

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: **7 March 2014**

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA***

**Public Document**

**Judgment pursuant to article 74 of the Statute**

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

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**ANNEX I – OPINION OF JUDGE VAN DEN WYNGAERT**  
**ANNEX II – CONCURRING OPINION OF JUDGE DIARRA AND**  
**JUDGE COTTE**

**ANNEX A**  
**ANNEX B**  
**ANNEX C**  
**ANNEX D**  
**ANNEX E**  
**ANNEX F**

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively) hereby issues its judgment pursuant to article 74 of the Rome Statute (“the Statute”) in the case of *The Prosecutor v. Germain Katanga*.

## I. OVERVIEW

1. The crimes for which Germain Katanga stands accused were committed on 24 February 2003 during the attack on Bogoro, a village in Ituri, in the Democratic Republic of the Congo (“the DRC”).<sup>1</sup>

### A. LOCATION OF BOGORO

2. The DRC is divided into administrative units known as “provinces”, “districts”, “territories”, “collectivités”, “groupements” and “localités”.<sup>2</sup> Bogoro village is located at the intersection of Bagaya and Dodoy *localités*, and is the administrative centre of Babiase *groupement*, which falls under Bahema Sud<sup>3</sup> *collectivité* in Irumu territory, one of the sub-divisions of Ituri district, which is in the east of Orientale province.<sup>4</sup>

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<sup>1</sup> [Pre-Trial Chamber I, \*Decision on the confirmation of charges\*, 30 September 2008, ICC-01/04-01/07-716-Conf \(public version: ICC-01/04-01/07-717\) \(“\*Decision on the confirmation of charges\*”\), paras. 573-582.](#)

<sup>2</sup> P-233, T. 87, pp. 56-57. In this Judgment witnesses heard by the Chamber are referred to by their witness number, with the prefix “P” for witnesses called by the Prosecution, “D02” for witnesses called by the Defence for Germain Katanga, “D03” for witnesses called by the Defence for Mathieu Ngudjolo, “V” for witnesses called by the common legal representative of the main group of victims and “CHM” for witnesses called by the Chamber. Transcript references are to the French version and are referenced as: “T. [transcript number]”.

<sup>3</sup> P-233, T. 83, pp. 6 and 19; T. 87, p. 55.

<sup>4</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0336 to DRC-OTP-0129-0337, para. 13); EVD-D02-00219: Administrative map of the Democratic Republic of the Congo. Documentary evidence is also presented following the format set out above: “EVD-[OTP; D02; D03; V; CHM]-evidence number”, where “OTP” refers to evidence tendered by the Office of the Prosecutor.

3. Bogoro lies to the south of Walendu-Tatsi *collectivité*,<sup>5</sup> to the north of Walendu-Bindi *collectivité*<sup>6</sup> and mid-way between Bunia, Ituri's main town, and Lake Albert, which forms the border between the DRC and Uganda.<sup>7</sup>
4. Its position at the centre of Bahema Sud *collectivité* means that Bogoro is at the junction of a road between two Lendu communities and a road linking the DRC with Uganda.

## B. THE ACCUSED

5. Germain Katanga, of Ngiti ethnicity,<sup>8</sup> was born on 28 April 1978 in Mambasa, in the territory of Mambasa, in Ituri district, DRC.<sup>9</sup>
6. In early December 2004, the President of the DRC, Joseph Kabila, appointed Germain Katanga Brigadier General in the *Forces Armées de la République Démocratique du Congo* [Armed Forces of the Democratic Republic of the Congo] ("the FARDC"), a post which he held at the time of his arrest by the DRC authorities, on or around 10 March 2005.<sup>10</sup>

## C. THE CHARGES

7. On 26 September 2008, Pre-Trial Chamber I issued the *Decision on the confirmation of charges* wherein it found unanimously that there was sufficient evidence to establish substantial grounds to believe that, during the attack on Bogoro of 24 February 2003, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes with intent:

<sup>5</sup> EVD-OTP-00273: Sketch outlining Bedu-Ezekere *groupement* by D03-88; D03-88, T. 299, pp. 30-31.

<sup>6</sup> EVD-D02-00217: Map on which Germain Katanga outlined Walendu-Bindi *collectivité*.

<sup>7</sup> EVD-D02-00119: Map of the DRC; EVD-OTP-00250: Map.

<sup>8</sup> [Decision on the confirmation of charges](#), para. 5; D02-300, T. 314, p. 21.

<sup>9</sup> [Decision on the confirmation of charges](#), para. 5; D02-300, T. 314, p. 18.

<sup>10</sup> [Decision on the confirmation of charges](#), para. 7.

- the war crime of wilful killing under article 8(2)(a)(i) of the Statute;<sup>11</sup>
  - the crime against humanity of murder under article 7(1)(a) of the Statute;<sup>12</sup>
  - the war crime of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;<sup>13</sup> and
  - the war crime of destruction of property under article 8(2)(b)(xiii) of the Statute.<sup>14</sup>
8. Germain Katanga also stands accused of having committed jointly with Mathieu Ngudjolo through other persons, within the meaning of article 25(3)(a) of the Statute, the war crime of pillaging under article 8(2)(b)(xvi) of the Statute, with the knowledge that the crime would occur in the ordinary course of events.<sup>15</sup>
9. Furthermore, Germain Katanga stands accused of having committed jointly with Mathieu Ngudjolo, within the meaning of article 25(3)(a) of the Statute, the war crime of using children under the age of fifteen years to participate actively in hostilities, as set out in article 8(2)(b)(xxvi) of the Statute.<sup>16</sup>
10. However, only a majority of the Pre-Trial Chamber, Judge Anita Ušacka dissenting, found that there was sufficient evidence to establish substantial grounds to believe that, during the attack on Bogoro on 24 February 2003, Germain Katanga jointly committed with Mathieu Ngudjolo through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes, with the knowledge that they would occur in the ordinary course of events:

<sup>11</sup> [Decision on the confirmation of charges](#), para. 575.

<sup>12</sup> [Decision on the confirmation of charges](#), para. 579.

<sup>13</sup> [Decision on the confirmation of charges](#), para. 575.

<sup>14</sup> [Decision on the confirmation of charges](#), para. 575.

<sup>15</sup> [Decision on the confirmation of charges](#), para. 575.

<sup>16</sup> [Decision on the confirmation of charges](#), para. 574.

- the war crime of sexual slavery under article 8(2)(b)(xxii) of the Statute;<sup>17</sup>
- the crime against humanity of sexual slavery under article 7(1)(g) of the Statute;<sup>18</sup>
- the war crime of rape under article 8(2)(b)(xxii) of the Statute;<sup>19</sup> and
- the crime against humanity of rape under article 7(1)(g) of the Statute.<sup>20</sup>

With respect to the temporal scope of the case, the Chamber is mindful that the charges include only the crimes committed on 24 February 2003 or whose commission commenced on that date.

11. On the basis of the charges as set out in paragraphs 7 to 10 above and pursuant to article 64(8)(a) of the Statute, on 24 November 2009 the Accused and Co-Accused were invited to enter a plea of guilty or not guilty. Germain Katanga pleaded not guilty.<sup>21</sup>
12. Pursuant to article 74(2) of the Statute, the Chamber's decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges". Hence, the charges as confirmed by the Pre-Trial Chamber establish the factual scope of the judgment issued pursuant to that article, as explained by the Chamber in its decision of 21 October 2009,<sup>22</sup> wherein it instructed the Office of the Prosecutor ("the Prosecution") to prepare a summary of the charges,<sup>23</sup> and as

<sup>17</sup> [Decision on the confirmation of charges](#), para. 576.

<sup>18</sup> [Decision on the confirmation of charges](#), para. 580.

<sup>19</sup> [Decision on the confirmation of charges](#), para. 576.

<sup>20</sup> [Decision on the confirmation of charges](#), para. 580.

<sup>21</sup> T. 80, pp. 11-21.

<sup>22</sup> [Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG with annex \("Decision on the Filing of a Summary of the Charges"\)](#).

<sup>23</sup> [Office of the Prosecutor, "Document Summarising the Charges Confirmed by the Pre-Trial Chamber", 3 November 2009, ICC-01/04-01/07-1588 and annex \("Summary of the Charges" or "Summary"\)](#).

recalled in the 21 November 2012 decision on the implementation of regulation 55 of the Regulations of the Court.<sup>24</sup>

13. Accordingly, Germain Katanga cannot be found guilty on the basis of facts and circumstances not contained in the *Decision on the confirmation of charges*.

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<sup>24</sup> [Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG \(“21 November 2012 Decision”\)](#).

## II. BRIEF HISTORY OF THE CASE

### A. JURISDICTION

14. Pursuant to article 19(1) of the Statute, “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”. The DRC became a State Party to the Statute on 11 April 2002. In March 2004, pursuant to article 14 of the Statute, the DRC Government referred to the Office of the Prosecutor the situation in the DRC, that is, all of the events falling within the Court’s jurisdiction committed on the territory of the DRC since the entry into force of the Rome Statute on 1 July 2002.<sup>25</sup>

15. Pre-Trial Chamber I was satisfied that the Court did have jurisdiction to prosecute Germain Katanga.<sup>26</sup> The personal, temporal, territorial and material criteria for the Court’s jurisdiction have remained unchanged since the issuance of that decision.<sup>27</sup>

### B. PROCEDURAL BACKGROUND

16. On 2 July 2007, Pre-Trial Chamber I issued a warrant of arrest against Germain Katanga.<sup>28</sup> On 17 October 2007, the Congolese authorities surrendered him to the Court, and transferred him to The Hague the following day. He made his first appearance on 22 October 2007.<sup>29</sup>

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<sup>25</sup> [Situation in the Democratic Republic of the Congo, Presidency, Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04-1](#), p. 4 (notified on 6 July 2004).

<sup>26</sup> [Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest against Germain Katanga, 6 July 2007, ICC-01/04-01/07-04-US-Exp](#), para. 20, (ICC-01/04-01/07-4).

<sup>27</sup> See “Section I(C) The charges”, para. 11.

<sup>28</sup> [The Prosecutor v. Germain Katanga, Pre-Trial Chamber I, Warrant of arrest for Germain Katanga, 2 July 2007, ICC-01/04-02/07-1-US-tENG \(ICC-01/04-01/07-1 with annex\)](#).

<sup>29</sup> *The Prosecutor v. Germain Katanga*, T. 5.

17. On 10 March 2008, Pre-Trial Chamber I joined the hitherto separate cases against Germain Katanga and Mathieu Ngudjolo, who had been arrested in the DRC on 6 February 2008.<sup>30</sup> The decision was confirmed by the Appeals Chamber.<sup>31</sup>
18. The Chamber was constituted on 24 October 2008 and held a first status conference on 27 and 28 November 2008.<sup>32</sup> It subsequently held a further 24 status conferences<sup>33</sup> and issued 201 written and oral orders and decisions before the commencement of the trial on 24 November 2009.<sup>34</sup>
19. In accordance with rule 118(2) of the Rules of Procedure and Evidence (“the Rules”), before the commencement of the trial the Chamber regularly reviewed the decisions on Germain Katanga’s continued detention<sup>35</sup> and, pursuant to rule 118(3) of the Rules, on 23 March 2009, held a hearing specifically concerning his detention.<sup>36</sup>
20. The presentation of evidence commenced on 25 November 2009 and concluded on 11 November 2011.<sup>37</sup> On 18 and 19 January 2012, the Chamber conducted a judicial site visit to the DRC, accompanied by the parties and participants and representatives of the Registry of the Court.<sup>38</sup> The presentation of evidence was declared officially closed on 7 February 2012.<sup>39</sup>

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<sup>30</sup> [The Prosecutor v. Germain Katanga, Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, ICC-01/04-01/07-257.](#)

<sup>31</sup> [Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573.](#)

<sup>32</sup> T. 52 and T. 53.

<sup>33</sup> T. 54 (28 January 2009) to T. 79 (23 November 2009).

<sup>34</sup> [Decision postponing the date of commencement of the trial \(Rule 132\(1\) of the Rules of Procedure and Evidence\), 31 August 2009, ICC-01/04-01/07-1442-tENG.](#)

<sup>35</sup> See Annex A.

<sup>36</sup> T. 63.

<sup>37</sup> See also [Décision relative à trois requêtes tendant à la production d’éléments de preuve supplémentaires et à un accord en matière de preuve, 15 December 2011, ICC-01/04-01/07-3217-Conf \(ICC-01/04-01/07-3217-Red\).](#)

<sup>38</sup> [Decision on a judicial site visit to the Democratic Republic of the Congo, 18 November 2011, ICC-01/04-01/07-3203-Conf-tENG with confidential annex \(ICC-01/04-01/07-3203-tENG with annex\) \(“Decision on a Judicial Site Visit”\).](#) See “Section IV(B)(3)(i). Judicial site visit”.

<sup>39</sup> [Declaration of closure of submission of evidence, 7 February 2012, ICC-01/04-01/07-3235-tENG.](#)

21. During the trial, the Chamber heard 54 witnesses and sat for 265 days.<sup>40</sup> The Chamber itself called two witnesses,<sup>41</sup> the Prosecution called 24,<sup>42</sup> and two victims were called to appear at the request of the Legal Representative of the main group of victims.<sup>43</sup> The Defence for Germain Katanga (“the Defence”) called 17 witnesses<sup>44</sup> and the Defence for Mathieu Ngudjolo called 11.<sup>45</sup> Three of the Defence witnesses were common to both teams.<sup>46</sup> Once the testimonies had been concluded, both Accused also testified as witnesses.<sup>47</sup> During their testimonies, like all the witnesses, they also answered questions put to them by the Chamber.
22. The Prosecution tendered 261 exhibits into the record; the Defence for Germain Katanga tendered 240; and the Defence for Mathieu Ngudjolo tendered 132. The Chamber itself entered five exhibits and authorised the Legal Representatives of Victims to tender five as well,<sup>48</sup> bringing the total to 643 exhibits.<sup>49</sup>

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<sup>40</sup> This figure includes status conferences held in the course of the trial, and the hearings for the closing statements.

<sup>41</sup> The head of the investigations team in the Investigations Division of the Office of the Prosecutor and Ms Constance Kutsch Lojenga, an expert in the Ngiti language.

<sup>42</sup> Six of the witnesses were women. Witnesses called by the Prosecution testified between 26 November 2009 and 8 December 2010. In-court protective measures were ordered for 19 of the witnesses pursuant to rules 87 and 88 of the Rules. Witness P-323 was recalled, and testified by videoconference on that occasion. Further to an application filed by the Prosecution, the Chamber ruled that it would not attach any probative value to the testimony of Witness P-159: [Decision on the Prosecution’s renunciation of the testimony of Witness P-159, 24 February 2011, ICC-01/04-01/07-2731](#).

