47. It will be noted that the Pre-Trial Chamber did not even hint at the possibility that evidence of the events in Nyankunde demonstrated that the Ngiti fighters of Walendu-Bindi were driven by an "anti-Hema ideology" or otherwise affected the *mens rea* of those who carried out the attack on Bogoro. Yet, this is a crucial finding in the Majority Opinion.[63]

48. For this reason, I believe it is inappropriate for the Majority to now make "Nyankunde" a central pillar of its case under article 25(3)(d)(ii). It is particularly telling, in this regard, that section X.C.3.a) of the Majority Opinion, dealing with the question of whether or not the charges under article 25(3)(d)(ii) exceed the scope of the 'facts and circumstances', makes no mention of Nyankunde.[64] Considering the centrality of "Nyankunde" for the altered charges, it is unlikely that this omission is due to an oversight. It may therefore safely be concluded that the Majority has implicitly conceded that "Nyankunde" was not part of the 'facts and circumstances' of the Confirmation Decision.

49. I therefore conclude that the Majority did not comply with the Appeals Chamber's clear statement of principle that, although changes in

[62] Confirmation Decision, para. 552.
[63] See Majority Opinion, paras 1151-1154.
[64] See Majority Opinion, para. 1445 et seq.

narrative are permissible to a certain extent, there are clear limitations to what is appropriate under regulation 55. In my view, this case is a textbook example of the kind of "drastic change" the ICTY warned against even in cases where all forms of criminal responsibility were charged.[65] Indeed, one struggles to think of how the 'facts and circumstances' could be more contorted than in this case.

B. The application of regulation 55 violates Germain Katanga's right to a fair trial

50. Amending the legal characterisation of facts can only be done insofar as it does not render the trial unfair. It is for that reason that paragraphs (2) and (3) of regulation 55 provide procedural safeguards for the accused. Nowhere has the Appeals Chamber stated that the 'fight against impunity' provides a justification for infringing upon the rights of the accused. The Appeals Chamber has made it very clear that "[h]ow these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented [...] will depend on the circumstances of the case".[66] This means that the mere formal application of the guarantees in paragraphs (2) and (3) of regulation 55 is not, in and of itself, a sufficient guarantee that the rights of the accused are respected.

1. Right not to be compelled to testify (article 67(1)(g))

51. It bears repeating that, on 24 November 2009, the specific charges of "indirect co-perpetration" under article 25(3)(a) were read out to Germain Katanga and he pleaded not guilty thereto.

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[65] See ICTY, Appeals Chamber, *Prosecutor v. Kupreškić et. al*, , "Judgment", 23 October 2001, IT-95-16-A, paras 93, 115-125.

[66] *Lubanga* Regulation 55 Appeals Judgment, para. 85.

52. It seems a fairly basic and uncontroversial requirement that when an accused waives his right to remain silent, he must do so with full understanding of what this waiver implies. If the accused reasonably misapprehends the consequences of his waiver of the right to remain silent, the evidence thus obtained cannot be used against him.

53. It is therefore important to assess the scope of Germain Katanga's waiver of his right to remain silent in this case. It is noteworthy, in this regard, that the Chamber reminded Germain Katanga before he started testifying of the terms of the Chamber's Decision of 13 September 2011.[67] According to this Decision, "once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating."[68] However, this reminder was clearly qualified, in that the permissible scope of questioning to which Germain Katanga could be exposed was limited to "the present case".[69] The Chamber emphasised this point by stating, unambiguously, that "[q]uestions relevant to the case for the cross-examining party must be *strictly related to the charges*" and that such questions "should not merely be aimed at incriminating the accused in relation to facts and circumstances falling outside the *scope of the current case*."[70] To avoid any confusion in this regard, the Chamber required that, if the Prosecutor intended to ask questions that were relevant to the contextual circumstances of the case, he should "state the purpose behind the question and explain how the evidence sought is relevant to

[67] ICC-01/04-01/07-T-314-ENG CT2, pp. 10-11.
[68] Trial Chamber II, "Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused", 13 September 2011, ICC-01/04-01/07-3153 ("*Ngudjolo* Self-incrimination Decision"), para. 7.
[69] *Ngudjolo* Self-incrimination Decision, para. 8.
[70] *Ngudjolo* Self-incrimination Decision, para. 11 (emphasis added).

the *confirmed charges*."[71]

54. To my mind, the terms of this Decision indicated unambiguously that German Katanga waived his right to remain silent *only* in relation to the confirmed charges under article 25(3)(a) and that questions that went beyond the scope of these charges were strictly prohibited. At the very least, the decision did *not* clearly indicate that, by choosing to testify, the accused exposed himself to the risk of self-incrimination under a different form of criminal responsibility. Under these circumstances, at least I was under the impression that Germain Katanga's testimony could only ever be used against him as an alleged 'indirect co-perpetrator'. And if I was under this impression, I think it is reasonable to assume that the accused and his Defence Team also misapprehended the situation and did not contemplate the possibility that Germain Katanga's testimony could ever be used to convict him under article 25(3)(d)(ii). Accordingly, I believe that Germain Katanga did not knowingly and freely waive his right to remain silent in relation to article 25(3)(d)(ii).

55. It is worth noting, in this regard, that the Chamber had made it quite clear, in its decision of 13 September 2011, that it expected Germain Katanga to answer all "permissible questions"[72] and that it would draw "adverse inferences" if he declined to answer.[73] In other words, Germain Katanga was compelled to answer all of the Chamber's questions, as long as they were "permissible". It seems that there was a fundamental misunderstanding between the Majority and Germain Katanga's Defence as to which questions the Majority deemed "permissible". It is worth

[71] *Ngudjolo* Self-incrimination Decision, note 13 (emphasis added).
[72] *Ngudjolo* Self-incrimination Decision, para. 8.
[73] Ibidem.

emphasising, in this regard, that the Chamber, far from putting the accused on notice that his testimony could be used to convict him under different forms of criminal responsibility, took pains to stress that the only role it saw for itself was to determine whether or not Germain Katanga was guilty of "the charges",[74] which can only be interpreted as referring to his alleged criminal responsibility under article 25(3)(a).[75] Had Germain Katanga known that the Majority deemed it "permissible" to force him to answer questions that could incriminate him under a different form of criminal responsibility, he might well have decided to remain silent.

56. The argument that Germain Katanga must have been aware of the existence of regulation 55 cannot be used against him in this context. Indeed, if it is argued that Germain Katanga should have taken the possibility of a recharacterisation into consideration when deciding to give testimony under oath, this begs the question why the Chamber did not think of this possibility itself at the time and, if it did so, why it did not find it necessary to inform the accused of the fact that the Chamber would consider Germain Katanga's evidence for a possible recharacterisation. Again, I did not for a moment contemplate this was a possibility when the Chamber questioned Germain Katanga at such great length. Otherwise, I would certainly not have agreed to a number of questions the bench put to the accused and would have insisted that he was given the option to invoke his right to remain silent in relation to questions that might lead to self-incrimination under a different form of criminal responsibility. In my view, this is the only way in which the

[74] ICC-01/04-01/07-T-324-ENG ET, pp. 64-65.

[75] Note that under regulation 52 the Document containing the Charges includes both a statement of the facts (regulation 52(b)) and a legal characterisation of the facts (regulation 52(c)).

Chamber could have proceeded as it did without running afoul of its obligation under article 64(2) to ensure that the trial is fair and conducted with *full* respect for the rights of the accused.

57. For example, the Chamber questioned Germain Katanga extensively on his role as coordinator between the APC and the fighters of Walendu-Bindi.[76] It should come as no surprise that Germain Katanga enthusiastically answered the many questions about his role as a coordinator. Undoubtedly, he was under the impression that the Chamber was interested in his *defence* against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.

58. However, now the Majority relies heavily on Germain Katanga's role as a coordinator for its finding that he made a 'significant contribution' in the sense of article 25(3)(d). In other words, the Majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.

59. To the extent that the accused was – unintentionally - misled in this regard by the Chamber's decisions and utterances, I consider that any

[76] Transcripts T-324, p. 74-78, 82, 89; T-325, p. 3, 16, 18, 21-22.

answers Germain Katanga gave that incriminated him under article 25(3)(d)(ii) were given in violation of his free will. Using this evidence against him therefore violates article 67(1)(g).[77]

2. Right to be informed of the charges and to have adequate time and facilities for the preparation of the defence (article 67(1)(a) and (b))

60. I turn now to two inter-related further Defence rights that I consider have been infringed: article 67(1)(a) and (b)**.** Article 67(1)(a) provides for the accused's right to 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 Germain Katanga's right under article 67(1)(a) to be fully respected. As acknowledged by the Majority in the Notice Decision, both the European and Inter-American Courts of Human Rights hold that this right incorporates being informed of the legal qualification of the charges.[78] In addition, the accused must be given adequate time and facilities for the preparation of the defence, a right so prominent that it is guaranteed both by the Statute (article 67(1)(b)) and the Regulations (Regulation 55(2)(b)).

61. I consider there to be a host of problems in this respect. First, the timing of the notice was anything but "prompt" in the sense of article 67(1)(a) (*infra*, II.B.2.(a)). Second, I believe that the Majority failed to give sufficiently detailed information (*infra*, II.B.2.(b)). Third, I think that the notice was grossly inadequate (article 67(1)(a)), all of which impacted on

[77] As I will discuss later in this Opinion, Germain Katanga's evidence is the most relied upon source in the Majority Opinion. See *infra* II.B.1 Right not to be compelled to testify (article 67(1)(g)).

[78] Notice Decision, para. 22, note 35: "ECHR, *Kamasinski v. Austria, Application no. 9783/82*, Judgement, 19 December 1989, para. 79; ECHR (Grand Chamber), *Pélissier and Sassi v. France, no. 25444/94*, Judgement, 25 March 1999, para. 51; Inter-American Court of Human Rights, *Barreto Leiva v. Venezuela, (Merits, Reparations and Costs)*, series C, No. 206, 17 November 2009, para. 28."

the accused's right to adequately prepare his defence (article 67(1)(b) (*infra*, II.B.2.(c)).

a) Timing of notice under regulation 55

62. I fail to see how the Majority's Notice Decision could be consistent with Germain Katanga being "promptly" informed of the charges in accordance with article 67(l)(a). Notice under regulation 55(2) "*shall*" be given "[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change".[79] In my view, this language means that, although the Chamber's decision to give notice under regulation 55(2) is discretionary, the Chamber is under an ongoing obligation to remain vigilant in considering whether to trigger regulation 55.

63. The Majority had two and a half years of trial during which they could have provided Germain Katanga with reasonable notice that the charges 'may' be subject to change. I therefore do not believe that the timing of the Notice Decision can be reconciled with the duty of diligence which rests upon the Chamber. This is particularly so in light of the fact that the Defence on several occasions requested – without success - additional clarifications of the Document Containing the Charges, in particular regarding the alleged co-perpetrators of Germain Katanga,[80] challenged

[79] (Emphasis added). I note, in this regard, that the Appeals Chamber has clearly interpreted regulation 55 in light of article 67(1)(a) of the Statute, see *Katanga* Regulation 55 Appeals Decision, para. 100.

[80] "Defence Motion seeking the Amendment of the Document containing the Charges", 9 June 2008, ICC-01/04-01/07-574; "Defence Reply to Prosecution's Consolidated Response to the Defences' Motions Regarding the Document Containing the Charges", 20 June 2008, ICC-01/04-01/07-620; "Defence Application for an Amended Document Containing the Charges", 12 March 2009, ICC-01/04-01/07-954; "Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges", 17 July 2009, ICC-01/04-01/07-1310; "Defence Observations on a 'Summary Document Reflecting the Charges'", 6 October 2009, ICC-01/04-01/07-1509; "Décision relative au dépôt d'un résumé des charges par le Procureur", 21 October 2009, ICC-01/04-01/07-1547;

the mode of liability, but also made the Defence position clear through statements, submissions and questions.[81] On no occasion was any issue raised by the Prosecutor, the co-accused, the OPCV, or the Chamber relating to an alternative form of personal liability.[82]

64. Despite limited precedent before this Court, notice of possible recharacterisation has consistently been provided at a far earlier stage of the trial proceedings, permitting the accused to appropriately adjust their

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"Defence Observations on the Summary of Charges and Request for Clarification and or an extension of time", 5 November 2009, ICC-01/04-01/07-1601; "Defence Observations on the Document Summarising the Charges", 19 November 2009, ICC-01/04-01/07-1653; "Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23 November 2009 on the Defence Request for Clarification of the Charges", 30 November 2009, ICC-01/04-01/07-1690; "Décision relative à la demande d'autorisation d'appel contre la décision orale de la Chambre de première instance II du 23 novembre 2009 relative à la notification des charges", 23 June 2010, ICC-01/04-01/07-2213.

[81] It was even clearer by 7 March 2011, i.e. more than one year and a half before the Notice Decision, through the disclosure of the "Summaries of Defence Witnesses" (ICC-01/04-01/07-2760-Conf-Anx2), which showed that the Defence intended to argue, and to prove, *inter alia*, that, Germain Katanga was not President of the FRPI at the time of the Bogoro attack; there was no hierarchy in the FRPI at the time of the Bogoro attack; Germain Katanga did not at the time have effective control over the Ngiti fighters and did not attend the Bogoro attack; Yuda and Dark's group attended the Bogoro attack; EMOI attended the Bogoro attack; Germain Katanga went to Beni to collect weapons; and weapons were sent from Beni to Aveba, etc. Further details were given by the disclosure of the statements of Defence witnesses between March and June 2011.

[82] Much procedural energy was indeed devoted to the law on article 25(3)(a) and the control of the crime theory. See my Dissenting Opinion of 21 November 2012 to the Notice Decision, para. 38, note 54 which stated: "Both defence teams asked the Chamber to reject the Pre-Trial Chamber's interpretation of Article 25(3)(a). Katanga Defence, *Prosecutor v. Katanga and Ngudjolo*, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, 30 October 2009, ICC-01/04-01/07-1578-Corr; Ngudjolo Defence, *Prosecutor v. Katanga and Ngudjolo*, Mémoire de la Défense de Mathieu Ngudjolo sur l'interprétation de l'article 25(3)(a) du Statut de Rome, 28 October 2009, ICC-01/04-01/07-1569. Though the prosecution adhered to the control over the crime theory, it asked the Chamber to "revisit or closely examine" two elements of the Pre-Trial Chamber's interpretation. Prosecution, *Prosecutor v. Katanga and Ngudjolo*, Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541. The final submissions of the Defence for Germain Katanga again challenged the validity of the control over the crime theory and reiterated its arguments raised in October 2009. Katanga Defence, *Prosecutor v. Katanga and Ngudjolo*, Public Redacted Version - Second Corrigendum to the Defence Closing Brief, 29 June 2012, ICC-01/04-01/07-3266-Corr2-Red, paras 1111-1112; Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, 21 May 2012, ICC-01/04-01/07-T-33 8-RED-ENG-WT, p. 18-19, 52 *et seq*".

defence to the charge.[83] For example, the Trial Chamber V(A) decision in *Prosecutor v. Ruto and Sang* was rendered three months after the trial hearings started on 10 September 2013.[84] Even at this relatively early stage, the Chamber felt it prudent to justify why notice was not given earlier still, stating:

> *The Chamber acknowledges that Regulation 55(2) Notice could have been given at an even earlier point during the trial proceedings than now. However, this is the first extended break in the proceedings since the Prosecution Additional Submission was filed and the Chamber required additional time to deliberate on the legal and factual complexity raised by the relief sought.*[85]

65. Trial Chamber V(A) emphasised that, despite any additional preparation time which comes from giving regulation 55(2) Notice, waiting to provide such notice increases the chances of prejudice to the Defence. It further stated that:

> *[t]he remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of*

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[83] In *Prosecutor v. Thomas Lubanga Dyilo*, Regulation 55 notice on the re-characterisation of the nature of the armed conflict given thirteen months prior to the start of trial. Notice of re-characterisation regarding sexual offences was given the day the Prosecution closed its case. See Trial Chamber I, "Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted", 13 December 2007, ICC-01/04-01/06-1084; "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 14 July 2009, ICC-01/04-01/06-2049. In *Prosecutor v. Jean-Pierre Bemba* Trial Chamber III gave notice at the close of the Prosecution case: "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 21 September 2012, ICC-01/05-01/08-2324, para. 5.

[84] Trial Chamber V(A), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation", 12 December 2013, ICC-01/09-01/11-1122 ("*Ruto and Sang* Notice Decision").

[85] *Ruto and Sang* Notice Decision, para. 28.

respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.[86]

66. Contrary to all other Chambers of the Court, the Majority in this case appears to be unconcerned by any of these considerations and deems that the accused should have anticipated the possibility of a requalification. My firm view remains that a recharacterisation from article 25(3)(a) to article 25(3)(d)(ii) was, to the contrary, entirely unforeseeable to the Defence and rendered at a point in the proceedings when the Defence was unable to effectively respond to it. As observed above,[87] if the Majority can argue that the Defence should have been able to foresee an article 25(3)(d)(ii) recharacterisation, then it seems equally reasonable that the Majority should have been able to foresee this possibility as well and given notice at a point that would have respected the rights to have adequate time and facilities for the preparation of the defence pursuant to article 67(1)(b) and regulation 55(3)(a), and to have witnesses examined pursuant to article 67(1)(d) and regulation 55(3)(b).

67. Considering how late the notification was given, it was therefore of the utmost importance that, when it came, it would be as complete and detailed as possible. In this case, however, the Majority failed to do so. Indeed, it was only after being admonished by the Appeals Chamber[88]

[86] *Ruto and Sang* NoticeDecision, para. 27.

[87] See *supra*, para. 56.

[88] *Katanga* Regulation 55 Appeals Decision, para. 102. Judge Tarfusser also found in his dissent that the Impugned Decision fell "largely short of providing an adequate amount of information to the accused". Judge Tarfusser emphasised that the Majority on Appeal had itself explicitly admitted that it "neither knows the precise nature of the recharacterisation that may be made nor the evidence on

that the Majority acknowledged the need to provide considerable further clarifications in order to permit the Defence to defend itself effectively.[89] However, as I will argue in what follows, the Majority's Further Notice Decision still fell far short in this regard.

b) Need to provide detailed information

68. It is beyond dispute that article 67(1)(a) and (b) require that the Defence is given detailed information about the charges. The importance of providing detail of the relevant charges has also been recognised by this Chamber. On 13 March 2009, more than eight months before the start of the trial, the Trial Chamber required the Prosecutor to submit an in-depth analysis chart ("IDAC") to the Defence prior to the start of trial detailing how each piece of the Prosecution evidence related to each of the charges levelled against the accused. The reason behind this instruction was that such information was necessary to give meaning to the right of the accused to prepare a defence. The Chamber referred to the need to ensure that "there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber" and that such a table was "necessary for a fair and effective presentation of the evidence on which the Prosecution intends to rely at trial".[90] It is worth citing in full what the Chamber saw the table would achieve:

> *[It would] ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b)*

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which the Trial Chamber may rely in relation thereto", para. 24 referring to the Majority view in the *Katanga* Regulation 55 Appeals Decision, para. 95.

[89] "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, ("Further Notice Decision"), para. 9. See also the discussion in my Dissent to that Decision, "Dissenting Opinion of Judge Christine Van den Wyngaert", 20 May 2013, ICC-01/04-01/07-3371-Anx ("Dissenting Opinion of 20 May 2013"), paras 10 – 20.

[90] "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009, ICC-01/04-01/07-956, para. 5.

of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them. [….] The Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of trial.[91]

69. In light of this high standard applied to the initial charges under article 25(3)(a), one can only wonder why the Majority has made no serious effort to inform Germain Katanga of the precise nature of the charges against him under article 25(3)(d)(ii). Indeed, I think it is fair to say that the Majority's negative attitude with regard to the accused's repeated requests for more detailed information violates the letter and the spirit of the very principles which the Chamber pronounced before the start of the trial.

70. This situation stands in sharp contrast with how regulation 55 has been applied by other Trial Chambers. For example, Trial Chamber V(A) in *Prosecutor v. Ruto and Sang* alluded to the importance of detailed notice in its decision of 12 December 2013 providing notice that, with respect to Mr Ruto, there is a possibility that the legal characterisation of the facts

[91] Idem, para. 6.

may be subject to change to accord with article 25(3)(b), (c) or (d).[92] On 9 July 2012, the Chamber had already directed the Prosecution to file a pre-trial brief "explaining its case with reference to the evidence it intends to rely on at trial".[93] In their Notice Decision, Trial Chamber V(A) directed the Prosecution to file an addendum to this brief wherein the Prosecution was to explain its case, with accompanying evidence, under each of the proposed legal characterisations.[94]

71. It would of course have been difficult for the Majority to ask the Prosecutor to submit a new document containing the charges under article 25(3)(d)(ii) at the end of the trial. Doing so would have given the Prosecutor an unfair advantage. I therefore submit that, at the end of the trial, it is only appropriate to apply regulation 55 in relation to purely technical matters, such as the nature of the armed conflict, for which it is not necessary to provide any additional notice concerning the underlying factual basis of the recharacterisation.

72. I stress, in this regard, that it is not appropriate to argue that, because the accused is aware of everything that was presented at trial, he or she therefore has notice of everything.[95] As already noted, charges are more

[92] *Ruto and Sang* Notice Decision. See also discussion of the issue prior to the commencement of trial: ICC-01/09-01/11-T-15-ENG ET page 25, line 16 to page 30, line 18; "Order scheduling a status conference", 14 May 2012, ICC-01/09-01/11-413", para. 5; "Order setting the deadline for submissions on Regulation 55 and Article 25(3)", 15 June 2012, ICC-01/09-01/11-426.

[93] Trial Chamber V(A), *Prosecutor v. William Ruto and Joshua Sang*, "Decision on the schedule leading up to trial" 9 July 2012, ICC-01/09-01/11-440. See also "Prosecution's Updated Pre-Trial Brief", 9 September 2012, ICC-01/09-01/11-625-AnxB-Red.

[94] *Ruto and Sang* Notice Decision, para. 45.

[95] See, for example, Majority Opinion, para. 1520: [TRANSLATION] "it is expedient not only to refer to information provided by the Chamber following the 21 November 2012 Decision, but also to all the information which, given the course of the hearings and the content thereof, was evidently in the Defence's possession already." ("il convient non seulement de se référer aux informations que la Chambre a données à la suite de la Décision du 21 novembre 2012 mais aussi à toutes celles qui,

than a list of isolated facts and a list of legal elements. Instead, charges are *allegations* about the existence of specific relations between evidence and factual propositions on the one hand, and between those several factual propositions on the other. Together, they are *claimed* to demonstrate a particular narrative which, if true, would cover all the legal elements of the charges with which it corresponds.

73. Having a general idea about how the Majority might argue the case is simply inadequate. As any lawyer knows, the devil is always in the detail and this is why the Defence is entitled to know the charges in as much detail as possible. Whereas it may be difficult to give very detailed information about how the charges will be proved at the commencement of a trial, once the trial has run its course, there is no excuse for not giving the accused exhaustively detailed information about the intended recharacterisation so that he or she may defend him or herself as effectively as possible.

c) Inadequate notice

74. The Majority Opinion states that, because the facts relied upon for the recharacterisation under article 25(3)(d)(ii) are the same as those initially relied upon by the Prosecutor under article 25(3)(a), the only questions that need to be asked in relation to article 67(1)(a) are whether the charges under article 25(3)(a) were sufficiently notified and whether the Defence received adequate notice about those facts that have taken a "different significance" under article 25(3)(d)(ii).[96] As I do not agree with my colleagues that the facts underlying the article 25(3)(d)(ii) charges are

compte tenu de la manière dont se sont déroulés les débats et de leur teneur, étaient d'évidence déjà en possession de la Défense.").

[96] Majority Opinion, paras 1488-1489.

the same as those that were initially charged under article 25(3)(a),[97] I am also not in agreement with this suggestion.

75. Moreover, the Majority's argument that it did not have to provide detailed notice of the new charges under article 25(3)(d)(ii) because they are based on the same 'facts and circumstances' as the charges under article 25(3)(a) fails. This is because *any* legitimate application of regulation 55 must, by definition, be limited to the same 'facts and circumstances' as contained in the Confirmation Decision. Accordingly, if the Majority's reasoning were accepted, it would never be necessary to provide further notice.

76. Be that as it may, even if it were true, as the Majority Opinion states, that this is just an instance of the same facts taking on a particular importance,[98] then it would still be incumbent upon the Majority to explain exactly how the significance of those particular facts has changed and how those changes have altered the narrative of the charges. However, I cannot fail to note that even when the Majority purported to provide the Defence with further information, it remained exceedingly vague. For example, on 15 May 2013, the Majority gave the Defence more information about the charge that Ngiti combatants committed crimes in Bogoro on 24 February 2003. However, rather than indicating a number of specific incidents of crimes committed by particular Ngiti combatants, the Majority stated:

> *[t]he Defence is invited to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants*

[97] See *supra*, II.A.1 The Judgment relies on facts that clearly fall outside the 'facts and circumstances' of the Confirmation Decision.
[98] Majority Opinion, paras 1488-1489.

from Walendu-Bindi collectivité, sometimes identified by the name FRPI.[99]

With all due respect, I struggle to think of a formula that would have been any vaguer than this.

77. In relation to the Defence request to have more specific notice about when and where the common purpose to attack the civilian population of Bogoro was supposedly formed, the Majority states that:

> *the Defence should not have confined itself to a purely formal conception of the common purpose by seeking proof of planning or an express statement of the group's ambitions and/or the promulgation of a decision which it may have formally taken.*[100]

78. However, other than stating the general principle that it is *possible* to infer the existence of a common purpose from circumstantial evidence,[101] the Majority never explained with any level of precision which particular circumstantial evidence it had in mind, let alone how it thought this specific evidence proved the existence of the criminal common purpose.

79. After this unhelpful comment, the Majority Opinion goes on by stating that, "even assuming" evidence of specific meetings was essential to prove the common purpose, it was incumbent upon the Defence to refer to those meetings that had already been discussed during the trial and gives *as an example* a meeting mentioned in the Confirmation Decision at

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[99] Further Notice Decision, para. 19.

[100] Majority Opinion, para. 1516: "la Défense ne devait pas se limiter à une conception purement formelle du dessein commun en recherchant la preuve d'une planification ou d'une formulation explicite des ambitions du groupe et/ou de la communication d'une décision formelle qu'il aurait prise", referring to: "Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013" 26 June 2013, ICC-01/04-01/07-3388 ("Décision du 26 juin 2013") paras 27, 28.

[101] Décision du 26 juin 2013, para. 28.

paragraph 548(vi).[102] First, it is entirely inappropriate to be so ambivalent about the importance of certain specific meetings. Second, it is totally inappropriate to formulate charges on such a central issue by way of examples. Third, it is hard to see how the Defence should have guessed that this particular meeting was relevant to the new charges. The Majority had only made reference to paragraph 548 twice before; once in relation to the *objective* elements of article 25(3)(d), i.e. Germain Katanga's alleged contribution and particularly his "overall coordinating role"[103] and once in relation to the allegation that "on the eve of the attack, several commanders took up positions with their troops in Medhu or Kagaba in order to launch the Bogoro operation",[104] which is unrelated to the question of the genesis of the alleged criminal common purpose.

80. Last but not least, I simply cannot see the relevance of this particular reference, as it relates to a meeting which allegedly took place the day before the attack on Bogoro, between Germain Katanga, Mathieu Ngudjolo and other commanders in the camp of Cobra Matata (i.e. Bavi). Not only is there no evidence for this meeting (as is evident from the fact that the Majority makes no reference to this meeting in its reasoning under article 25(3)(d)(ii)), it also allegedly involved Mathieu Ngudjolo and Cobra Matata, two persons of whom it has not been shown that they took part in the attack on Bogoro. In other words, the Majority seems to be arguing that the Defence had received sufficient notice because the Confirmation Decision mentioned a meeting that never took place and which, even if it did, would have been irrelevant to the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi.

[102] Majority Opinion, para. 1516.
[103] Notice Decision, para. 28.
[104] Further Notice Decision, para. 20.

81. Be that as it may, the most fundamental problem with regard to the lack of notice is, in my view, that the Majority has never informed the Defence of the precise evidentiary basis of the charges under article 25(3)(d)(ii).[105] In response to repeated requests by the Defence in this regard, the Majority laconically states:

> *as to the list of evidence to which it will refer, the Chamber considers that at this juncture, the Defence could not have been unaware of that evidence and therefore the Bench had no need to provide it.*[106]

82. The Majority also rejected the Defence's request to be informed of how it evaluated the credibility of the evidence by stating that the Defence had no right to know what the Chamber thought about the evidence before the judgment was pronounced.[107]

83. Whether or not one agrees with this from a formal point of view, I cannot help but notice how artificial these arguments sound in this particular context. Of course, the Defence was aware of the evidence in the case. However, the Defence was also aware of the fact that the Majority clearly did not believe a considerable portion of this evidence, otherwise it would not have taken the step to recharacterise the charges to begin

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[105] Although regulation 52 of the Regulations of the Court does not specify that the Document Containing the Charges should include references to the supporting evidence, I note that all Chambers in all cases have required the Prosecutor to provide the Defence with either a document or a table indicating precisely upon which evidence she relies in order to prove her allegations. This requirement has been applied also when the charges are amended (see, for example, Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo,* "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, (c)(ix) of the operative part). I can think of no good reason why the accused should not be entitled to the same in cases when the charges are recharacterised, especially at the end of the trial, when the Trial Chamber knows exactly which evidence is available in the case record.

[106] Majority Opinion, para. 1524: "[e]n ce qui concerne la liste des preuves auxquelles entend se référer la Chambre, celle-ci estime qu'à ce stade, la Défense ne pouvait les ignorer et qu'elle n'avait donc pas à les lui adresser".

[107] Majority Opinion, para. 1524.

with. Accordingly, as the Defence was not informed about which parts of the Prosecutor's evidence the Majority was still considering relying upon, the Defence was left guessing about which evidence it had to challenge in order to defeat the article 25(3)(d)(ii) charges. More importantly, the Defence could not possibly have foreseen how the Majority would use its own evidence, as well as that of the co-accused – which was presented to *disprove* the charges under article 25(3)(a) – in order to *prove* the charges under article 25(3)(d)(ii). The significance of this point can be seen from the fact that the Majority relied heavily on several Defence witnesses and exhibits, such as D02-148, D03-88, the "Lettre de doléances", as well as Germain Katanga's own testimony.[108] Had the accused been given adequate notice of how the Majority planned on using this evidence against him, the Defence may well have decided to recall some of these witnesses to clarify a number of points.

84. The issue of notice perfectly illustrates, in my view, how problematic it is when chambers (re)formulate charges, especially when this happens at the end of a trial. By doing so, the entire balance and structure of the proceedings was upset. For example, the whole purpose of having closing arguments is to give the Prosecutor an opportunity to state, one last time and in great detail, how she believes the evidence proves her allegations. The reason why the Defence is never required to submit its final observations at the same time as the Prosecutor is because it has a fundamental right to *respond* to the latter's claims. What the Majority has done here, however, is similar to compelling the accused to defend himself *before* he learns about the precise nature of the allegations against him.

[108] See *infra*, para. 167.

85. Based on these considerations, it is my firm view that the Majority has completely failed to live up to the most basic requirements in terms of notice to the Defence and has violated the accused's right to be informed in detail about the charges.

3. Failure to afford a reasonable opportunity to investigate (article 67(1) (b) and (e))

86. The Majority's arguments concerning the Defence's right to investigate the new charges can be summarised as follows: first, the Majority argues that the Defence did not prove that conducting an investigation was an absolute necessity in this case and that there were other means by which the accused could defend himself (*infra,* II.B.3.(a)*)*;[109] second, the Majority seems to suggest that it offered the Defence a number of meaningful alternatives, short of fresh investigations, to defend itself, but that the latter failed to seize them (*infra,* II.B.3.(b));[110] and third, the Majority clearly accuses the Defence of not having been sufficiently diligent and for having squandered the opportunity to investigate when it presented itself (*infra,* II.B.3.(c)).[111] Below I will traverse only some of the reasons why I distance myself completely from the Majority on each of these points.

a) Serious investigation was necessary

87. Contrary to what my colleagues assert, an additional investigation into a number of key factual issues was more than necessary. It suffices to point to the example of Nyankunde and what is alleged to have

[109] Majority Opinion, para. 1538: [TRANSLATION] "further investigations or search for new evidence do not constitute the only possible means of defence" ("la conduite de nouvelles enquêtes ou la recherche de nouveaux éléments de preuve ne constitue pas la seule voie de défense possible").
[110] Majority Opinion, para. 1574. See *infra,* II.B.3.b). There were no meaningful alternatives, short of fresh investigation.
[111] Majority Opinon, para. 1568 et seq.

happened there on 5 September 2002 to illustrate the point. Seeing that very little reliable evidence was presented on this point during the trial - which can be explained by the fact that this allegation was all but immaterial under the initial article 25(3)(a) charges - and noticing also how extremely weak the evidential basis is on which the Majority relies for its findings in this regard, I think it is difficult to maintain that further investigations were anything other than a bare necessity. The Chamber accepted as much on 26 June 2013:

> *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 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 […].*[112]

88. After this the Majority had what can only be described as a complete change of heart on this matter:

> *[the Majority] has never taken the view that further Defence investigations in situ were indispensable to meet the fair trial requirement. It merely refrained from objecting to the Defence's possible pursuance of its*

[112] "Decision on the Defence Requests set forth in observations 3379 and 3386 of 3 and 17 June 2013" 26 June 2013, ICC-01/04-01/07-3388-tENG ("Decision of 26 June 2013"), paras 17-18.

investigations[113]

89. While I agree with the Majority that regulation 55 does not give the Defence an unfettered right to conduct unlimited investigations, I think that in this particular case it was absolutely clear that, in order to maintain some level of fairness and balance in the proceedings, the Defence had to be able to conduct a meaningful investigation. It is noteworthy, in this regard, that prior to the new charges under article 25(3)(d)(ii), there was no need for the Defence to invest its limited resources in the investigation of questions such as what happened in Nyankunde or who inflicted most harm upon the civilian population of Bogoro. As previously noted, the Defence was perfectly entitled to limit itself to challenging other aspects of the Prosecutor's case under article 25(3)(a), and it therefore had no need to investigate these facts.

90. The mere existence of regulation 55 cannot impose a burden upon the Defence to investigate all possible facts and circumstances contained in the Confirmation Decision, just in order to be prepared for the eventuality that the Chamber might at some point decide to recharacterise the charges. Such a suggestion would run counter to the avowed purpose of why we have regulation 55, i.e. to allow for shorter, more focused, trials. Accordingly, I am of the view that if the Defence can identify particular factual issues which it did not previously investigate – without having been negligent in this regard – and it is clear that these issues have a particular significance in the context of the recharacterised charges, then the Defence should, as a matter of

[113] Majority Opinion, para. 1553: "Il n'a donc jamais été question, pour elle, de considérer que l'accomplissement de nouvelles enquêtes effectuées in situ par la Défense était indispensable pour satisfaire à l'exigence d'équité du procès. Elle s'est bornée à ne pas s'opposer à ce que la Défense poursuive éventuellement ses enquêtes".

principle, be given a meaningful and realistic opportunity to investigate these issues.

91. I therefore fundamentally disagree with my colleagues when they argue that it was somehow incumbent upon the Defence to demonstrate why further investigations were absolutely necessary.[114] To the extent that the Defence had to demonstrate a need for further investigations, it amply did so by identifying those areas which it had not previously investigated through no fault of its own. The requirement that the Defence should somehow have proved that additional investigations would have yielded new information that would have been favourable to its case is plainly incongruous. It amounts to demanding that the Defence predict – prove, even – what the results of the investigation will be. However, common-sense dictates that it is simply impossible to foresee what the evidence one may or may not discover will reveal. One therefore wonders what more the Defence could have done, other than stating that it *hoped* that the witnesses it would interview would contradict the allegations contained in the new charges.[115]

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[114] Majority Opinion, para. 1581: [TRANSLATION] "the Defence shied away from demonstrating specifically that further investigations were necessary […], even though the Chamber had expressly requested the Defence to do so." ("*la Défense s'est abstenue de démontrer, de manière spécifique, que des enquêtes complémentaires étaient pour elles nécessaires […] alors même que la Chambre le lui avait expressément demandé*").

[115] The Majority's suggestion, at paragraph 1582, that the Defence should have indicated what evidence it hoped to obtain from the witnesses it had already met, would, for the same reasons, only have been answered by similarly aspirational statements on the part of the Defence. It is highly questionable whether the Majority would have been satisfied with this and have granted the requested extension of time for further investigations: [TRANSLATION] "had it been important to the Defence to continue its interviews with certain persons whom it met for the first time in the summer of 2013, it would have been at liberty to request additional time, provided, as the Chamber indicated to the Defence, it justified its request. Again, however, the Defence did not make use of this possibility, which it had been expressly given by the Chamber, if only to request in general terms additional time to continue its investigations without any further clarification or justification as to the significance of any testimony to its case or its relevance within the context of the recharacterisation."

92. The fundamental flaw in the Majority's reasoning lies in the fact that they seem to argue that further investigations are only "necessary" under regulation 55(3) when they will result in new information that may have an impact on the outcome of the proceedings. However, this is a crucial misconception of what this provision means. The necessity in question is not to be measured on the basis of what impact further investigations may have on the outcome of the case. Rather, necessity here refers to the fairness of the proceedings. Accordingly, even if the investigations yield no useful new evidence whatsoever, this does not mean – even with hindsight - that they were not necessary. Arguing otherwise would imply that Defence investigations are always a waste of time when the accused is convicted in the end.[116] The point of defence investigations is to give the accused a fair opportunity to challenge the charges and the evidence against him or her. Even if in the end the accused is convicted, the defence's investigatory efforts will still have made a very important contribution to the trial process, namely by showing that the incriminating evidence was so strong that it could not be defeated by whatever evidence the defendant could – or, crucially, could not – find to contradict the charges. In other words, defence investigations that yield no significant result play a very important role in confirming the validity

("s'il avait été important pour la Défense de poursuivre ses entretiens avec telle ou telle des personnes qu'elle a pu rencontrer pour la première fois au cours de l'été 2013, il lui aurait été loisible de solliciter de sa part un délai supplémentaire, à condition, comme la Chambre le lui avait indiqué, de justifier une telle demande. Or, là encore, la Défense n'a pas usé de cette possibilité que lui avait pourtant expressément donnée la Chambre sauf à demander, de manière générale, un délai supplémentaire pour poursuivre ses enquêtes sans autre précision ou justification sur l'importance de tel ou tel témoignage pour sa cause ainsi que sur sa pertinence dans le cadre de la requalification.")

[116] For this reason I find the Majority's statement, in paragraph 1584, that the Defence has no right to investigations that yield favourable results entirely misplaced. However, it is very illustrative of the Majority's mindset as far as the accused's defence rights are concerned. [TRANSLATION] "The defence has no acquired right to obtain from its investigations results that are always favourable to its case." ("Il n'existe aucun droit acquis, pour une Défense, d'obtenir de ses enquêtes des résultats toujours favorables à sa cause.").

of the conviction. However, if no investigation takes place at all, there always remains the reasonable possibility that evidence might have been found that could contradict the available incriminating evidence.[117]

93. As I noted in my initial dissent, appended to the November 2012 Notice Decision, the Majority's application of regulation 55 can only be understood as a consequence of a fundamental misconstruction of the adversarial process. While article 64(8)(b) of the Statute gives Trial Chambers considerable flexibility in how to conduct trial proceedings, it has been a deliberate choice of this Trial Chamber to conduct the proceedings in an adversarial manner.[118] Although the Chamber reserved the right to order the production of all evidence that it considered necessary for the determination of the truth[119] (a *discretionary* power as stipulated in article 69(3)), the trial was essentially organised in an adversarial manner.[120]

94. In inquisitorial systems, the main responsibility for fact-finding is centralised in the hands of a neutral magistrate and the evidence is largely collected before the start of the actual trial. Thus, applying the different legal recharacterisation in that kind of system is not likely to give rise to the same concerns as the ones voiced in this Opinion. Indeed, in such a procedural model, the entire evidence of the case is centralised in a shared *dossier*, the contents of which are known to the parties and participants right from the start of the proceedings. The Chamber trying

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[117] See *infra* III.B.2 Missing evidence.

[118] "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr ("Rule 140 Decision").

[119] Rule 140 Decision, para. 3.

[120] The fact that paragraph 7 of the Rule 140 Decision foresaw the possibility of calling further witnesses after the defence teams had concluded their case did not fundamentally change the adversarial nature of the trial. In any event, the Chamber did not avail itself of this option, and no further evidence was called after the defence finished their cases.

the case can freely decide which evidence to call and rely upon, independently of the parties.

95. By contrast, in adversarial proceedings, the spectrum of available evidence is more limited and, crucially, determined by what the parties actually proffer. What evidence the Defence will present is determined entirely in function of what the charges are and how the Prosecutor has substantiated them.

96. Any analysis of whether a given invocation of regulation 55 is fair must thus be carried out on a case-by-case basis in light of the Court's procedural structure and must be mindful of how the trial has actually been conducted. The Majority's reference to cases from the European Court of Human Rights, concerning late recharacterisations in particular domestic procedural contexts that are different from how this case has been conducted,[121] is therefore of limited interest. In the end, all that matters is whether *this* proposed recharacterisation is fair in light of the way in which *this* trial has been conducted.

97. Moreover, even if none of these procedural considerations were relevant, it would still be strange for an inquisitorially-minded Majority to close its eyes to additional evidence. Indeed, the only way in which the Majority can consistently claim to be interested in the truth, and deny the Defence's request to conduct further investigations at the same time, is if it made a finding that no new evidence that might be found during an additional investigation could make a difference to its existing opinion.[122]

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[121] For example, see Notice Decision, para. 16.

[122] See Majority Opinion, para. 1553: "Il n'a donc jamais été question, pour elle, de considérer que l'accomplissement de nouvelles enquêtes effectuées *in situ* par la Défense était indispensable pour satisfaire à l'exigence d'équité du procès. Elle s'est bornée à ne pas s'opposer à ce que la Défense poursuive éventuellement ses enquêtes".

However, considering the dearth of reliable evidence on so many of the points in question, I believe such a claim would be entirely unjustifiable. On the contrary, I submit that if, for example, the Defence had found a single credible witness who would have testified that Cobra Matata's troops were responsible for the large majority of civilian deaths in Nyankunde, this would have undermined the entire edifice of the Majority's theory about this case.[123]

98. In short, I believe that the Majority's arguments in relation to the need for additional Defence investigation are wrong both as a matter of law and as a matter of fact.

b) There were no meaningful alternatives, short of fresh investigation

99. Throughout the Majority's Opinion on regulation 55, there is a string of reproaches to the Defence, accusing the latter of not having made full use of the alternative means to defend the accused, short of investigating, that were available to it.[124] However, upon closer inspection, it turns out that the alternative opportunities they had in mind were less than meaningful.

100. For example, the Majority seems to make much of the fact that it allowed the Defence to make submissions based on the existing evidence in the case record. As I have noted, I was under the impression that the Majority had – as a matter of principle – accepted the need for new

[123] See *infra*, III.B.2 Missing evidence.

[124] Majority Opinion, para. 1578: [TRANSLATION] "in focusing on the investigations the Defence had somewhat "lost sight" of the procedural possibility favoured by regulation 55" ("en se concentrant sur les enquêtes, la Défense avait quelque peu « perd[u] de vue » la possibilité procédurale pourtant privilégiée par la norme 55") (footnote omitted).

investigations on 26 June 2013,[125] but then changed its previous position by compelling[126] the Defence to submit a brief on the basis of the existing evidence.[127] This to me seems like it was an attempt by the Majority to put the Defence's argument (i.e. that no meaningful defence was possible without further investigations) belatedly to the test. However, as the Defence had no precise idea about how the Majority would formulate its conclusions under article 25(3)(d)(ii),[128] the best that could be expected from the accused was for him to formulate general denials. This so-called opportunity for the accused to defend himself on the basis of the existing record therefore amounted to little more than a chance to plead "not guilty" to whatever charges under 25(3)(d)(ii) the Majority had in mind.[129] Accordingly, on 25 October 2013, the Defence was confined to reiterating its inability to provide an adequate response or defence in respect of the altered mode of liability in the absence of additional investigations.[130] I still cannot understand how this exercise could have proven whether or not the Defence was able to meaningfully defend itself *without* additional investigations, because we cannot tell how much more persuasive the Defence might have been *with* additional evidence.[131]

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[125] Décision du 26 juin 2013, paras 17-18.

[126] The Majority Decision was couched as an 'invitation' but it was clear from the wording of paragraph 18 of the 2 October 2013 Decision that this was the Defence's last chance. "Décision relative aux observations de la Défense (document 3397-Conf du 17 Septembre)", ICC-01/04-01/07-3406, ("Decision of 2 October 2013").

[127] See *supra*, para. 87.

[128] See II.B.2 Right to be informed of the charges and to have adequate time and facilities for the preparation of the defence (article 67(1)(a) and (b)).

[129] Idem.

[130] "Defence Observations on Article 25(3)(d) of the Rome Statute", 25 October 2013, ICC-01/04-01/07-3417, para. 1.

[131] "Dissenting Opinion of Judge Christine Van den Wyngaert" to the Decision of 2 October 2013, 2 October 2013, ICC-01/04-01/07-3406-Anx, para. 5.

101. The Majority also seems to suggest that the Defence did not maximise the opportunity to recall witnesses who had already testified in this case before.[132] With respect, I do not think it was appropriate to ask the Defence to select which existing witnesses to recall before having finalised its investigation. However, the Defence was never afforded the opportunity to have a meaningful discussion before this Chamber about whether or not it was essential for the Defence to be able to conduct further investigations, or present other fresh evidence in relation to article 25(3)(d)(ii). My recommendation for a status conference to exhaustively litigate whether it was fair to recharacterise the charges in these circumstances was never heeded.[133]

102. Therefore, although I am not in a position to determine whether or not the Defence has been able to usefully explore the possibility of recalling old witnesses, I can only conclude that the Majority put the Defence in a very awkward position by forcing it to give a provisional list of witnesses before being able to conduct any further investigation. I can perfectly understand that any party would be reluctant to commit to choosing its witnesses, even provisionally, before it has been able to canvas all the available evidence. This reluctance is all the more understandable when the witnesses in question have already testified. I therefore reject any suggestion or innuendo according to which the fact that the Defence has refrained for putting forward some of the old witnesses would somehow be indicative of the fact that the Defence has not been diligent in

[132] Majority Opinion, para. 1557 : "La Défense a fait le choix de ne pas demander le rappel des témoins qu'elle avait elle-même initialement cités".

[133] Annex to "*Ordonnance relative aux Observations de la Défense sur les Observations du Greffier, du Procureur et des Représentants légaux (document 3407-Conf du 4 octobre 2013)*" ("Ordonnance du 10 octobre 2013"), "Dissenting Opinion of Judge Christine Van den Wyngaert", 10 October 2013, ICC-01/04-01/07-3412-Anx, ("Dissenting Opinion of 10 October 2013"), para. 4.

exploring this option or that none of these witnesses had anything exonerating to say. Indeed, it is very well possible that the witnesses that were re-interviewed simply had no first-hand knowledge of the facts of interest or that the Defence had other valid reasons for not wanting to call them (assuming the witnesses were willing to cooperate).

c) The Defence did not have a meaningful opportunity to investigate

103. By far the most disturbing part of the Majority's treatment of the issue of defence investigations is how my colleagues deal with the question as to whether the Defence had a meaningful opportunity to investigate, where the Majority shows a consistent unwillingness to acknowledge the real difficulties encountered by the Defence and by the unreasonable nature of the criticisms that are hurled at it. I entirely disagree with the wholly unreasonable suggestion that the Defence has somehow been negligent and has squandered supposedly ample opportunities to investigate.[134] Prior to and during the trial, the Defence was able to gain access to Walendu Bindi and Beni and was able to address the charges as originally framed. Had notice been given at any point during trial, or even for much of 2012, the Defence would have had a reasonable opportunity to carry out further investigations. However, the Chamber did not authorise the Defence to conduct further investigations until 26 June 2013.[135] A Registry Report attested to the fact that investigations could have been undertaken up until August 2013, but corroborated the Defence's contention that the security situation prevented investigations

[134] See *supra*, para. 99.

[135] See also, "Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013", 19 November 2013, ICC-01/04-01/07-3419, ("Décision du 19 novembre 2013"), para. 11.

thereafter.[136] It cannot therefore reasonably be argued that there was sufficient opportunity between 26 June 2013 and August 2013 for the Defence to reassemble their small investigatory team, travel to Ituri and conduct meaningful investigations on broad topics over an expansive geographical area.[137]

104. Despite all this, the Majority attaches "particular importance" to the Defence's decision to postpone a planned mission at the beginning of August 2013.[138] In doing so, the Majority completely ignores the reason given by the Defence for its decision, which was that it was only possible to travel to the locations in question with a MONUSCO military escort and that past experience had shown that potential witnesses were extremely reluctant to talk to the Defence under such circumstances. That this is a very plausible explanation is demonstrated by the systematic use of intermediaries by the Prosecutor throughout its own investigations in Ituri. The Defence therefore considered the limited potential benefit of conducting the mission under such conditions and preferred to wait a little while in the hope that the security situation – which, by all accounts, was extremely volatile at that time – would improve, so that it would be possible for the Defence to render itself to the places of interest without a military escort. The Defence can hardly be reproached for not having foreseen that the security situation would worsen rather than improve. Similarly, it cannot be held against the

[136] " Observations du Greffe en application de la Décision ICC-01/04-01/07-3398", 23 September 2013, ICC-01/04-01/07-3400-Conf.

[137] It is worth noting in this respect the latest Defence filing as of 27 January 2014, informing that Chamber that the "the situation has not improved to the extent where the defence considers investigations are viable. Indeed in respect of Beni the situation has got worse. The key area of Walendu Bindi remains too insecure for investigations": "Defence Further Report on the Security Situation in Eastern DRC", ICC-01/04-01/07-3427, 27 January 2014, para. 3.

[138] Majority Opinion, para. 1587.

Defence that it chose not to avail itself of an opportunity which would, in all likelihood, not have yielded any meaningful results.

105. More fundamentally, it is extremely unreasonable to suggest that, had the Defence conducted the planned missions, it would have been able to satisfy its evidentiary needs. It is clear that these missions could only have been a first step in a necessarily much more protracted process of identifying and interviewing a large number of potential witnesses.

106. Moreover, it is not disputed that the Defence did not have any opportunity to go to Walendu-Bindi, including Aveba. The Majority brushes aside this highly significant factor by accusing the Defence of having no idea about what evidence it was going to find there and even goes so far as to accuse the Defence of merely intending to conduct a "fishing expedition".[139] With respect, I find this suggestion entirely baseless. Indeed, one can hardly reproach the Defence for not knowing in advance who it would be able to find in these remote locations or what precise information they could have provided.

107. In short, I am firmly of the view that the Defence did not have a reasonable opportunity to conduct a meaningful investigation and I strongly reject the accusations of negligence at the address of the Defence. I find it particularly striking that my colleagues of the Majority, who have needed more than twenty months to produce a judgment in a

[139] Majority Opinion, para. 1586: [TRANSLATION] "it is clear from the First Annex that part of the Defence investigations consisted purely and simply in conducting a "fishing expedition" based on scarce information, pertaining at times solely to the location of the person and devoid of any temporal indication or indication as to the expected witness' experience" ("il ressort clairement de la Première annexe qu'une partie des enquêtes de la Défense consistait purement et simplement à procéder à une « fishing expedition » sur la base d'informations plus que succinctes, relevant parfois de la seule localisation de la personne et sans que soit donnée aucune indication d'ordre temporel ou liée à ce que pouvait être l'expérience du témoin pressenti") (footnote omitted).

case of relatively limited dimensions on the basis of a limited amount of evidence[140] that had been, for the most part, known to it for a long time, now find it fitting to criticise the Defence for not being able to conduct a complex investigation with limited resources and under very difficult circumstances in less than two months. As the Majority knows very well, the Defence for Germain Katanga has always demonstrated great professionalism and integrity throughout the proceedings. I therefore find it unseemly that the Majority now attempts to lay responsibility for the fact that Germain Katanga did not have a meaningful opportunity to defend himself against the charges under article 25(3)(d)(ii) at the doorstep of his Defence. This suggestion, which is entirely unjustified, can only add insult to the injury already caused by these proceedings under regulation 55. I note, in this regard, that if the Majority had provided the Defence with adequate information about the new charges from the start, and had immediately granted them permission to conduct additional investigations on 21 November 2012, most of the Defence's investigations might well have been completed by the time the security situation worsened.

108. As it eventuated, it was simply not possible, under the prevailing conditions of precipitation and insecurity, for the Defence to conduct a meaningful investigation. Whereas the Majority could not have foreseen the security problems, it should have known that any meaningful investigation would require a considerable amount of time. By not giving the Defence an adequate amount of time from the initial regulation 55 Notice Decision, the Majority has effectively denied the accused's right to defend himself against the new charges under article

[140] The Chamber heard 54 witnesses and admitted 643 items of evidence.

25(3)(d)(ii).

4. The Majority's unwillingness to rule on a number of requests of the Defence concerning the fairness of the procedure

109. I am of the view that the Majority consistently failed to address the Defence's concerns about the Majority's course of action. I think it is no exaggeration to say that the Majority has systematically turned a blind eye towards the Defence's repeated requests to terminate the regulation 55 proceedings, or at least to rule on the inherent unfairness of these proceedings before moving to judgment.

a) Order of 10 October 2013

110. On 4 October 2013, the Defence requested that, in light of the obligation to preserve a fair and expeditious trial, the Chamber exercise its discretion not to recharacterise, lamenting "enough is enough".[141] The Majority simply dismissed this request, stating "it will rule on the relevance of all of the Defence's filings on the investigations it sought to conduct in the DRC only in the judgment to be delivered pursuant to article 74 of the Statute".[142] In my Dissent, I expressed my concern that a status conference was 'necessary' in the sense of regulation 55(2) because not all matters relevant to the proposed change had been adequately considered.[143] The Majority disagreed and proceeded in the face of Defence requests for additional time and resources to prepare an

[141] "Defence Observations on the Registry, Prosecution and Victim Representatives' Observations", 4 October 2013, ICC-01/-4-01/07-3407-Conf, para. 7.
[142] Ordonnance du 10 octobre 2013, para. 5: [TRANSLATION] "it will rule on the relevance of all of the Defence's filings on the investigations it sought to conduct in the DRC only in the judgment to be delivered pursuant to article 74 of the Statute." ("elle ne se prononcera sur la pertinence de l'ensemble des écritures de la Défense relatives aux investigations qu'elle entendait conduire en RDC que dans le jugement qu'elle rendra sur le fondement de l'article 74 du Statut").
[143] Dissenting Opinion of 10 October 2013, para. 101.

adequate defence under article 25(3)(d). The matters were thus never exhaustively litigated.

b) 'Non-decision' of 19 November 2013

111. On 19 November 2013, the Majority issued its *Décision portant rappel des* termes *de la décision n° 3406 du 2 octobre 2013 et de* l'*Ordonnance n° 3412 du 10 octobre 2013*[144] in which it stated that:

> *[…] having regard to the obligation cast on the Bench to rule expeditiously, in its forthcoming judgment pursuant to article 74 of the Statute the Chamber will adjudge the difficulties which the Defence may have encountered in effecting those investigations which it considered indispensable and, more generally, the consistency of the recharacterisation procedure with the rights of the Accused. Accordingly, the Chamber must confirm that at this juncture it does not envision further investigations. Should it consider that the procedure for recharacterisation contemplated does not safeguard the rights of the Accused, it will desist from recharacterisation and then rule solely on the basis of the initial mode of liability, namely under article 25(3)(a) of the Statute. […]*[145]

112. In my Dissent, I reiterated my view that the Majority's approach was not

[144] ICC-01/04-01/07-3419.