<sup>43</sup> Both these victims gave evidence in hearings held between 21 and 25 February 2011. During their testimony, both women were afforded in-court protective measures pursuant to rules 87 and 88 of the Rules.

<sup>44</sup> The witnesses called by the Defence for Germain Katanga testified between 24 March 2011 and 12 July 2011. Two of the witnesses were women, and three of the witnesses received in-court protective measures during their testimony pursuant to rule 87 of the Rules.

<sup>45</sup> The witnesses called by the Defence for Mathieu Ngudjolo testified before the Chamber between 15 August and 16 September 2011. One of these witnesses was a woman; she received protective measures during her testimony, pursuant to rule 88 of the Rules.

<sup>46</sup> Witnesses D02-236/D03-011, D02-147/D03-236 and D02-146/D03-340. These witnesses will be referred to in this Judgment by the pseudonyms D02-236, D02-147 and D02-146 respectively.

<sup>47</sup> Germain Katanga testified on 27 and 28 September 2011 and on 4-6, 10-12 and 18-19 October 2011 (T. 314 to T. 325). Mathieu Ngudjolo testified on 27, 28 and 31 October and 8-11 November 2011 (T. 327 to T. 333).

<sup>48</sup> Four exhibits were tendered by the common legal representative of the main group of victims, and one by the legal representative of the child-soldier victims.

23. After filing their closing briefs,<sup>50</sup> the parties and participants made their closing statements at hearings held between 15 and 23 May 2012.<sup>51</sup> Finally, Germain Katanga made an oral statement as provided for by article 67(1)(h) of the Statute.<sup>52</sup>
24. Since its constitution, the Chamber has issued 409 written decisions and orders and 168 oral decisions.<sup>53</sup> A list of the main written decisions appears in Annex A, but particular attention should be directed to some decisions which were significant to developments in the proceedings.

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<sup>49</sup> The exhibits were admitted either through witnesses or by oral decisions handed down by the Chamber in court, by the Decision on Applications (see, for example, the [Decision on the Bar Table Motion of the Defence of Germain Katanga](#), 21 October 2011, ICC-01/04-01/07-3184).

<sup>50</sup> [Office of the Prosecutor, "Corrigendum du Mémoire final", 3 July 2012, ICC-01/04-01/07-3251-Conf-Corr with annexes \(3 July 2012, ICC-01/04-01/07-3251-Corr-Red\) \("Prosecution Closing Brief"\); Common Legal Representative of the main group of Victims, "Second Corrigendum Conclusions Finales", 16 March 2012, ICC-01/04-01/07-3253-Conf-Corr2 \(16 March 2012, ICC-01/04-01/07-3253-Corr2-Red\) \("Closing Brief of the common legal representative of the main group of victims"\); Legal Representative of the Child-Soldier Victims, "Corrigendum Conclusions finales du Représentant légal des victimes enfants soldats", 13 March 2012, ICC-01/04-01/07-3250-Conf-Corr; ICC-01/04-01/07-3258 \(10 July 2012, ICC-01/04-01/07-3250-Corr-Red\) \("Closing Brief of the legal representative of the child-soldier victims"\); Defence for Germain Katanga, "Second Corrigendum to Defence Closing Brief", 23 April 2012, ICC-01/04-01/07-3266-Conf-Corr2 with annex \(29 June 2012, ICC-01/04-01/07-3266-Corr2-Red\) \("Closing Brief of the Defence for Germain Katanga; Defence for Mathieu Ngudjolo, "Second Corrigendum to the Conclusions finales de Mathieu Ngudjolo", 8 November 2012, ICC-01/04-01/07-3265-Conf-Corr2 with confidential annexes \(8 November 2012, ICC-01/04-01/07-3265-Corr2-Red\) \("Closing Brief of the Defence for Mathieu Ngudjolo"\). See also \[Office of the Prosecutor, "Observations de l'Accusation à la suite du prononcé du jugement dans l'affaire Lubanga \\(ICC-01/04-01/06-2842\\)", 22 March 2012, ICC-01/04-01/07-3264-Conf \\(14 May 2012, ICC-01/04-01/07-3264-Red\\); Legal Representative of the Child-Soldier Victims, "Conclusions additionnelles du Représentant légal des victimes enfants soldats", 22 March 2012, ICC-01/04-01/07-3262; Common Legal Representative of the main group of Victims, "Observations additionnelles aux conclusions finales du représentant légal suite au jugement rendu dans l'affaire Lubanga", 22 March 2012, ICC-01/04-01/07-3263 \\("Observations of the Legal Representative of the main group of Victims on the Lubanga Judgment"\\).\]\(#\)](#)

<sup>51</sup> More precisely, closing statements were made by the Prosecution on 15, 16 and 23 May 2012 ([T. 336](#), [T. 337](#) and [T. 340](#)), the Legal Representatives of Victims on 16 May ([T. 337](#)), the Defence for Germain Katanga on 21 and 23 May ([T. 338](#) and [T. 340](#)), and the Defence for Mathieu Ngudjolo on 22 and 23 May 2012 ([T. 339](#) and [T. 340](#)).

<sup>52</sup> T. 340, pp. 54-59.

<sup>53</sup> These figures do not include orders for the redaction of transcripts or translations but take into account dissenting opinions.

25. On 10 February 2009, the Defence for Germain Katanga submitted a challenge to the admissibility of the case,<sup>54</sup> which the Chamber dismissed.<sup>55</sup> The Appeals Chamber confirmed the decision.<sup>56</sup>
26. On 20 June 2009, the Defence for the Accused filed an application for his arrest and detention in the DRC to be declared unlawful and for the proceedings against him to be stayed. The Chamber considered that the motion had been filed at too late a stage in the proceedings and declined to examine its merits, declaring it inadmissible.<sup>57</sup> The Appeals Chamber also confirmed that decision.<sup>58</sup>
27. On 20 November 2009, the Presiding Judge adopted directions regulating the conduct of the trial, in particular as regards the conduct of the proceedings and the various trial phases as well as the presentation of evidence.<sup>59</sup>
28. Three witnesses, detained by the authorities of the DRC<sup>60</sup> and called by the defence teams, were transferred to the Court with the cooperation of the DRC for appearance before the Chamber. They testified between 30 March and 3 May 2011.<sup>61</sup> On 12 April 2012, they filed a request to the Chamber to order their

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<sup>54</sup> Defence for Germain Katanga, "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute", 10 February 2009, ICC-01/04-01/07-891-Conf-Exp.

<sup>55</sup> T. 67; [Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case \(Article 19 of the Statute\), 16 June 2009, ICC-01/04-01/07-1213-tENG.](#)

<sup>56</sup> [Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, paras. 85-86.](#)

<sup>57</sup> [Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings, 20 November 2009, ICC-01/04-01/07-1666-Conf-Exp-tENG \(ICC-01/04-01/07-1666-Red\).](#)

<sup>58</sup> [Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings', 12 July 2010, ICC-01/04-01/07-2259, para. 40.](#)

<sup>59</sup> [Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009; ICC-01/04-01/07-1665-Corr.](#)

<sup>60</sup> Witness D01-228, Floribert Ngabu Njabu, common to both defence teams, and Witnesses D02-228, Pierre Célestin Pichou Iribi Mbodina and D02-350, Ndadza Dz'na Charif, called by the Defence for Germain Katanga.

<sup>61</sup> [Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus, 7 January 2011, ICC-01/04-01/07-2640-Conf-Exp \(3 May 2011, ICC-01/04-01/07-2640-Red3\);](#) [Décision relative à la requête de la Défense](#)

“presentation” to the Dutch authorities with a view to applying for asylum and for the suspension of their return to the DRC. On 9 June 2011, the Chamber issued a decision suspending their return to the DRC pending the response of the Dutch authorities competent to rule on the asylum applications.<sup>62</sup> The Appeals Chamber denied leave to appeal the decision sought by the competent representatives of the Netherlands.<sup>63</sup> Thereafter, the Chamber issued several decisions on issues related both to the continued detention of the three detained witnesses and suitable security and protective measures available to them in the event they are returned to the DRC.<sup>64</sup>

29. On 21 November 2012, the Trial Chamber rendered a decision severing the case of Germain Katanga from the case of Mathieu Ngudjolo. On 18 December 2013, the Trial Chamber issued its *Judgment pursuant to article 74 of the Statute* in the case of Mathieu Ngudjolo.<sup>65</sup>

30. In that same decision of 21 November 2012, the Chamber stated its intention to implement regulation 55 of the Regulations of the Court, specifying that the mode of liability under which Germain Katanga stood charged was amenable to legal recharacterisation pursuant to article 25(3)(d) of the Statute.<sup>66</sup> The decision was upheld by the Appeals Chamber.<sup>67</sup> Thereafter, the Chamber issued several

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[\*de Germain Katanga tendant à l'amendement de la décision sur sa requête visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus\*, 25 January 2011, ICC-01/04-01/07-2660-Conf-Exp \(3 May 2011, ICC-01/04-01/07-2660-Red3\).](#)

<sup>62</sup> [\*Decision on an Amicus Curiae application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile' \(articles 68 and 93\(7\) of the Statute\)\*](#), 9 June 2011, ICC-01/04-01/07-3003-tENG, para. 62.

<sup>63</sup> [\*Appeals Chamber, Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 15 July 2011, 26 August 2011, ICC-01/04-01/07-3132.\*](#)

<sup>64</sup> See Annex A.

<sup>65</sup> [\*The Prosecutor v. Mathieu Ngudjolo Chui, Trial Chamber II, Judgment pursuant to Article 74 of the Statute\*, 18 December 2012, ICC-01/04-02/12-tENG \("Ngudjolo Judgment"\); \*The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert\*, 18 December 2012, ICC-01/04-02/12-4 \("Concurring Opinion of Judge Christine Van den Wyngaert to the Ngudjolo Judgment"\).](#)

<sup>66</sup> [21 November 2012 Decision.](#)

<sup>67</sup> [\*Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court\*](#)

decisions relating to the implementation of regulation 55 of the Regulations of the Court.<sup>68</sup>

### C. PARTICIPATION OF VICTIMS

31. Article 68(3) of the Statute provides for victim participation in proceedings before the Court. The victims in the present case were afforded this opportunity. Consequently, they participated in the trial via their legal representatives, who were able to examine witnesses, request that evidence be admitted into the record, file submissions throughout the proceedings, make opening statements and file closing briefs, and, ultimately, make closing statements.

32. On 26 February 2009, the Chamber laid down the procedure for the consideration of applications filed by individuals seeking to participate in the proceedings as victims. It set 20 April 2009 as the time limit for any new applications for participation to be filed with the Registry.<sup>69</sup>

33. In the decision on the 345 applications for participation by victims, the Chamber ruled on the applications for participation, the status of applications submitted by deceased victims, and the possible influence by intermediaries of the Office of the Prosecutor.<sup>70</sup>

34. Pursuant to the Chamber's order of 22 July 2009 concerning the common legal representation of the victims,<sup>71</sup> the Registry appointed two legal representatives,

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*and severing the charges against the accused persons", 27 March 2013, ICC-01/04-01/07-3363 ("27 March 2013 Appeals Chamber Judgment").*

<sup>68</sup> See Annex A; "Section X(C) Legal recharacterisation of the facts".

<sup>69</sup> *Decision on the treatment of applications for participation, 26 February 2009, ICC-01/04-01/07-933-tENG, p. 24.*

<sup>70</sup> *Corrigendum of Operative part of the Decision on the 345 applications for participation as victim in the proceedings, 5 August 2009, ICC-01/04-01/07-1347-Corr-tENG; Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009, ICC-01/04-01/07-1491-Conf, with confidential ex parte annex (ICC-01/04-01/07-1491-Red-tENG with a redacted confidential annex).*

<sup>71</sup> *Order on the organisation of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328.*

one responsible for representing the main group of victims, and the other for the group of child-soldier victims.<sup>72</sup>

35. The Decision on rule 140<sup>73</sup> set out a number of rules governing victims' participation in the trial. In a subsequent decision issued on 22 January 2010 and upheld on appeal,<sup>74</sup> the Chamber responded to various issues raised by the parties and participants, further setting out the precise modalities of victims' participation in respect of points which had not been addressed in the aforementioned decision on rule 140.<sup>75</sup>

36. Ultimately, 366 persons were authorised to participate in the trial as victims, 11 of them as child soldiers;<sup>76</sup> however, victim status was subsequently withdrawn from two of them.<sup>77</sup> Furthermore, the Chamber authorised four victims to appear as witnesses,<sup>78</sup> but following an application by the common legal representative of the main group of victims, only two victims ultimately appeared.<sup>79</sup>

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<sup>72</sup> [Registry, "Désignation définitive de Me Fidel Nsita Luwengika comme représentant légal commun du groupe principal de victime et affectation des victimes aux différentes équipes", 22 September 2009, ICC-01/04-01/07-1488.](#)

<sup>73</sup> See Annex A.

<sup>74</sup> [Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, ICC-01/04-01/07-2288.](#)

<sup>75</sup> [Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG.](#)

<sup>76</sup> See Annex A.

<sup>77</sup> [Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luwengika's request for leave to terminate his mandate as said victims' Legal Representative, 7 July 2011, ICC-01/04-01/07-3064-tENG.](#)

<sup>78</sup> [Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, 9 November 2010, ICC-01/04-01/07-2517-tENG.](#)

<sup>79</sup> [Decision on the notification of the removal of Victim a/0381/09 from the Legal Representative's list of witnesses, 31 January 2011, ICC-01/04-01/07-2674-tENG; Décision relative à la notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal, 11 February 2011, ICC-01/04-01/07-2699-Conf \(21 February 2011, ICC-01/04-01/07-2699-Red\).](#)

### III. METHOD OF INTERPRETATION OF THE FOUNDING TEXTS OF THE COURT

37. In this section, the Chamber will determine, in the light of the relevant rules, the interpretation method it will use, as necessary, to apply the law. To this end, after having first identified the sources of law on which it will draw in the case at bar, the Chamber will set out the principles and the rules it must take into account in its interpretation of the law.