[145] Décision du 19 novembre 2013:

> *12. […] eu égard à l'obligation qui lui est faite de statuer avec diligence, c'est dans le jugement qu'elle rendra en application de l'article 74 du Statut qu'elle se prononcera sur les difficultés qu'a pu rencontrer la Défense pour accomplir les enquêtes qu'elle estimait indispensable d'effectuer et, plus généralement, sur la compatibilité de la procédure de requalification avec les droits de l'accusé. La Chambre ne peut dès lors que confirmer qu'elle n'envisage pas, à ce stade, l'accomplissement de nouvelles enquêtes. S'il lui apparaissait que la procédure de requalification envisagée ne garantit pas les droits de l'accusé, elle s'abstiendra d'y procéder et elle statuera alors sur le seul fondement du mode de responsabilité initial, c'est-à-dire de l'article 25-3-a du Statut. […]*
>
> *14. Enfin, c'est également dans le jugement que la Chambre statuera sur la demande de la Défense tendant à ce que soit exclues certaines parties du témoignage fait en audience par l'accusé.*

only unfair, but wrong as a matter of law.[146] I also emphasised that I found the decision particularly problematic because it deprived Germain Katanga of the possibility of seeking recourse before the Appeals Chamber in order to protect his rights. This is because the Decision posed as a non-decision, whereas in fact it constituted a rejection of the Defence's alternative request for additional time to investigate further.

c) Dismissal of the Defence stay motion

113. The most recent example of the Majority's disregard for the arguments of the Defence is the dismissal of the Defence stay motion.[147] On 11 December 2013, the Defence filed a request for a permanent stay of proceedings in which it submitted that for the Majority to move to judgment under article 74 on the basis of requalified charges without providing the accused with a further opportunity to make effective investigations would constitute a manifest unfairness to the accused.[148] The Defence stated that, in the event that "the Chamber becomes minded to requalify the charges and to render a decision, other than an acquittal in respect of all those charges, the defence requests a stay of proceedings. Such a stay should, given the circumstances of the case, be a permanent stay".[149]

114. It is highly significant to note, in this regard, that none of the other parties or participants opposed the stay motion. Although it would be inappropriate to speculate about the reasons for this conspicuous silence, the least that can be inferred from it is that neither the Prosecutor, nor the

[146] Dissenting Opinion to Décision du 19 novembre 2013, ICC-01/04-01/07-3419-Anx, para 1. See also my previous Dissents ICC-01/04-01/07-3319, ICC-01/04-01/07-3371-Anx, ICC-01/04-01/07-3388-Anx, ICC-01/04-01/07-3406-Anx, ICC-01/04-01/07-3412-Anx.
[147] Majority Opinion, paras 1593-1595.
[148] "Defence Request for a Permanent Stay of Proceedings", 11 December 2013, ICC-01/04-01/07-3422.
[149] Ibidem, para. 1.

Victims Legal Representatives thought it was a matter of priority for them to argue in favour of the prospective recharacterisation. This is remarkable, given that they must have realised that, if the Chamber were to grant the stay motion, this would, in all likelihood, have led to termination of the proceedings against Germain Katanga. Moreover, they must have been aware that their silence could only have increased the chances of the stay motion being granted. Indeed, the Chamber might well have interpreted the fact that none of the other parties or participants objected as an indication that they acquiesced in the stay motion. In light of this, it is all the more surprising that the Majority declined to rule separately on the stay application. This, to my mind, is yet another illustration of the fact that the Majority was the only driving force behind the recharacterisation of the charges. It also clearly shows the Majority's tenacious determination to persevere with its clear intention to convict Germain Katanga on the basis of article 25(3)(d)(ii) despite mounting problems and despite the fact that no other party or participant supported this course of action.

115. On the basis of today's conviction pursuant to article 25(3)(d)(ii), it can safely be assumed that, had the Majority been so minded as to rule on the stay application before rendering judgment, they would have rejected the request. However, at least in doing so, this would have been a tangible ruling the Defence could have challenged on appeal.

116. One may object that an interlocutory appeal might have needlessly prolonged the proceedings. However, such arguments overlook the fact that by joining the question of procedural fairness to the merits of the case under article 25(3)(d)(ii), the Majority has denied the accused an opportunity to avoid the stigma of a conviction at all. More importantly, by joining the two questions, the Majority has potentially prolonged the

already protracted period of detention of the accused, because if Germain Katanga had prevailed in an interlocutory appeal, he would have been acquitted on the charges under article 25(3)(a) and would have been able to contest the appeal on the merits in freedom.

117. All the accused can hope for now is that the Appeals Chamber will consider this question of procedural fairness immediately and rule on it before entertaining the question as to whether Germain Katanga can be found guilty under article 25(3)(d)(ii) on the merits.

5. The expediency of the proceedings (article 64(2)) and the right to be tried without undue delay (article 67(1)(c))

118. Without the Notice Decision, Germain Katanga would have received judgment on 18 December 2012 and, as can be seen from today's judgment, he would have been acquitted together with Mathieu Ngudjolo on the confirmed charges. The decision to activate regulation 55 has therefore had a significant impact on the expeditiousness of the proceedings. In this respect the Majority acknowledged in November 2012 that giving notice under regulation 55 would prolong the proceedings, but considered this would not "inevitably entail a violation of the right to be tried without undue delay".[150]

119. The length of the post-notice proceedings (21 November 2012 – 7 March 2014) has shown the Majority to be wrong. I cannot see how the Majority can justify having prolonged Germain Katanga's detention by over a year while engaging in lengthy deliberations following the Notice Decision. Accordingly, the Notice Decision ventured beyond a reasonable application of article 64(2) and cannot be reconciled with the

[150] Notice Decision, para. 52.

Chamber's obligation under rule 142(1), to pronounce the judgment within a reasonable period of time after retiring to deliberate.

a) General principle

120. The right to be tried without undue delay is clearly laid out in major international human rights instruments,[151] stemming from the fundamental basis that prolonged proceedings "can put a considerable strain on accused persons" and potentially "exacerbate existing concerns such as uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity".[152]

121. Before this Court, while article 64(2)[153] affords Trial Chambers discretion in determining what constitutes a fair trial, the task remains to ensure fairness, expeditiousness, and respect for the rights of the accused, alongside regard for the protection of witnesses and victims.[154] The word expeditious reappears in the Rules, which require that the Court has "regard to the need to facilitate fair and expeditious proceedings" and that those participating in proceedings "endeavour to act as

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[151] Article 14(3)(c) of the International Covenant on Civil and Political Rights grants the accused an entitlement "[t]o be tried without undue delay". Article 6(1) of the European Convention on Human Rights provides "everyone is entitled to a fair and public hearing within a reasonable time". Article 8(1) of the American Convention on Human Rights provides the right to a hearing "within a reasonable time". Article 7(1)(d) of the African Charter on Human and Peoples' Rights grants "[t]he right to be tried within a reasonable time".

[152] Stefan Trechsel, former President of the European Commission, *Human Rights in Criminal Proceedings,* (Oxford University Press, 2005), p. 135. See also ECtHR, *Stögmüller v. Austria,* 10 November 1969, application no. 1602/62, para. 5.

[153]Article 64(2) states "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.".

[154] According to Judge Pikis, the standard of expeditiousness set out in article 64(2) "is more stringent than the one imported by the requirement of trial being held without undue delay, which is incorporated in the notion of a fair trial; a standard that the Court is duty bound to uphold": *Prosecutor v. Thomas Lubanga Dyilo,* "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", Dissenting Opinion of Judge GeorghiosPikis, 21 October 2008, ICC-01/04-01/06-1487, para. 15.

expeditiously as possible".[155] Similarly, article 67(1)(c) provides for the right of the accused to be tried without undue delay. All stages of the case, from the time the suspect is informed that the authorities are taking steps towards prosecution until the definitive decision, namely final judgment or dismissal of the proceedings, including appeal, must occur without undue delay.[156] In assessing whether delay has indeed been undue, international human rights bodies have typically followed the approach taken by the European Court of Human Rights in *Philis v. Greece (No. 2)*, namely that the:

> *reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is necessary among other things to take account of the importance of what is at stake for the applicant in the litigation.*[157]

122. While the breadth and complexity[158] of the case is relevant, the European

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[155] Rule 101 of the Rules of Procedure and Evidence. See also, rules 84, 91(3)(b), 132(2), 156(4). On the importance of expeditiousness, see also *Situation in* the *Democratic Republic of Congo,* "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation'", 17 August 2007, ICC-01/04-374, para. 47, note 38: "This obligation can be found throughout the Statute and Rules *eg* for a unique investigative opportunity article 56(1)(b) of the Statute, in the procedures for disclosure of evidence in rule 84 of the Rules, for the trial in general in article 64 of the Statute and status conferences in rule 134 of the Rules, and in the right of appeal in article 82(l)(d) of the Statute".

[156] "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial", 23 August 2007, UN Doc. CCPR/C/GC/32 ("General Comment No. 32"), para. 35; Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 1993, p. 257, para. 45.

[157] ECtHR, *Philis v. Greece (No. 2)*, "Judgment", 27 June 1997, application no. 19773/92, para. 35. See also *Rajak v. Croatia*, "Judgment", 28 June 2001, application no. 49706/99, para. 39; *Thlimmenos v. Greece*, "Judgment", 6 April 2000, application no. 34369/97, paras. 60, 62.

[158] See Trechsel, p. 144: "Complexity is generally highlighted by reference to the size of the file and to the number of the accused and/or witnesses involved" and his note 69: "See e.g. *Neumeister v. Austria; Eckle v. Germany; Kemmache (Nos. 1 and 2) v. France; Hozee v. Netherlands; CP and others v. France; Lavents v. Latvia; Kangasluoma v. Finland;* and *GK v. Poland".*

Court of Human Rights has found violations in cases involving a certain or even considerable degree of complexity. [159] The "decisive element" is thus the conduct of the authorities.[160] The ICTR has similarly assessed (a) the length of delay; (b) the complexity of proceedings (the number of counts, number of accused, number of witnesses, quantity of evidence, complexity of facts and the law); (c) the conduct of the parties; (d) the conduct of the authorities involved; and (e) any prejudice to the accused.[161]

123. The Appeals Chamber in March 2013 held that it was premature to determine whether Germain Katanga's right to be tried without undue delay had been infringed, because it was unable to judge how much time would be added to the trial proceedings as a result of the recharacterisation. However, the Appeals Chamber noted the need for the Trial Chamber to be "particularly vigilant in ensuring Germain Katanga's right to be tried without undue delay".[162] Almost a year has passed since the Appeals Chamber wrote those words.

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[159] See, for example, *Eckle v. Germany*, "Judgment", 15 July 1982, application no. 8130/78; *Schumacher v. Luxembourg*, "Judgment", 25 November 2003, application no. 63286/00; *Gonzales Doria Duran de Quiroga v. Spain*, "Judgment", 28 October 2003, application no. 59072/00; *Beladina v. France*, "Judgment", 30 September 2003, application no. 49627/99; *Mouesca v. France*, "Judgment", 3 June 2003, application no. 52189/99; *Panek v. Poland*, "Judgment", 8 January 2004, application no. 38663/97; *Kangaluoma v. Finland*, "Judgment", 20 January 2004, application no. 48339/99, 20 January 2004. Trechsel suggests that complexity is not a relevant consideration in European Court cases, stating that: "Whether the case is complex or not is in essence entirely irrelevant – a violation will only be found when there have been periods during the proceedings where no action was taken, although something could and should have been done", p. 144.

[160] Trechsel, p. 142.

[161] ICTR, Trial Chamber, *Prosecutor v.Bizimungu et al.*, "Judgment and Sentence", 30 September 2011, ICTR-99-50-T, para. 73, citing Appeals Chamber, *Prosecutor v. Nahimana et al.*, "Judgement", 28 November 2007, ICTR-99-52-A, para. 1074 and Appeals Chamber, *Prosecutor v. Prosper Mugiraneza*, "Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief", 2 October 2003, ICTR-99-50-AR73, 27 February 2004, p. 3.

[162] *Katanga* Regulation 55 Appeals Decision, para. 99.

b) Statistics

124. It is also now more than six years since Germain Katanga was surrendered to the Court by the DRC. The trial was lengthy in itself, beginning on 24 November 2009. The last witness testified in November 2011, evidence closed on 7 February 2012 and the arguments of the parties and participants closed on 23 May 2012. A delay of 182 days eventuated until the Majority rendered its Notice Decision on 21 November 2012. The Further Notice Decision was not issued until 15 May 2013. The Decision refusing further investigations did not come until 19 November 2013. Today, 444 days after the acquittal of Mathieu Ngudjolo, 471 days after the Notice Decision, 653 days after the closing arguments and 759 days after the closing of the evidence, we now have the final judgment. To me, this is an inordinately long delay.[163]

125. A key criterion for measuring whether a delay is reasonable is whether the delay could have reasonably been avoided. Any case before this Court necessarily involves very high stakes for the accused, thus a stringent obligation on the authorities to act diligently to avoid any delay is essential,[164] even when dealing with a complex and contested Statute. The fact that Germain Katanga has been detained pending the outcome of the proceedings calls for extra diligence.[165] I fail to see how the Majority has been diligent in this respect as the delay in this case has been entirely avoidable and thus by definition unreasonable.

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[163] See the "Partially Dissenting Opinion of Judge Patrick Robinson" in ICTR, Appeals Chamber, *Prosecutor v. Justin Mugenzi and Prosper Mugiraneza,* 4 February 2013, ICTR-99-50-A, in which the Judge emphasises that the period of two years and ten months for the preparation of the Trial Judgment was "inordinately long" and in breach of the Appellants' right to a trial without undue delay, para. 1.

[164] Trechsel, p. 144

[165] See, for example,. ECtHR, *Motsnik v. Estonia*, "Judgment", 29 April 2003, application no. 50533/99, para. 40; *Abdoellah v. Netherlands*, "Judgment", 25 November 1992, application no. 12728/87, para. 24.

126. Activating regulation 55 does not stop the clock for reasonable delay. Otherwise it would suffice to activate the regulation at regular intervals during the deliberations to prolong this phase indefinitely. More importantly, the focus for reasonable delay should not be on how much work a Chamber has had[166] but on how efficiently the proceedings have been conducted. The significant delays that have eventuated are not due to an insurmountable workload in formulating the Majority Opinion delivered today, but due to the protracted procedural exchange since November 2012 that could have been avoided had the Notice Decision been rendered in due time and with sufficient specificity.

127. Had the Judges of the Majority provided proper and detailed notice on 21 November 2012 and immediately authorised the Defence to conduct additional investigations, it would not have been necessary to wait almost another half year before providing the Defence with further details about the new charges in the Further Notice Decision.[167] As the Majority failed to provide sufficient specificity in November 2012, the Defence was then necessarily placed in a position of having to seek further information, which it did on 15 April 2013, requesting that the Chamber provide further and better notice of the "facts and circumstances" that may be relied upon if the Chamber was minded to contemplate altering the mode of liability.[168] Unfortunately, as I noted in May 2013, the Majority's factual exposition in paragraphs 18-25 of the Further Notice Decision of 15 May 2013 also provided insufficient detail in order to allow Germain Katanga an adequate opportunity to defend

[166] Majority Opinion, para. 1590.
[167] See the "Dissenting opinion of Judge Cuno Tarfusser" to the *Katanga* Regulation 55 Appeals Decision, emphasising that the Notice Decision did not provide enough detail to allow Germain Katanga to prepare his defence vis-à-vis the recharacterisation, paras 24, 27.
[168] "Defence Observations on Article 25(3)(d)", 15 April 2013, ICC-01/04-01/07-3369, para. 193.

himself against these allegations formulated under article 25(3)(d)(ii),[169] thereby causing further, avoidable, delays.

128. It cannot be said in the circumstances that the Defence has acted in a way to contribute to the prolongation of the proceedings nor has there been any evidence of acting obstructively, on the contrary. The undue delay cannot reasonably be blamed on the Defence, which is entitled to exercise its rights to the fullest extent.[170] In any case, Germain Katanga has presented his defence in a diligent manner. The factual complexity of this case also does not justify such a delay. The charges now concern one accused and are based on a single attack on a single location on a single day, which renders the case factually far less complex than many multi-accused cases before other international courts and tribunals. In these circumstances, the delays are inexplicable and unjustifiable.

C. Conclusion

129. To recapitulate, I consider that the recharacterised charges under article 25(3)(d)(ii) go well beyond the 'facts and circumstances' of the Confirmation Decision. I hold this view because the Majority takes 'facts and circumstances' out of their context, and even relies on facts that were not contained in the 'facts and circumstances' of the Confirmation Decision, Crucially, the new charges also fundamentally change the narrative compared to the original charges. Accordingly, I have no hesitation in saying that the Majority's decision is in violation of article 74(2) and regulation 55(1).

130. Furthermore, I believe that the Majority failed to respect Germain Katanga's right to remain silent (article 67(1)(g)), to have prompt and

[169] Dissenting Opinion of 20 May 2013, para. 28.
[170] Dissenting Opinion of 21 November 2012, para. 49.

detailed notice of the new charges (article 67(1)(a)) and, especially, his right to have a reasonable opportunity to respond to the new charges by conducting a meaningful investigation (article 67(1)(b) and (e)).

131. Finally, I am of the view that the extreme tardiness of the Notice Decision, in combination with the poor handling of the ensuing proceedings, has resulted in inexcusable delays, in direct violation of articles 64(2) and 67(1)(c) and of rule 142(1).

132. I therefore dissent in the strongest possible terms to the Majority's alteration to the form of criminal responsibility and maintain, for the reasons developed in Part III of this Opinion, that Germain Katanga should have been acquitted on 18 December 2012 alongside Mathieu Ngudjolo.[171]

[171] See Trial Chamber II, *Prosecutor v. Mathieu Ngudjolo Chui,* "Judgment pursuant to Article 74 of the Statute", 18 December 2012, ICC-01/04-02/12-3, ("*Ngudjolo* Judgment").

III. GERMAIN KATANGA'S GUILT HAS NOT BEEN ESTABLISHED BEYOND REASONABLE DOUBT

133. Turning to the merits, it is my firm belief that the evidence adduced at trial does not warrant a conviction. Not only is there not enough evidence to convict Germain Katanga under the original charges on the basis of article 25(3)(a) (*infra*, III.A), there is equally insufficient evidence to convict him under article 25(3)(d)(ii). For the reasons explained below, I believe that the Majority has applied the standard of proof erroneously. In addition, the fact that so much evidence was missing, and that there were so many serious credibility problems with crucial prosecution witnesses, should have led to much greater caution in the assessment of the evidence as well as the drawing of inferences. I also believe that Germain Katanga's testimony should have been treated with much greater caution (*infra*, III.B).

134. It is also my firm belief that another reasonable reading of the evidence is possible in this case. Applying the standard of proof to the evidence, I do not think that it has been established beyond reasonable doubt that on 24 February 2003, the civilian population of Bogoro was the target of an attack (*infra*, III.C.1). Moreover, the evidence does not establish to the necessary threshold that the Ngiti fighters of Walendu-Bindi constituted a "group" or an "organisation" in the sense of articles 25(3)(d)(ii) and 7 respectively (*infra*, III.C.2). Finally, I fundamentally disagree with the Majority's finding that the alleged racial hatred of the Ngiti towards the Hema allows it to infer the existence of a "common purpose" (article 25(3)(d)(ii)) and of an "organisational policy" (article 7) (*infra*, III.C.3).

135. I also believe that there is insufficient evidence of crimes against

humanity (*infra*, III.D) and I disagree with the Majority's findings on the nature of the conflict (*infra*, III.E).

136. While I agree with the Majority that Germain Katanga's responsibility under article 25(3)(a) has not been established (*infra*, III.F), I fundamentally disagree with its finding that his responsibility under article 25(3)(d)(ii) has been proven beyond a reasonable doubt (*infra*, III.G). I would therefore acquit Germain Katanga.

A. Weakness of Prosecution case under article 25(3)(a)

137. As the Majority agrees that the case under article 25(3)(a) has not been proven, there is no real need for me to develop my own views on the matter. The Prosecution case was indeed extremely weak. It is worth keeping in mind, in this regard, that the Prosecutor alleged at the outset that Germain Katanga and Mathieu Ngudjolo were both supreme commanders of their respective militias, who together devised the plan to "wipe out" Bogoro. At the end of the trial, however, nothing remains of these allegations: neither Germain Katanga nor Mathieu Ngudjolo have been proven to have had anything near the level of authority ascribed to them in the charges and the allegation that they concluded a common plan has also totally evaporated. The reason why we find ourselves in the present position is thus not, as the Majority suggests, because the facts charged would somehow fit more naturally under article 25(3)(d)(ii), but because the two key elements upon which the charges under article 25(3)(a) rested have simply not been proven. The cause of this complete failure of the Prosecution case is that the incriminating evidence did not pass muster.

138. Like in the case against Mathieu Ngudjolo, who was the co-accused

before the cases were severed, and who was acquitted in 2012,[172] there were many deficiencies in the Prosecution's investigations:[173] they took place more than three years after the facts; a number of crucial sites (including Aveba, Zumbe, Nyankunde, Mandro and the camps Kagaba, Lakpa, Bavi Olongba, Medhu, etc.) were never visited; essential forensic evidence[174] was lacking; and a number of potential witnesses were either not interviewed (Aguru, Adirodu, Boba Boba, Kakado/Bayonga, Kasaki, Blaise Koka, Cobra Matata, Yuda, Dark, Oudo, Mbadu, Garimbaya, etc.) or not called to testify.

139. Importantly, the accused himself was never interviewed. Had the Prosecution done so, it would have been able to test a number of important elements that were raised in Germain Katanga's testimony and to cross-examine the accused more effectively. The Prosecution also failed to follow-up on the investigation of its own key witnesses. For example, in the cases of P-250, P-279 and P-280, who the Prosecutor alleged were child soldiers who participated in the battle of Bogoro,[175] it was the Defence who produced school reports and identified witnesses who, at trial, testified that P-250, P-279 and P-280 had never participated in combat.

140. Such lack of due diligence on the part of the Prosecution is highly

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[172] See *Ngudjolo* Judgment.

[173] See Majority Opinion, paras 59-67.

[174] The Prosecution only proceeded to gather forensic evidence in 2009. The forensic investigation found the remains of 18 individuals, some of which bore the signs of violence. However, the Chamber rejected the late addition of the reports, because the limited probative value did not outweigh the potential delays and prejudice to the defence. See Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the disclosure of evidentiary material relating to the prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009", 7 October 2009, ICC-01/04-01/07-1515.

[175] In the case of witnesses P-279 and P-280, the Prosecution withdrew their allegation that they were child soldiers in their closing arguments. See Prosecution Closing Brief, paras 781,788.

disappointing. I note, in passing, that the Prosecution has shown great zeal in other cases before this Court pursuing persons whom it suspects of having suborned testimony by launching a string of prosecutions under article 70.[176] However, despite repeated requests and reminders by the Chamber in this case, the Prosecutor has still to take any initiative with regard to witness P-159, whose testimony the Prosecutor had to withdraw.[177]

141. Considering the very serious and seemingly systemic nature of these problems, I can only welcome that, under the leadership of the new Prosecutor and Deputy Prosecutor, the Office of the Prosecutor seems to have acknowledged past shortcomings and has demonstrated a greater willingness to critically assess the strength and weaknesses of the cases that are brought before the Court.[178] This is highly significant, as I am of the view that the Prosecution has both a legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable and, to the extent possible, complete. I even suspect that if the Prosecution had in the past complied with this obligation – which derives directly from article 54(1)(a) – it might never have brought the charges in this case to begin with.

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[176] See *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13 and *Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13.

[177] See this Chamber's "Decision on the Prosecution's renunciation of the testimony of witness P-159", 24 February 2011, ICC-01/04-01/07-2731 and the Prosecutor's response to a request by the Chamber for an update, "Prosecution's response regarding its investigations into the alleged false testimony of witness P-159", 31 January 2012, ICC-01/04-01/07-3225, in which the Prosecutor informed the Chamber that, more than two years after the witness had been withdrawn, "the Prosecution has not yet undertaken further investigative steps to pursue the contradiction between the testimony of the witness and other information in its possession and disclosed to the parties." The reason provided for this lethargy was that "the Prosecution determined that there are no special circumstances warranting action before the final judgment" and that, on balance, "it is best to not appear to be trying to influence the ongoing proceedings", para. 6.

[178] See Office of the Prosecutor, "Strategic Plan, 2012-2015", pp. 13-14, 20-22.

142. I fully appreciate that investigating crimes committed in a war zone is not an easy task. Witness CH-1 has indeed told the Chamber about the numerous difficulties with the investigations in the present case. This does not mean, however, that the Court should lower its evidentiary standard and be more flexible about the evidence. Of course, many witnesses who testify in a (post-) conflict situation are extremely traumatised and vulnerable and in need of protection before/during/after giving their evidence. However, this should not detract the Court from considering the evidence of such witnesses in the same rigorous way as the evidence of any witness should be evaluated. Rather, it should lead the Court to be extremely cautious about their testimony.

B. Weakness of the Majority's case under article 25(3)(d)(ii)

143. As the charges under article 25(3)(d)(ii) were formulated by the Majority instead of the Prosecutor, it is only appropriate to speak of the "Majority's case" in this section. In what follows, I will discuss a number of points in relation to the Majority Opinion which I find to be problematic. In light of my conclusion in relation to regulation 55 above, I proceed on a hypothetical basis only, namely that none of the issues regarding the recharacterisation of the charges were of any concern and that the charges under article 25(3)(d)(ii) were properly before the Chamber.

1. Erroneous application of standard of proof

144. For the reasons explained below, I am of the view that the Majority, in many of its crucial findings, did not comply with the standard of proof. Although the Majority states the law correctly,[179] it is my strong

[179] See Majority Opinion, paras 68-70.

impression that, at various junctures in the judgment, it did not *apply* the standard correctly.

145. In particular, there are countless points where I think it is beyond dispute that reasonable alternative explanations can be given to the evidence. It is uncontroversial that the Chamber can only rely on the incriminating version of events if all alternative explanations can be rejected for being unreasonable. However, the Majority only engages in this exercise selectively and often simply states that it is not convinced by the explanations offered by the Defence. With all due respect, this is not the appropriate approach. Instead, the Chamber must convincingly explain *why* the alternative explanation is considered to be unreasonable.[180]

146. The Defence does not shoulder any burden of proof in this regard. Yet, this is very often the attitude taken by the Majority.[181] Rather, unless the Defence raises an explanation that is patently absurd, it is the Prosecutor's task to *disprove* it. Moreover, I think that it is obligatory on any Trial Chamber to demonstrate that it has carefully considered exonerating explanations of the evidence and that it has very good reasons for rejecting them as unreasonable.

147. Similarly, the Majority has failed to comply with its own precept[182] that indirect evidence can only serve as proof beyond reasonable doubt if the incriminating inference is the only reasonably possible one.[183] In fact, on

[180] See, for example, *infra*, para. 299.
[181] See, for example, *infra*, para. 197.
[182] See Majority Opinion, para. 109.
[183] To indicate but one example, in paragraph 1277 of the Majority Opinion, the Majority infers from a letter by Cobra Matata that the "family" of Germain Katanga were the direct consignees of the ammunition coming from Beni. Apart from the fact the Majority does not explain who the "family" of Germain Katanga is in this context, it also entirely overlooks the possibility that Cobra Matata may have misunderstood the situation (as might reasonably be inferred from Oudo's response) or indeed

many occasions I myself was often more persuaded by an exculpatory explanation of the evidence than by the incriminating one.

2. Missing evidence

148. Another issue that is directly related to the correct application of the standard of proof is that of missing evidence. As already indicated, it is fairly obvious that there are quite a number of potential witnesses who could in all likelihood have given the Court highly relevant information, as they ostensibly played key roles in this sad story.[184] Of course, there is nothing to guarantee that these persons would all have been willing to testify or, even if they were, that they would have told the complete truth. However, the complete absence of evidence from those who were really at the centre of things at the time inevitably creates the impression that essential information is missing from the record. The Majority appears to agree with me on this point, [185] but, without explaining why, attaches no consequences to it. It is odd, in my view, to recognise that important evidence is missing from the case record, but to nevertheless proceed to making a string of findings beyond reasonable doubt on precisely those points on which the missing evidence could have cast a significantly different light. This concern is aggravated by my impression that most of the witnesses who were called by the Prosecution to give evidence about the role of Germain Katanga and the structure of the Ngiti fighters of Walendu-Bindi during the relevant time-period were persons whose knowledge about these matters was second-

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that the reason why Cobra Matata did not receive ammunition as he wanted was because those in charge in Beni did not want him to. See "Plainte de Cobra Matata", EVD-D02-00243.

[184] See *supra*, para. 138.

[185] See Majority Opinion, paras 62-63.

hand or incomplete at best.[186]

149. It is important to consider the significance of so much missing evidence for the standard of proof. Indeed, one may wonder whether it is at all possible to reach the required threshold when so many questions remain and where it is obvious that having more and better evidence might very well have led to significantly different answers. I am well aware, of course, that the Chamber may only base its decision on evidence that was actually submitted and discussed before it at trial. However, if the Chamber becomes aware, during the trial, of the existence of highly relevant evidence that has the potential to alter the findings based on the evidence in the record, I believe that the failure to submit this evidence may, in certain circumstances, suffice to generate a reasonable doubt in the sense of article 66(3).[187] Conclusions reached on the basis of such incomplete evidence are inherently fragile and uncertain and cannot suffice for the standard of proof beyond reasonable doubt.

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[186] For example, the Prosecutor relied heavily on the testimony of P-28, an alleged child solider, and P-219, a non-combatant, to demonstrate Germain Katanga's leadership position. However, even if P-28 had been part of the militia – which has not been established – his position would have been so junior that he could not possibly have given a truly informed picture of Germain Katanga's position of power. The Majority, for its part, relies quite heavily on D03-88's testimony. However, he did not even belong to the same community and only spent limited time in Aveba. Significantly, none of the people who could really have confirmed Germain Katanga's level of authority, such as Dark or Colonel Aguru or any of the other leaders at the time gave evidence in this case.

[187] It is quite clear to me that in several instances in this case, it is highly probable that further evidence would in all likelihood have shed a significantly different light upon the events in question. For example, the Majority acknowledges that concepts of hierarchy and obedience in the local context of the case may be quite different from Western notions in this regard. The Majority points to the special place and role of witchdoctors in this regard (see Majority Opinion, para. 66). It is indeed true that the names of a number of witchdoctors have appeared with constant regularity throughout this case, especially in the context of Walendu-Bindi, but that their exact role has never been fully clarified. Given that the Majority itself acknowledged this issue as being significant, I find it surprising, to say the least, that my colleagues have nevertheless felt able to make findings beyond reasonable doubt about how the leadership of the Ngiti fighters of Walendu-Bindi was organised without receiving adequate evidence regarding the specific role of particular witchdoctors in the organisation of military matters in Walendu-Bindi at the relevant time.

3. Unconvincing credibility analysis

a) General

150. Another major point of disagreement with my colleagues in this case relates to the evaluation of the evidence. As this disagreement is fairly wide-ranging and has a significant impact on the outcome of this trial, I consider it useful to elaborate on my reasons for departing from my colleagues.

151. In essence, I believe that the way in which the evidence should be evaluated is dictated by the standard of proof, which requires that whenever there is reasonable doubt, such doubt should be resolved in favour of the accused. It follows that whenever there are reasonable doubts about the trustworthiness of a witness or the precise meaning of a certain document or other exhibit, the Chamber should refrain from relying on such evidence. It is important to stress that it is not necessary to *dis*believe[188] a witness in order to set aside his or her testimony. It suffices that there is reasonable *doubt* about the testimony's accuracy or trustworthiness. Whether or not such doubt exists can only be determined on a case-by-case basis, in light of the other available evidence and the Chamber's understanding of the overall context and circumstances of the case.

152. I am deeply concerned about the Majority's treatment of several testimonies in this regard. There is a worrying tendency throughout the Majority Opinion to brush over serious credibility problems of many of

[188] To my mind, there is a clear distinction between not believing that a witness has spoken the truth and disbelieving their testimony. Disbelief implies an affirmation that the witness has actually given incorrect information, whereas non-belief simply means that the listener is not sufficiently convinced that the testimony is accurate and trustworthy. However, I firmly believe that when serious doubts are cast upon the credibility of evidence, it should lead to its rejection.

the witnesses.[189] Yet, I believe that for many witnesses in this case, there were many indications of serious potential problems with their credibility. All too often, witnesses admitted to glaring inconsistencies between what they said on the stand and what they had declared in previous statements.[190] Although this does not automatically disqualify their testimony, there need to be cogent and convincing explanations for why the story has changed. However, more often than not, the explanations offered, if any, were far from adequate, thereby casting serious doubt upon the reliability of the testimony. Despite this, the Majority sometimes seems eager to explain away contradictions and inconsistencies on the basis of the fact that a long time has passed since the events took place[191] or indeed that witnesses may have suffered

[189] To indicate but one example, the Majority accepts that P-132's testimony is in considerable part contradicted by that of P-353. It is thus not possible that both their stories can be true at the same time. Yet, the Majority Opinion states in paragraph 211 that [TRANSLATION] "there can be no question of affording precedence to one testimony over another as regards the circumstances of P-132's abduction […]" ("il ne saurait être question de faire prévaloir l'un des témoignages sur l'autre en ce qui concerne les circonstances de l'enlèvement de P-132 […]") However, in my view, such a position is untenable, because at least one of the two must have given false information. Unless this contradiction can be resolved by ruling in favour of the credibility of one witness over the other, it is not possible to determine which one of them may have spoken the truth. Under such circumstances, both testimonies should be discarded.

[190] For example, P-132's testimony changed almost entirely between her different statements and her testimony at trial. Indeed, the Majority itself acknowledges the numerous incongruities in P-132's testimony (see Majority Opinion, para. 203). Surprisingly however, the Majority concluded that it could rely on certain parts of this witness's testimony (see Majority Opinion, para. 212). The same is true with respect to witness P-161, who had previously stated that he had heard a recording of a radio-intercept (implying that he was not present) but said at trial that he was present and even intervened personally (see Majority Opinion, para. 222). Although the Majority attaches no consequence to this incident, I respectfully disagree. In my view, the foregoing represents a clear indication that the witness has been careless with the truth, to say the least, and that, therefore, his testimony should have been treated with great caution.

[191] For example, such an explanation is offered in relation to witness P-353. See Majority Opinion, para. 335. To suggest that the witness would have confused Ugandans for Hema is utterly implausible, especially for the Majority, who attach such enormous importance to the ethnic dimension of this case.

trauma from witnessing the events in question.[192] Even if time lapse and trauma can explain why witnesses give incoherent or contradictory evidence, this does not justify reliance thereon. Indeed, understanding why someone may be unreliable does not make the unreliability disappear. On the contrary, such insights should be a reason for treating the evidence in question with extra caution.

153. Of course, it is not the case that if there are reasonable doubts about part of a witness' testimony, this automatically disqualifies the rest of it. However, considerable caution should be exercised in this regard. There have to be cogent reasons that convincingly explain why a witness' memory is faulty with regard to one part of her testimony but is nevertheless still considered reliable in relation to another part.[193] The same applies with even greater force when a witness has been found to have lied in relation to part of his or her testimony. Witnesses who have lied – especially when under oath – should be treated with extreme prudence. Indeed, I am of the view that if it has been found that a witness has given false testimony about a matter that is directly relevant to the charges, then the entire testimony should, in principle, be discarded. This is because when a witness has knowingly provided the Court with false information, this shows willingness on his or her part to pervert the course of justice, which renders the entire testimony highly

[192] For example, witnesses P-132 and P-353 (see Majority Opinion, paras 211,338).

[193] For example, the Majority accepts that V-2 cannot be relied upon when she alleged having heard about the impending attack from Ngiti women who visited the Bogoro market from Beni and from her parents, who had in turn allegedly obtained the information from D03-410, who denied even having been in contact with her parents (see Majority Opinion, para 351). See also D03-410, T-311, p. 39, 46. It is interesting to observe, in this regard, that the Majority minimises the problematic parts of V-2's testimony, particularly her evidence that Ngiti women came to the market of Bogoro shortly before the attack, something which clearly contradicts the Majority's views about the deep-seated hatred of all Ngiti towards the Hema and the allegation that the former were trapped and surrounded by the latter (see Majority Opinion, para. 350).

suspect. Accordingly, it becomes unsafe for any further reliance to be placed on the testimony, except when there are very strong indications about the truthfulness and reliability of those parts of the testimony that are not affected by the insincerity at all.

154. Based on these considerations, I would have refrained from relying on the testimonies of P-160, P-161, P-132, P-249, P-287, P-353 and V-2 altogether, especially in relation to any incriminating facts. In order not to be misunderstood, I want to make it very clear that I do not suggest that all these witnesses have come to lie in the witness box. Nor am I suggesting that none of what they said was true. What I am saying is that there are so many serious problems with essential parts of their testimony that it is simply impossible for me to say with any confidence which parts of their testimony are true and which are not. Given that the standard of proof does not tolerate such uncertainty, I have no choice but to refrain from relying on this evidence.

155. Based on these considerations, I will now devote some specific attention to the evidence of two witnesses which I think were particularly problematic: P-28 and P-12.

b) P-28

156. P-28 was one the two most important witnesses for the Prosecutor's case under article 25(3)(a). In particular, his evidence was relied upon to prove that there was a common plan between the Lendu and the Ngiti as well as Germain Katanga's leadership of the latter. In their analysis of the credibility of witness P-28,[194] the Majority accepts that he lied about the date he arrived in Aveba (beginning of February 2003 instead of

[194] See Majority Opinion, paras 119-147.

November 2002) and about his membership of the militia (and therefore his status as Germain Katanga's bodyguard as well as his participation in the attack on Bogoro and other operations).[195] The Majority also finds that witness P-28 lied about his date of birth and that his account about the circumstances of his abduction by a commander from Walendu-Bindi is contradictory. Based on this, one would expect P-28's testimony to be treated with the utmost circumspection and to be used only when clearly and strongly corroborated.[196] Instead, however, P-28 is the most cited-to witness after Germain Katanga himself.[197]

157. It will come as no surprise that I have serious misgivings about the manner in which the Majority makes use of his testimony in their Opinion. As indicated, to my mind, a witness who has been wilfully dishonest in one material part of his or her testimony should not be trusted with regard to other parts of it unless there are very strong indications that the witness' mendacity was confined to a particular part of his or her testimony or in case certain parts of the testimony are corroborated by independently strong and reliable evidence. In light of the scope and seriousness of P-28's dishonesty, I firmly believe that the requirement of corroboration, partially endorsed by the Majority itself, should have been applied rigorously.

158. Upon inspection of the Majority's Opinion, one can easily notice, however, that it has not systematically applied the aforementioned requirement of corroboration and that, where it did look for

[195] See Majority Opinion, para. 144.
[196] In fact, the Majority concluded that the testimony of P-28 should not be used in relation to essential points pertaining to the responsibility of Germain Katanga unless it was corroborated by other witnesses. However, astoundingly, the Majority did not deem it necessary to impose such a condition with regard to the remainder of his testimony. See Majority Opinion, para. 147.
[197] The Majority Opinion contains more than 100 references to P-28.

corroboration, it did not apply this requirement very strictly. For example, in one instance, the Majority relies on hearsay evidence given by witnesses P-28 and D02-160 to establish the identity of the assailants of Nyankunde.[198] However, it is quite uncontroversial in my view that one cannot speak of meaningful corroboration when the source of information for both P-28 and D02-160's statements with respect to the attack on Nyankunde are unknown.[199]

159. Another example of faulty corroboration occurs where the Majority relies on P-28's testimony with respect to the presence in Aveba of a delegation from Zumbe. The Majority links his testimony about a visit of a few days by a delegation from Zumbe to the so-called "Soap Letter" ("Lettre des savons").[200] This letter mentions that a delegation from Zumbe had been present in Aveba for three weeks at the beginning of January 2003.[201] However, given the fact that the Majority itself concluded that P-28 could only have arrived in Aveba at the beginning of February 2003 at the earliest,[202] I find it hard to understand how the letter, which mentions an event that took place before P-28 arrived, could somehow corroborate P-28's testimony on this issue. Even if P-28 was in fact talking about the same delegation,[203] the only reasonable conclusion can be that his

[198] See Majority Opinion, para. 553.

[199] This is also true with respect to another instance where the Majority once again relies on hearsay evidence given by P-28 to corroborate the testimony of witness D02-148. See Majority Opinion, para. 1003.

[200] "Lettre de savons", EVD-OTP-00025.

[201] See Majority Opinion, paras 614-615.

[202] See Majority Opinion, para. 144.

[203] P-28 testified that a delegation from Zumbe visited Aveba for a few days (see P-28, T-217, p. 40 and P-28, T-223, pp. 31-32). According to this witness, the delegation, which was comprised of approximately 25 people (see P-28, T-217, p. 45), came to Aveba on two occasions (see P-28, T-217, p. 40). As P-28 does not give a specific temporal indication (he only said that two delegations came after a delivery of ammunitions from Beni – however, there were several flights with ammunition in the period between November 2002 and February 2003), it is difficult to know with any degree of

testimony in this respect is based on anonymous hearsay[204] and is therefore highly unreliable.

160. What is even more striking with respect to this instance of alleged corroboration is the selective manner in which my colleagues have chosen to rely on P-28's testimony. Indeed, as the Majority recognises, the composition of the delegation mentioned in the "Lettre des savons" is different from the composition of the delegation mentioned by P-28.[205] One would assume that this immediately puts an end to any suggestion of corroboration. However, the Majority resolves this obstacle by simply discounting those parts of P-28's testimony that are incompatible with the content of the "Lettre des savons" and simply concludes that there was "a" delegation from Zumbe.[206] With all due respect, this is like saying that if one witness states she saw an eagle and another witness states she saw a parrot, then it is safe to conclude that there must have been a bird.

161. Yet another worrisome issue with regard to the way in which the Majority treats P-28's testimony is that it completely disregards the fact that he has been in contact with intermediary P-143, who proved to be so problematic in

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certainty whether he referred to the delegation mentioned in the "Lettre des savons". However, since P-28 testified to having personally witnessed these visits (see P-28, T-233, p. 31), this is very unlikely.

[204] The Majority acknowledges that P-28's testimony is based on hearsay (without, however, specifying that the source is unknown), but attaches no consequence to this. See Majority Opinion, para. 615.

[205] See Majority Opinion, para. 614: [TRANSLATION] "this delegation, composed of about 25 persons, if the commanders and their bodyguards are included, was led by Boba Boca and by commanders Kute and Bahati de Zumbe, whom he knew since his stay in Nyakunde." ("cette délégation, composée, si l'on compte les commandants et leurs gardes du corps, de 25 personnes environ, était conduite par Boba Boba ainsi que par les commandants Kute et Bahati de Zumbe, qu'il connaissait depuis son séjour à Nyakunde"). However, the "Lettre des savons" only mentions 15 members and indicates that the leader of the delegation was Martin Banga. The only other named member of the delegation is Bukpa Kalongo (see "Lettre des savons", EVD-OTP-00025).

[206] See Majority Opinion, para. 617.

the *Lubanga* case.[207] Despite the fact that the Chamber has not allowed the relevant part of the *Lubanga* judgment into evidence, I believe it cannot fully ignore this element when assessing the relevant evidence. For example, in one instance, the Majority alleges corroboration between witnesses P-28 and P-132.[208] Given that both witnesses were involved with intermediary P-143, about whom Trial Chamber I said that it is "likely that as common point of contact he persuaded, encouraged or assisted some or all of [the witnesses he was in touch with] to give false testimony",[209] I find any suggestion of genuine corroboration to be highly suspicious.

162. One might argue that it is inappropriate to rely on the findings of a judgment that was not admitted into evidence, especially since the statutory instruments do not provide for judicial notice of adjudicated facts. Moreover, it may be argued that the Chamber considered the question of admitting the *Lubanga* judgment and decided that its potential contribution to the manifestation of the truth was not significant enough to justify the reopening of the case.[210] However, as already noted, missing evidence may be a ground for reasonable doubt, if it is likely that this evidence may have an influence on the Chamber's findings.[211] I believe that it is impossible, in this case, to totally ignore the *Lubanga* judgment and its potential impact on the evaluation of the credibility of particular key witnesses, including P-28 and P-132. The evidence is only "missing" from a formal point of view, in that it does not have an EVD number. The fact that the Chamber may not have

[207] See *Lubanga* Judgment, para. 291.
[208] See Majority Opinion, paras 1344-13445.
[209] See *Lubanga* Judgment, para. 291.
[210] See Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the request by the Defence for Germain Katanga seeking to admit excerpts from the judgment rendered in Lubanga", 26 April 2012, ICC-01/04-01/07-3279-tENG, para. 18.
[211] See *supra* III.B.2 Missing evidence.

anticipated this specific issue when rendering its decision of 26 April 2012 cannot be a sufficient reason for the Chamber to now close its eyes to information that is publicly available and that is clearly and directly relevant to the case. Accordingly, even if the Chamber did not consider it possible to rely on the *Lubanga* judgment on the basis of judicial notice, I believe it should have reopened the case and admitted the relevant sections of the *Lubanga* judgment into evidence.

163. Be that as it may, considering the numerous lies that were found to be present in P-28's account, and the fact that it is impossible to determine with any degree of certainty which parts of the rest of his testimony are based on first-hand observation and truthful recollection, I can only conclude that it would have been much safer to disregard his testimony in its entirety.

c) P-12

164. As far as P-12 is concerned, I feel unable to rely on large parts of his evidence because it consists mainly of speculation or opinion evidence, much of it based on anonymous hearsay. The Majority acknowledges the problem,[212] but despite concluding that prudence is called for in relation to all his evidence that is not based on personal observation,[213] references to his testimony of this kind are strewn throughout the Majority's Opinion.[214]

165. As far as P-12's testimony about Germain Katanga's alleged confession about the attack on Bogoro is concerned, I find that there are too many incongruities in his evidence and that it is therefore not warranted to rely

[212] See Majority Opinion, para. 189.
[213] See Majority Opinion, para. 197.
[214] Presumably, these references are intended merely to indicate corroboration, but it is difficult to see how opinion evidence based on hearsay could ever provide a meaningful level of corroboration.

on it as proof beyond reasonable doubt of the fact that Germain Katanga did indeed confide all this information to P-12, let alone that these affirmations were true. The Majority seems to agree with me on this point,[215] but nevertheless relies upon the alleged statement by Germain Katanga that the attack on Bogoro constituted "carnage".[216] No explanation is given as to why one part of P-12's testimony is considered to have insufficient probative value with regard to Germain Katanga's alleged "admission", but it is nevertheless considered reliable with regard to the accused's description of the attack.

d) Improper use of Germain Katanga's testimony

166. Finally, I want to voice my concern about the way in which the Majority has used Germain Katanga's testimony. Leaving aside that I think it is entirely inappropriate to rely on his testimony for the charges under article 25(3)(d)(ii),[217] I think there are serious issues with the way in which the Majority uses the accused's evidence.

167. First, it is noteworthy that Germain Katanga's testimony is by far the most relied upon source of evidence in the Majority Opinion. There is nothing untoward about using the testimony of an accused against him or her. However, it is telling that in this case Germain Katanga's testimony is the main source of incriminating evidence under the *new* article 25(3)(d)(ii) charges, i.e. the charges applied after recharacterisation. However, if the charges had remained as confirmed by the Pre-Trial Chamber (article 25(3)(a)), his evidence would have been

[215] See Majority Opinion, para. 754.
[216] See Majority Opinion, para. 836.
[217] See *supra*, II.B.1 Right not to be compelled to testify (article 67(1)(g)).

almost entirely exculpatory.[218]

168. Second, the Majority's selection of which parts of Germain Katanga's testimony it considers credible and those which it rejects is unbalanced in my view. In particular, the Majority seems to find everything the accused said that it considers incriminating credible, but systematically rejects his testimony whenever it tends to contradict the Majority's version of events.[219] This tendency is particularly noticeable whenever the accused gave a particular piece of information in a specific context or gave a qualified answer to a particular question.[220] I recall, in this regard,

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[218] Indeed, by presenting himself as the intermediary between EMOI and the Ngiti fighters of Walendu-Bindi, on the one hand, as well as the "coordinator" of the different camp commanders of Walendu-Bindi, on the other hand, Germain Katanga undermined the Prosecutor's allegation that he was the all-powerful commander of all fighters of Walendu-Bindi, who had total control over the FRPI "organisation".

[219] For example, in paragraph 1290 of the Majority Opinion, the Majority rejects Germain Katanga's testimony that when Blaise Koka and Mike4 came to Aveba, they were responsible for the distribution of weapons. The reasons for rejecting his testimony are (a) that he is the only witness to have mentioned this and (b) that D02-129 and D02-148 failed to mention this, despite being specifically asked about it (see Majority Opinion, para. 1290). However, I cannot see from the references provided in the footnotes to paragraph 1290 that either D02-129 or D02-148 were asked any specific questions in this regard. Moreover, D02-129 was present in Aveba but not involved with the military, so there is no reason why he should have known about these matters (see, D02-129, T-271, pp. 33-38). With regard to D02-148, I note that he did not live in Aveba and simply denied ever having heard about Blaise Koka (D02-148, T-279, p. 19). I find it hard to see how the fact that a witness denied knowing a person in any way demonstrates that this person did or did not exercise a particular function. As far the reference to P-350's testimony is concerned, I simply do not see how it relates to the specific issue of who was in charge of the distribution of weapons in Aveba in February 2003 (i.e. immediately before the attack). Finally, I am not persuaded by the two examples upon which the Majority relies in paragraphs 1286-1288 of their Opinion. In particular, I fail to see how the fact that the accused may have given 1,200 rounds to D03-88, and that he gave the wrong ammunition to Kisoro in order to appease him, proves that he was in charge for the distribution of all ammunitions coming from Beni. Considering that it is not contested that several plane loads of ammunition were sent during the relevant period, these two small incidents appear very insignificant indeed.

[220] For example, in paragraph 1261 of their Opinion, the Majority states that, although Germain Katanga testified explicitly that he was only head of the Aveba combatants in the delegation that went to Beni in November 2002, he would have later "specified" that he was the head of *all* the Ngiti combatants. However, the source for this allegation (i.e. D02-300, T-322, p. 19) is by no means conclusive. In particular, the accused never confirmed that he was the leader of *all* the combatants among the delegation. It must be said that the Prosecutor's question was far from clear in this regard.

that Germain Katanga was not aware of any charges under article 25(3)(d)(ii) and that it is thus unlikely that he would have adjusted his testimony to escape conviction on this basis.

169. It is also important to remember that when the accused gives evidence in his defence, this should be evaluated in accordance with the standard of proof. This means that the mere fact that the Majority is not persuaded by certain parts of his evidence is not sufficient to ignore the reasonable doubt it creates.[221] On the contrary, unless it is patently implausible or it has convincingly been shown to be untrustworthy, Germain Katanga's own testimony raises a reasonable doubt just like any other evidence.

170. Third, I believe that the Majority sometimes misrepresents the evidence given by the accused. For example, in one of its crucial findings on Germain Katanga's responsibility, in particular his *mens rea*, the Majority refers to his testimony and to the fact that he himself explained that he willingly contributed to the plan (*projet*) to attack Bogoro and its

[221] For example, the Majority does not consider Germain Katanga's testimony with regard to his having knowledge of the content of the so-called "Lettre de doléances" to be credible (see Majority Opinion, para. 575). However, that conclusion is based on what the Majority describes as contradictions and his evasive manner of answering the questions by the Prosecutor. Although it may, in certain cases, be appropriate to dismiss the denials of a witness because the Chamber, based on the nature of the testimony, attaches no credibility to them, I do not believe that such a conclusion is warranted in this case. Even if it was fair to characterise the accused's denial as incredible on this issue – something I would dispute – this would still not prove that Germain Katanga actually did ever read the document. The mere fact that the Majority thinks it would be *plausible* for him to have read it, even combined with their rejection of his testimony to the contrary, does not establish beyond reasonable doubt that he actually did read the "Lettre de doléances" or that he was familiar with all of its content.
Another example can be found in paragraph 634 of the Majority Opinion, where the Majority rejects Germain Katanga's testimony that APC commander Blaise Koka arrived in Aveba during the month of February 2003 with 150 soldiers. The reason for rejecting his testimony is that he was the only one to have mentioned this number. I note, in this regard, that the Majority has not difficulty basing other important findings on the evidence of just one witness. See, for example, *infra*, para. 177.

conception in November 2002 in Beni.[222] This explanation is misconstrued as an admission of his knowledge of the alleged criminal purpose of the group to which he presumably contributed (article 25(3)(d)(ii)), whereas all the accused did was say that he was aware of a non-criminal plan of the EMOI to attack Bogoro. He said this in an effort to defend himself against the Prosecution's allegation that he and Mathieu Ngudjolo had concocted a plan to "wipe out" the village (article 25(3)(a)). In the same vein, the Majority misconstrues the accused's admission of his willingness to participate in the attack, had he not been restrained in Aveba on 24 February 2003.[223] Again, the accused did not make this admission in relation to a *criminal* attack but to a legitimate military operation on the side of APC commander Blaise Koka.

4. Conclusion

171. In conclusion, considering the weakness of so much of the evidence in this case, and adding to that the strong suspicion that more and better evidence could have led to substantially different conclusions on many key issues of this case, I am of the view that the charges – whether under article 25(3)(a) or (d) – have not been proven and the case should have been dismissed a long time ago.

172. One of my fundamental concerns about this judgment is that the entire decision is very short on hard and precise facts and very long on vague and ambiguous 'findings', innuendo and suggestions. Whatever my colleagues may believe in their *intime conviction*, I fear it cannot stand up

[222] See Majority Opinion, para 1682: [TRANSLATION] "He himself explained that he had knowingly made a contribution to the plan to attack Bogoro and had taken part in its design, in November 2002 in Beni […]" ("Il a lui-meme explique qu'il avait consciemment apporte sa contribution au projet d'attaquer Bogoro et qu'il avait participé à sa conception, à Beni, au mois de novembre 2002 […]").
[223] See Majority Opinion, para. 1683.

against the required standard of proof and the dispassionate rigour it demands. More specifically, the case record has so many weaknesses and presents such an incomplete picture that it is impossible, in my view, to come to conclusions beyond reasonable doubt on many points. In addition, most of the evidence falls far short of the standards of reliability that I was accustomed to at the ICTY. It is not possible, in my view, to base a conviction on such weak evidence. The standard of proof, which must be the same for everyone no matter how challenging the circumstances are for the Prosecutor, simply does not allow it.

C. Another reasonable reading of the evidence is possible

173. According to the Majority, the evidence shows that, on 24 February 2003, a group of Ngiti fighters of Walendu-Bindi, together with other groups, attacked Bogoro and committed crimes against the Hema civilian population on a massive scale and in a systematic manner.[224] The Majority believes that the Ngiti fighters of Walendu-Bindi constituted a "group acting with a common purpose"[225] in the sense of article 25(3)(d) of the Statute and that their main purpose behind the attack on Bogoro was to "wipe out " the Hema civilian population there.[226] The Majority also believes that these fighters formed an "organisation" in the sense of article 7 of the Statute.