#### A. APPLICABLE LAW UNDER ARTICLE 21 OF THE STATUTE

38. The applicable law is set out in article 21 of the Statute:

##### Article 21 Applicable Law

1. The Court shall apply:
  - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

39. The Chamber would emphasise that article 21 of the Statute establishes a hierarchy of the sources of applicable law and that, in all its decisions, it must “in the first place” apply the relevant provisions of the Statute. In the light of the

established hierarchy, the Chamber shall therefore apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules.<sup>80</sup>

40. The Chamber considers that the Statute and the Elements of Crimes comprehensively regulate the Court's subject-matter jurisdiction in relation to the crimes or the modes of criminal liability with which the accused is charged. Accordingly, the Chamber considers that it need not apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute to these two points. In the case at bar, the Chamber will apply only articles 7, 8, 25 and 30 of the Statute.<sup>81</sup>

41. Furthermore, considering the existing hierarchy between the sources of applicable law established by article 21(1)(a) of the Statute and the clarifications provided in article 9(1), the Elements of Crimes may assist the Chamber in the application of the aforementioned provisions of the Statute.<sup>82</sup> In the Chamber's view, since the Elements of Crimes provide clarification of the Statute, they should be considered founding texts in respect of subject-matter jurisdiction. Indeed, the Chamber recalls that the Elements of Crimes set forth the constituent elements of the crimes within the jurisdiction of the Court in accordance with, as article 9(3) of the Statute so prescribes, the relevant statutory provisions.

42. Lastly, in accordance with article 21(2) of the Statute, the Chamber may also apply the principles and rules of laws as defined in previous decisions of the pre-trial

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<sup>80</sup> [Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168](#), para. 39 ("13 July 2006 Appeals Chamber Judgment"); [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 \(2\) \(a\) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772](#), para. 34; [The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3](#), para. 44. ("Warrant of Arrest in Al Bashir").

<sup>81</sup> See the [Decision on the confirmation of charges](#).

<sup>82</sup> See also [Elements of Crimes](#), General introduction, para. 1.

chambers<sup>83</sup> and trial chambers of the Court,<sup>84</sup> and the judgments of the Appeals Chamber.

## B. METHOD OF INTERPRETATION

### 1. Method adopted by the Chamber for the interpretation of the founding texts of the Court

43. To interpret the relevant provisions of the Statute and the Elements of Crimes, the Chamber must draw on the method of interpretation laid down in the Vienna Convention on the Law of Treaties (“the Vienna Convention”),<sup>85</sup> specifically articles 31 and 32. The chambers of the Court have unanimously and systematically<sup>86</sup> based their interpretation of the Statute on the principles established by the Vienna Convention.

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<sup>83</sup> See, in particular, [The Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tENG \(“Decision on the confirmation of charges in Lubanga”\)](#); [The Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424 \(“Decision on the confirmation of charges in Bemba”\)](#); [The Prosecutor v. Bahar Idriss Abu Garda, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red \(“Decision on the confirmation of charges in Abu Garda”\)](#); [The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Corr-Red \(“Decision on the confirmation of charges in Banda and Jerbo”\)](#); [The Prosecutor v. Callixte Mbarushimana, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red \(“Decision on the confirmation of charges in Mbarushimana”\)](#); [The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 \(“Decision on the confirmation of charges in Ruto et al.”\)](#); [The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Articles 61\(7\)\(a\) and \(b\) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red \(“Decision on the confirmation of charges in Kenyatta et al.”\)](#).

<sup>84</sup> See, in particular, [The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 \(“Lubanga Judgment”\)](#); [Ngudjolo Judgment](#).

<sup>85</sup> The Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232.

<sup>86</sup> See, in particular, [13 July 2006 Appeals Chamber Judgment](#), para. 6; [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Decision on the admissibility of the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges of 29 January 2007”, 13 June 2007, ICC-01/04-01/06-926](#), para. 8; [The Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Appeals](#)

44. Firstly, it should be recalled that, as stated by the Appeals Chamber,<sup>87</sup> the Vienna Convention sets forth *one* general rule of interpretation (“the General Rule”)<sup>88</sup> and one alone.
45. Article 31(1) of the Convention lays down: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. This method of interpretation prescribes that the various ingredients – the ordinary meaning, the context, and the object and purpose – be considered together in good faith.<sup>89</sup> The General Rule, which therefore refers to a holistic approach, does not establish any hierarchical or chronological order in which those various ingredients are to be examined and then applied.<sup>90</sup> On the contrary, it enumerates various elements which must be simultaneously taken into account in a single process of interpretation. In other words, the ordinary meaning, the context, and the object

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[Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, ICC-01/04-01/07-522](#), para. 38; [The Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Pre-Trial Chamber I, Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, 9 April 2008, ICC-01/04-01/07-384](#), p. 6; [Arrest warrant in Bashir](#); paras. 44 and 126; [Decision on the confirmation of charges in Lubanga](#); paras. 276-285; [Lubanga Judgment](#), paras. 601-602 and 979. See also [Decision on the confirmation of charges in Mbarushimana](#), para. 274; [Decision on the confirmation of charges in Ruto et al.](#), para. 289. See also the interpretation of article 30 of the Statute, [Decision on the confirmation of charges in Bemba](#), paras. 361-369.

<sup>87</sup> [13 July 2006 Appeals Chamber Judgment](#), para. 33.

<sup>88</sup> The preparatory work of the Vienna Convention confirms that it is in fact *one* rule of interpretation and not several rules, since the singular was substituted for the plural in the title of the article in the course of the negotiations (Jean-Marc Sorel and Valérie Boré-Eveno, “Article 31”, in O. Corten and P. Klein (Eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. I (2011), (“Sorel and Eveno, ‘Article 31’”), pp. 814 and 816).

<sup>89</sup> Olivier Dörr, “Article 31”, in O. Dörr and K. Schmalenbach (Editor), *Vienna Convention on the Law of Treaties: A Commentary* (2012), (“Dörr, ‘Article 31’”) pp. 523 and 541; Sorel and Eveno, ‘Article 31’, pp. 817-818.

<sup>90</sup> Dörr, ‘Article 31’, p. 541; Sorel and Eveno, ‘Article 31’, pp. 807-808 and 816; Mark E. Villiger, “The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission”, in E. Cannizzaro (Ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), pp. 113-114. See also ICJ, *Judgment of April 9<sup>th</sup>, 1949, Corfu Channel Case (United Kingdom v. Albania)*, ICJ Reports 1949, p. 4, pp. 23-24; [ICJ, Judgment of 1 April 2011, Application of the International Convention on the Elimination of All Forms of Racial Discrimination \(Georgia v. Russian Federation\)](#), *Preliminary Objections*, ICJ Reports 2011, p. 70, paras. 133-134.

and purpose must be considered together, not individually.<sup>91</sup> Accordingly, a bench cannot decline to draw on a particular element of the General Rule because, as noted above, its ingredients form a whole.

46. The principle of effectiveness of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation.<sup>92</sup> Thus, in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions.

47. Article 31 of the Vienna Convention also provides that in addition to the context consideration shall be given to “any relevant rules of international law applicable in the relations between the parties”.<sup>93</sup> The General Rule provides that, to interpret or impart meaning to a provision of a treaty, the bench may rely on rules extraneous to the text concerned (in this case, the founding texts) where it is established that they are applicable to the relations between the States Parties. Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the ad hoc tribunals and other courts on the matter. Nonetheless, the ultimate meaning which the Chamber will apply must always be underpinned by the above-mentioned method of interpretation, which means that it must construe, in good faith, the terms used in accordance with their ordinary meaning, considered in their context and in the light of the purpose and object of the Statute.

48. The Chamber notes that, as regards the interpretation and application of the statutory provisions, the text of the Statute itself refers at times to external

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<sup>91</sup> See for example, [ICTY, Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004](#), para. 31.

<sup>92</sup> Sorel and Eveno, ‘Article 31’, pp. 817-818; Dörr, ‘Article 31’, p. 540.

<sup>93</sup> See, in particular, Panagiotis Merkouris, “Article 31(3)(c) of the VCLT and the Principle of Systemic Integration”, Ph.D thesis at Queen Mary University, University of London, School of Law, supervised by Malgosia Fitzmaurice, January 2010, p. 296, online at: [https://qmro.qmul.ac.uk/jspui/bitstream/123456789/477/1/MERKOURISArticle%2031\(3\)\(c\)2010.pdf](https://qmro.qmul.ac.uk/jspui/bitstream/123456789/477/1/MERKOURISArticle%2031(3)(c)2010.pdf).

sources.<sup>94</sup> This is the case, for example, for war crimes under articles 8(2)(a) and 8(2)(b) of the Statute, which refer verbatim to the Geneva Conventions and “the established framework of international law”.

49. It must also be recalled that, in addition to the General Rule, article 32 of the Vienna Convention provides for “supplementary means of interpretation” such as the preparatory work of the treaty and the circumstances of its conclusion. Having examined the texts in accordance with the General Rule, the bench may then have recourse to the supplementary means of interpretation to confirm the meaning resulting from the application of article 31, or to determine the meaning of a provision where the interpretation according to article 31 “leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable”.<sup>95</sup>

## 2. Observance of the principle of legality

50. Further to the above rehearsal of the principles and rules to which it must afford consideration in interpreting the applicable law in the instant case, the Chamber underscores several restrictions expressly laid down by the Statute. Firstly, the Chamber notes that article 21(3) states most clearly that the application and interpretation of the applicable provisions must be consistent with internationally recognised human rights and be without any adverse distinction. The outcome of the interpretation undertaken by the Chamber must not therefore run counter to such rights. Article 22(2) of the Statute also sets a further restriction on the bench’s

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<sup>94</sup> In this regard see Rome Statute, article 21(3).

<sup>95</sup> See, in particular, [The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V\(a\) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 25 October 2013, ICC-01/09-01/11-1066](#), para. 52. See also Stephen M. Schwebel, “May Preparatory Work be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision” in J. Makarczyk (Ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (1996), pp. 541-547; Panos Merkouris, “‘Third Party’ Considerations and ‘Corrective Interpretation’ in the Interpretative Use of *Travaux Préparatoires*: - Is it Fahrenheit 451 for Preparatory Work? -” in M. Fitzmaurice, O. Elias and P. Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), pp. 75-95.

role of interpretation by requiring it, upon completion of its analysis, to discard any meaning derived from a broad interpretation that is to the detriment of the accused.

51. Contrary to the founding texts of the ad hoc international criminal tribunals, the Statute explicitly enshrines the principle of legality<sup>96</sup> in article 22. Implementation of the method set forth in the General Rule must therefore always be consistent with that provision, which constitutes a clear and explicit restriction on all interpretative activity. The bench must therefore respect the two corollaries of the principle of legality, namely the principle of strict construction and the principle of *in dubio pro reo*.
52. In application of the principle of strict construction, the provisions of the Statute concerning the crimes may not, therefore, be defined by analogy or applied to situations not expressly provided for in the actual wording of the statutory provisions. The Chamber therefore cannot adopt a method of interpretation that might broaden the definition of the crimes and it is instead duty-bound to apply strictly the provisions which specifically proscribe only the conduct which the drafters expressly intended to criminalise. The primary task of the bench in criminal cases is the application and interpretation of the law but, under no circumstances, creation of the law, since the sole purpose of the bench's interpretative activity is to impart meaning to *existing* law.
53. Regarding the principle of *in dubio pro reo* as set forth in article 22(2) of the Statute, it should be noted that it is applicable only "in case of ambiguity" and clearly should be relied on only after an unsuccessful attempt at interpretation effected in good faith and in accordance with the General Rule of the Vienna Convention or in accordance with article 32 of the Convention. In fact, this principle only entails that, where doubt cast by an equivocal term or phrase as to the exact meaning of a

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<sup>96</sup> The principle so enshrined inheres in other provisions of the Statute, in particular in articles 11, 23 and 24 of the Statute and in the very existence of the Elements of Crimes.

provision cannot be dispelled by the General Rule or supplementary means of interpretation, it must be resolved in favour of the subject, in this case the Accused, and not in favour of the drafter, who was unclear. It should therefore not be considered that article 22(2) of the Statute from the outset takes precedence over the conventional method of treaty interpretation or only a part of the method. Were this to be so, rather than being in a position to take the requisite open and neutral approach, the bench would be compelled automatically to apply the provisions of the Statute in favour of the accused, thereby excluding any attempt to interpret in good faith, whether in favour of or against the accused.

54. With respect to the principle of legality as enshrined in article 22 of the Statute, the Chamber notes that different authors have questioned the use of the General Rule in international criminal law, in particular where the object and purpose of the treaty appear critical for the interpretation of statutory provisions.<sup>97</sup> Hence, recourse, as part of a process of interpretation of the Statute based on the Vienna Convention, to a teleological approach entailing consideration of the need to end impunity for the perpetrators of the most serious crimes could be considered antithetical to the principle of legality and, more specifically, to the rule of strict construction and the principle of *in dubio pro reo*.

55. In the light of the principles recalled above, the Chamber considers it self-evident that the aim of the Statute,<sup>98</sup> *viz.* to put an end to impunity for the perpetrators of the most serious crimes within the jurisdiction of the Court, can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of its text. Nonetheless, the object

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<sup>97</sup> See, in particular, Darryl Robinson, "The Identity Crisis of International Criminal Law", 21 *Leiden Journal of International Law* (2008), pp. 933-943; Leena Grover, "A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court", 21 *European Journal of International Law* (2010), pp. 550-558; Dov Jacobs, "Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories" (2012), in J. d'Aspremont and J. Kammerhofer (Eds.), *International Legal Positivism in a Post-Modern World* (forthcoming). See also [Concurring Opinion of Judge Christine Van den Wyngaert in the Ngudjolo Judgment](#).

<sup>98</sup> Rome Statute, Preamble.

and purpose of the Statute must always be borne in mind and fully considered during the interpretation of its provisions as they are one of the components which make it possible to establish its definitive meaning.

56. Here, it should be noted that the method of interpretation propounded by the General Rule also makes it possible to identify or confirm one of the ordinary meanings of the text and not to impart to it a meaning contrary to the terms employed by interpreting it to suit the desired result.<sup>99</sup> The Vienna Convention therefore provides for a method of interpretation which is both circumscribed and rigorous and which leaves little scope for any risk of misinterpretation of the Statute.

57. Therefore, in ensuring, furthermore, that it will adhere to the requirements of strict construction in accordance with article 22(2), the Chamber will, in the light of the foregoing, rely on the General Rule set forth in the Vienna Convention in its interpretation of the provisions of the Statute, in particular those concerning the definition of the crimes and the Accused's criminal responsibility.

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<sup>99</sup> See, in particular, Dörr, "Article 31", p. 547.

## IV. THE EVIDENCE

58. The Chamber will essentially adopt the analysis of this matter which appears in the judgment handed down by the Trial Chamber in *Lubanga*.<sup>100</sup>

### A. PROSECUTION'S INVESTIGATIONS

59. The investigation in the case of *The Prosecutor v. Germain Katanga*, is along with those in the cases of *The Prosecutor v. Thomas Lubanga* and *The Prosecutor v. Mathieu Ngudjolo*, one of the first investigations conducted by the Office of the Prosecutor. The Chamber is mindful that the investigation had to be carried out in a region with a high degree of insecurity.<sup>101</sup> It therefore acknowledges the difficulties which the Office of the Prosecutor may have encountered in finding witnesses with a sufficiently precise recollection of the events and ready to testify without fear, as well as gathering – absent infrastructure, archives or public information – reliable documentary evidence which can be used to determine the truth.