174. I do not agree with the Majority's findings on any of these points. First, I do not believe there is enough evidence to say beyond reasonable doubt that the civilian population was the main target of the attack on Bogoro (*infra*, III.C.1.). Second, I consider the evidence does not show beyond

[224] See Majority Opinion, paras 755, 1159.
[225] See Majority Opinion, paras 1650 - 1666.
[226] See Majority Opinion, paras 1139-1153.

reasonable doubt that the Ngiti-fighters of Walendu-Bindi constituted a "group" or an "organisation" within the meaning of articles 25(3)(d) and 7 respectively (*infra*, III.C.2.). Finally, I fully reject the Majority's findings with regard to the alleged "anti-Hema ideology" and particularly the alleged criminal purpose or organisational policy which the Majority derives from this (*infra*, III.C.3.).

1. The Bogoro attack was not an attack against the civilian population (article 8(2)(b)(i) and article 7)

175. I do not believe the evidence bears out the Majority's claim that the attack was aimed, if not primarily then at least concurrently, at the Hema civilian population of Bogoro. Civilians were killed in that attack, but I see no evidence establishing, beyond reasonable doubt, that it was an attack against the civilian population as such. There are a number of reasons why I hold this view.

176. According to the initial charges, as confirmed by the Pre-Trial Chamber, 200 civilians were killed in the Bogoro attack.[227] The Prosecutor, in his Closing Brief, relied on a list produced by P-166 to support the claim that there were 150 civilian casualties.[228]

177. It is important to note that no forensic evidence was available[229] and that the Chamber's findings concerning the victims of the attack are entirely based on testimonial evidence.[230] The lists, established by P-317 and P-166 counting 330 and approximately 150 victims, respectively, were

[227] See Confirmation Decision, para. 304. According to the Prosecution, the victim count was that confirmed by the Pre-Trial Chamber, namely 200 civilians (see Prosecution Closing Brief, paras 6,35).
[228] See Prosecution Closing Brief, para. 64.
[229] See also *supra*, para. 138.
[230] See Majority Opinion, paras 809–855.

correctly not considered reliable by the Chamber.[231]

178. On the evidence, the Majority Opinion counts 60 casualties, out of which 30[232] were civilians killed by Ngiti fighters, acting alone or jointly with Lendu fighters. I note, in this regard, that for many of these 30 alleged confirmed killings, the Chamber possesses neither birth nor death certificates, let alone any forensic evidence. In fact, for a majority of cases, the Chamber only has the word of one witness. A number of those witnesses are also participating victims in these proceedings and thus have a direct interest in the outcome of this trial. Moreover, as already indicated, many of these witnesses suffered from serious credibility problems.[233] How it is possible, under such circumstances, to arrive at any findings about such serious allegations beyond reasonable doubt eludes me.

179. I am furthermore astounded by the Majority's assertion that, although it can only identify 30 cases of killings by Ngiti, acting either alone or jointly with others, it is convinced beyond reasonable doubt that the actual number of victims is greater.[234] With all due respect, it is wholly inappropriate to make such abstract findings, which are impossible to verify.[235]

180. Moreover, it is only permissible to count victims of crimes that were allegedly committed jointly by Ngiti and Lendu (or others) if the evidence shows beyond reasonable doubt that there was, in fact, co-

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[231] See Majority Opinion, para. 837.
[232] See Majority Opinion, para 869.
[233] See *supra*, III.B.3 Unconvincing credibility analysis.
[234] See Majority Opinion, para. 869.
[235] As the Majority Opinion acknowledges in paragraph 839, where it is stated that the reason why the Majority is unable to determine the exact number of victims is [TRANSLATION] "the imprecision of the available evidence".

perpetration in the sense of article 25(3)(a). This is because the group acting with a common purpose either has to commit, or attempt to commit, the crime.[236] However, I am of the view that the evidence does not permit any firm conclusions in this regard. It is indeed possible that the Ngiti simply encouraged, aided, or abetted the Lendu in the sense of article 25(3)(b) or (c), which would disqualify victims of the Lendu from being counted as having been "committed" by the Ngiti group acting with a common purpose.[237]

181. However, even if this figure of 30 casualties could be established beyond reasonable doubt, which I do not accept, I think it casts serious doubt on the proposition that civilians were the explicit target of the attackers. For example, even if we accept the Majority's conservative estimate that the civilian population of Bogoro constituted approximately 800 members,[238] and compare this to the 'proven' civilian victim count of 30 casualties,[239] then we arrive at a percentage of well below 5%.[240] Considering the UPC casualty ratio of more than 50%,[241] it becomes immediately apparent that the attackers, who according to witness P-323 numbered over a thousand,[242] concentrated their lethal efforts on the UPC contingent and not on the villagers.

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[236] See *infra*, para. 284.
[237] Idem.
[238] Majority Opinion, para. 729.
[239] Majority Opinion, para. 869.
[240] It may be noted that the Prosecutor claims there were around 3000 civilians present during the attack. See Prosecution Closing Brief, para. 40. Accordingly, even if we accept the Prosecutor's allegation that there were 150 civilian casualties, this would still amount to no more than 5% of the total civilian population.
[241] Although the Majority says it cannot determine the exact number of UPC casualties, D02-176 (see T-255, p. 40) puts it at around 70. D02-176 also stated that the UPC contingent counted 130 soldiers on the day of the attack (see T-255, p. 26). The Majority seems to at least accept this last number (see Majority Opinion, para. 840).
[242] See P-323, T-117, p. 31. The Majority makes no estimate, whereas the Prosecutor keeps it at "several hundred" (see Prosecution Closing Brief, para. 41).

182. Without wanting to belittle the suffering of the civilians of Bogoro in any way, I fear it is not reasonable to consider those ratios and still claim that the civilian population of Bogoro was a prime target of the attackers, who, on some accounts, outnumbered them. However, this is far from the only problem with this claim.

183. In relation to the civilians who were killed during the actual attack, I am of the view that the Majority is too eager to find that the attackers were aiming to strike at civilians. For example, the Majority finds that a number of civilians were killed when they were trying to flee from the *Institut de Bogoro* together with the UPC.[243] Although the Majority accepts that UPC soldiers constituted a legitimate target,[244] it makes the following peculiar argument about this incident:

> *[TRANSLATION] [the Majority] considers that the loss of human life ensuing from the shots fired at the group of fleeing persons was excessive in relation to the military advantage which the attackers could have anticipated, specifically given that the UPC soldiers were in the process of fleeing. […] It takes the view that by shooting at fleeing persons, the Lendu and Ngiti showed scant regard for the fate of the civilians and knew that their death would occur in the ordinary course of events."*[245]

184. I have serious problems with this reasoning. First, the Majority does not

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[243] See Majority Opinion, paras 818-824.

[244] See Majority Opinion, para. 865.

[245] See Majority Opinion, para. 865: [TRANSLATION] "[The Majority] considers that, by shooting at fleeing persons indiscriminately, the Lendu and Ngiti showed only little consideration to the fate of civilians mixed with UPC soldiers and knew that their death would result in the ordinary course of events." ("*elle estime que les pertes en vies humaines résultant des tirs effectués dans ce groupe de personnes en fuite ont été excessives par rapport à l'avantage militaire que les assaillants pouvaient en attendre dès lors que, précisément, les soldats de l'UPC étaient en train de s'enfuir. […] Elle estime qu'en tirant sur des personnes prenant la fuite, les Lendu et Ngiti ne faisaient que peu de cas du sort des civils et savaient que leur mort interviendrait dans le cours normal des évènements.*").

indicate how many civilians there were among the fleeing UPC soldiers. Yet, this is an essential piece of information, without which it seems impossible to form any opinion about the disproportionality of the action. Second, the Majority – unable to identify who fired at the fleeing people and from what distance – is not in a position to know whether those who fired the lethal shots knew that there were civilians among the group of fleeing UPC soldiers. It may be pointed out, in this regard, that the persons in question were leaving the main UPC military position in Bogoro at the time. It is thus far from established that the shooters were cognisant that they might hit civilians. Third, even assuming that the shooters were aware that civilians were present among the fleers, the possibility that the shooters were aiming for the UPC soldiers and only hit the civilians accidentally cannot be ruled out. [246]

185. Similar questions may be asked in relation to civilians who were killed during the attack at the site of the *Institut de Bogoro* or who were going towards it. The Majority seems to underestimate the possibility that some of them may have been mistaken for combatants or were tragically caught in the crossfire. Whether or not one believes the testimony of D02-148 that the majority of inhabitants of Bogoro were armed,[247] the fact remains that civilians were involved in the so-called *autodéfense*, i.e. civilians taking part in the defence of their village. Moreover, it is difficult to discount the possibility that a number of civilians were simply caught in the violence as they approached the UPC camp – the place where they were used to seeking refuge in case of attack - where the

[246] For example, in paragraph 823, the Majority Opinion mentions the death of Matia Babona and recalls D02-176's testimony that this person was running directly in front of him. However, as D02-176 was a UPC fighter, it cannot be excluded that the unidentified person or persons were actually aiming for him, rather than for Mr Babona.
[247] See Majority Opinion, para. 820.

fighting was particularly intense.

186. The Majority's finding that the Ngiti combatants attacked the civilian population in Bogoro on 24 February 2003 not only led it to conclude that article 8(2)(b)(i) (war crime of attacking civilians) of the Statute has been violated,[248] but also that one of the necessary conditions for the contextual circumstances under article 7 (crimes against humanity) have been fulfilled, i.e. that on 24 February 2003, an attack was launched against the civilian population of Bogoro and that this attack had the civilian population as its target.[249] As I am in disagreement with the finding, I am also in disagreement with both conclusions.

2. The Ngiti fighters of Walendu-Bindi did not constitute a "group acting with a common purpose" (article 25(3)(d)) or an "organisation" (article 7)

a) The perpetrators of the crimes

187. Another fundamental problem with the Majority's claim about the nature of the attack is that it is entirely unclear when and by whom most civilians were killed. Indeed, as the Majority acknowledges, besides the Ngiti fighters of Walendu-Bindi, there were also soldiers from the APC and Lendu fighters from Bedu-Ezekere.[250] In addition, there is evidence that Bira also took part in the attack, or at least the commission of crimes against civilians.[251] Despite its best efforts, the Majority is unable to convincingly demonstrate which of these different groups was most responsible for killing civilians in Bogoro. In relation to the identity of the attackers and those who committed crimes during and afterwards, I will limit my comments to the following points.

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[248] See Majority Opinion, para. 879.
[249] See Majority Opinion, para. 1166.
[250] See Majority Opinion, para. 1667.
[251] See Majority Opinion, para. 734.

188. First, I observe that the Majority's approach to isolate the Ngiti fighters of Walendu-Bindi from the planners and enablers in Beni[252] is completely artificial.[253] According to this approach, the Ngiti fighters of Walendu-Bindi were carrying out two separate operations at the same time, one involving the reconquest of Bogoro and the other involving the elimination of the civilian population.[254] The Majority might argue that this misrepresents their view and that they believe that the Ngiti fighters from Walendu-Bindi simply did not distinguish between UPC fighters and the Hema civilian population.[255] However, apart from being contradicted by the numerical considerations rehearsed above,[256] there is another fundamental problem with this suggestion, namely that it excludes the possibility that some Ngiti fighters were actually *only* taking part in the EMOI plan. In my view the evidence does not permit the exclusion of this possibility. On the contrary, if the Majority is right that there were only a very small number of APC soldiers who took part in the attack,[257] then this begs the question as to whether there was anyone left to carry out the EMOI plan to chase the UPC from Bogoro. Moreover, I believe that, for example, the "Rapport de service"[258] by Oudo Mbafele, commander of the Medhu camp whose troops allegedly took part in the attack on Bogoro, is a clear indication that several Ngiti

[252] See Majority Opinion, para. 1665.

[253] In the same vein, I also disagree with the Majority's finding that there were two plans, namely a legitimate plan by EMOI-Kinshasa to reconquer Ituri and a criminal plan by the Ngiti combatants of Walendu Bindi to attack the Hema population. See *infra*, paras 212-221.

[254] See Majority Opinion, para. 1665.

[255] See Majority Opinion, paras 718, 850, 1144.

[256] See *supra*, para. 178.

[257] See Majority Opinion, paras 635, 740.

[258] "Rapport de service", EVD-D02-00231. This document consists of a handwritten report by commander Oudo Mbafele, addressed to several authorities, including the RCD/ML, FRPI and CODECO, and explicitly mentions the "Neutralisation of the enemy forces of the UPC based in Bogoro, Chay, Makabho, Kombokhabo, Mandro … including the fall of Bunia […]".

commanders saw themselves as being part of the Beni-led military campaign to "neutralise the UPC enemy forces" in Bogoro and other places.

189. In any event, even if the Lendu took part in the attack from the start, there is no reliable evidence of any prior plan between the Ngiti fighters of Walendu-Bindi and the Lendu fighters from Bedu-Ezekere. [259] This creates a legal difficulty which the Majority fails to fully acknowledge. In particular, if it is true that many of the crimes were committed by Ngiti and Lendu acting together, it cannot be the case that these crimes were part of the alleged original common purpose of the Ngiti fighters of Walendu-Bindi.[260] To the extent that a Ngiti/Lendu common purpose to commit crimes against Hema civilians materialised during or shortly after the attack,[261] this must have been a different plan from the one to which Germain Katanga is alleged to have contributed, as all his significant contributions were allegedly made well *before* the attack.[262]

b) The existence of a "group acting with a common purpose" or an "organisation"

190. Contrary to what the Majority claims, I do not agree that it is possible to hold, on the basis of the evidence before the Chamber, that the "Ngiti fighters of Walendu-Bindi" formed a group in the sense of article 25(3)(d)

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[259] This is in fact the very reason why the initial charges under article 25(3)(a) have not been established.

[260] Indeed, the Majority strongly emphasises that the common purpose was limited to the Ngiti fighters of Walendu-Bindi. I stress, in this regard, that the Majority points to no evidence whatsoever to demonstrate that the common purpose of the Ngiti fighters of Walendu-Bindi involved the joint commission of crimes with individuals from other groups such as the Lendu. Any contribution to the alleged criminal plan of the Ngiti of Walendu-Bindi is therefore limited to crimes committed exclusively by Ngiti.

[261] I note, in this regard, that a common plan is an essential subjective element of joint commission under article 25(3)(a), without which it is not possible to speak of co-perpetration.

[262] See *infra*, para. 293.

let alone an organisation in the sense of article 7.

191. A "group" only exists by virtue of the fact that *all* of its members share the common purpose. In other words, unless there is evidence to suggest that *every* member of a particular existing group/organisation agreed to a common criminal purpose, it is not permissible to equate existing groups/organisations with "groups acting with a common purpose" in the sense of article 25(3)(d). Indeed, it is perfectly conceivable that a limited number of members of an existing group or organisation agree to commit a crime together without the consent (or perhaps even knowledge) of the rest of the group. In such a scenario, the "group acting with a common purpose" is constituted *only* by those individuals who share the common purpose.

192. It matters, in this regard, to distinguish the concept of "organisational policy" in the sense of article 7 from a "group acting with a common purpose" in the sense of article 25(3)(d). Whereas article 25(3)(d) defines the group in function of its members' shared criminal purpose, article 7 does not.[263]

193. It is therefore not possible to equate an organisation that adopts a criminal policy (article 7) with a group acting with a common purpose (article 25(3)(d)), unless the evidence shows that the policy was unanimously adopted or endorsed by all members of the organisation. This last point is important, because, even if there were evidence of an

[263] Another important difference between the two concepts is that article 7 does not require that the crimes committed pursuant to or in furtherance of an organisational policy also be committed by members of that organisation. Article 25(3)(d), on the contrary, does require that the crime be committed by members of the group, acting individually, jointly (possibly with non-members) or indirectly through other persons (possibly including non-members). See *infra* III.G.1 The law on article 25(3)(d)(ii).

organisational policy to attack the Hema civilian population, this would not automatically prove the existence of a group acting with a common purpose.

194. It is highly significant, therefore, that the Majority bases its entire case under article 25(3)(d) on exactly the same elements as it relies upon for finding that there was an organisation with a policy to attack the Hema population under article 7.[264] It is thus worthwhile to have a closer look at the 'organisation' identified by the Majority.

195. In terms of numbers, the Majority submits that the fighters of the "network" of camps in Walendu-Bindi "numbered in the thousands".[265] This implies that, according to the Majority, there is evidence showing beyond reasonable doubt that these thousands of *unidentified* persons all shared the common purpose. The Majority also makes reference to a number of locations of camps,[266] without specifying whether this list is exhaustive or, indeed, whether all these camps – and all the combatants living in those camps – are considered to be part of the "organisation". Indeed, it is worth pointing out that the Majority relies to a large extent on Germain Katanga's own testimony to make this list, but that the latter has denied that all these camps were part of an integrated structure.[267]

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[264] See Majority Opinion, para. 1654.

[265] See Majority Opinion, paras 635, 1418. The Majority also holds that there were only a limited number of APC soldiers in Walendu-Bindi, putting this number at around 30. It is unclear to me how the Majority arrived at this number, especially in light of the off-hand remark that Germain Katanga was the only one to mention the presence of 150 soldiers under the command of Blaise Koka (see Majority Opinion, para. 634). In making this finding, the Majority seems to have overlooked the fact that (a) the Defence does not have the burden of proof in this regard and (b) it is precisely in order to clarify such issues that the Defence should have been allowed to collect further evidence.

[266] See Majority Opinion, paras. 624-625, which list: Aveba, Kagaba, Olongba, Medhu, Tatu, Lakpa, Nyabiri, Bukiringi, Gety, Mandre and Bulanzabo.

[267] See D02-300, T.324, p. 89: "No one had authority over anyone else on his turf. I was chief in my area and others were chiefs in their areas".

196. In terms of what the Majority relies upon to find that the different camps were part of one organisation, reference is made to a similar 'division of labour' within the different camps,[268] the fact that Aveba was the central place for the supply of weapons and ammunitions[269] the fact that certain letters were copied to different persons,[270] the vague finding that some of the fighters referred to themselves as being part of the FRPI or a "movement",[271] and, finally, the necessity to fight together against a common enemy.[272]

197. Before addressing these issues, I want to state my concern about the fact that the Majority makes the improper remark that it cannot "adhere" to the Defence's thesis according to which the different camps were largely autonomous.[273] The Defence has no burden to prove anything and the fact that none of the witnesses have mentioned that the different groups of combatants "lived in isolation and were completely independent"[274] – here the Majority caricatures the Defence's position[275] – does not prove the opposite.

198. Be that as it may, I am of the view that the available evidence does not allow one to conclude beyond reasonable doubt that at the relevant time the Ngiti fighters of Walendu-Bindi formed either an "organisation" in

[268] See Majority Opinion, paras 672-4.
[269] See Majority Opinion, para. 675.
[270] See Majority Opinion, paras 676-8.
[271] See Majority Opinion, para. 676.
[272] See Majority Opinion, para. 679.
[273] See Majority Opinion, para. 680.
[274] See Majority Opinion, para. 680.
[275] See Defence Closing Brief, paras 574-575. It is not contested by the Defence that the groups in these camps acted with each other on occasion, but this is something quite different from saying that the different groups were integrated into a single structure.

the sense of article 7 of the Statute, or even a "single militia".[276]

199. First, the argument that the different camps were all organised in a similar manner, with functions attributed according to standard nomenclature (i.e. S1, S2, S3, etc.) for staff functions,[277] is unconvincing. Indeed, such nomenclature is common among many armed forces throughout the world and no one would argue that, for example, the Belgian and Dutch armies are part of the same organisation simply because they use the same the same nomenclature to designate different staff functions.

200. Second, I believe that the Majority places excessive weight on a number of documents[278] which it considers are proof of the allegation that there was a so-called "common authority" based in Aveba,[279] to which several others addressed themselves in relation to matters of a civil, administrative or military nature.[280] These documents provide the evidentiary basis for two sets of crucial findings by the Majority, the first being the organisation of the camps in the Walendu-Bindi area,[281] and the second being the role of Germain Katanga as the president of the movement of the combatants of Walendu -Bindi.[282]

201. It is crucial to note, in this regard, that *none* of the authors of *any* of the documents in question testified. Given the opaque nature of the content

[276] See Majority Opinion, para. 679. I note, in this regard, that the Majority Opinion claims that there was a "well-established network", but that no details about this network are provided.
[277] Majority Opinion, para. 672.
[278] In particular, see "Lettre de savons", EVD-OTP-00025; "Lettre Évangélisation", EVD-OTP-00238; "Lettre Perception taxes d'or", EVD-OTP-00239; "Lettre Défense de brandir les armes", EVD-OTP-00278; "Rapport de service", EVD-D02-00231; "Plainte de Cobra Matata", EVD-D02-00243.
[279] See Majority Opinion, para. 678.
[280] See Majority Opinion, para. 677.
[281] See Majority Opinion, paras 676-678.
[282] See Majority Opinion, paras 1312-1331.

of some of the documents, and the difficulty to understand who was addressed by the many unidentified individuals who are mentioned as addressees or as copied for information, I believe it is very difficult, if not impossible, to fully understand the content and significance of these documents. Under these circumstances, one may wonder whether the Chamber adhered to its own criteria of admissibility in relation to these documents.[283] Indeed, I think it quite likely that many of the inferences drawn by the Majority from these documents could easily be discredited by the testimony of the authors of the letters. I am therefore firmly of the view that the probative value of these documents is limited and does not permit making any findings beyond reasonable doubt.

202. In particular, I have strong doubts with regard to the Majority's claim that these documents show that the Ngiti fighters of Walendu-Bindi constituted a single militia or an organisation in the sense of article 7 of the Statute.[284] Although it is perhaps *possible* to read these documents in this manner, it is certainly not the only way to read them. For example, of the six documents in question, three seem to have been written by persons who were not members of the "organisation".[285] The subjects broached in the letters are completely haphazard and it is hard to see how one can infer anything about the operational structure of the Ngiti fighters of Walendu-Bindi from this.

203. More importantly, among the different addressees there appear no less than one "Chef d'Etat-Major Suprême" based in Olongba;[286] one

[283] See "Decision on the Prosecutor's Bar Table Motion", 17 December 2010, ICC-01/04-01/07-2635.
[284] See Majority Opinion, paras 671 et seq.
[285] "Lettre de savons", EVD-OTP-00025; "Lettre Évangélisation", EVD-OTP-00238; "Lettre Défense de brandir les armes", EVD-OTP-00278.
[286] "Lettre Perception taxes d'or", EVD-OTP-00239.

"Commandant Suprême des FRPI" also based in Olongba;[287] a "Commandant de l'Etat Major de Nyabiri";[288] a "President du Mouvement" based in Aveba;[289] a "Président de FRPI" in Aveba;[290] a "Commandant auditeur des FRPI des Walendu-Bindi" based in Aveba;[291] a "Chargé de front" based in Aveba; [292] a "Comité des FRPI" based in Beni;[293] a "Comité de Gestion de CODECO" based in Tseyi;[294] and a "PDG de CODECO" also based in Tseyi.[295] In addition, there are a number of unnamed commanders based in different locations, although there is no consistency in this regard between the documents.[296] With respect to my colleagues of the Majority, I fail to see how it could be concluded from this muddle that there was a single militia in Walendu-Bindi. On the contrary, it seems to me that there were a lot of putative 'supreme leaders' and headquarters. Moreover, it should be mentioned that no less than six different names of organisations appear in the different documents.[297] Finally, it is important to bear in mind that only two of the six documents have any clear relation to military activities.[298]

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287 "Rapport de service", EVD-D02-00231.

288 "Lettre Perception taxes d'or", EVD-OTP-00239; "Lettre Défense de brandir les armes", EVD-OTP-00278.

289 "Lettre Défense de brandir les armes", EVDOTP-00278.

290 "Lettre Perception taxes d'or", EVD-OTP-00239.

291 "Rapport de service", EVD-D02-00231.

292 "Rapport de service", EVD-D02-00231 and "Lettre Défense de brandir les armes", EVD-OTP-00278. In "Rapport de service", there is mention of a "Chargé de guerre des FRPI des Walendu". It is possible that this refers to the same position.

293 "Rapport de service", EVD-D02-00231.

294 "Rapport de service", EVD-D02-00231.

295 "Lettre Défense de brandir les armes", EVD-OTP-00278.

296 I.e. it is not the case that the same positions consistently reappear throughout the different documents.

297 To wit: RCD-ML, FRPI, Mouvement de Libération Lendu, Front Patriotique en Ituri, Forces de Résistance Patriotique en Ituri.

298 These are "Plainte de Cobra Matata", EVD-D02-00243 and "Rapport de service", EVD-D02-00231. The others deal with such disparate issues as the provision of soap (see "Lettre de savons", EVD-OTP-00025); an evangelisation campaign (see "Lettre Évangélisation", EVD-OTP-00238); the

Of these two documents, one seems to be internal to Cobra Matata's own group,[299] whereas the other is addressed to three different groups – RCD-ML, CODECO and FRPI.[300] It is noteworthy that the latter document mentions a "Directeur de Communication du RCD/ML à Gety-Bolo" [i.e. Aveba] as well as a "Comité des FRPI des Walendu à Beni", adding to the confusion about the geographical situation of the respective groups.

204. Taken at face value, these documents thus present an unclear and confusing picture. The Majority nevertheless claims to see some coherence, but can only do so by making a number of assumptions about the several positions mentioned in the documents.[301] However, these assumptions are based on little more than speculation on the part of the Majority. Plausible speculations, perhaps, but certainly not the only reasonable ones.

205. In any event, even with the help of speculation and the glossing over of many points of uncertainty, the Majority is unable to explain with any level of precision how the so-called militia of the Ngiti fighters of Walendu-Bindi was structured or how it supposedly operated. In fact, the Majority is forced to admit that there is no evidence to suggest that the 'Ngiti militia' was under a centralised chain of command[302] or that Germain Katanga (or anyone else, for that matter) possessed any real

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prohibition to carry arms at a cattle market (see "Lettre Défense de brandir les armes", EVD-OTP-00278); and the collection of taxes on gold trade (see "Lettre Perception taxes d'or", EVD-OTP-00239).

[299] "Plainte de Cobra Matata", EVD-D02-00243.

[300] "Rapport de service", EVD-D02-00231.

[301] For example, in paragraph 677, the Majority states that Germain Katanga is mentioned in four different documents. However, in relation to "Lettre Défense de brandir les armes", EVD-OTP-00278 and "Lettre Perception taxes d'or", EVD-OTP-00239, I cannot fail to note that Germain Katanga's name does not appear and that the accused has never recognised that he saw these documents or that he was indeed the addressee. I further note that, although reference is made to Germain Katanga's family in "Plainte de Cobra Matata", EVD-D02-00243, this is in the body of the text and contains no information about any alleged affiliation.

[302] See Majority Opinion, para. 675.

authority over all the Ngiti fighters of Walendu-Bindi.[303]

206. Accordingly, I am strongly of the view that there is no evidence showing that, at the relevant time, the militia of Walendu-Bindi were anything more than a loose coalition of largely autonomous units. In fact, to the extent that it is possible to conclude anything from the available evidence, I believe it is that whatever "federative" impulse there may have been originated from EMOI in Beni. The fact that Aveba served as the central logistics base and that Germain Katanga tried to coordinate matters from there on behalf of EMOI does not show that the Ngiti of Walendu-Bindi were integrated in a single structure. Under such circumstances it is thus difficult to speak of an organisation in the sense of article 7 of the Statute, regardless of which definition of "organisation" one adheres to.

207. Theoretically speaking, this conclusion does not exclude the possibility that there might still have been a group acting with a common purpose in the sense of article 25(3)(d). However, the Majority Opinion does not make an attempt to explain how and when the "thousands" of individual members of the Ngiti fighters of Walendu-Bindi would have adopted the alleged common purpose to attack the Hema civilian population. As there is no independent evidence of the formation of a group based on a shared intent to commit crimes against the Hema civilian population, it must be concluded that this – essential – aspect of the Majority's case under article 25(3)(d)(ii) is not substantiated.