60. In assessing the body of evidence produced by the Prosecution and the conditions under which the investigations were conducted, the Chamber nevertheless made various observations which, in its view, may provide a better understanding of the present judgment.<sup>102</sup>

61. The Chamber notes firstly that the initial investigative documents in its possession date back to mid-2006<sup>103</sup> and therefore post-date by three years the *sub judice* facts. Yet, the taking of testimonies that are as close as possible to the date of the events is of critical importance. It is equally desirable, where practicable, to make as many factual findings as possible – in particular, forensic findings which are often crucial to the identification of victims – expeditiously and at the *loci in*

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<sup>100</sup> [Lubanga Judgment](#).

<sup>101</sup> CHM-1, T. 81, pp. 9-12.

<sup>102</sup> CHM-1, T. 81, pp. 10-13.

<sup>103</sup> CHM-1, T. 81, pp. 7, 58-59 and 71.

*quo*. In the case at bar, the absence of such evidence<sup>104</sup> made it necessary to rely primarily on the statements of witness and reports of MONUC investigators.<sup>105</sup>

62. Similarly, the Chamber considers that before the opening of the trial, it would have been desirable for the Prosecution to visit the places where the Accused persons lived and where preparations for the attack on Bogoro<sup>106</sup> were allegedly made. To cite only a few examples, proper knowledge of the distance between Aveba and Bogoro, Aveba and Zumbe, and Kagaba, the topography of the region and the type and state of the roads would have been helpful in eliciting useful clarification of some of the in-court statements of several witnesses, and fostered from the outset a better understanding and a more accurate appraisal of the various statements.<sup>107</sup> To the same end, it would have been desirable, before the commencement of the Prosecution representatives' examinations, to have been in a position to exactly situate, in Aveba, the so-called BCA camps, the airport and the neighbourhood called Atele Nga. It would also have been important and useful to be able to determine the location of the homes or houses of Germain Katanga, his father and various witness called by the Prosecution or by the Defence for the Accused.

63. In the view of the Chamber, it would also have been desirable to hear the testimonies of some of the commanders who played a key role before the attack, during combat and thereafter. Without disregarding the powers which articles

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<sup>104</sup> The first Prosecution forensic investigation mission to Bogoro was conducted in March 2009. See Office of the Prosecutor, "[Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge](#)", 15 July 2009, ICC-01/04-01/07-1305, paras. 8-14. For reasons explained in its decision of 7 October 2009, the Chamber ruled that the probative value of the findings in the forensic experts' reports was insufficient to warrant their late submission ([Corrigendum – Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, 9 October 2009, ICC-01/04-01/07-1515-Corr](#), paras. 27-36).

<sup>105</sup> EVD-OTP-00285: MONUC report on the events in Ituri.

<sup>106</sup> The Chamber was informed that, on 10 July 2009, the then Prosecutor of the Court, Mr Moreno-Ocampo, visited Zumbe. It notes, however, that the trip was part of a general visit to the DRC and was not an investigative measure in the legal sense.

<sup>107</sup> See in this regard, [Closing Brief of the Defence for Mathieu Ngudjolo](#), paras. 450-453.

64(6)(d) and 69(3) of the Statute vest in it, the Chamber considers that the initiative to call those witnesses lay first and foremost with the Office of the Prosecutor. For example, and insofar as the persons were still alive and accessible, statements of military leaders such as Colonel Aguru, Captain Blaise Koka and Commanders Boba Boba, Yuda and Dark could have provided more detail about the preparations for the attack, how it proceeded and the forces which remained *in situ* at the end of the fighting. It would also have undoubtedly been of interest to put questions to Colonel Cobra Matata.

64. Regarding Germain Katanga, the Chamber is of the view that it would again have been desirable – subject to his consent – for his statement to have been taken at the investigative stage. He chose to testify as a witness under oath at the end of the trial, having heard all of the *viva voce* evidence. As a result, the uniqueness of his statement at the final stage of the hearings did not put the Chamber in a position to compare the account he gave at that time with previous statements, which would however have been most useful.

65. The Chamber, once again, is aware of the difficulties encountered by the Prosecution in conducting investigations in a region afflicted by recurrent conflict and the fact that it was required to avoid anything that could identify witnesses in need of protection. Nevertheless, the Chamber considers that, to better ascertain the credibility of some Prosecution witnesses, it would have been desirable, once again, for the Prosecution to have more thoroughly reviewed their civil status and educational background. It must be noted that most often it was the Defence teams who produced both civil status documents and school report cards – evidence making it possible to determine more accurately the age claimed by some witnesses as well as the dates, schools and locations where they studied. Further, this material, some of whose authenticity was not contested by the Prosecution, was given significant weight in the Chamber's assessment of the

witnesses' status, their possible membership of a militia, their ability to testify and their credibility.<sup>108</sup>

66. In-court testimonies allowed the Chamber to measure the very specific significance of local customs and the role of family relationships in Ituri. It also noted that the notions of hierarchy and obedience could be interpreted very differently and, in this regard, the role of fetish-priests [*féticheurs*] in the local societies warranted special attention.

67. Most probably, the Prosecution's investigation would have benefited from pursuing these issues, which would have permitted a more nuanced interpretation of certain facts; a more accurate interpretation of some of the testimonies and, hence, a fine-tuning of the criteria relied on by the Chamber in assessing the credibility of several witnesses. In fact, many of the socio-cultural aspects of the evidence were discussed further to questions from the Bench. In the Chamber's view, these aspects should have been discussed as soon as presentation of the Prosecution's evidence commenced so as to prompt a more informed adversarial debate from the outset .

## **B. THE CHAMBER'S CRITERIA FOR EVALUATION OF THE EVIDENCE**

### **1. Onus of proof**

68. Under article 66 of the Statute, the accused is presumed innocent until the Prosecutor has proved his or her guilt.<sup>109</sup> In order to convict the accused, each element of the particular offence charged must be established "beyond reasonable doubt".<sup>110</sup>

69. The Chamber emphasises that the standard of proof "beyond reasonable doubt" must be applied in establishing an element of crime or the mode of liability held

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<sup>108</sup> See "Section V Analysis of the credibility of specific witnesses".

<sup>109</sup> [Rome Statute](#), articles 66(1) and 66(2).

<sup>110</sup> Rome Statute, article 66(3); [Lubanga Judgment](#), para 92.

against the accused, as well as in establishing the existence of facts indispensable for entering a conviction.

70. It is the Chamber's position that the fact that an allegation has not, in its view, been proven beyond reasonable doubt, does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to adjudge the veracity of the alleged fact in the light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt".

## **2. Facts requiring no evidence**

### **a) Facts of common knowledge**

71. Under article 69(6) of the Statute, the Chamber may take judicial notice of facts of common knowledge. However, the Chamber has been unable to do so in the specific context of the present case.

### **b) Agreements as to evidence**

72. In accordance with rule 69 of the Rules, the parties may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested. In such circumstances, the Chamber may consider such alleged fact as being proven.

73. The parties in the case at bar were able to agree only on a limited number of facts.<sup>111</sup> The Chamber has considered them as being proven for the purposes of this judgment.

### 3. The evidence

74. Oral, written and audio-visual evidence was introduced at trial. Witnesses who provided *viva voce* evidence did so in person or, in some exceptional cases, via video link. Excerpts from written statements of some witnesses were admitted into evidence pursuant to rule 68 of the Rules.<sup>112</sup> Documents and other material such as transcripts of interviews, videos, documents from a variety of organisations, letters, photographs and maps were either tendered during oral testimony of witnesses or directly introduced by counsel – in the latter case, following a written application.<sup>113</sup>

75. The Appeals Chamber has held that article 69(4) of the Statute requires the Trial Chamber to rule on the admissibility of each item of submitted evidence “at some point in the proceedings”.<sup>114</sup> In any event, an exhibit will be admissible only where the Chamber rules that it is relevant and/or admissible within the meaning of article 69(4), which requires assessment of its probative value and whether it

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<sup>111</sup> [Decision on Agreements as to Evidence, 3 February 2011, ICC-01/04-01/07-2681 \(“Agreement as to evidence”\)](#); Oral decision, 5 April 2011, T. 243; Defence for Germain Katanga, “Defence Notice of an Admission”, 15 November 2011, ICC-01/04-01/07-3202-Conf.

<sup>112</sup> See, *inter alia*, [Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362; Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 26 August 2010, ICC-01/04-01/07-2289-Conf-Corr \(ICC-01/04-01/07-2289-Corr\); Corrigendum to the Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts, 15 July 2010, ICC-01/04-01/07-2233-Corr.](#)

<sup>113</sup> See, *inter alia*, [Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635 \(“Decision on Bar Table Motions”\)](#).

<sup>114</sup> [The Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37 \(“3 May 2011 Appeals Chamber Judgment”\)](#).

may adversely affect the fairness of the trial or a fair evaluation of the testimony of the witness.<sup>115</sup>

76. In ruling on the admissibility of a piece of evidence, the Chamber employed a three-tiered approach. Firstly, it examined the relevance of the item; it then assessed its probative value; and lastly it weighed the probative value against any prejudice which might result from its admission into evidence.<sup>116</sup>

**a) Method of evaluation of evidence**

77. This judgment is based on “the entire proceedings” and on the Chamber’s “evaluation of the evidence” pursuant to article 74(2) of the Statute.<sup>117</sup>

78. This statutory provision requires the Chamber to rely “only on evidence submitted and discussed before it at the trial.” In the Chamber’s view, the phrase “discussed before it at the trial” encompasses not only oral testimonies, together with any documents and other exhibits such as video recordings which were discussed during the hearings, but also any piece of evidence “discussed” in the written submissions of the parties and participants at any stage of the trial (such as documents introduced by counsel pursuant to a prior written application). The principal consideration is that the evidence on which the Chamber’s article 74 decision is based was tendered at trial, becoming an integral part of the trial record,<sup>118</sup> after assignment of an evidence number (“EVD” number) and that the parties had the opportunity to make submissions as to each item of evidence.

79. The Chamber first assessed the credibility of all the relevant evidence presented. The statements of various witness and exhibits tendered into the record were analysed in the light of all the other relevant evidence on record.

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<sup>115</sup> [3 May 2011 Appeals Chamber Judgment](#), para. 37. See also Rome Statute, article 69(4); [Lubanga Judgment](#), para. 100.

<sup>116</sup> [Decision on the Prosecutor’s Bar Table Motions](#); see, in particular, para. 16.

<sup>117</sup> [Lubanga Judgment](#), para. 94.

<sup>118</sup> [Lubanga Judgment](#), para. 98.

80. On the basis of this analysis, the Chamber ruled on whether the evidence on which the Prosecution relied had to be accepted as establishing the alleged facts, notwithstanding the exculpatory evidence submitted.

81. In determining whether an allegation by the Prosecution had been proved, the Chamber did not restrict its evaluation to the evidence which parties and participants explicitly relied on in their oral submissions. It considered on a case-by-case basis whether it could rely on evidence on record which was not referred to explicitly in establishing a factual allegation, taking into account the requirements of articles 64(2) and 74(2) of the Statute. In particular, it satisfied itself that the Defence had been afforded the opportunity to make submissions as to the evidence in question.

#### **b) Evaluation of oral testimony**

82. In evaluating the oral testimony of witnesses, the Chamber considered a number of factors, which are set out below.

83. It made allowance for instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the specific circumstances of individual witnesses. It was also mindful that the charges relate to events which took place some time ago, in 2002 and 2003. The passage of time explains why memories may sometimes have faded and witnesses – some of whom were still children at the time, or were traumatised – might have had difficulty in providing a coherent, complete and logical account. There are other potential reasons for flaws in some witnesses' evidence and the Chamber took these considerations into account in its overall evaluation of the testimonies in question.<sup>119</sup>

84. In certain instances, the Chamber did not take into account part of a witness's account whilst admitting other aspects of his or her evidence, thereby acknowledging that a witness may give an accurate account of some issues and

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<sup>119</sup> [Lubanga Judgment](#), para. 103.

be unreliable on others. Nonetheless, when the Chamber rejected part of a witness's testimony, it invariably considered the impact of that rejection on the reliability of the remainder of the testimony.<sup>120</sup>

85. The Chamber considered the individual circumstances of each witness, including his or her relationship to the Accused, age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination, sincerity, possible bias towards or against the Accused and motives for telling the truth or giving false testimony.<sup>121</sup>
86. The Chamber assessed each witness's ability to testify and the reliability of his or her testimony. In view of the body of evidence on record and the circumstances specific to those testimonies, it verified whether it could establish that witnesses were physically present at those locations where they claimed in their testimony to have been at the material time.
87. Specifically in respect of the witnesses' reliability, the Chamber ruled on the probative value to be attached to the information provided. To this end, it took the entirety of their testimony into consideration, having regard, in particular, to the capacity and quality of their recollection. It also considered whether there were indications that the witnesses may have been pressured or influenced, or whether there was a risk that they were colluding with other witnesses. To this end, the Chamber afforded particular consideration to the consistency of the accounts, the precision and plausibility of the information provided, possible contradictions with previous statements, insofar as the relevant portions of the prior statements are in evidence,<sup>122</sup> possible contradictions with the testimonies of other witnesses and, finally, the witnesses' demeanour when testifying such as readiness, willingness and manner of responding to questions from the parties, participants and the Chamber itself.

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<sup>120</sup> [Lubanga Judgment](#), para. 104.

<sup>121</sup> [Lubanga Judgment](#), para. 106.

<sup>122</sup> [Lubanga Judgment](#), para. 102

### c) Evaluation of evidence other than direct oral evidence

88. The framework defined by the Rome Statute affords the Chamber considerable flexibility in weighing the evidence before it, as stated in Trial Chamber I's analysis in its *Decision on the admissibility of four documents*:

24. [...] the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence “freely”. Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to “apply national laws governing evidence”. For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.<sup>123</sup>

89. Regarding evidence other than direct oral evidence, the Chamber made allowance for the difficulties encountered where it proves impossible to examine the individual who originally supplied the information. The degree of relevance and potential prejudice would then depend on the nature and circumstances of the particular piece of evidence. The situations which the Chamber might face in this respect being infinitely variable (as indicated in the above quotation), the Chamber has approached them on a case-by-case basis.<sup>124</sup>

90. The Chamber took a cautious approach in evaluating evidence from anonymous hearsay. It did not rule out such evidence immediately but evaluated its probative value on the basis of the context and conditions in which it was obtained and

<sup>123</sup> [The Prosecutor v. Thomas Lubanga Dyilo, Corrigendum to Decision on the admissibility of four documents, 20 January 2011, ICC-01/04-01/06-1399-Corr.](#) See also [Lubanga Judgment](#), para. 107.

<sup>124</sup> [Lubanga Judgment](#), para. 108.

with due consideration of the impossibility of cross-examining the information source.

#### **d) Evaluation of documentary evidence**

91. Regarding documentary evidence, the Chamber considered the content and source and any other related material. The Chamber considered the document's author if known, as well as his or her role in the relevant events, and the chain of custody from the time of the document's creation until its presentation to the Chamber. The indicia of reliability were duly assessed, the Chamber bearing in mind that a document, although authentic, may be unreliable.<sup>125</sup>

92. Regarding the relevance of documentary evidence, the Chamber refers to its ruling that:

[...] If a party has tendered an item of evidence as proof of a particular proposition, the Chamber will in principle admit it only for that purpose, even if the entire exhibit is admitted into evidence. Accordingly, if the same item of evidence could also prove another proposition than the one(s) for which it was tendered, the Chamber will not consider the evidence in relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.<sup>126</sup>

93. Therefore, the Chamber sought full respect for the adversarial principle, set forth in the last sentence in article 74(2) of the Statute.

#### **e) Expert witnesses**

94. In evaluating the testimony of expert witnesses, the Chamber considered factors such as his or her established expertise, the methodology used, the extent to which his or her findings were consistent with other evidence tendered in the case and the general reliability of the expert's evidence.<sup>127</sup> On the latter point, the Chamber considered scientific evidence to be objective, even if the expert was

<sup>125</sup> [Lubanga Judgment](#), para. 109.

<sup>126</sup> [Decision on Bar Table Motions](#), para. 17.

<sup>127</sup> [Lubanga Judgment](#), para. 112.

appointed by only one party or by the Court in accordance with regulation 44 of the Regulations of the Court.

**f) Interpretation and translation**

95. Simultaneous interpretation was used throughout the trial because the witnesses in this case gave evidence in a number of different languages. Whilst on the whole it was good, on several occasions, difficulties regarding the accuracy of some parts of the interpretation were signalled.

96. The Chamber was mindful that difficulties sometimes arose from the interpretation or understanding of certain words, such as the names of people and places. It was also mindful that simultaneous interpretation cannot always ensure an absolutely perfect and precise rendition of what was said. The Chamber also noted, on various occasions, difficulties in transcribing statements made in court. Accordingly, it treated with circumspection the passages in the transcripts where witnesses claimed to have reported “word for word” what was said by a third party. Nevertheless, absent any challenge to the accuracy of the interpretation and the transcription in the closing briefs, the Chamber relies on the transcripts, in their corrected form as appropriate.

**g) Protective measures**

97. The Chamber ordered measures to protect the identity of many witnesses because of their concerns for personal safety and the security of their families.<sup>128</sup> For the same reasons, witnesses are referred to in this judgment by a number rather than by name and certain details that might reveal their identities have been omitted.<sup>129</sup> It should be emphasised that whenever the Chamber ordered protective

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<sup>128</sup> See, in particular [Order on protective measures for certain witnesses called by the Prosecutor and the Chamber, 23 November 2009, ICC-01/04-01/07-1667-Conf-tENG \(9 December 2009 ICC-01/04-01/07-1667-Red-tENG\)](#).

<sup>129</sup> See Annex C.

measures for witnesses, the parties and participants were always aware of the relevant particulars.<sup>130</sup>

98. To ensure the effectiveness of the protective measures ordered, testimony was frequently heard in closed session, which the public was unable to follow. Nonetheless, insofar as the proceedings must be public as a rule, the Chamber endeavoured to develop, in close collaboration with the parties and participants, best practices which enabled such closed sessions to be kept to a minimum. To the extent necessary and pursuant to articles 64(7) and 67(1) of the Statute, the Chamber instructed the parties and participants to carefully review the transcripts of testimonies given in closed sessions, and ordered that any portions thereof not containing information which could pose a security risk be reclassified as public.

99. Aside from these in-court protective measures, the Chamber authorised redactions to certain documents as requested by the parties in order to protect various categories of sensitive information. It carefully reviewed the proposed redactions before authorising them, and some redacted passages were reinstated during the course of the trial.

100. The Chamber would also emphasise, that insofar as it does not amount to a security risk for witnesses, confidential information has been maintained to the greatest extent possible in this judgment. The Chamber considered that confidentiality of some information was not necessary and decided to list in Annex E those footnotes which potentially identify witnesses.

#### **h) Testimony and statement of the Accused**

101. Germain Katanga chose to testify under oath, as is his right under article 67(1)(g) of the Statute. At the closing hearings, he decided, as is his right under article 67(1)(h) of the Statute, to address the Chamber again, but this time not

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<sup>130</sup> [Lubanga Judgment](#), para. 115.

under oath.<sup>131</sup> Although to a certain degree the Chamber took into account his statement under article 67(1)(h), only those statements made under oath must be considered part of the record of the case in accordance with article 74(2). The Chamber therefore recalls that Germain Katanga testified as a witness in the case at bar.<sup>132</sup>

102. The Prosecution argued in its Closing Brief that the Accused had chosen to testify after the Defence had rested its case – a significant factor which the Chamber would have to take into account in evaluating his evidence.

103. The Defence countered that it would be wrong for Germain Katanga's choice to testify and hence to waive his right to remain silent, and the timing of his testimony to be taken into account in the determination of his guilt or innocence.<sup>133</sup>

104. Firstly, the Chamber considers that Germain Katanga voluntarily testified before it, thereby waiving his right to remain silent.<sup>134</sup> Further it notes that it draws no particular conclusion regarding the Accused's responsibility, from his choice to testify before it or, moreover, from the timing of the testimony.

105. Regarding its intended use of the testimony, the Chamber considers that, on certain topics, it took Germain Katanga's statements into account, having found them credible, and hence relied on them in its Judgement. Where, however, it considered the Accused's account not sufficiently credible, it dismissed it without any conclusion as to his guilt or innocence.<sup>135</sup>

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<sup>131</sup> See "Section II(B) Procedural Background", para. 23.

<sup>132</sup> D02-300, T. 314-325.

<sup>133</sup> [Defence Closing Brief](#), para. 525.

<sup>134</sup> [Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, Trial Chamber II, 13 September 2011, ICC-01/04-01/07-3153](#), para. 7 ("Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination").

<sup>135</sup> See in this regard, [ICTY, Prosecutor v. Prlić et al., Case No. IT-04-74, Trial Judgement, 29 May 2013, Vol.1](#), para. 399.

### i) Judicial site visit

106. After consulting the parties, the Chamber decided to travel to the DRC to make findings as to the *loci in quo*.<sup>136</sup> The Registry prepared a report on the site visit,<sup>137</sup> which forms part of the entire proceedings within the meaning of article 74 of the Statute.<sup>138</sup>

107. The judicial visit took place on 18 and 19 January 2012, in the presence of the representatives of the parties and participants, but without the Accused persons. During the visit, the Chamber travelled to Bunia, Aveba, Zumbe and Kambutso and twice to Bogoro. The exact itinerary and the locations visited are detailed in the Site Visit Report. The Chamber met with several individuals *in situ*, but neither heard any witnesses nor allowed anyone to provide it with any information relating to the case. During the visit, the Chamber invited the parties and participants, at various places, to identify locations, sites or buildings and to provide any relevant further details about the events which occurred there. These observations were also noted by the Court Officer in the Site Visit Report.

108. Aside from the opportunity thus afforded to the Chamber to gain a better understanding of the context of the events before it for determination, the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications *in situ* of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the Accused persons. The Chamber has drawn on such findings in the present judgment.

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<sup>136</sup> [Decision on a Judicial Site Visit](#).

<sup>137</sup> Registry, "[Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo](#)", 3 February 2012, ICC-01/04-01/07-3234 with confidential annex ([ICC-01/04-01/07-3234-Anx-Red](#)) ("Site Visit Report").

<sup>138</sup> [Decision on the nature of the "Procès-verbal de l'opération de transport judiciaire en République démocratique du Congo"](#), 14 February 2012, [ICC-01/04-01/07-3240-tENG](#).

**j) Circumstantial evidence**

109. No provision in the Rome Statute framework precludes the Chamber from relying on circumstantial evidence. Where, in the light of the evidence, there is only one reasonable finding to be made from particular facts, the Chamber concluded that they were proven beyond reasonable doubt.<sup>139</sup>

**k) Corroboration**

110. Rule 63(3) of the Rules prohibits the Chamber from “impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.” The extent to which a single piece of evidence suffices to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence under consideration. Accordingly, the Chamber once again adopted a case-by-case approach.

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<sup>139</sup> [Lubanga Judgment](#), para. 111; [Warrant of Arrest in Al Bashir](#), para. 33.

## V. ANALYSIS OF THE CREDIBILITY OF SPECIFIC WITNESSES

111. In this section, the Chamber sets out its assessment of the credibility of specific witnesses who are relevant to the assessment of the role Germain Katanga may have played during the period before and after the 24 February 2003 attack on Bogoro. In principle, it is not mandatory for the Chamber to furnish a lengthy analysis of the credibility of each of the witnesses called by the parties and participants. However, since the Prosecution's case with regard to Germain Katanga is for the most part based upon the testimony of two key witnesses, P-219 and P-28, whose credibility is vigorously impugned, the Chamber is of the view that the conditions under which they testified and the substance of their testimony should be thoroughly analysed. It adopted the same approach for Witnesses P-12, P-132, P-161, P-250, P-279, P-280, P-317 and P-353, who were also called to testify by the Prosecution, as well as Victim V-2, who was called by the common legal representative of the main group of victims. Lastly, the Chamber analysed the situation of five witnesses called by the Defence teams, whose testimonies it considered to be of particular importance to Germain Katanga's case – D03-88, D02-176, D02-228, D02-236 and D02-350.

112. The Chamber has already assessed the credibility of Witnesses P-28, P-219, P-250, P-279, P-280, P-317 and D03-88 in the *Judgment pursuant to article 74 of the Statute in Ngudjolo*<sup>140</sup> and it will adopt the same analysis in the present judgment. However, where considered necessary, it took care to specify the weight to be accorded to the passages from these witnesses' testimonies relevant to the present case.

113. Lastly, the Chamber recalls that it will not analyse the credibility of Germain Katanga's own testimony in this section.<sup>141</sup> If need be, the Chamber will make

<sup>140</sup> [Ngudjolo Judgment](#), paras. 124-313.

<sup>141</sup> See "Section IV(B)(3)(h) Testimony and statement of the Accused".

observations warranted by his statements in court where they are mentioned and will at that juncture make a finding as to the reliability of each statement.

## A. KEY PROSECUTION WITNESSES

### 1. P-28

#### a) Main subject areas covered by Witness P-28's testimony

114. Witness P-28 testified before the Chamber on 15, 16, 17, 18, 22, 23, 24 and 25 November 2010.<sup>142</sup>

115. According to his testimony, P-28 was born in 1989.<sup>143</sup> On 24 February 2003, during his alleged participation in the attack on Bogoro, he would therefore have been in his fourteenth year. He stated that he is related to Germain Katanga's wife, whom he also calls his sister.<sup>144</sup>

116. The witness stated that he fled Bunia during the clashes preceding the downfall of Governor Lompondo in August 2002. According to his account, he took refuge first in Oicha,<sup>145</sup> then Singo,<sup>146</sup> and finally in Avenyuma<sup>147</sup> with members of his extended family.<sup>148</sup> Whilst travelling between Avenyuma and Aveba, P-28 was allegedly abducted by the men of a local commander and forced to undergo military training in Bulandjabo camp.<sup>149</sup> Having managed to escape, he went to Aveba shortly before Germain Katanga's wedding.<sup>150</sup>

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<sup>142</sup> T. 216-T. 223.

<sup>143</sup> P-28, T. 216, p. 23; T. 219, p. 62; T. 223, p. 6.

<sup>144</sup> P-28, T. 217, p. 3.

<sup>145</sup> P-28, T. 216, pp. 33-34; T. 219, pp. 36-37.

<sup>146</sup> P-28, T. 216, p. 35.

<sup>147</sup> P-28, T. 216, p. 43.

<sup>148</sup> P-28, T. 216, p. 44.

<sup>149</sup> P-28, T. 216, pp. 49 and 52; T. 219, p. 14.

<sup>150</sup> P-28, T. 219, pp. 14-15; T. 220 p. 66.

117. Once in Aveba, P-28 allegedly joined Germain Katanga's combatants and became a member of his personal escort.<sup>151</sup> In this capacity, he allegedly accompanied the Accused on several journeys within Walendu-Bindi *collectivité*<sup>152</sup> which Germain Katanga made in the capacity of "[TRANSLATION] number one chief of the FRPI combatants" according to the witness.<sup>153</sup>

118. As one of Germain Katanga's escorts, P-28 claimed to have witnessed the preparations for the attack on Bogoro.<sup>154</sup> Subsequently, he allegedly participated in the attacks on Bogoro<sup>155</sup> and Mandro before being demobilised.<sup>156</sup> Lastly, according to the witness, Bogoro was attacked by FRPI, FNI and APC combatants<sup>157</sup> and the attack on Mandro was launched by Zumbe combatants jointly with FRPI and APC combatants.<sup>158</sup>

#### **b) Analysis**

119. The Office of the Prosecutor and the Defence disagreed on a number of pivotal aspects of P-28's testimony which are of import to his ability to testify to the facts of the case. Both parties accepted that P-28 left Bunia after the downfall of Governor Lompondo, and that he took refuge in Oicha. However, they disagreed on the date of his arrival in Aveba and on whether he was a member of the militia.

120. Indeed, the Prosecution contended that P-28 was abducted in Kaswara by a commander from Walendu-Bindi and that he subsequently went to Aveba. It is alleged that he arrived there shortly before Germain Katanga's wedding, which,

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<sup>151</sup> P-28, T. 217, pp. 19-20; T. 221, pp. 44-47.

<sup>152</sup> P-28, T. 217, p. 19.

<sup>153</sup> P-28, T. 217, p. 13.

<sup>154</sup> P-28, T. 217, pp. 34 *et seq.*

<sup>155</sup> P-28, T. 217, pp. 37 and 50-55.

<sup>156</sup> P-28, T. 218, p. 23-26.

<sup>157</sup> P-28, T. 217, pp. 34-38.