[303] See Majority Opinion, para. 1306, 1365.

3. There is no evidence of a common purpose or organisational policy to attack the Hema civilian population

a) There was only one plan

208. Even assuming that there was a group acting with a common purpose (article 25(3)(d)) or an organisation (article 7), I do not believe there is enough evidence showing the existence of a common purpose to attack the Hema civilian population or an organisational policy to that effect. As the Majority is unable to explain how the alleged "organisation" of the Ngiti fighters of Walendu-Bindi operated, it is also unable to point to any direct evidence about how this organisation or group would have adopted the alleged policy/common purpose to attack the Hema civilian population. Yet, the Majority maintains that the Ngiti fighters of Walendu-Bindi had their own plan, which consisted of:

> *[TRANSLATION] to attack the village of Bogoro so as to wipe out from that area not only the UPC troops but also, and, first and foremost, the Hema civilians who were there.*[304]

209. Viewed in isolation, the alleged common purpose appears relatively simple and straightforward. However, it is essential to place this in its broader context.

210. First, the Majority asserts that the common purpose of the Ngiti fighters of Walendu-Bindi was integrated within the framework of a larger military offensive conducted in Ituri against the UPC, which originated from the authorities in Beni.[305] This wider plan originated from Beni, where a coalition of forces, including the Kinshasa government, the

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[304] See Majority Opinion, paras 1155, 1654, 1665: *"attaquer [le village de Bogoro] pour en effacer non seulement les éléments militaires de l'UPC mais aussi, et à titre principal, les civils Hema qui s'y trouvaient."*
[305] See Majority Opinion, paras 1148, 1654.

RCD/ML (an ethnically mixed group), Maï-Maï and the "FRPI", had organised themselves as the EMOI.

211. Indeed, there is a lot of evidence in this case that the Ngiti fighters of Walendu-Bindi were operating in conjunction with EMOI and that EMOI's objective was political, i.e. the restoration of the Congolese government's authority over Ituri.[306] The Majority is aware of this evidence, but puts it to one side by arguing that the political objective of EMOI to reclaim Ituri was perfectly compatible with the desire to exterminate the entire Hema population of Bogoro on the part of the Ngiti fighters of Walendu-Bindi.[307]

212. For the Majority, there were thus at least two plans in operation: one 'political' plan that originated in Beni and one 'ethnic' plan that was proper to the Ngiti fighters of Walendu-Bindi. The key question is thus how these two plans were related, if at all. It is instructive to quote the Majority Opinion in this regard, which states in paragraph 584 that:

> *[TRANSLATION] the effect of the ensuing situation was twofold: the RCD-ML was able to reinforce its troops and increase its chances of "retaking" Ituri with troop support from the Lendu, who were the adversary of the Hema as an ethnic group; the local combatants, for their part, thus found themselves "accompanied" and were therefore able to give their struggle a patriotic dimension and prevent annexation of their territory by foreign powers by joining the RCD-ML fight against the secessionist UPC, which, by then, was allied to Rwanda.*[308]

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[306] See *supra*, para. 188.

[307] See Majority Opinion, paras 600, 1147-1148.

[308] See Majority Opinon, para. 584: "*[…] la situation ainsi créée avait eu un double effet : le RCD-ML avait ainsi pu renforcer ses troupes et augmenter ses chances de « récupérer » l'Ituri en s'appuyant sur les*

Later, we read in paragraph 1144 that

> *[TRANSLATION] the ties established between the Beni authorities and the local combatants were, in the circumstances, the result of a fruitful exchange for both parties: the former relied on the local combatants to reconquer Ituri, then in the grip of UPC military forces, and the local combatants received Beni's support in bolstering their chances in their struggle against the Hema and the UPC and in breaking the encirclement which beset them.*[309]

213. Despite these clearly overlapping interests and objectives, the Majority does not accept that EMOI and the Ngiti fighters of Walendu-Bindi concluded a single plan and maintains that two parallel plans were in operation.[310]Instead, according to the Majority, the "local combatants" saw benefit in an alliance with EMOI because (a) they wanted to give a patriotic dimension to their struggle against the UPC and Rwanda's secessionist plan to create a so-called "Hema-Tutsi empire", and (b) to break the encirclement by the Hema and the UPC. However, there are a number of problems with the Majority's narrative.

214. First, my colleagues place a great deal of importance on the allegation that, between August and November 2002, the *collectivité* of Walendu-Bindi and the *groupement* of Bedu Ezekere were surrounded by the UPC and found themselves under constant attacks by UPC militias and their

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combattants Lendu, opposés, sur le plan ethnique, aux Hema ; les combattants locaux, de leur côté, se voyaient donc « accompagn[és] » et s'étaient ainsi trouvés en mesure de donner une dimension patriotique à leur combat et d'éviter une annexion de leur territoire par les puissances étrangères, en rejoignant la lutte menée par le RCD-ML contre l'UPC sécessionniste et alors devenue l'alliée du Rwanda."

[309] See Majority Opinion, para. 1147: "*les liens mis en place entre les autorités de Beni et les combattants locaux procédaient, en l'occurrence, d'un échange avantageux pour les deux groupes : les premières s'appuyant sur les combattants locaux pour reconquérir l'Ituri alors aux mains des forces militaires de l'UPC et les combattants locaux bénéficiant de l'appui de Beni pour augmenter leur chance dans la lutte qu'ils menaient contre les Hema et l'UPC et pour briser la situation d'encerclement dans laquelle ils se trouvaient.*"

[310] See, for example, Majority Opinion, paras 1148, 1665.

allies.[311] According to the Majority, the alleged encirclement by UPC forces and the ensuing attacks were key factors that gave rise to the alleged anti-Hema ideology and important reasons for why the Ngiti combatants of Walendu-Bindi sought to create an alliance with the authorities in Beni. However, this argument fails because, whereas the Lendu *groupement* of Bedu Ezekere might have been encircled by UPC forces based in Mandro, Bunia and Kasenyi,[312] the same is not true with respect to the Ngiti *collectivité* of Walendu Bindi.[313] While some of the witnesses testified that UPC militias were based in Nyankunde, Bogoro, Bunia and Mandro,[314] no evidence has been adduced with respect to a UPC presence to the south and west of Walendu Bindi. I am therefore of the view that the evidence in the case does not warrant a finding beyond reasonable doubt that the Ngiti of Walendu-Bindi were in fact surrounded by UPC forces.

215. Second, the Majority is silent on the part played by the Lendu in the EMOI operations. This is strange, considering how much importance the Majority attaches – wrongly, in my view - to the so-called "Lettre de doléances",[315] which clearly involved the Lendu from Bedu-Ezekere as much as the Ngiti of Walendu-Bindi.

216. Third, the Majority is ambivalent regarding who took the initiative to form a coalition. Paragraph 1142 states that the Lendu and Ngiti combatants took the initiative themselves to approach the authorities in

[311] See Majority Opinion, paras 570-571, 1144, 1147.
[312] See, for example, D03-88, T-299, pp. 45-46. See also D03-66, T-295, p. 62; T-297, pp. 10-11.
[313] See Majority Opinion, para. 570. None of the witnesses referred to by the Majority mention that Walendu-Bindi was encircled by the UPC.
[314] See, among others, D02-148, T-279, pp. 6-7.
[315] See *infra*, paras 234-240.

Beni in the context of EMOI,[316] whereas paragraph 582 states that the authorities in Beni had already started mobilising the local combatants with a view to associate them to the political-military plan of Mbusa Nyamwisi as of October 2002.[317] This point is significant, because if the initiative for the military operations came from Beni – which I believe the evidence shows it did – then it becomes much harder to argue that the Ngiti fighters of Walendu-Bindi had their own, separate, pre-existing plan. In fact, I think there is absolutely no evidence to show that the Lendu and Ngiti approached the authorities in Beni with a preconceived plan for conducting military operations against the Hema civilian population of Bogoro.[318] On the contrary, all the evidence shows is that the Lendu and Ngiti went to Beni with a desperate cry for help and protection.

217. It is highly significant, in this regard, that the only reliable evidence in the record about when, where and by whom the attack on Bogoro was planned relates to EMOI. The Majority acknowledges as much, when it states that:

> *[TRANSLATION] The planning as such of the attack on Bogoro has involved several local and regional actors and the first phases of the planning took place in Beni.*[319]

218. Moreover, the Majority accepts that, by the end of January 2003, Beni sent several APC men to Walendu-Bindi in order to reorganise the FRPI

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[316] See Majority Opinion, para. 1149.
[317] See Majority Opinion, para. 582.
[318] I note, in this regard that the "Lettre de doléances",EVD-D03-00098, makes no mention of Bogoro at all, let alone of any offensive operations against this location.
[319] Majority Opinion, para. 1145: "*la planification, en tant que telle, de l'attaque de Bogoro a impliqué plusieurs acteurs locaux et régionaux et que les premières étapes de cette planification se sont déroulées à Beni.*"

forces in general, and the combatants of Aveba and Kagaba in particular.[320] This clearly contradicts the Majority's affirmation that the operation against Bogoro was organised locally by the Ngiti combatants.[321]

219. Considering the clear and preponderant role of EMOI, and in light of the total absence of reliable evidence about any planning activities – e.g. meetings or other forms of communication among local commanders – at the level of the Ngiti fighters of Walendu-Bindi, it is my considered opinion that the evidence indicates that there was only one plan. Indeed, I think that the authorities in Beni took the initiative to regain control over Ituri, enlisted the Ngiti fighters of Walendu-Bindi (as well as others) to that end, provided them with weapons and tactical coordination, and carried out a joint operation with them, which ended up causing a number of civilian casualties because the troops were insufficiently trained and disciplined and went on a rampage once the military operation was over.

220. The Majority's theory, according to which the common purpose of the Ngiti fighters of Walendu-Bindi existed totally independently from the EMOI plan, but was at the same time perfectly integrated in it[322] is, in my view, totally unpersuasive and amounts to nothing more than an artificial construct that has no basis in the evidence whatsoever. Indeed, if, for example, the Majority is right that the APC played no significant role in the execution of the attack on Bogoro, then it is difficult to explain why Germain Katanga and other Ngiti commanders participated in several lengthy meetings in Beni with EMOI officers to plan the attack on

[320] See Majority Opinion, para. 589.
[321] See Majority Opinion, para. 1671.
[322] See Majority Opinion, para. 1654.

Bogoro and other locations.

221. Accordingly, I do not accept the Majority's view that EMOI and the Ngiti fighters of Walendu-Bindi carried out a joint operation but that they did so according to separate plans and/or for different purposes.

b) The content of the policy/common purpose

222. Even assuming that there was a separate policy/common purpose on the part of the Ngiti fighters of Walendu-Bindi, I would still vehemently disagree with the Majority about its content. As already noted, there is no mention of any documents in which a Ngiti policy, plan or common purpose to eliminate the Hema civilian population was mentioned or of any meetings during which such policy/common purpose was discussed. To substantiate the existence of a common purpose, the Majority relies exclusively on circumstantial evidence. This evidence is completely inadequate in my view (*infra*, III.C.3(b)(2)) and there is another, more plausible explanation of the evidence (*infra*, III.C.3(c)). However, before commenting on the insufficiency of the evidence, I will first address another important question with regard to the nature of the policy/common purpose.

(1) The policy/common purpose had legitimate aspects

223. In particular, according to the Majority, the policy/common plan was focused on the elimination of the Hema civilian population of Bogoro.[323] However, as the quotes above show, the Majority also considers that the Ngiti fighters of Walendu-Bindi were fighting the UPC as such, because they wanted to prevent them from creating a so-called "Hema-Tutsi empire" and because they wanted to break the encirclement by the UPC.[324] In other words, by the Majority's own acknowledgement, part of the Ngiti's alleged policy/common purpose was aimed at a legitimate target, i.e. the UPC.

224. The Majority brushes over this crucial element and simply states that:

> *[TRANSLATION] to the Ngiti combatants the UPC, and the Hema as an ethnic group, were their enemy – to them, the two were of one ilk.*[325]

225. However, the fact that the Ngiti fighters of Walendu-Bindi may, as the Majority claims, have made no distinction between the UPC and the Hema civilians does not detract from the fact that the UPC was a legitimate target. Moreover, the evidence about how the military operation was carried out shows very clearly that the attack was first and foremost directed against the UPC positions in Bogoro, in particular the *Institut de Bogoro.* It is thus simply untenable, on the basis of the evidence in the record, to maintain that the Ngiti fighters of Walendu-Bindi did not specifically target the UPC. To the extent that their common purpose included military operations against the UPC, it was

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[323] See Majority Opinion, paras 1155, 1654, 1665, where it is emphasised that the killing of Hema civilians was the "first and foremost" objective of the Ngiti fighters of Walendu-Bindi.
[324] See *supra,* paras 214-215.
[325] See Majority Opinion, para. 1144: "*les combattants ngiti considéraient l'UPC et les Hema, en tant que groupe ethnique, comme étant leur ennemi, ces deux entités étant pour eux assimilées.*"

therefore not criminal and, significantly, overlapped entirely with the EMOI plan.[326] As will be seen, this conclusion is of great relevance to the evaluation of Germain Katanga's contribution to the alleged common purpose.[327]

(2) There is no convincing evidence of a criminal common purpose

226. Turning now to the alleged illegitimate aspect of the policy/common purpose, there is not a single item of direct evidence about the Majority's allegation that the Ngiti fighters of Walendu-Bindi adopted a common purpose to attack Bogoro in order to eliminate the Hema civilian population there. In fact, it is not an easy task to discern the exact evidentiary basis of the Majority's findings in this regard, because they are scattered over several different places throughout the Majority Opinion.[328] From what I have been able to ascertain, I seem to understand that the Majority relies on the following circumstantial evidence.

(a) Way in which the attack was carried out

227. The first main argument of the Majority to substantiate the claim that the Ngiti fighters of Walendu-Bindi attacked Bogoro in order to eliminate the Hema civilian population is that this can be inferred from the way in

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[326] Although the Majority, for reasons that are not explained and which seem difficult to reconcile with the very broad arguments invoked to support the existence of a criminal common purpose, states that the common purpose of the Ngiti fighters of Walendu-Bindi was limited geographically and temporally to the operation launched against Bogoro on 24 February 2003, see Majority Opinion, para. 1672. It should be noted, in this regard, that the EMOI plan was much broader in geographic and temporal scope and that there are strong indications that Ngiti fighters of Walendu-Bindi participated in other EMOI operations as well. The Majority Opinion does not explain whether the Ngiti fighters of Walendu-Bindi also had parallel purposes for participating in these other operations or whether they were just executing the EMOI plan in these cases.

[327] See *infra*, III.G Germain Katanga's responsibility under article 25(3)(d)(ii) has not been established.

[328] In particular, I believe I have found elements of the reasoning about the alleged common purpose in chapters VII.B, VII.E, and IX.A.2.

which the attack was carried out. As I have already indicated my views in this regard,[329] I will not repeat them here, except for two points.

228. First, the Majority attaches considerable importance to the allegation that Bogoro was "attacked from all sides, very early in the morning, when it was still night and when the inhabitants were at their homes asleep".[330] It is not possible to extrapolate from the fact that the UPC position at the *Institut de Bogoro* came under attack from several directions that the entire village was systematically approached from all sides in order to trap the civilian population. In fact, it seems a lot more likely that the attackers quickly penetrated the village in order to reach the UPC position and concentrated their offensive efforts on this. As regards the timing of the attack, I think it is perfectly possible that the attackers wanted to use the element of surprise against the UPC. The Majority's suggestion that the early hour of the attack was somehow related to the attacker's alleged intention to harm civilians is purely speculative and has no evidentiary basis.

229. Second, I want to emphasise that I do not accept the Majority's reliance on the alleged fact that the Ngiti fighters of Walendu-Bindi, together with unidentified other attackers, one by one destroyed and/or burned and/or took away the roofs of houses belonging mainly to the Hema population of Bogoro in an organised manner.[331] First, there is no reliable evidence about the proportion of houses that were effectively destroyed or pillaged by Ngiti fighters of Walendu-Bindi. As the Majority acknowledges, many others, including Lendu, Bira or indeed Ngiti

[329] See *supra,* III.C.1 The Bogoro attack was not an attack against the civilian population (article 8(2)(b)(i) and article 7).
[330] See Majority Opinion, para. 1653.
[331] See Majority Opinion, para. 1656.

civilians, may have carried out the pillaging and destruction of property. Second, there simply is no evidence that the civilian houses of Bogoro were pillaged and/or destroyed in an organised manner. It is to be noted, in this regard, that the Majority acknowledges that those acts may have been carried out after the attack. The Majority does not provide an indication of the time-frame involved, but I believe that it cannot be excluded that Bogoro was gradually pillaged and destroyed by civilians from surrounding areas, such as Bedu-Ezekere, who came to scavenge once the fighting was over.

(b) Prior and posterior conduct

230. The Majority also invokes the Ngiti's alleged prior and subsequent behaviour during other attacks, including Nyankunde.[332] I will come back at length to the only example of prior conduct, i.e. Nyankunde,[333] however, I want to express my astonishment here about the fact that the Majority relies on events that took place *after* the attack on Bogoro.

231. First, I am of the view that the available evidence does not allow the Chamber to make any findings about what may have happened during posterior events beyond reasonable doubt. As these alleged events have not been substantiated, it is not permissible to rely on them for making inferences beyond reasonable doubt.

232. Second, I do not see how what is alleged to have happened during subsequent events can inform us about what the Ngiti fighters of Walendu-Bindi intended to do in Bogoro on 24 February 2003. It is entirely unclear whether these subsequent operations were already

[332] See Majority Opinion, para. 1658, which contains a cross-reference to section VII.E of the Majority Opinion, but in which I do not find any substantive treatment of subsequent attacks during which Ngiti fighters of Walendu-Bindi are alleged to have committed crimes against Hema civilians.
[333] See *infra*, III.C.3.b)(2)(d) The attack on Nyankunde.

planned before the attack on Bogoro and it certainly cannot be maintained that it was foreseeable at the time what would happen during these operations. Even if it were possible to retroactively infer something from a pattern of conduct, it cannot reasonably be argued that those involved in the preparations of the attack on Bogoro could know about what was going to happen in Bogoro on the basis of other events that were yet to take place and which were not part of the same common purpose.[334]

233. The two main remaining elements in the Majority's reasoning about the policy/common purpose are the so-called "Lettre de doléances" and the evidence about what happened during the attack on Nyankunde of 5 September 2002.[335]

(c) Lettre de doléances

234. The so-called "Grievances Letter" ("Lettre de doléances")[336] is a crucial piece of evidence in the Majority's reasoning leading to the conclusion that the Ngiti fighters of Walendu -Bindi were moved by ethnic hatred towards the Hema.[337]

235. A first point to note with regard to this letter is that it is addressed to the Presidents of the DRC and Uganda, the Secretaries General of the United

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[334] See Majority Opinion, para. 1672.

[335] It is interesting to note that the "Lettre de doléances", EVD-D03-00098 was submitted by the Defence for Mathieu Ngudjolo and that almost all of the evidence in relation to the attack on Nyankunde was delivered by witnesses for the Defence of Germain Katanga and Germain Katanga himself. If ever one needed proof that the anti-Hema ideology of the Ngiti fighters of Walendu-Bindi did not form an important part of the Prosecutor's case under article 25(3)(a), I think the fact that the Prosecution presented almost no evidence on it is very telling in this regard.

[336] "Lettre de doléances", EVD-D03-00098. This document, which dates from 15 November 2002 and is signed by 18 representatives of the "Communauté Lendu de Base", contains an appeal for assistance by the Lendu community and lists a number of alleged attacks carried out by the UPC and its allies against Lendu villages.

[337] The Majority Opinion contains almost 40 references to this document.

Nations and the African Union, the President and Chief of Staff of the RCD-KisML as well as MONUC.[338] I draw attention to this point because it seems rather unlikely that anyone would have addressed all these authorities and exposed to them their criminal plan to eliminate the Hema civilian population. It is important to bear this in mind, especially when considering the Majority's interpretation of this document.

236. A second general observation pertains to the fact that the "Lettre de doléances" was written in the name of the "Communauté Lendu de Base". Moreover, although the letter was drafted in Aveba with the involvement of members of the Lendu-delegation from Zumbe during its visit to Aveba in November 2002,[339] none of the commanders of the so-called "Ngiti fighters of Walendu-Bindi" signed the document. Whatever the content of the document may be, it seems thus rather difficult to conclude anything from this beyond reasonable doubt about the mental state of the Ngiti fighters of Walendu-Bindi, even if they were aware of its existence and content.

237. With regard to the content of the "Lettre de doléances", I find it hard to see how this document constitutes proof of the alleged desire to exterminate the Hema civilian population. In order to make this argument nevertheless, the Majority relies on a number of questionable assumptions.

238. First, the Majority posits that, in the eyes of the drafters of the "Lettre de doléances", UPC/RP and the Hema civilian population were one and the same.[340] In order to come to this conclusion, the Majority seems to

[338] "Lettre de doléances ", EVD-D03-00098 at DRC-OTP-0194-0348.
[339] See Majority Opinion, para. 574.
[340] See Majority Opinion, para. 718.

assume that the drafters made the mistake of assuming that because all UPC/RP members were Hema, this necessarily meant that all Hema were also UPC/RP. This is of course not correct, as is illustrated by the fact that there were other Hema 'politico-administrative' organisations, such as PUSIC, and it is entirely possible that some Hema were simply not affiliated with any political/military groups. Accordingly, whatever one may be able to infer from the "Lettre de doléances" about the attitude of the "Lendu de base" vis-à-vis the UPC, this cannot be extrapolated to the wider Hema civilian population.

239. Second, the Majority ignores the fact that the document systematically mentions the UPC/RP *and its allies*. According to the "Lettre de doléances", these allies are none other than Uganda and Rwanda.[341] The document even claims that all important decisions by the UPC/RP are taken only with the approval of "Kampala".[342] Indeed, the very fact that the letter claims that the alleged ultimate goal of the UPC/RP and its allies was to establish an independent "Hema-Tutsi Empire" (which was supposed to have encompassed, apart from Ituri, both the francophone provinces of Uganda, as well as Rwanda and Burundi), clearly shows that the true concern of the drafters of the "Lettre de doléances" vastly transcended any rivalry with the local Hema civilian population.

240. Finally, it needs to be said that the Majority is unable to point to any document, statement or testimony from which it clearly transpires that "the Lendu", much less the Ngiti fighters of Walendu Bindi, were animated by a desire to harm Hema civilians. In fact, the "Lettre de

[341] This is even mentioned in the title of the document: "Rapport Circonstancié – Dénonciation de la planification de l'extermination des résistants de base de l'Ituri par L'UPC/RP et ses alliés l'Ouganda et le Rwanda". See "Lettre de doléances", EVD-D03-00098 at DRC-OTP-0194-0349.
[342] See "Lettre de doléances", EVD-D03-00098 at DRC-OTP-0194-0352.

doléances" shows the exact opposite. Far from expressing an attitude of ethnic vengefulness, the "Lettre de doléances" constitutes an expression of fear, a cry for help and an urgent request for a return to normalcy.[343] It is telling, in this regard, that although the UPC/RP is portrayed as being the "executioner" of the Lendu, the Hema population as such is not characterised as being the enemy.

(d) The attack on Nyankunde

241. It is no exaggeration to say that the attack on Nyankunde of 5 September 2002 is the centrepiece of the Majority's reasoning with regard to the so-called "anti-Hema ideology" and the supposed criminal intentions of the Ngiti fighters of Walendu-Bindi who attacked Bogoro.[344] It is therefore particularly important to consider the strength of the evidence about this tragic incident. In my view, apart from stating generalities such as that very bad things happened in Nyankunde, it is impossible to say with any level of precision or certainty what exactly happened there and, more to the point, who did what to whom and why. This point is illustrated by the fact that the Majority rejected the testimony of the only witness who was actually present during the event – D02-148 – when it comes to civilian casualties.[345] Ironically, the Majority does consider the same witness "particularly credible" in relation to the relative number of Ngiti fighters who participated in the attack – a point of his testimony which

[343] This is demonstrated quite clearly in the final part called "Suggestions", where mention is made of restoring the power of the RCD-Kis/ML, reopening schools, hospitals and infrastructure and so on. In fact, the only request in relation to the UPC/RP that is made is that the international community condemn them and their allies for deploying anti-personnel mines. See "Lettre de doléances", EVD-D03-00098 at DRC-OTP-0194-0353.

[344] The Majority Opinion contains more than 90 references to Nyakunde, in particular, paras 705-706, 1151-1154.

[345] See Majority Opinion, para. 559.

fits nicely in the Majority's conception of events.[346] As a result, the Majority is left with some anonymous hearsay evidence,[347] including a report of UN investigators. In relation to the latter, I cannot fail but notice that it seems rather unconvincing to base a finding beyond reasonable doubt on a report that (a) has been proved rather inaccurate in other parts[348] and (b) which, in relation to the most important point – i.e. the responsibility for the civilian killings – states that "From 80 survivors' statements gathered by MONUC, it *appears* that mainly Ngiti forces were responsible for the killings."[349] Clearly this is insufficient evidence for even the most basic findings, which once again demonstrates how important it was to have additional investigations into what occurred in Nyankunde.[350]

242. One particularly important question with regard to Nyankunde is who killed most of the civilians. As the Majority acknowledges, the attack was carried out by a coalition of forces. This coalition brought together an APC battalion under the command of Major Faustin and a number of local 'Ngiti militia'. With regard to the latter, the Majority maintains the Ngiti fighters were all under the command of Kandro,[351] but this is

[346] See Majority Opinion, para. 556.
[347] See, in particular, the vague and general testimony of several hearsay witnesses listed in the footnotes to paragraph 558 of the Majority Opinion.
[348] For example, the findings in relation to the attack on Bogoro. See United Nations Security Council, "Special report on the events in Ituri, January 2002-December 2003", EVD-OTP-00206 ("UN Special Report"), paras 64-67.
[349] (Emphasis added). See UN Special Report, EVD-OTP-00206, para. 58.
[350] This point is reinforced by the fact that the Chamber did not allow all relevant paragraphs from the UN Special Report,EVD-OTP-00206 about what happened in Nyankunde into evidence. In particular, paragraphs 53-55 and 59-60 were not admitted, even though they contain potentially relevant information about events at Nyankunde. This illustrates, once again, that Nyankunde was not really an issue throughout the trial. See UN Special Report, EVD-OTP-00206, paras 53-55 and 59-60.
[351] See Majority Opinion, para. 555.

clearly not the case.[352] Cobra Matata was there as well with his men. Considering the evidence concerning the disagreement between Kandro and Cobra, who both bore the rank of colonel, and the killing of the former by the latter shortly after the attack on Nyankunde, I think it is hard to sustain that Cobra's men were somehow under Kandro's authority.[353] This point is important, because Cobra did not take part in the attack on Bogoro. Accordingly, if it were mainly Cobra's men who killed civilians in Nyankunde, it is difficult to infer anything from this about the mental state of those who attacked Bogoro several months later.

243. Moreover, command over Kandro's militia – the "Garnison" – changed twice between the attack on Nyankunde and the attack on Bogoro.[354] Whatever may have been Kandro's policies with regard to the Hema population cannot, therefore, be assumed to have persisted, despite the fact that his successor – Yuda – who led the attack against Bogoro was also present at Nyankunde. I note, in this regard, that the only witness who was part of the Garnison and who fought in Nyankunde testified that:

> *The aim was to attack soldiers in their camp, and civilians could, of course, be injured, but the aim was not to attack them or kill them.*[355]

244. Accordingly, it is not at all clear who did most of the killing at Nyankunde. I note in passing that there is simply no reliable evidence about the scale of the massacre at Nyankunde. The Majority does not

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[352] D02-148, T-279, p. 8: "[the] most important commanders were Kandro and Cobra."
[353] After Nyankunde, Kandro was killed by Cobra and fighting ensued between the "Garnison" and Cobra's troops. See D02-148, T-279, pp. 11 and 13.
[354] D02-148, T-279, pp. 13-14.
[355] D02-148, T-279, p. 55.

venture to suggest a minimum number of casualties, but simply informs us about what the UN Special Report has to say in this regard. As the Chamber is not entitled to take judicial notice of findings by the UN, one wonders what the value of such a reference is.[356] More importantly, one may ask whether the Majority has carried out its responsibility to enter its own findings on the basis of the applicable standard of proof. In any event, in the absence of clear information about how many civilians were killed, the proportion of casualties within the total population and the number of UPC combatants, and, most importantly, whether most civilians were killed during the attack or in the days that followed, there is simply no solid basis for making any inference beyond reasonable doubt about the intent of the troops who attacked Nyankunde.

245. One particularly salient point about Nyankunde is that the vast majority of civilian casualties were not of Hema ethnicity. Instead, as the Majority acknowledges, most civilian victims at Nyankunde belonged to the Bira ethnic group.[357] This conclusion would seem detrimental to any argument that Nyankunde could somehow be considered as a 'precedent' for what happened in Bogoro and, therefore, as an indication of the criminal state of mind of the Ngiti fighters of Walendu-Bindi.

246. However, the Majority appears undaunted by the fact that the principal group of victims at Nyankunde belonged to a different ethnic group than the one who appears to have borne the brunt at Bogoro. Indeed, the Majority even states that:

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[356] I note, in passing, that the UN Special Report, which did not apply the beyond reasonable doubt standard, has proved less than reliable with regard to the victim count in Bogoro. Compare, in this regard, the alleged number of 260 victims with the findings beyond reasonable doubt of the Chamber. See UN Special Report, EVD-OTP-00206, para. 65.

[357] See Majority Opinion, paras 566,706.

> *[TRANSLATION] the design to wipe out the Hema civilian population of Bogoro is in sequel to another operation, which was also of a large scale, carried out several months earlier against Nyakunde.*[358]

247. The Majority explains away this apparent contradiction by arguing that the Bira (or at least part of that ethnic group) had sided with the Hema and that accordingly:

> *[TRANSLATION] the civilian population, for the most part Bira from Nyakunde, was attacked on 5 September 2002 because of its status as a UPC/Hema ally.*[359]

248. There are several fundamental problems with this statement. First, the supposed alliance between the Hema and the Bira and, more importantly, the alleged equation of the two by the Ngiti, is a proposition that was never litigated during the trial. Accordingly, this argument will come as much of a surprise to the Defence as it did to me. Needless to say, it is fundamentally unfair when a Chamber bases one of its key findings on an alleged fact against which the Defence has never had an opportunity to defend itself.[360] Moreover, in order to meaningfully respond to this surprising allegation, the Defence would have had to be able to investigate the matter further. As noted, the Majority denied the Defence a meaningful opportunity in this regard.[361]

249. The Majority also seems to have overlooked the fact that the UN Special

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[358] See Majority Opinion, para. 1151: " *le projet d'effacer la population civile hema de Bogoro s'inscrit dans la continuité d'une autre opération, d'envergure elle-aussi, menée quelques mois plus tôt contre Nyakunde.*"

[359] See Majority Opinion, para. 706: " *que c'est en raison de son statut d'allié de l'UPC/Hema que la population civile, essentiellement Bira de Nyakunde, a été attaquée le 5 septembre 2002.*"

[360] I note, in this regard, that the testimony of Germain Katanga upon which the Majority relies in part for this finding relates to the chasing of the Lendu and Ngiti from Nyankunde in August 2001 (i.e. one year earlier), by the Bira and the UPDF.

[361] See *supra*, II.B.3.c) The Defence did not have a meaningful opportunity to investigate.

Report – which is relied upon by the Majority in the same paragraph – states that:

> *Each time that they took control of Bunia – August 2002 and May 2003 – UPC forces conducted a manhunt for Lendu, Bira, Nande and non-Iturians whom they considered opponents*[362]

250. This seems to be quite odd behaviour for an ally who is considered to be so close that the Ngiti treated them as if they were interchangeable. Moreover, the Majority appears to ignore its own finding that Bira participated in the commission of crimes against Hema at Bogoro.[363] In any event, even if it was indeed the case that the Ngiti viewed the Bira of Nyankunde as allied to their nemesis the Hema, this would seem to constitute an argument against any *ethnically* biased motive behind the crimes against civilians in Nyankunde.

251. Be that as it may, I would observe that, even if it were proven beyond reasonable doubt that the persons or groups who attacked Nyankunde on 5 September 2002 were driven by a desire to kill the Bira population as proxies for the Hema, this would still not constitute proof of the allegation that the Ngiti of Walendu-Bindi who attacked Bogoro on 24 February 2003 were motivated by the same desire. There are a number of reasons as to why this is so.

252. First, there is insufficient evidence to suggest that all the persons hailing from Walendu-Bindi who attacked Bogoro also took part in the attack on Nyankunde. The Majority mentions that at least three Ngiti

[362] UN Special Report, EVD-OTP-00206, para. 37.
[363] See Majority Opinion, paras 734, 816, 842, 867, 885, 933, 941.

commanders were involved in both operations.[364] However, the only one of them who actually testified, D02-148, denied he was motivated on ethnic grounds. There simply is no information about the motivations of the other two. Although there is no doubt that there were at least some fighters from Walendu-Bindi who did participate in both events, there is nothing to suggest that the same is true for the majority – or even a significant minority – of Ngiti fighters who fought at Bogoro. Indeed, there is not even clear evidence to show that those who attacked Bogoro even knew what had exactly happened in Nyankunde or why, let alone that they approved of it.

253. Second, even assuming that the majority of the Walendu-Bindi fighters who took part in Bogoro were also present in Nyankunde, there is no good evidence to show that they were the ones who committed crimes against the Bira in Nyankunde. As already indicated, it is not unreasonable to think that most atrocities against civilians were committed by Cobra Matata's men, who did not take part in the attack on Bogoro. It cannot be assumed that those who were present in Nyankunde and witnessed crimes being committed there shared the criminal intent with the perpetrators or approved of their actions.

254. Third, even assuming that the same fighters from Walendu-Bindi perpetrated most of the crimes against Bira in Nyankunde, this still would not warrant one to infer beyond reasonable doubt that they attacked Bogoro with the intention to kill Hema civilians there as well. One incident is simply statistically insignificant. In order to prove a tendency to commit crimes on the basis of prior behaviour, it would, in my view, be necessary to show there was a series of similar incidents in

[364] See Majority Opinion, para. 1151.

which the same individuals behaved according to a clear pattern. Whatever one may believe about Nyankunde, it can never prove that all the Ngiti always acted in the same manner.

(e) Ethnic animosity does not automatically equal criminal common purpose

255. The Majority's position is that the principal parties of the conflict were the Hema and the Lendu (including the Ngiti) and that all other allied groups simply allied themselves with either side.[365] With respect, this way of presenting things grossly oversimplifies a very complex situation.[366] It may well be that many Ngiti from Walendu-Bindi held deep grudges against the Hema population, at whose hands they believed to have suffered for a long time.[367] However, hating ones enemy for being the enemy is not the same as denying their right to exist. Indeed, the wish to prevail over ones enemy cannot simply be equated with intent to erase them from the face of the earth, as the Prosecutor and the Majority seem to suggest.

256. It is on this point that my disagreement with the Majority's reasoning is most pronounced. In particular, in order to come to the conclusion that

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[365] See Majority Opinion, para. 702.

[366] The UN Special Report, EVD-OTP-00206, mentions, in paragraph 12, 18 different ethnic groups, of which the Alur were supposed to be the biggest group. It must be pointed out that the Majority does not explain the position of all the other ethnic groups who lived in Ituri. If the Hema population was indeed intent on establishing hegemony over Ituri, this would quite naturally make enemies of all other ethnic groups. Although the evidence in the case is insufficient in this regard, it is worth noting that the UN Special Report mentions that in Bunia the UPC adopted an ethnic cleansing policy "to empty the town of its Lendu and Bira populations, as well as the 'non-Iturian' Nande community". See UN Special Report, EVD-OTP-00206, para. 5. There is no reliable information about the Alur in this regard.

[367] However, it is noteworthy that the Majority Opinion states that several witnesses have mentioned that it was common knowledge that the enemies of the Lendu were the Hema, but that apart from P-28 none of these witnesses are Ngiti. See Majority Opinion, para. 708. The Majority also refers to Germain Katanga's testimony, but there is no indication that the APC officers mentioned were Ngiti or even Lendu.

the Ngiti fighters of Walendu-Bindi viewed the entire Hema ethnic group as a whole (i.e. including civilians) as their target for destruction, the Majority seems to adopt the following line of argument: the UPC is seen as the enemy; as the UPC is a predominantly Hema movement, the Ngiti identified the Hema with the enemy; as the Ngiti wanted to destroy their enemy, they wanted to destroy the entire Hema population.

257. I note with concern, in this regard, that the Majority engages in selective reading of the evidence and sometimes misstates the content of the evidence. For example, in paragraph 585, the Majority refers to comments made on a video recording by commander Dark, in which he is said to have spoken of an "ethnic war" and to have linked this to patriotic motives. However, when the transcript of Dark's utterances on the video is read in its entirety, a rather different picture emerges. In fact, Dark was responding to a question by a journalist, and stated that the journalist was talking of ethnic war, but that this was not what he was doing.[368] On the contrary, Dark emphasises that his troops, who were occupying Bogoro at the time, had opened the main road through Bogoro for all, including the Hema. This is just one example which clearly illustrates a wider problem, namely that the Majority seems to systematically ignore or downplay those parts of the evidence that do not fit within its ethnicity-centred view on the case, while routinely amplifying those parts of the evidence that confirm it.

258. Be that as it may, one should be extremely careful not to exaggerate the significance of motives like "ethnic hatred" or "desire for revenge". Whereas ethnicity sometimes does play an important role in the type of conflict that took place in Ituri, it is essential not to fall into the trap of

[368] Transcript T-331, p. 18.

oversimplification. There is a real danger in treating entire populations, or vast categories within a population, as abstract entities with a mind of their own. Whatever sociologists and anthropologists may be able to teach us about the collective characteristics of social and ethnic groups, it is not permissible in a judicial context to extrapolate from such collective traits any firm conclusions about how individual members of the group acted or behaved in a particular context. Even though international criminal law deals with what is sometimes described as "group" or "mass criminality", its ultimate concern is with specific individuals and their personal criminal behaviour. It is therefore inappropriate to lump together entire populations and attribute collective criminal intentions to all their members. Individuals are not predetermined to act or think in a particular way simply because they belong to a certain social or ethnic group, even if a considerable majority of the group does act or think that way. Accordingly, without very solid and sufficiently specific evidence showing that particular members of a certain social or ethnic group actually shared the intent to commit crimes, it is not possible to speak of a "group acting with a common purpose" in the sense of article 25(3)(d).

c) There is a more plausible interpretation of the evidence

259. Based on the above considerations, I think it is fair to say that the Majority's interpretation of the available evidence is highly problematic. Indeed, the wholly artificial segregation of the EMOI plan from the alleged policy/common purpose of the Ngiti fighters of Walendu-Bindi, forces the Majority adopt a narrative which is, in my view, rather implausible. In particular, if we are to believe the Majority, we have to accept that the Ngiti fighters of Walendu-Bindi were so afraid of the impending rise of the "Hema-Tutsi empire" that they developed an "anti-Hema ideology" which was so strong that they wanted to eliminate

all Hema from Bogoro.[369] In order to achieve this goal, they were willing to act as cannon-fodder for the APC in the fight against the UPC, which they did for the sole purpose of obtaining weapons and tactical guidance from them so that they would be able to satisfy their blood thirst against the Hema.

260. Apart from the fact that there is simply no good evidence for this proposition, it is a lot more plausible that the initiative to drive out the UPC from Ituri by military force originated from the authorities in Kinshasa and Beni, who enlisted several Ngiti commanders, including Germain Katanga and some former APC officers, for that purpose. The planning and preparation was carried out under the auspices of the EMOI, which also provided the necessary logistical, tactical and material support – including weapons and ammunitions. The EMOI plan was legitimate and did not involve the commission of crimes against the Hema civilian population. However, an indeterminate number of Ngiti fighters (together with others), deeply resented the Hema and, because of a lack of proper military discipline and adequate command and control structures, were able to go on a rampage in Bogoro. They were spontaneously joined in this by Bira and Lendu, combatants as well as civilians (including women and children), from areas surrounding Bogoro.

261. I do not pretend to know that this is how everything took place. Due to a lack of adequate evidence, we will never fully understand what happened on 24 February 2003 and especially who did what to whom and why. However, what I am saying is that this is a more plausible and

[369] The Majority does not explain how eliminating all Hema civilians from Bogoro would have reduced the threat posed by the UPC and its allies.

realistic interpretation of the evidence. At the very least, it is a reasonable reading of the evidence, which casts a serious doubt upon the theory of the Majority.

4. Conclusion

262. Based on the above considerations, I conclude that the Majority's case under article 25(3)(d)(ii) fails to persuade. Apart from the fact that there simply is not enough reliable evidence to sustain it, I cannot escape the impression that the Majority Opinion on several occasions seems to betray a certain tendency to accept evidence supporting the Majority's theory of the case and reject anything else. In any case, I do not believe that the evidence leaves no other interpretation open. On the contrary, I am strongly of the view that there are other, more convincing, ways of interpreting the evidence. Accordingly, it is not possible to maintain that the Majority's case under article 25(3)(d)(ii) has been established beyond reasonable doubt.

D. There is insufficient evidence of crimes against humanity

263. Given my views on the evidence in general and more particularly in relation to the Majority's charges under article 25(3)(d)(ii),[370] there is no real need for me to comment on the contextual elements in this case. However, I wish to make the following few observations to explain why I am of the view that the conditions for the contextual elements under article 7 have not been established.

1. No "multiple commission"

264. As far as the "Multiple Commission Requirement" (article 7(2)(a)) is concerned, I respectfully disagree with my colleagues that a casualty

[370] See *supra*, III.B Weakness of the Majority's case under article 25(3)(d)(ii).

count of 33[371] satisfies the minimum threshold. Without wishing to minimise the seriousness of even a single death, I do not believe that such a relatively small number rises to the level of a crime against humanity.

265. In this regard, I believe that it is not permissible to take into consideration conduct that is not categorised as crimes against humanity in order to meet the "Multiple Commission Requirement", or indeed the "Widespread or Systematic" requirements.[372] Accordingly, I think it is inappropriate for the Majority to make reference to acts of pillaging and destruction of civilian property, which are charged under article 8 of the Statute.[373] Instead, I believe that in order to satisfy the Multiple Commission Requirement, the Prosecutor must be able to point to a sufficient number of instances of crimes under article 7(1) that have been committed by the perpetrators pursuant to or in furtherance of a State or organisational policy.

266. Of course, it would have been theoretically possible that members of another organisation had fulfilled the "Multiple Commission Requirement", in which case it would only have been necessary to show that the crimes committed by the Ngiti fighters of Walendu-Bindi were

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[371] This number is based on the Majority's count of 30 cases of killing and 3 cases of rape/sexual slavery. As already indicated, I fundamentally object to the Majority's vague and abstract claim that the number of victims of killing "went beyond" 30 (see Majority Opinion, para. 869). In any event, as the Majority Opinion provides no order of magnitude, and this claim is based mainly on the testimony of one witness (P-353), it is probably safe to conclude that whatever additional number of casualties the Majority has in mind would not fundamentally affect my argument.

[372] Article 7(2)(a) quite clearly states that "attack against a civilian population means a course of conduct involving the multiple commission *of acts referred to in paragraph 1* […]"(emphasis added).

[373] See Majority Opinion, para. 1138. It may well be that in certain circumstances such acts may amount to the crime of humanity of forcible transfer. However, such a finding was not warranted in this case. Moreover, it was never charged and the Chamber never provided notice of it under regulation 55.

committed "as part of" the widespread or systematic attack. However, the Majority only relies on what it sees as the "course of conduct" of the Ngiti in order to find that crimes against humanity were committed.

2. Directed against any civilian population

267. In relation to the requirement that the attack must have been directed primarily against a civilian population, I refer to my opinion on the non-existence of a criminal purpose.[374] I am of the view that the evidence does not show beyond reasonable doubt that the Hema civilian population of Bogoro was the primary target of the attackers.

3. No organisational policy

268. As far as the requirement of an "Organisational Policy" is concerned, I also refer to my earlier findings in relation to the alleged criminal common purpose.[375] For the same reasons I do not think that a policy in the sense of article 7(2)(a) has been proved.

4. No organisation

269. Moreover, even if one did not accept my views in relation to the policy, I would still argue that the contextual circumstances of article 7 had not been satisfied because I do not believe that whatever corporate shape the so-called "Ngiti-fighters of Walendu-Bindi" took qualifies as an "organisation" in the sense of article 7(2)(a). This conclusion remains valid, even if I accepted all of the Majority's findings in relation to the structure and organisation of the Ngiti fighters of Walendu-Bindi.

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[374] See *supra*, paras 207- 208.

[375] See *supra,* III.C.2 The Ngiti fighters of Walendu-Bindi did not constitute a "group acting with a common purpose" (article 25(3)(d)) or an "organisation" (article 7) and III.C.3 There is no evidence of a common purpose or organisational policy to attack the Hema civilian population.

5. Not systematic

270. Finally, I wish to distance myself from the Majority's finding that the attack on Bogoro qualified as a systematic attack in the sense of article 7(1) of the Statute.

271. First, I would simply like to observe that the Majority's claim that the strategy of the attackers made it very difficult for the civilian population to flee[376] is not borne out by the victims count.[377] If the Majority is correct that the civilian population was consciously 'trapped' inside Bogoro, it would stand to reason that there would be a much higher number of victims, especially taking into account the alleged high number of attackers.[378] I recall, in this regard, that I do not accept the evidence shows that Bogoro as such was indeed attacked from all sides.[379]

272. Second, I disagree that the alleged fact that the attackers made no distinction between combatants and civilians is an indication of systematicity in the sense of article 7(1) of the Statute. I note, in this regard that the use of a so-called "Lopi"[380] (an allegation which I do not consider proven, considering the untrustworthiness of witness P-161) is not proof of systematicity either. It is quite plausible that the attackers were searching Bogoro for hiding UPC soldiers.

273. Third, as already noted, I object to my colleagues' reference to instances of pillaging and destruction of civilian property, which are charged under article 8 (war crimes).[381] Neither of these two crimes is listed in

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[376] See Majority Opinion, para. 1159.
[377] See Majority Opinion, para. 1134.
[378] See *supra*, para. 178.
[379] See *supra* III.C.3.b)(2)(a) Way in which the attack was carried out.
[380] See Majority Opinion, para. 1160.
[381] See Majority Opinion, para. 1138.

article 7(1) and they can therefore not be taken into consideration for the determination of the nature of the attack.

274. Fourth, so little is known about how, when and by whom most of the crimes against civilians were actually carried out that it is totally impossible to form any opinion about the systematic nature of it.

275. Finally, I want to stress that the fact that the military attack may have been planned and carried out in an organised and coordinated manner – at least as far as the APC and the Ngiti fighters of Walendu-Bindi were concerned – can hardly constitute evidence for the allegation that the crimes against the civilians were also planned and carried out in an organised and coordinated manner. In fact, the large-scale participation of Lendu and Bira fighters in the commission of crimes against civilians contradicts such a claim. As there is no good evidence about any coordination between the Ngiti fighters and the Lendu or the Bira, it can only be assumed that their arrival at the scene disrupted any operations the former might have planned (but for which there is also no reliable evidence).

E. The nature of the armed conflict

276. The Majority Opinion concludes that the nature of the armed conflict was non-international. I do not wish to take a firm position on this issue, as the law is far from settled in my view,[382] and the facts of this case are particularly complex on this point. Suffice it to say that I am of the view that, here again, the evidence is not sufficient to arrive at any conclusions beyond reasonable doubt, as is required by the Appeals Chamber.[383] Accordingly, I am unable to agree with my colleagues in this regard.

F. Germain Katanga's responsibility under article 25(3)(a) has not been established

277. I agree with the Majority that Germain Katanga's responsibility under article 25(3)(a) has not been established. I will therefore limit myself to some observations in relation to the Majority's legal analysis.

278. It follows from the acquittal of Mathieu Ngudjolo[384] that the charge of "indirect co-perpetration" has been rejected. The Majority therefore does not develop its views as to this form of responsibility. At this juncture, I want to repeat what I said in my Concurring Opinion in *Ngudjolo*: I believe that the concept of "indirect co-perpetration" has no place under

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[382] For example, the Majority Opinion relies on the "overall control" criterion from the ICTY jurisprudence. Whereas, as the International Court of Justice has pointed out in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* "Judgment", 26 February 2007, ICJ Reports 2007, paras 396-407 that this may well be the appropriate criterion for determining the nature of an armed conflict, it is in need of a new justification, as the ICJ has clearly rejected the rationale based on the law of state responsibility. See also Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, (Oxford University Press, 2012), pp. 32-79.

[383] Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta and Francis Kirimi Muthaura*, "Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-02/11-425, paras 33-36.

[384] See *Ngudjolo* Judgment.

the Statute as it is currently worded, because it adds a fourth form of responsibility to the three forms already laid down in article 25(3)(a), namely perpetration, co-perpetration and perpetration through another person. I consider this to be an expansive interpretation which is inconsistent with article 22(2) of the Statute and which therefore should be rejected.[385]

279. The Majority adopts the "control of the crime" theory but, unlike all previous cases where the control theory was adopted, rejects the concept of a hierarchy of responsibilities within article 25(3)(a).[386] I agree with the latter, but disagree with the former. For the reasons I developed in my Concurring Opinion in *Ngudjolo*,[387] I am not convinced that the "control of the crime theory" should guide the ICC's interpretation of article 25(3). The Majority Opinion has not persuaded me to change my mind.

280. Like Judge Fulford, I believe that we should adopt the ordinary meaning of the language of article 25(3) and interpret its terms accordingly. In my Concurring Opinion in *Ngudjolo*, I concluded that a plain reading of article 25(3)(a) requires, for the purposes of joint perpetration, that only those individuals whose acts make a direct contribution to bringing

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[385] See *Ngudjolo* Judgment, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4 ("Concurring Opinion of Judge Van den Wyngaert"), para. 64.

[386] The Majority also rejects the idea that the so-called "Organisationsherrschaft" doctrine is a constitutive element of "indirect perpetration" in the sense of article 25(3)(a) (see Majority Opinion, para. 1406). While I agree with my colleagues on this point, I do not agree with their suggestion that "Organisationsherrschaft" can be used to assign individual criminal responsibility to indirect perpetrators because control over an organisation provides them with control over the *crime*. As I have explained in my Concurring Opinion of 18 December 2012, I can imagine that control over an organisation can be an important factor to demonstrate that an accused did in fact dominate the *will* of certain individuals who were part of this organisation. However, in such cases, control over the organisation is used to demonstrate control by the indirect perpetrator over the physical perpetrator (i.e. the individual person(s)) and not control over the crime. See, Concurring Opinion of Judge Van den Wyngaert, paras 49-57.

[387] Concurring Opinion of Judge Van den Wyngaert, para. 6.

about the material elements of the crime can be said to have jointly perpetrated the crime.[388]

281. The new approach of the Majority may lack consistency. The control theory was originally adopted in the jurisprudence of this Court as the best way to separate principals and accessories to crimes.[389] The methodology behind this separation was seen as particularly important so as to assign the "masterminds" or "intellectual authors" of international crimes the label of "committers" under article 25(3)(a) of the Statute.[390] The notion of hierarchy is thus inherent in the control theory. However, if there is no hierarchical arrangement between these concepts, principals can be just as blameworthy as accessories. If this is true, then why go to such theoretical lengths to divide principals and accessories at all? Instead of the control theory, why not just adopt the ordinary meaning of the language of article 25(3) of the Statute in light of its object and purpose, which is the interpretive standard for every other provision in the Statute?[391] Even if it were conceded that the control theory was available when interpreting the Statute, on the Majority's interpretation it

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[388] Concurring Opinion of Judge Van den Wyngaert, para. 48.

[389] See Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06-803-tEN, paras 327-40.

[390] See Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "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. 409; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "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. 134(a); Confirmation Decision, para. 515.

[391] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 331, article 31, as relied on as an interpretive source by Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I", 26 November 2008, ICC-01/04-01/07-776, para. 13; Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 15 July 2006, ICC-01/04-168, para. 33.

is harder than ever to see what advantage there is to using this theory to interpret article 25(3).

G. Germain Katanga's responsibility under article 25(3)(d)(ii) has not been established

282. Under this heading I will discuss Germain Katanga's role in light of article 25(3)(d)(ii). I will first offer a few comments on how I see the interpretation of this article. After that I will comment upon the Majority's conclusions and present my own views of the evidence.

1. The law on article 25(3)(d)(ii)

283. As to the applicable law for article 25(3)(d) liability, I find myself generally in agreement with the approach taken by the Majority[392] and Pre-Trial Chamber I in *Prosecutor v. Mbarushimana*.[393] I wish only to briefly clarify my position in relation to four points.

284. First, any interpretation of article 25(3)(a) affects the interpretation of the "common purpose group" in article 25(3)(d), because the group with a common purpose has to either commit or attempt the commission of the crimes for 25(3)(d) liability.[394] As it is a *group* that must commit or attempt to commit crimes, there must, by definition, be joint commission as defined in article 25(3)(a).[395] Accordingly, the group committing crimes for 25(3)(d) liability must contain persons who could be

[392] See Majority Opinion, paras 1616-1642.

[393] See *Mbarushimana* Confirmation Decision, paras 268-289.

[394] Article 25(3)(d) of the Statute provides, in relevant part, that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […] [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose".

[395] Article 25(3)(a) of the Statute provides, in relevant part, that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […] [c]ommits such a crime, whether as an individual, jointly with another or through another person […]".

considered as jointly perpetrating these crimes under article 25(3)(a).[396]

285. In accordance with my conclusion in *Ngudjolo*, this means that common purpose groups must fulfil the material elements of the crimes and include those who made direct contributions to bringing about those material elements, either personally or through others.[397] A group consisting solely of persons who other Chambers would describe as "indirect co-perpetrators" is insufficient for 25(3)(d) liability in my view as I do not consider this theory of commission to form part of article 25(3)(a) of the Statute.[398]

286. Second, I read article 25(3)(d) in such a way that the common purpose of the group acting with a common purpose must be *criminal*. The group's common purpose must be such that the group members are at least aware that crimes will be committed in the ordinary course of events.[399] The Majority's analysis confirms this point,[400] but it also discusses how the group's common purpose need not be specifically directed at the commission of a crime.[401] I agree that the relevant group for 25(3)(d) purposes may simultaneously have criminal and non-criminal purposes. However, the criminal component must be such an inherent part of the common plan (i.e. that it *will* happen in the ordinary course of events (article 30)) that nothing is added by avoiding the label "criminal" when

[396] See *Mbarushimana* Confirmation Decision, para. 271 (also linking the common purpose group under article 25(3)(d) with the notion of joint perpetration under article 25(3)(a)).
[397] Concurring Opinion of Judge Van den Wyngaert, para. 44.
[398] Concurring Opinion of Judge Van den Wyngaert, paras 58-64.
[399] See article 30(2)(b) of the Statute (definition of intent in relation to a consequence given as that the person "means to cause that consequence or is aware that it will occur in the ordinary course of events").
[400] See Majority Opinion, para. 1627.
[401] Idem.

describing the common purpose required.[402] As a consequence, and on the subjective elements side of 25(3)(d) liability, I also believe that the person's intentional contribution must be at least aware that he/she is contributing to the *criminal* activities of the group.