<sup>158</sup> P-28, T. 218, p. 23.

in the Accused's own words, took place on 18 November 2002.<sup>159</sup> He stayed with a pastor for two days and then went to live with a commander from Aveba.<sup>160</sup> It is the Prosecution's view that P-28 was one of the Aveba combatants, and even one of the Accused's bodyguards. As such, he allegedly participated in the attack on Bogoro.<sup>161</sup>

121. According to the Defence, the witness left Oicha and travelled directly to Aveba in late January or early February 2003. The Defence therefore contested both P-28's abduction by a Walendu-Bindi commander and the date of his arrival in Aveba.<sup>162</sup> The Defence considers that, when the witness arrived in Aveba, he lived with a pastor for a long period of time.<sup>163</sup> It is the Defence's view that P-28 was never a combatant and that his account describing the preparations for the attack on Bogoro, his participation in the fighting and his description of the attack on Mandro are pure fabrication.<sup>164</sup>

**i. P-28's testimony**

122. In its Closing Brief, the Prosecution submitted that the numerous details contained in the evidence given by P-28 greatly attest to his reliability and show that he had personal knowledge of the facts.<sup>165</sup>

123. The Chamber indeed notes that P-28 testified in detail on a number of events. It recalls, however, that the final version of his account was provided only after several successive statements made during the Office of the Prosecutor's

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<sup>159</sup> D02-300, T. 316, p. 20.

<sup>160</sup> [Prosecution Closing Brief](#), paras. 185 and 701-703.

<sup>161</sup> [Prosecution Closing Brief](#), paras. 703-704.

<sup>162</sup> [Defence Closing Brief](#), paras. 154, 178-180, 190-192 and 233.

<sup>163</sup> [Defence Closing Brief](#), paras. 194-195.

<sup>164</sup> [Defence Closing Brief](#), para. 154.

<sup>165</sup> [Prosecution Closing Brief](#), paras. 763-765. The Prosecution emphasised that P-28 and Defence Witness D03-88 both stated that the ammunition transported from Beni was contained in "[TRANSLATION] plastic bags". For the Prosecution, not only can this detail "[TRANSLATION] not have been fabricated", but it demonstrates, on the contrary, that the witness was already in Aveba when Germain Katanga returned from his first trip to Beni in early December 2002.

investigations. During his testimony in court, P-28 made further corrections to his prior statements that he himself considered necessary to make during his last statement. Acknowledging that he had first given Prosecution investigators an inaccurate account of the circumstances of his abduction, he explained in court that he had not been abducted on the way to school with three classmates,<sup>166</sup> that he had not witnessed the abduction of children after school by the commander who allegedly abducted him,<sup>167</sup> and that he had also not witnessed an abortive escape attempted by his three classmates.<sup>168</sup>

124. According to P-28, his initial erroneous statements were attributable in part to an Office of the Prosecutor intermediary – Intermediary 183 – who allegedly asked him to alter his account.<sup>169</sup> For the Prosecution, this explanation is evidence of the witness's sincerity and his willingness to tell the Chamber the truth.<sup>170</sup> In the view of the Defence, however, he changed his version of the events in October 2010, that is, only several weeks before his appearance before the Chamber, when developments in *Lubanga* led him to understand that the Defence was also carrying out inquiries of its own.<sup>171</sup>

125. The Chamber notes that in court the witness was consistent in repeating explanations that he had given to the Prosecution in his corrective statement of October 2010. Nonetheless, there were a certain number of inconsistencies, of variable importance, in the witness's testimony.

126. Some of the inconsistencies relate to his date of birth. During his examination-in-chief, P-28 stated that he was born in 1989.<sup>172</sup> This date of birth appears on two reports from the Songolo Institute which, according to the witness himself, were

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<sup>166</sup> P-28, T. 220, p. 70.

<sup>167</sup> P-28, T. 220, pp. 48-49.

<sup>168</sup> P-28, T. 220, p. 57.

<sup>169</sup> P-28, T. 220, pp. 49 and 69-70; T. 221, pp. 20-21.

<sup>170</sup> [Prosecution Closing Brief](#), paras. 701 and 769.

<sup>171</sup> [Defence Closing Brief](#), para. 185.

<sup>172</sup> P-28, T. 216, p. 23; T. 219, p. 62; T. 220, p. 35; T. 223, p. 6.

falsified to enable him to continue attending school.<sup>173</sup> Attempting to clarify this point, the Defence put forward three alternative dates of birth based on three separate documents: the first of the dates appears on P-28's voting card<sup>174</sup> and indicated that the witness was at least 15 years old in February 2003. The second date appears on a report from the Congolese authorities, dated 2005,<sup>175</sup> and on a court document from the Congolese judicial authorities;<sup>176</sup> P-28 would appear then to have been 16 years old in February 2003. Finally, according to the date appearing in the registers of two separate schools,<sup>177</sup> P-28 would have been 14 years old in February 2003.

127. According to the Prosecution, 1988 – the year stated on the two oldest school reports from Muzora Institute and the Nyankunde school – should be taken as the correct year since these documents were drawn up when P-28 was a child, and it was a family member who had provided this date of birth to the school.<sup>178</sup> Since P-28 said that his mother had given him another date of birth, which he provided in court,<sup>179</sup> the Chamber cannot accept the date advanced by the Prosecution. The Chamber finds it unlikely that the witness's parents would have given the correct date of birth to the school authorities but lied to their son.

128. Whilst the Chamber is quite prepared to accept that in the very specific context in which he lived the witness did not know the precise date of his birth, it cannot fail to note that he appears to have altered his age according to circumstances. P-28 himself admitted to having falsified school reports in order to resume his education<sup>180</sup> and also to having given erroneous information about his age in order to secure admission into the demobilisation programme for adults

<sup>173</sup> P-28, T. 220, pp. 20 and 24.

<sup>174</sup> EVD-D02-00086: Voting card; P-28, T. 220, p. 29.

<sup>175</sup> EVD-D02-00088: Record of proceedings; P-28, T. 220, pp. 30, 33-34.

<sup>176</sup> EVD-D02-00089: Court document; P-28, T. 219, p. 63, T. 220, p. 36.

<sup>177</sup> EVD-D02-00090: Register (DRC-OTP-0001-0379); EVD-D02-00085: Register (DRC-OTP-1056-0041). See also P-28, T. 220, pp. 25-26; T. 221, pp. 4-5.

<sup>178</sup> [Prosecution Closing Brief](#), para. 698.

<sup>179</sup> P-28, T. 216, pp. 31-32.

<sup>180</sup> P-28, T. 220, pp. 20 and 24.

and thus to benefit from certain material advantages specific to the demobilisation centre.<sup>181</sup>

129. Nonetheless, the Chamber does not consider that such variations affect the witness's reliability. In the light of the considerable amount of material on record, it seems to the Chamber that modifying birth-dates is a fairly common practice in the DRC, in particular in relation to school enrolment, in order either to delay or accelerate a child's enrolment in school. The Chamber further highlights that P-28 is not an isolated case, since two other witnesses, D02-161<sup>182</sup> and D02-259,<sup>183</sup> also acknowledged that they had provided false information about their civil status in order to be accepted into the demobilisation programme. It is the Chamber's view, therefore, that P-28 is not answerable for the inconsistencies in his statements concerning his age as, locally, they are very widespread. Additionally, the Chamber finds that the witness demonstrated sincerity when he volunteered the explanation that he had on two occasions furnished false information about his civil status.

130. However, the Chamber considers the discrepancy in P-28's accounts concerning Germain Katanga's wedding more significant. In his statement to the Prosecution in April 2006, he claimed to have arrived in Aveba after the Accused's wedding, but during the hearing he said that, on the contrary, he had participated in the marriage ceremony.<sup>184</sup> The Chamber further considers that this contradiction is inconsistent with P-28's testimony: indeed, in view of the way he described his relationship to the couple, this ceremony ought to have been a significant personal event for him. It also represented a public event that was equally important for the local Ngiti population, having further regard to the

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<sup>181</sup> P-28, T. 218, pp. 27-28.

<sup>182</sup> D02-161, T. 270, pp. 19 and 38-40.

<sup>183</sup> D02-259, T. 284, pp. 46 and 51.

<sup>184</sup> P-28, T. 220, pp. 64 and 66.

witness's description of Germain Katanga as Commander of the whole Walendu-Bindi *collectivité*.

131. According to the Defence, P-28 was also unable to date the arrival of the delegation from Zumbe<sup>185</sup> or to estimate how long it remained in Aveba.<sup>186</sup> In the Chamber's view, it cannot, however, be precluded that the witness noticed the presence of a delegation whilst he was in Aveba. In this regard, it notes that he did provide an indication of the delegation's arrival date when he said that it was after one of the weapons and ammunition deliveries to Aveba from Beni.<sup>187</sup>
132. Finally, the Defence also challenged the very consistency of P-28's testimony, highlighting certain ambiguities, and even various contradictions relating<sup>188</sup> to the circumstances of his appointment to the post of bodyguard for that Accused,<sup>189</sup> his participation in various unidentified attacks, which allegedly took place at a rate of two or three per week,<sup>190</sup> his participation also in several other battles on unspecified dates, allegedly in Nyakunde<sup>191</sup> and in Singo,<sup>192</sup> and, lastly, his participation in alleged meetings in Aveba and/or Bavi between FRPI commanders before the attack on Bogoro.<sup>193</sup>
133. The Chamber is indeed surprised at the contradictions concerning Commander Adolphe in P-28's account. The contradictions concern both the witness's appointment as bodyguard for Germain Katanga and whether an alleged meeting took place in Bavi shortly before the attack on Bogoro. In his statement of April 2006, P-28 stated that Commander Adolphe appointed him to head the Accused's escort;<sup>194</sup> that, together with Commander Adolphe, he

<sup>185</sup> [Defence Closing Brief](#), para. 216

<sup>186</sup> [Defence Closing Brief](#), para. 217.

<sup>187</sup> P-28, T. 217, pp. 34-35.

<sup>188</sup> [Defence Closing Brief](#), para. 231.

<sup>189</sup> [Defence Closing Brief](#), paras. 201-205.

<sup>190</sup> [Defence Closing Brief](#), para. 200.

<sup>191</sup> [Defence Closing Brief](#), para. 189.

<sup>192</sup> [Defence Closing Brief](#), paras. 197-199.

<sup>193</sup> [Defence Closing Brief](#), paras. 208-214.

<sup>194</sup> P-28, T. 221, pp. 46-47.

accompanied Germain Katanga to Bavi, and that he returned to Aveba in order to lead the troops from that location to the gathering organised in Kagaba on the evening of 23 February 2003.<sup>195</sup> In court, P-28 maintained that it was, in fact, another commander who enabled him to become a bodyguard,<sup>196</sup> that he went directly from Aveba to Kagaba without detouring to Bavi,<sup>197</sup> and that Adolphe was still only a low ranking soldier and not a commander.<sup>198</sup> Albeit alive to the difficulties of recollecting distant events in detail, the Chamber considers that the numerous changes in stance are more akin to contradictions than mere confusion.

134. Finally, P-28's demeanour in court at times also surprised the Chamber. After heeding his account of the fighting in Bogoro, the Chamber observed that he had not really entered into the detail of the events he claimed to have experienced personally during the attack.<sup>199</sup> Admittedly, his restraint could be interpreted as proof of his difficulty in recalling painful memories and relating particularly traumatising events. However, this explanation does not explain why the witness did not deliver the account that would be expected from a combatant who had personally experienced the event, participated in it and taken risks. On the contrary, P-28 provided a detached report of the fighting in Bogoro which did not appear to reflect the acts of someone who had directly participated in the attack, but rather seemed to be the recollection of a person far removed from the battle-field, and who had, perhaps, heard numerous accounts of the events which took place at Bogoro on 24 February 2003.

## ii. Other testimonial evidence

135. Firstly, the Chamber notes that the Prosecution did not call any witness who might have corroborated the circumstances of P-28's possible abduction, his

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<sup>195</sup> P-28, T. 221, pp. 56-57.

<sup>196</sup> P-28, T. 217, p. 20; T. 221, pp. 45-47.

<sup>197</sup> P-28, T. 217, pp. 43-44; T. 222, p. 40.

<sup>198</sup> P-28, T. 221, pp. 46-47.

<sup>199</sup> P-28, T. 217, pp. 37 and 52-53; T. 218, pp. 16-18.

membership of the militia of Walendu-Bindi *collectivité*, or even simply his purported arrival in Aveba in November 2002. The Chamber did note that P-28 identified Witness P-219,<sup>200</sup> just as it noted the Prosecution's submission that the fact that it was impossible to say when P-219 arrived in Aveba attests to his honesty and keenness to testify "[TRANSLATION] to the best of his knowledge".<sup>201</sup> However, it is difficult for the Chamber to ignore that P-219 did not mention the presence of P-28 amongst Germain Katanga's bodyguards whereas the two witnesses knew each other.

136. Conversely, the Chamber notes that several witnesses called by the Defence gave evidence on P-28's activities during this period. Chief amongst these is Witness D02-134, who notably stated that he had met P-28 in Oicha in October 2002,<sup>202</sup> that P-28 had travelled to Aveba in February 2003<sup>203</sup> before the celebration of his marriage,<sup>204</sup> and lastly that P-28 had lived there with him as from May 2003.<sup>205</sup> To this information about P-28's itinerary, he added that P-28 had never been a member of the militia.<sup>206</sup> The Chamber notes, however, that D02-134 voiced his concern about the possible deterioration of relations between the family of the Accused and his own because of the incriminating testimony of P-28.<sup>207</sup> Such a statement inevitably leads the Chamber to treat his testimony with circumspection.

137. Nonetheless, in this regard five other witnesses corroborated D02-134's account of the events exactly. D02-129 thus stated that he had arrived in Aveba in January 2003 and that P-28 had arrived one month after him.<sup>208</sup> He also stated that he had never heard that P-28 had joined the militia, only that he had been

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<sup>200</sup> P-28, T. 219, pp. 15-16.

<sup>201</sup> [Prosecution Closing Brief](#), para. 762.

<sup>202</sup> See Annex E.

<sup>203</sup> See Annex E.

<sup>204</sup> See Annex E.

<sup>205</sup> See Annex E.

<sup>206</sup> See Annex E.

<sup>207</sup> See Annex E.

<sup>208</sup> See Annex E.

demobilised.<sup>209</sup> D02-161 said that he had arrived in Aveba in September 2002 and that P-28 was not a combatant.<sup>210</sup> D02-136, for his part, stated that P-28 had not yet arrived in Aveba when he himself left the place in early December 2002.<sup>211</sup> D02-259 maintained that P-28 had arrived in Aveba in early 2003<sup>212</sup> and that he had never seen him carrying a weapon<sup>213</sup> or wearing a uniform.<sup>214</sup> Finally, D02-501 stated that P-28 had come to Aveba for the first time shortly before Witness D02-134's wedding in July 2003<sup>215</sup> and that, to his knowledge, he was not a member of the militia.<sup>216</sup>

138. The Chamber notes that none of those Defence witnesses denied that P-28 might have been present in Aveba before the attack on Bogoro and that the majority of them recognised that he had special ties with one of the commanders from Aveba.

139. The Prosecution's Closing Brief emphasised that these Defence witnesses maintained close ties with Germain Katanga's extended family (D02-501 and D02-259) and with Germain Katanga's wife (D02-501, D02-129 and D02-134) when they were not close to the Accused himself (D02-136 and D02-161).<sup>217</sup> It also stressed that they were close to one another.<sup>218</sup> In the Prosecution's submission, this demonstrates that all those witnesses colluded in an attempt to disqualify P-28.<sup>219</sup>

140. For the Chamber, their belonging to mutual circles of acquaintances including Germain Katanga could indeed weaken the corroborative information contained

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<sup>209</sup> See Annex E.

<sup>210</sup> See Annex E.

<sup>211</sup> See Annex E.

<sup>212</sup> See Annex E.

<sup>213</sup> See Annex E.

<sup>214</sup> See Annex E.

<sup>215</sup> See Annex E.

<sup>216</sup> See Annex E.

<sup>217</sup> [Prosecution Closing Brief](#), paras. 706-712.

<sup>218</sup> [Prosecution Closing Brief](#), para. 714.

<sup>219</sup> [Prosecution Closing Brief](#), para. 715.

in the testimony of these Defence witnesses. For this reason, the Chamber accords little probative value to the evidence on this matter of D02-136, who not only happens to be Germain Katanga's half-brother but also acknowledged having been in contact with the Accused more than four times, by telephone, in 2009 and 2010.<sup>220</sup> The Chamber holds the same view regarding Witness D02-501, whose recollection appeared, in some respects, very defective throughout his testimony. Indeed, he stated that he did not know whether Germain Katanga was the leader of the combatants in Aveba between 2002 and 2003<sup>221</sup> and claimed that he had never heard of deliveries of weapons and ammunition to that place.<sup>222</sup>

141. The Chamber further noted that Germain Katanga had allegedly contributed financially to Witness D02-161's studies, and this potentially affects this witness's credibility.<sup>223</sup> However, it also noted that not all of this witness's testimony was solely in favour of the Accused; the testimony rang true, in particular as regards specific details concerning the authority exercised by Germain Katanga,<sup>224</sup> without excluding the possibility that he might have participated in the battle of Bogoro.<sup>225</sup> In addition, contrary, for example, to the testimony of Witness D02-501, D02-161's testimony did not entirely concern P-28. As a result, the Chamber takes the view that Witness D02-161 should be considered credible but that his closeness to Germain Katanga requires that the probative value of certain exonerating material in that testimony be considered with circumspection.

142. For all that, the Chamber considers it problematic to cast doubt on the reliability of these witnesses solely on the ground that they allegedly maintained or continue to maintain close relations with members of Germain Katanga's family. In this regard, the Chamber recalls that P-28 himself belongs to Germain

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<sup>220</sup> See Annex E.

<sup>221</sup> See Annex E.

<sup>222</sup> See Annex E.

<sup>223</sup> See Annex E.

<sup>224</sup> See Annex E.

<sup>225</sup> See Annex E.

Katanga's family circle and that it is therefore natural that he went to see persons in Germain Katanga's circle whilst he himself was living in Aveba. The Chamber also considers that the persons likely to testify meaningfully on P-28's activity in Aveba, which is a small place, were very likely to have ties with the Accused. The Chamber therefore finds that it cannot hold against the Defence for Germain Katanga the inability to call witnesses who had had dealings with P-28 in Aveba but were not part of Germain Katanga's circles of acquaintances.

143. The Chamber took the risk of collusion among Defence witnesses raised by the Prosecution very seriously. Indeed, although it would appear to the Chamber that attending the same place of worship, carrying out similar professional activities, and the existence of common friendships should dictate caution when evaluating testimony, those factors do not inevitably lead to the conclusion that the witnesses concerned were colluding with each other. Nevertheless, the Chamber compared the manner in which the witnesses expressed themselves in order to detect possible signs of collusion. From that analysis, the Chamber noted that their accounts of P-28's itinerary before arriving in Aveba were not similar. Thus, Witness D02-134 was able to specify that P-28 arrived in Aveba in February 2003. Witness D02-129 estimated a gap of one month between his own arrival in Aveba and P28's arrival and Witness D02-136 said that P-28 had not yet arrived in Aveba by the time he himself left that location in December 2002. Given the diversity of the points of view expressed, the Chamber does not consider itself in a position to accept the allegation of collusion.

### **c) Conclusion**

144. In the light of the foregoing, the Chamber cannot consider P-28 credible when he states that he was abducted by a commander from Walendu-Bindi, that he arrived in Aveba in November 2002, or that he was a combatant in the Aveba militia. This witness's testimony, considered in the light of the testimony given by

at least four of the above-mentioned Defence witnesses, can only lead the Chamber to find that he is not credible on these various points and that he could only have arrived in Aveba in early February 2003 at the earliest. In the Chamber's estimation, as it is unable to consider P-28 a combatant, he cannot testify meaningfully on the crimes committed in Bogoro and Mandro.

145. However, since the Chamber accepts that the witness was present in Aveba before the attack on Bogoro and that the majority of the witnesses acknowledged that he had special ties with a commander there, the Chamber considers that P-28 could provide useful information on the Aveba militia, its activities and its operations. The Chamber thus considers that it can rely on the parts of his testimony concerning the various aspects of life in Aveba in that he is an informed person who had taken refuge there from February 2003, had also had the opportunity to enter Germain Katanga's home and lived in close proximity to a commander stationed in Aveba.

146. In conclusion, the Chamber considers that, apart from the well-known events, the following facts or information may be relied on from P-28's evidence: the identification of the commanders present in Aveba; Germain Katanga's position of authority in Aveba and, if applicable, Walendu-Bindi; the existence in Walendu-Bindi of various military positions; the administration of the civilian population of Aveba by the local combatants; the presence of child soldiers in Germain Katanga's personal escort; the existence of means of communication in Aveba; the supply of weapons and ammunition by air to Aveba; the storage of weapons and ammunition transported from Beni to Aveba; the supply in Aveba of weapons and ammunition to commanders of Walendu-Bindi *collectivité*; the presence of a delegation from Zombe to Aveba in early 2003; and the preparations in Aveba for the attack on Bogoro, including preparatory meetings.

147. In the light of its assessment of the credibility of P-28, the Chamber notes that his word alone does not suffice on key points entailing the Accused's criminal

responsibility. It thus finds that it can rely on the crucial information which he gave only if it is corroborated by other witnesses. However, in respect of the other aspects of his testimony, the Chamber will determine on a case-by-case basis whether such aspects can be relied upon without corroboration.

## 2. P-219

### a) Main subject areas covered by Witness P-219's testimony

148. Witness P-219 testified on 15, 18, 19, 20, 21 and 22 October 2010.<sup>226</sup>

149. During the Prosecution investigation, the Prosecution met with this witness on several occasions in order to record his statements. At the Chamber's request, the transcripts of P-219's interviews, carried out in February 2007 and November 2009, were summarised in the form of a statement in December 2009.<sup>227</sup> Furthermore it appears that, in June 2009, Germain Katanga spoke with P-219 from the Detention Centre in The Hague. The telephone conversation was recorded, transcribed and translated by the competent services of the Registry.<sup>228</sup>

150. In his oral testimony, P-219 said that he had fled Bunia after the downfall of Governor Lompondo in August 2002 and that he had gone to Aveba to find refuge.<sup>229</sup> When he arrived in Aveba, he said that he lived with a member of Germain Katanga's family.<sup>230</sup>

151. According to the witness, the FRPI was created in Beni immediately after the battle in Nyakunde<sup>231</sup> and, following the killing of Commander Kandro, Germain Katanga succeeded him as "[TRANSLATION] head of the Ngiti army".<sup>232</sup> He

<sup>226</sup> T. 204-T.209

<sup>227</sup> [Office of the Prosecutor, "Communication d'un procès-verbal de synthèse du témoin P-219 et demande d'ajout de ce procès-verbal sur la liste des éléments à charge de l'Accusation", 17 December 2009, ICC-01/04-01/07-1727](#) and confidential *ex parte* annex (ICC-01/04-01/07-1727-Conf-Exp-AnxA).

<sup>228</sup> EVD-D02-00077: Transcript.

<sup>229</sup> P-219, T. 204, pp. 53-54.

<sup>230</sup> P-219, T. 204, p. 56.

<sup>231</sup> P-219, T. 205, p. 8.

<sup>232</sup> P-219, T. 205, p. 7; T. 207, p. 66.

maintained that he had never been a member of the FRPI, but that he did have privileged access to the BCA camp<sup>233</sup> because he personally knew several commanders from that organisation. He added that his professional activity meant that he was well-acquainted with the various FRPI camps in Walendu-Bindi *collectivité*.<sup>234</sup>

152. P-219 stated that, as a regular visitor to the BCA camp in Aveba, he witnessed the preparations for the attack on Bogoro. He spoke of flights carrying military supplies between Aveba and Beni<sup>235</sup> and stated that a “*phonie*” existed between Aveba and Zumbe.<sup>236</sup> He also claimed that Germain Katanga chaired a strategic meeting in Aveba on the eve of the attack on Bogoro.<sup>237</sup>

153. The witness further claimed that he went on foot to Bogoro the day after the attack of 24 February 2003 and returned to Aveba the same day.<sup>238</sup> Although he did not stay there a long time, he said that he was able to ascertain the extent of the crimes committed by the attackers.<sup>239</sup>

154. Lastly, P-219 maintained that on several occasions he had been able to talk about the details of the attack on Bogoro with various combatants who had participated in the attack, including Witness D03-88,<sup>240</sup> Commander Bahati de Zumbe, Commander Yuda, and even Germain Katanga<sup>241</sup> and Mathieu Ngudjolo.<sup>242</sup>

155. According to the witness, Bogoro was half-way between the FRPI forces led by Germain Katanga and the FNI forces led by Mathieu Ngudjolo.<sup>243</sup> P-219 stated

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<sup>233</sup> P-219, T. 204, pp. 54-56.

<sup>234</sup> P-219, T. 205, pp. 21-25.

<sup>235</sup> P-219, T. 205, p. 42.

<sup>236</sup> P. 219, T. 208, pp. 62-63.

<sup>237</sup> P-219, T. 205, pp. 43-44.

<sup>238</sup> P-219, T. 205, pp. 54-56; T. 208, pp. 66-69; T. 209, pp. 5-11.

<sup>239</sup> P-219, T. 205, pp. 56-58, T. 206, p. 17; T. 207, pp. 19-21.

<sup>240</sup> P-219, T. 205, p. 62; T. 209, pp. 19-22.

<sup>241</sup> P-219, T. 205, p. 62-63; T. 206, pp. 47-48.

<sup>242</sup> P-219, T. 206, pp. 8-10.

<sup>243</sup> P-219, T. 205, p. 47.

that Mathieu Ngudjolo, who was based in Zumbe, communicated regularly with Germain Katanga using a “*phonie*”<sup>244</sup> before the attack on Bogoro.<sup>245</sup>

156. Furthermore, at the time when a MONUC Uruguayan contingent was present, P-219 spoke with Mathieu Ngudjolo in Bunia.<sup>246</sup> Mathieu Ngudjolo allegedly stated: “[TRANSLATION] Germain instigated the war in Bogoro, but he could not have won if I had not gone to help him. He could not have won because he had been repulsed several times”.<sup>247</sup>

157. Lastly, P-219 stated that Germain Katanga and Mathieu Ngudjolo both participated in the attack on Mandro.<sup>248</sup>

## **b) Analysis**

158. The Prosecution and the Defence disagreed on a pivotal aspect of P-219’s testimony which is of import to his ability to testify to the facts of case: the question arises as to whether the witness’s claim that he came to Aveba after the fall of Bunia in August 2002 is credible.

159. The Prosecution submitted that the amount of detail provided by P-219 shows that he was indeed in Aveba before the attack on Bogoro.<sup>249</sup> It is the view of the Defence that he did not arrive in Aveba until May 2003, after the re-conquest of Bunia by the UPC.<sup>250</sup>

### **i. P-219’s testimony**

160. According to the Prosecution, P-219 provided numerous details demonstrating that he was indeed living in Aveba before the attack on Bogoro. In

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<sup>244</sup> P-219, T. 205, pp. 47-49.

<sup>245</sup> P-219, T. 208, pp. 62-63.

<sup>246</sup> P-219, T. 209, p. 42.

<sup>247</sup> P-219, T. 206, pp. 8-10.

<sup>248</sup> P-219, T. 206, p. 18.

<sup>249</sup> [Prosecution Closing Brief](#), para. 792.

<sup>250</sup> [Defence Closing Brief](#), paras. 243, 246 and 248.

this connection, the Prosecution noted that the witness described supplies of weapons and ammunition arriving in Aveba from Beni, Doctor Adirodu's participation in the first delivery of weapons, the delivery of ammunition to Germain Katanga's house,<sup>251</sup> the journey of several commanders "[TRANSLATION] of the FPRI" to Aveba to obtain supplies of weapons and ammunition,<sup>252</sup> and lastly an incident involving Commander Kisoro in February 2003.<sup>253</sup>

161. According to the Prosecution, those various events, which could all prove that P-219 was present in Aveba before the attack on Bogoro, constitute evidence which is all the more reliable as some of the information was confirmed by Witness P-28 and other information by Germain Katanga himself. P-28's testimony did confirm the delivery of ammunition and weapons to Aveba from Beni before the attack on Bogoro, the transportation of weapons and ammunition to Germain Katanga's house and the journey of commanders to Aveba to obtain supplies of weapons and ammunition. As for Germain Katanga, his testimony in court confirmed that the incident involving Commander Kisoro in February 2003 actually took place, and also confirmed the presence of Dr Adirodu on one of the flights bringing supplies from Beni.<sup>254</sup>

162. For the Chamber, the various aspects of P-219's account tend to show that the witness could have observed the events that took place in Aveba between September 2002 and February 2003 at first hand. Admittedly, it notes that the extent of corroboration between P-219, P-28 and Germain Katanga was not perfect as, in any event, the Prosecution so noted its Closing Brief.<sup>255</sup> Indeed, P-219 disagreed with P-28 on the name of the airline which flew to Aveba from Beni, and the date that he gave for Dr Adirodu's alleged journey to Aveba is inconsistent with the date given by Germain Katanga. The Chamber however

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<sup>251</sup> [Prosecution Closing Brief](#), para. 792.