287. Third, the assessment of a significant contribution can include factors which go above and beyond the original inclusive list in *Mbarushimana*.[403] In particular, I note the recent jurisprudence of the *ad hoc* tribunals regarding the "specific direction requirement" in the aiding and abetting context.[404] Just like with aiding and abetting liability at the ICTY, knowledge is a sufficient *mens rea* for liability under article 25(3)(d)(ii) of the Statute.[405] Without taking any position on the question as to whether customary international law has anything to say on aiding and abetting and, if so, whether or not it supports a requirement for "specific direction", I do consider that, when assessing the significance of someone's contribution, there are good reasons for analysing whether someone's assistance is specifically directed to the criminal or non-criminal part of a group's activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e.

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[402] See Majority Opinion, VIII.B.1.a).ii.a Droit applicable en vertu de l'article 30.

[403] See *Mbarushimana* Confirmation Decision, para. 284, where the Pre-Trial Chamber found that the following factors can assist in the assessment of a suspect's contribution to a crime: "(i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose; (ii) the efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes; (iii) whether the person created or merely executes the criminal plan; (iv) the position of the suspect in the group or relative to the group; (v) the role the suspect played vis-à-vis the seriousness of the crimes committed".

[404] ICTY, Appeals Chamber, *Prosecutor v. Šainović et. al.*, "Judgment", 23 January 2014, IT-05-87-A, paras 1617-1651; ICTY, Appeals Chamber, *Prosecutor v. Momćilo Perišić*, "Judgement", 28 February 2013, IT-04-81-A, paras 25-74; ICTY, Trial Chamber I, *Prosecutor v. Jovica Stanišić and Franko Simatović*, "Judgement" (Volume II of II), 30 May 2013, IT-03-69-T, paras 1264, 2356-61; SCSL, Appeals Chamber, *Prosecutor v. Charles Ghanka Taylor*, "Judgment", 26 September 2013, SCSL-03-01-A, paras 471-81.

[405] Article 25(3)(d) of the Statute provides, in relevant part, that "[s]uch contribution shall be intentional and shall either: […] or (ii) [b]e made in the knowledge of the intention of the group to commit the crime".

contributions that, by their nature, could equally have contributed to a legitimate purpose[406] – are criminal or not. The need for such a distinguishing element is especially acute in the context of article 25(3)(d), where both the *mens rea* and the *actus reus* thresholds are extremely low. That said, I see no need for incorporating a separate specific direction *requirement* for 25(3)(d) liability, but I believe the relevance of specific direction for the determination of the significance of any contribution in the sense of article 25(3)(d)(ii) should not be ignored. This is because there may otherwise be almost no criminal culpability to speak of in cases when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose.

288. Fourth, and finally, the relationship between the required *mens rea* and the particulars of the accused's understanding of the common plan changes across article 25(3)(d)(i) and 25(3)(d)(ii). Article 25(3)(d)(i) speaks of "furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court". By referencing "*a* crime", a more general understanding of the group's criminal purpose suffices for liability.[407] By contrast, article 25(3)(d)(ii) speaks of making a contribution "in the knowledge of the intention of the group to commit *the* crime". By referencing "the crime", the accused must have knowledge

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[406] I believe this is what Judge Fernández de Gurmendi called "neutral" contributions in her Separate Opinion to the Appeals Chamber, *Prosecutor v. Callixte Mbarushimana,* "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges'", 30 May 2013, ICC-01/04-01/10-514, ("Separate Opinion of Judge Fernández de Gurmendi"), para. 12.

[407] See *Mbarushimana* Confirmation Decision, Dissenting Opinion of Judge Sanji Mmasenono Monageng, para. 128, discussing how all that is required for article 25(3)(d)(i) is an aim to further the *general* criminal activity or purpose of the group.

of the specific crimes the group intends to commit, and a more generalised knowledge of a criminal purpose would be insufficient.

2. The facts under article 25(3)(d)(ii)

289. As will be clear from the analysis above, I am of the view that the essential ingredients for criminal responsibility under article 25(3)(d)(ii) have not been established. The Bogoro attack of 24 February 2003 was not an attack directed against a civilian population and the alleged existence of a group of Ngiti commanders/combatants acting with the criminal purpose to attack Hema civilians and to which Germain Katanga allegedly contributed is not sustained by the evidence. I also believe that Germain Katanga's alleged knowledge in the sense of (ii) of article 25(3)(d) has not been established (infra, III.G.2.a) nor do I think that it has been established that Germain Katanga contributed to a group acting with a common purpose rather than to a legitimate military operation (infra, III.G.2.b).

a) Germain Katanga's alleged knowledge of the criminal purpose

290. In order to prove Germain Katanga's alleged knowledge of the criminal common purpose of the Ngiti fighters of Walendu-Bindi, the Majority mainly relies on the following arguments. First, that Germain Katanga was aware of the manner in which war was conducted in Ituri.[408] Second, that Germain Katanga knew about the massacre in Nyankunde.[409] Third, that Germain Katanga knew that Yuda and Garimbaya had been present during events at Songolo and Nyankunde

[408] See Majority Opinion, para. 1682.
[409] See Majority Opinion, para. 1683-1684.

and that they were going to take part in the attack on Bogoro.[410] Fourth, that Germain Katanga knew that the UPC was considered a Hema militia and that several members of his community harboured "bad memories" of the Hema.[411] Fifth, that Germain Katanga knew about the anti-Hema ideology and its origin, the perceived threat of the instauration of a "Hema-Tutsi empire".[412] Sixth, that Germain Katanga was aware that the authorities in Beni used "the ethnic argument" to mobilise the local combatants.[413] Finally, the Majority claims that Germain Katanga fully shared the anti-Hema ideology.[414]

291. Needless to say, since I do not believe that there is sufficient evidence to show that there was a group acting with a criminal common purpose, I also do not believe that Germain Katanga was aware of such a plan. Moreover, I do not believe that the arguments employed by the Majority are very convincing in showing that German Katanga knew of a common purpose on behalf of the Ngiti fighters of Walendu-Bindi to specifically exterminate the Hema civilian population of Bogoro. In particular, I do not accept that the evidence shows that "the way of conducting war in Ituri" was such that the civilian population was always systematically exterminated.[415] As I already explained, I also do not accept that

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[410] See Majority Opinion, para. 1683, 1686. The Majority seems to assume that the mere presence of these two individuals (who never testified) at those events, and the fact that they may have witnessed horrific things there, somehow proves that they were animated by an intention to kill the Hema civilian population of Bogoro. Needless to say, I do not believe such an inference is warranted, let alone beyond reasonable doubt.

[411] See Majority Opinion, para. 1685.

[412] Idem..

[413] Idem..

[414] Idem..

[415] Interestingly, to illustrate this point, the Majority refers, among others, to Germain Katanga's knowledge about the violence employed by the UPDF. Accordingly, we must assume that the Majority believes that the phenomenon of killing of civilians was universal and not limited to the Ngiti fighters of Walendu-Bindi. I observe, in this regard, that if the killing of civilians was an

knowledge about what happened in Nyankunde proves beyond reasonable doubt that the same was inevitably going to happen again in Bogoro.[416] The argument that many Ngiti identified the UPC with the Hema more generally is equally unconvincing. Indeed, during the Second World War many allies probably referred to the Nazis as Germans, but that does not mean that they were incapable of distinguishing the armed forces from the civilians. Finally, I simply do not believe there is any solid evidence showing that there existed an anti-Hema ideology, which involved the indiscriminate killing of all Hema civilians. The fact that some may have manipulated fear of a chimeric "Hema-Tutsi empire" to enlist the Ngiti for their own political purposes does not prove that the Hema civilian population as such was a target for crimes. I therefore fully reject the suggestion that Germain Katanga's knowledge about concerns over the UPC's alleged secessionist tendencies somehow shows that he was filled with a hatred towards the Hema civilian population in general that was so strong that he wanted to eradicate them all. I stress, in this regard, that there is not a single reliable item of evidence in this case which refers to a single utterance by Germain Katanga that could be interpreted as anti-Hema.

292. In the end, one wonders whether the Majority Opinion's elaborate developments about an alleged ethnically-based ideology and the way in which "tribal warfare" was conducted in Ituri are not in fact a stalking horse for an argument that is based on *dolus eventualis*. Indeed, when reading the Majority Opinion as a whole, one cannot escape the impression that what Germain Katanga really stands accused of is that he made a contribution to an operation which he knew involved a risk

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inevitable corollary of conducting military operations in Ituri, including by foreign forces, then it seems unnecessary to show any specific ethnic motivation.

[416] See *supra*, III.C.3.b)(2)(d) The attack on Nyankunde.

that certain individuals, who lacked the necessary training and discipline and who held grudges against the Hema, might harm Hema civilians if they had the opportunity. However, as the Majority rightly concludes,[417] the Statute, for better or for worse, does not include *dolus eventualis*.[418] It is therefore inappropriate to rely on such arguments, even if they are dressed up under a different guise.

b) Germain Katanga's alleged contribution to the crimes

293. In terms of which contributions Germain Katanga is supposedly guilty of having provided, the Majority lists the following 'acts', which, in its view, constitute significant contributions to the crimes committed in Bogoro:[419]

(a) His role in establishing a coalition with the authorities in Beni and in devising a military strategy with them;

(b) His role in impressing upon the authorities in Beni the importance, for the Ngiti fighters of Walendu-Bindi, of the fight against the Hema ;

(c) His role in facilitating good communications between local commanders, the authorities in Beni and the soldiers of the APC, including the settling of disputes between local commanders; and

(d) His role in receiving, stockpiling and distributing weapons and ammunitions coming from Beni.

294. With all due respect for my colleagues, I think this list is entirely

[417] See Majority Opinion, para. 777.
[418] Concurring Opinion of Judge Christine Van den Wyngaert, paras 36-38.
[419] See Majority Opinion, para. 1671.

unconvincing and falls far short of showing that Germain Katanga made a significant contribution to the commission of crimes in Bogoro. For example, I do not believe there is any indication that Germain Katanga's interventions had any influence on the planners in Beni, much less that this caused them to provide the Ngiti fighters of Walendu-Bindi with the means to attack Hema civilians. I also do not accept the argument that Germain Katanga's involvement in facilitating communication and the distribution of weapons had any specific relation with the commission of crimes against Hema civilians in Bogoro.

295. However, there are two more fundamental underlying problems with the Majority Opinion in relation to the alleged role of, and contributions made by, Germain Katanga.

(1) The evidence does not show Germain Katanga was "president"

296. To begin with, the Majority Opinion misrepresents the evidence in that there is no proof beyond reasonable doubt that Germain Katanga was the "president"[420] of the Ngiti fighters of Walendu-Bindi in any meaningful sense of that term. I have already commented on the documentary evidence on which the Majority grounds its findings and which, in my view, cannot sustain any of the findings beyond reasonable doubt that the Majority makes.[421]

297. First, I note that the Majority relies heavily on the testimony of P-28 in this regard. I have already explained why I think this witness is unsafe and I consider it wholly inappropriate to rely on his testimony in relation to the position held by the accused. The Majority also invokes the

[420] See Majority Opinion, IX.A.6. Germain Katanga: autorité de référence à Aveba.
[421] See *supra* III.C.2.b) The existence of a "group acting with a common purpose" or an "organisation".

testimony of D03-88, even though this witness was from Bedu-Ezekere and it is entirely unclear what the basis for his knowledge about the organisation of the Ngiti fighters of Walendu-Bindi was. In any event, I stress that the witness denied having knowledge over the distribution of power in Irumu and never confirmed that Germain Katanga had any authority beyond Aveba.[422] As regards D02-228, a witness considered to be particularly trustworthy by the Majority,[423] I can only conclude that the Majority's reading of the transcript is extremely selective. More specifically, the Majority affirms that D02-228 stated the general principle that if one is responsible for the combatants then one has to be responsible for all the combatants of Walendu-Bindi.[424] However, closer inspection of the transcript reveals that the witness actually said:

> *Question : […] What is the area in which he exercised that power that was being challenged by some, if I understood you correctly?*
>
> *Answer : Thank you. I spoke about Kakado. Kakado wanted to put [Germain Katanga] in charge of the combatants, but he was faced with people who were against him; and when you are in charge of combatants, of course you have to be in charge of all the combatants of the Walendu-Bindi, in other words the whole administrative entity of Walendu-Bindi, and that was unacceptable because you had to be in a position to have your orders respected by Cobra Matata and others and those people found this unacceptable, especially because Germain had just arrived and had just entered into the combatant environment and to give him all these privileges at such an early stage was not acceptable. So in Aveba on the spot, well, he*

[422] D03-88, T-305, p. 31-2. In fact, it seems that the Majority is relying on the Prosecutor's leading question in this instance, rather than on the testimony of the witness.
[423] See Majority Opinion, para. 1264.
[424] See Majority Opinion, para. 1266.

could do so, but he couldn't claim to that position elsewhere.[425]

298. As regards the documentary evidence, I repeat my concern that none of the authors of any of these documents has been heard. The Chamber should therefore by very reluctant to speculate about the exact meaning of these documents.[426] Indeed, the Chamber *assumes* that Germain Katanga was the addressee of the so-called "Défense de brander les armes"[427] and "Lettre Perception taxes d'or",[428] however, his name is not mentioned and he has not confirmed it. Accordingly, the most the Majority can argue is that it is most plausible that Germain Katanga was the one being addressed as "president". Yet, even if this is correct, this still does not prove that Germain Katanga actually held that office[429] or, crucially, what powers this bestowed upon him. I note, in this regard, that the content of both documents does not indicate that the authors had much deference for the authority of the "president". On the contrary, one ("Défense de brandir les armes") contains an instruction and the other ("Perception taxes d'or") simply informs of a decision made unilaterally "in order to avoid any confusion". It should also be noted that the Majority fails to take into consideration two other highly significant documents, (i.e. "Plainte de Cobra Matata"[430] and "Rapport de

[425] D02-228, T-252, pp. 62-63.
[426] See *supra*, para. 200 et seq.
[427] "Lettre Défense de brandir les armes", EVD-OTP-00278.
[428] "Lettre Perception taxes d'or", EVD-OTP-00239.
[429] It should be noted, in this regard, that "Lettre Défense de brandir les armes" was apparently written by Kasaki, the number two of Kakado, who, according to P-228, wanted Germain Katanga to have the position of president. It may thus well be that the title used in this document shows a measure of "wishful thinking" on his part. This is of course speculation on my part, but so is the Majority's assumption that the mere fact that a particular letter uses particular words automatically means that they reflect reality.
[430] "Plainte de Cobra Matata", EVD-D02-00243.

service"[431]), neither of which mentions the presence of a president in Aveba and which cast serious doubt upon the proposition that Cobra Matata recognised Germain Katanga as his superior before the attack on Bogoro.

299. Finally, the Majority attaches considerable importance to the role played by Germain Katanga in events that took place in the second half of March 2003.[432] However, these events are only significant to the extent that the Majority rejects the Defence's argument that Germain Katanga was nominated president of the combatants of Walendu-Bindi on 3 March 2003. As I already noted, I am of the opinion that the Majority discards this version of events a little too easily. For example, I do not share my colleagues' view that it is "surprising" that so few witnesses have mentioned this event.[433] On the contrary I note that the two witnesses who did mention it – i.e. D02-228 and D02-148 - were two ranking officers, whereas the other witnesses who did not mention it (a) were never asked about it and (b) were either civilians or low-ranking. Moreover, I recall that it is not sufficient for the Majority to state that they are not convinced by the Defence's argument. Rather, cogent reasons must be given for why the Defence's claim cannot reasonably be true. I am afraid that I am not persuaded by the Majority Opinion in this regard.

300. In any case, I do not believe the evidence shows beyond reasonable doubt that Germain Katanga was recognised as the leader of the Ngiti when he participated in the delegation to Beni in November 2002 or that he was the "President of the movement of local combatants in Walendu-

[431] "Rapport de service", EVD-D02-00231.
[432] See Majority Opinion, paras 1348 et seq.
[433] See Majority Opinion, para. 1332.

Bindi" in any meaningful sense of this term before the attack on Bogoro.

(2) The evidence does not show that Germain Katanga's contribution was made to a criminal plan

301. Second, there is simply no evidence showing that Germain Katanga established contact with the authorities in Beni and continued to interact with them, in order to further the local criminal purpose of the Ngiti fighters of Walendu-Bindi.[434] The same is true with regard to Germain Katanga's role in relation to the reception, storage and distribution of weapons of ammunitions. Indeed, as the Majority acknowledges,[435] the weapons and ammunitions were essential to the success of the operation against the UPC and there is no indication that they were provided and distributed with the purpose of harming civilians. The Majority simply *assumes* that this was the case, but points to no evidence that can actually prove it beyond reasonable doubt. For example the Majority Opinion states that Germain Katanga aided the Ngiti militia by emphasising the importance of the fight against the Hema enemy during his contacts with the authorities in Beni.[436] However, there is not a shred of evidence to suggest that Germain Katanga ever raised the issue of attacking Hema civilians, either in his contacts with the authorities in Beni or elsewhere.

302. In my view there is more evidence to suggest that Germain Katanga acted as the 'middle man' between Beni and the local Ngiti commanders, and that he did so in the first place on behalf and for the benefit of EMOI. Indeed, the way in which I read the evidence in this case is that EMOI

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[434] I note, in this regard, that Germain Katanga went to Beni in November 2002, whereas the Majority Opinion states that he only knew about the alleged common purpose of the Ngiti fighters of Walendu-as of December 2002. See Majority Opinion, para. 1690.
[435] See Majority Opinion, para. 1674.
[436] See Majority Opinion, para. 1671.

used the local Ngiti fighters for its goal to reconquer Ituri, not the other way around.[437] In this sense I see Germain Katanga's role more as that of 'Beni's man in Walendu-Bindi' rather than as 'Walendu-Bindi's man in Beni'. At least I believe this is an entirely reasonable interpretation of the evidence, which colours everything in a significantly different light.

303. In any event, given that the Majority insists that there were two separate plans,[438] the "significance" of Germain Katanga's contribution to the crimes is impacted by the reasonable possibility that he made his alleged contributions towards the EMOI plan to reconquer Bogoro from the UPC (or the overlapping aspect of the Ngiti's alleged own common purpose), and not the criminal aspect of the common purpose of the Ngiti fighters of Walendu-Bindi.[439] As the Majority charges Germain Katanga under article 25(3)(d)(ii), I believe it is important to consider whether Germain Katanga's contribution was specifically directed at the crimes that were part of the criminal common purpose.[440]

304. There is no evidence showing that any of the contributions which Germain Katanga is alleged to have made were specifically linked to the commission of crimes in Bogoro. On the contrary, all of the alleged contributions could just as easily have been made to the EMOI plan to reconquer Bogoro. In fact, I think a reasonable interpretation of the evidence shows precisely this. The Majority acknowledges this point, but turns it upside down, when it states that the fact that the conduct of the accused constituted a contribution to the military operation decided

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[437] As I have already noted earlier, I do not believe the Ngiti fighters of Walendu-Bindi had a criminal purpose to attack the civilian Hema population. See *supra* III.C.2.b) The existence of a "group acting with a common purpose" or an "organisation".

[438] See my critique of this finding *supra*, III.C.3.a) There was only one plan.

[439] See *supra*, III.C.3.a) There was only one plan.

[440] See *supra*, para. 287.

by Beni does not exclude that his conduct could also have constituted a contribution to the commission of crimes by the Ngiti militia under article 25(3)(d).[441]

305. In other words, the Majority Opinion alleges that the Ngiti fighters of Walendu-Bindi were simultaneously executing two different, partially overlapping, plans and that a contribution to one plan automatically constituted a contribution to the other. However, even if it were shown that there were two different plans, and that Germain Katanga could have made a contribution to a group acting with a criminal common purpose by contributing to the legitimate plan of another group, I am strongly of the view that Germain Katanga's contributions were too far removed from the actual commission of crimes and therefore do not reach the threshold of article 25(3)(d)(ii) for lack of significance or "normative link".[442]

306. The only way in which Germain Katanga's contributions to the EMOI plan could be construed as having furthered the Ngiti's criminal common purpose is by arguing that the attack on the UPC was a necessary first step – a hurdle to overcome – in order to have free reign to attack the civilian population. In other words, in this interpretation the success of the legitimate plan by EMOI was a *precondition* for the success of the alleged criminal plan of the Ngiti fighters of Walendu-Bindi.[443] Therefore, if Germain Katanga made a contribution to the legitimate

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[441] See Majority Opinion, para. 1673.

[442] See, for this last concept, Separate Opinion of Judge Sylvia Fernández de Gurmendi, para. 12.

[443] The Majority seems to make this argument in paragraph 1679 of their Opinion, where it is stated that the Ngiti combatants did not have the means to launch an attack and to pursue their criminal objective to erase Bogoro without the logistical support in weapons and ammunitions: [TRANSLATION] "it significantly influenced their occurrence and the manner in which they were committed." ("*elle a influé de manière importante sur leur survenance ainsi que sur la manière dont ils ont été commis.*").

attack on the UPC, he also indirectly contributed to the crimes committed against the Hema civilian population by taking away a major obstacle – the UPC – which prevented a full-scale attack on the civilians.

307. However, such an argument would, it seems to me, be putting the cart before the horse. Even if it were true that the Ngiti fighters of Walendu-Bindi assimilated the UPC with the Hema population, then it would still be the case that the UPC was the actual target of the operation.[444] To suggest that the UPC was simply a hindrance that had to be removed in order to allow the commission of crimes against the Hema civilian population is not sustained by any evidence and, in my view, is entirely implausible.

308. In short, the Majority cannot have it both ways; either it must be able to point to evidence that EMOI was complicit in the criminal purpose of the Ngiti fighters of Walendu-Bindi, or, if there were indeed two completely distinct plans, the Majority must be able to point to evidence proving beyond reasonable doubt that Germain Katanga significantly contributed to the Ngiti's criminal plan and not EMOI's objective. However, there is no reliable evidence for either proposition and for this reason I cannot but distance myself completely from the Majority's case against Germain Katanga under article 25(3)(d)(ii).

[444] I am aware that, according to the Majority Opinion (para. 1665), the alleged common purpose was "primarily" ("à titre principal") to "erase" the Hema civilian population from Bogoro. However, as I have explained earlier (see, *supra*, III.C.3 There is no evidence of a common purpose or organisational policy to attack the Hema civilian population), I consider this proposition to be devoid of any evidentiary basis.

IV. CONCLUSION

309. As will be clear from the above, the divergence of opinion between the Majority and myself is wide-ranging and profound. Not only do I strongly disagree with the alteration of the form of criminal responsibility, particularly at this very late stage in the proceedings, but I also firmly believe that the evidence adduced in this case is not sufficient to warrant a finding of guilt beyond reasonable doubt against the accused, be it on the basis of the original charges under article 25(3)(a) or the recharacterised charges under article 25(3)(d)(ii). Moreover, I do not believe the evidence meets the criteria for crimes against humanity and I am unable to agree with the arguments for recharacterising the nature of the armed conflict.

310. While it is not for me to speculate about the reasons why my colleagues take such a different view on so many issues, I do want to offer some of my own reflections. Trials like these are difficult and complex matters, both from a legal and evidentiary point of view. Moreover, they are challenging on the human level. Sympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.

311. This raises the question by which standard fairness and justice should be evaluated. My view is that the trial must be first and foremost fair towards the accused. Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while

certainly relevant, cannot trump the rights of the accused. After all, when all is said and done, it is the accused - and only the accused - who stands trial and risks losing his freedom and property. In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential, in my view, to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. It is not good enough that most of the trial has been fair. All of it must be fair.

312. It is my considered view that it was not possible to convict Germain Katanga on the basis of article 25(3)(d)(ii) while maintaining these standards of fairness. In particular, as set out in further detail in this Opinion, I am of the view that the Majority Opinion infringes upon several fundamental rights of the accused.

313. First and foremost, I believe it is wholly inappropriate to fundamentally change the legal characterisation of the charges after the trial has run its course. It bears repeating that these proceedings were conducted for 1,969 days without anyone ever mentioning article 25(3)(d). What is more, when the Defence finally challenged the Majority's intention to recharacterise the charges, none of the other parties, including the Prosecutor, stood up in support. It is thus quite clear that the charges against Germain Katanga under article 25(3)(d)(ii) are a creation of the Majority alone, presumably in order to arrive at a ground for conviction, because none was available under article 25(3)(a).

314. It is important to be clear in this regard: Regulation 55 may well exist in order to stop the much-invoked "impunity gap", in the sense that it allows Chambers to avoid so-called "technical" acquittals. However, it is

not a licence to turn the entire factual and legal framework of a case upside down just in order to avoid an acquittal. Yet, this is precisely what has happened in this case.

315. Moreover, even if it were permissible to entirely reshape the charges at the end of the trial, this can only ever be done fairly if the accused receives a genuine and meaningful opportunity to defend himself against the new charges. This presupposes that the accused should be informed with the same level of precision and detail about the factual allegations, including the evidence that is said to support them, as the initial charges. In addition, the Defence must have a reasonable opportunity to conduct a meaningful investigation. Neither of these conditions was met in this case.

316. I am furthermore of the view that the decision to activate regulation 55 at such a late point in the trial has needlessly prolonged the length of the proceedings and has therefore violated Germain Katanga's right to an expeditious trial in direct violation of articles 64(2) and 67(1)(c) of the Statute. Indeed, the tardiness of the 25(3)(d)(ii) Notice Decision, combined with the lengthy and infelicitously handled proceedings that followed, have resulted in unjustifiable delays that could have been almost entirely avoided if the Majority had provided notice under regulation 55(2) earlier. Moreover, I also believe that these delays are incompatible with the Chamber's obligation under rule 142(1) of the Rules of the Court to render its judgment within a reasonable period of time after the Chamber has retired to deliberate.

317. Be that as it may, even if the charges under article 25(3)(d)(ii) were properly before this Chamber, I would still not have agreed to convict Germain Katanga. The reason for this is very simple: the evidence is

insufficient to meet the standard of proof. More specifically, I find that a lot of potentially relevant evidence is missing from the case record and that quite a lot of the available evidence suffers from serious credibility problems. Under these circumstances, it is simply not possible, in my opinion, to come to any meaningful findings beyond reasonable doubt. In fact, I am firmly of the view that a different interpretation of the evidence is possible, if not more plausible.

318. I understand that some may find this result unsatisfactory, especially after a trial that has lasted for so long. It is clear that bad things happened in Bogoro on 24 February 2003. However, I cannot say in good conscience that I understand exactly what really took place or that I have strong reasons to believe that Germain Katanga intentionally contributed to the commission of crimes by the Ngiti fighters of Walendu-Bindi. Moreover, as I have tried to explain in this Opinion, I think that the Majority Opinion attaches too much importance to the ethnic aspects of this case. This is not to deny that ethnic animosity was an important motive for the individuals who committed crimes against civilians in Bogoro. However, I firmly believe that it is factually wrong to reduce this case, and especially the reasons of the different Ngiti fighters and commanders for participating in the operation against the UPC, to ethnic fear and/or hatred. Such oversimplification may fit nicely within a particular conception of how certain groups of people behave in certain parts of the world, but I fear it grossly misrepresents reality, which is far more complex. It also implicitly absolves others from responsibility.

319. Let me be clear, I do not claim to know more about the facts of this case than my colleagues or to have a better understanding of the situation in Eastern-DRC in 2002-2003. On the contrary, I am keenly aware of the limitations of the available evidence, which makes it impossible, in my

view, to form a balanced and complete picture of what really happened during the weeks and months leading up to the attack on Bogoro or indeed on that day itself. Accordingly, the only thing I pretend to know is that we do not know enough to convict Germain Katanga of the charges against him, be they under article 25(3)(a) or 25(3)(d)(ii).

320. Based on these considerations, I continue to hold the view that this Chamber should have rendered its verdict under article 25(3)(a) a long time ago and that Germain Katanga should have been acquitted alongside Mathieu Ngudjolo Chui on 18 December 2012. I therefore distance myself from everything that has happened between then and now.

Judge Christine Van den Wyngaert

Dated this 7th day of March 2014

At The Hague, The Netherlands