<sup>252</sup> [Prosecution Closing Brief](#), para. 794.

<sup>253</sup> [Prosecution Closing Brief](#), para. 793.

<sup>254</sup> [Prosecution Closing Brief](#), paras. 792-794.

<sup>255</sup> [Prosecution Closing Brief](#), paras. 792-794.

recalls that the events are over ten years old, which could explain the minor discrepancies.

163. However, a number of about-turns performed by P-219 in court lead the Chamber to question whether he actually could have witnessed at first hand the events which he recounted. The Chamber has thus examined three significant inconsistencies between his previous statement and the evidence he gave in court – all three cast doubt on the exact circumstances in which he learnt of the information he described.

164. Quoting an earlier statement given by the witness, the Defence<sup>256</sup> noted that P-219 had claimed that he had attended a planning meeting on the eve of the attack on Bogoro, but later retracted in court, stating that he had learnt of the existence of the meeting only as a result of a conversation with a man called Oudo Jackson.<sup>257</sup> Initially, therefore, P-219 had presented himself as a direct witness to that meeting but later stated that he had only learnt of it through hearsay.

165. In the same statement, the witness had said that he heard Germain Katanga inform the Lendu of Zumbe of the Bogoro attack by “*phonie*”. In court, he retracted, maintaining that he had simply heard of the existence of regular communication between Aveba and Bedu-Ezekere *groupement*, without, however, being in a position to attest to their exact content.<sup>258</sup> The Chamber notes that the witness’s in-court testimony was much more general than the evidence he provided in his earlier statement, which was much more specific. The Chamber must therefore consider whether the witness’s account of communications exchanged between Zumbe and Aveba faithfully reflects the situation at the material time.

166. In one of his earlier statements, P-219 stated that he had seen Germain Katanga leave for Mandro. In court, he stated on the contrary that he had not seen

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<sup>256</sup> [Defence Closing Brief](#), paras. 270-275.

<sup>257</sup> P-219, T. 208, pp. 55-57.

<sup>258</sup> P-219, T. 208, pp. 62-63.

him leave for this attack. When questioned on the contradiction, he replied that the village of Aveba was sufficiently small for everyone to be aware that Germain Katanga had left for Mandro.<sup>259</sup> Even if this latest version were to be accepted, the discernible change in his statements once again leads the Chamber to question the circumstances in which P-219 found out the information that he recounted and his ability to do so.

167. It therefore appears that, on several occasions in court, P-219 modified or played down the accounts he had provided in his previous statement, either by presenting as hearsay what he had initially claimed to have witnessed or by declining to provide specific details of what he had observed before the attack on Bogoro.

168. Over and beyond the changes noted between his various accounts, several aspects of P-219's testimony are highly implausible, further reinforcing the Chamber's doubts as to the veracity of some of his statements. Thus, it seems difficult to believe the witness's claim, that on the day after the attack on Bogoro, he covered around one hundred kilometres – the distance of a round trip between Bogoro and Aveba – on foot in a single day, even though his health was likely to have affected his mobility.<sup>260</sup> Given the particularly difficult terrain of the region, which the Chamber, moreover, noted during its site visit, such a round trip would seem extremely difficult, if not impossible to complete in so little time. Of further surprise to the Chamber is that the witness could have met such a large number of commanders during the very short time he spent in Bogoro on that day.<sup>261</sup> The Chamber was further surprised that he was the only witness to mention the presence of defiled corpses and human remains on prominent display.<sup>262</sup> The Chamber can certainly accept that a witness might be telling the

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<sup>259</sup> P-219, T. 209, p. 23.

<sup>260</sup> P-219, T. 208, p. 68; T. 209, pp. 5-10.

<sup>261</sup> P-219, T. 205, pp. 58-59; T. 209, pp. 18-19.

<sup>262</sup> P-219, T. 206, p. 17; T. 207, pp. 16-17.

truth even when recounting an event which seems implausible in comparison to the body of evidence on record. However, that P-219's account is replete with such extraordinary events which he alone mentioned throws his claimed trip to Bogoro into serious doubt.

**ii. Other testimonial evidence**

169. Several witnesses broached the subject of P-219's presence in Aveba and when he had allegedly arrived there. D02-134 claimed that P-219, like him, was in a group of persons who had fled Bunia in May 2003.<sup>263</sup> D02-161, who lived in Aveba since September 2002, stated that P-219 had come to Aveba approximately three months after the battle of Bogoro, when everyone was fleeing Bunia, and that he then lived with P-219.<sup>264</sup> D02-228 also maintained that P-219 had come to Aveba after the 12 May 2003 attack on Bunia.<sup>265</sup> D02-129 stated that he did not see P-219 come to Aveba until May 2003.<sup>266</sup> D03-11 learnt that P-219, who was well acquainted with one of his family members, was in Bunia during the work of the Ituri Pacification Commission, which started in April 2003.<sup>267</sup> Among the Prosecution witnesses, only P-28 stated that he had seen P-219 in Aveba, but he also admitted that he did not know whether P-219 had arrived in Aveba before or after the battle of Bogoro.<sup>268</sup>

170. The Chamber had occasion to determine the credibility of D02-134 and D02-161 when considering P-28's credibility. Regarding D02-161, the Chamber maintains that the witness is credible but that his closeness to Germain Katanga requires that the probative value of certain exonerating material his testimony be treated with circumspection. However, it considers that its reasons for doubting

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<sup>263</sup> See Annex E.

<sup>264</sup> See Annex E.

<sup>265</sup> See Annex E.

<sup>266</sup> See Annex E.

<sup>267</sup> See Annex E.

<sup>268</sup> P-28, T. 219, pp. 15-16.

D02-134's testimony on P-28's itinerary do not apply here. Whereas D02-134 stated that P-28's testimony was likely to cause problems between him and Germain Katanga's family, it does not appear that the same held true for P-219's relatives, since he did not claim to have had a close relationship with P-219. Furthermore, the Chamber considers that the testimonies of Witnesses D03-11 and D02-228, whose credibility is evaluated below, are reliable on that aspect of their testimony.

171. Whereas the Chamber accepts that discernment of a close relationship between Germain Katanga and a Defence witness could lead it to doubt the witness's sincerity, it must also emphasise that the corroboration provided by the Defence, which called five witnesses who were able to testify on the date of P-219's arrival in Aveba, only reinforces its doubts concerning the witness's account and, in particular, as to when he joined this community. As for the risk of collusion between the various Defence witnesses, the Chamber notes that Witnesses D02-228 and D03-11, who were held in the prison in Kinshasa before coming to give evidence in The Hague, could not, in principle, have conferred with Germain Katanga's relatives on that issue for the purposes of discrediting P-219's testimony.

172. It must therefore be noted that the testimonies of Witnesses D02-129, D02-134, D02-161, D02-228 and D03-11 are consonant in stating that P-219 did not arrive in Aveba before the attack on Bogoro.

173. However, the Chamber accepts that this witness's proximity to various Ngiti commanders could have provided him with useful information about the modus operandi of the Walendu-Bindi *collectivité* militia.<sup>269</sup> Given the impossibility of determining whether the witness's description relates to the militia's activities before or after the attack on Bogoro, however, the Chamber will not rely on the witness's testimony on that point.

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<sup>269</sup> P-219, T. 204, pp. 54-57.

### iii. Conversations with various persons

174. Ultimately, the issues which may be analysed independently of P-219's arrival date in Aveba are restricted to the conversations he may have had with various Lendu and Ngiti commanders in the four following discussions: an alleged conversation with Germain Katanga about the attack on Bogoro, date of conversation unspecified;<sup>270</sup> an alleged conversation with Mathieu Ngudjolo on the respective responsibilities of both Accused persons at the time when the MONUC Uruguayan contingent was in the area;<sup>271</sup> an alleged conversation with Commander Yuda about the crimes that the latter had purportedly committed in Bogoro, date unspecified;<sup>272</sup> and lastly, an alleged conversation with Commander Bahati de Zumba on his own participation in the attack on Bogoro and on Germain Katanga's presence during the fighting, date also unspecified.<sup>273</sup>

175. Since the Chamber considers that P-219's alleged journey to Bogoro on 25 February 2003 strains credibility, it has also excluded the conversation which the witness claimed to have had with D03-88 during that visit.<sup>274</sup>

176. For the Chamber, the conversations should be considered in the light of P-219's conversation with Germain Katanga when the latter was held at the Detention Centre in The Hague. However, P-219's account of his conversation with Germain Katanga is inconsistent with the recording of it which was played in court. As the Defence for Germain Katanga noted, the Accused had in fact neither cried nor implored P-219 to perjure himself, as P-219 had claimed.<sup>275</sup> It is the Chamber's view that this incorrect account demonstrates that P-219 had no

<sup>270</sup> P-219, T. 205, pp. 62-63; T. 206, pp. 47-48.

<sup>271</sup> P-219, T. 206, pp. 8-10; T. 209, p. 42.

<sup>272</sup> P-219, T. 205, p. 63.

<sup>273</sup> P-219, T. 205, p. 63; T. 209, p. 24.

<sup>274</sup> P-219, T. 205, p. 62; T. 209, pp. 20-22.

<sup>275</sup> Office of the Prosecutor, "Prosecution's Request seeking temporary prohibition of contacts between Germain Katanga and the outside; post-factum analysis of telephone conversations and immediate temporary exclusion of an investigator", 23 December 2009, ICC-01/04-01/07-1739 with confidential *ex parte* annexes.

scruples about modifying both the content and the tone of a conversation. Accordingly, the Chamber does not consider itself in a position to rely on the conversations that the witness claimed to have had with various commanders who allegedly participated in the attack on Bogoro.

### **c) Conclusion**

177. The anomalies, not to mention the contradictions noted in P-219's account, when considered in the light of the statements of the five aforementioned witnesses, are factors which lead the Chamber to consider that P-219 is not credible when he states that he came to Aveba before the attack on Bogoro.

178. Moreover, the Chamber notes that on several occasions the witness proved unable to provide an accurate account of events as he experienced them, claiming to have witnessed at first hand an event that, in reality, was described to him by others, unduly exaggerating certain aspects of his account or altering the substance of the event itself.

179. For all these reasons, the Chamber considers that it is not in a position to rely on the evidence of this witness in the case at bar.

## **B. OTHER PROSECUTION WITNESSES**

### **1. P-12**

#### **a) Main subject areas covered by Witness P-12's testimony**

180. Witness P-12 testified on 28, 29 and 30 September, and on 6, 7, 8, 11, 12, 13, 14 and 15 October 2011.<sup>276</sup> Aside from his testimony in the present case, P-12 gave

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<sup>276</sup> T. 194-T. 204.

evidence to another chamber of the Court.<sup>277</sup> He was also questioned by a United Nations commission for the investigation of pillaging committed in the DRC.<sup>278</sup>

181. P-12 testified that from 1998 he lived both in Bunia, where he worked, and in Kampala, which was home to his family.<sup>279</sup> He claimed that on account of the insecurity in Ituri,<sup>280</sup> he settled in Kampala, Uganda, from mid-April 2002 and returned to Bunia for only two weeks between July and August 2002, and then on 17 March 2003.<sup>281</sup>

182. The witness was politically active, first joining a movement founded by the brothers of President Museveni of Uganda, which would later take the name of *Rassemblement congolais pour la démocratie* [Congolese Rally for Democracy] (“RCD-Congo”).<sup>282</sup> Between January 2003 and July or August 2005, he was also involved in the activities of the *Parti pour l’unité et la sauvegarde de l’intégrité du Congo* [Party for Unity and Safeguarding of the Integrity of Congo] (“PUSIC”), in which he held a position of responsibility.<sup>283</sup>

183. As part of his role within PUSIC, P-12 took part in the meetings on the creation of the FIPI,<sup>284</sup> in the discussions which culminated in the signing of the Agreement to End the Hostilities on 18 March 2003,<sup>285</sup> and in the work of the Ituri Pacification Commission<sup>286</sup> and one of its committees.<sup>287</sup>

184. P-12 stated that he heard the name of Germain Katanga for the first time in March 2003 and that he met him in person at the fourth meeting of the *Comité de concertation des groupes armés* [Committee for the Coordination of Armed Groups]

<sup>277</sup> P-12, T. 198, pp. 69-70; T. 199, p. 3.

<sup>278</sup> P-12, T. 198, p. 64.

<sup>279</sup> P-12, T. 198, pp. 19-20; T. 199, p. 6.

<sup>280</sup> P-12, T. 194, p. 64.

<sup>281</sup> P-12, T. 198, p. 21; T. 200, p. 22.

<sup>282</sup> P-12, T. 199, pp. 22-26.

<sup>283</sup> P-12, T. 194, p. 32, pp. 43-44; T. 199, pp. 16-17.

<sup>284</sup> P-12, T. 194, p. 50.

<sup>285</sup> EVD-D03-00044: Agreement to End the Hostilities in Ituri (DRC-OTP-0043-0203); P-12, T. 195, pp. 27 and 38.

<sup>286</sup> P-12, T. 195, pp. 54-56.

<sup>287</sup> P-12, T. 195, p. 66.

(CCGA), which was held in Kinshasa in August of the same year.<sup>288</sup> He knew at the time that Germain Katanga was suspected of being responsible for the attacks on Bogoro and Mandro.<sup>289</sup>

185. The witness allegedly managed to persuade Germain Katanga to travel to Kampala to meet the Ugandan President for the first time in October 2003<sup>290</sup> and again in January 2004.<sup>291</sup>

186. On that second visit, the Accused allegedly claimed in the course of a dinner that he had taken part in the attack on Bogoro.<sup>292</sup> During the meal, Germain Katanga, who was the main speaker, allegedly explained the reasons that had led to the attack on Bogoro and Mandro.<sup>293</sup> P-12 stated that during the same visit he had the opportunity to discuss in brief the two attacks with Germain Katanga for the first time.<sup>294</sup> The Accused allegedly told him that the Bogoro operation had been led by Dark but that he had been present himself and taken part.<sup>295</sup> P-12 stated several times that Germain Katanga had not told him that he had led the operations.<sup>296</sup> Germain Katanga allegedly told him that the attack had been carnage<sup>297</sup> and P-12 underscored that the Accused seemed most satisfied with the exploit – an unprecedented Lendu triumph over the Hema.<sup>298</sup>

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<sup>288</sup> P-12, T. 196, pp. 51-52; T. 197, p. 15 and T. 198, pp. 5-6, 19 and 23.

<sup>289</sup> P-12, T. 196, pp. 51-52; T. 198, p. 6.

<sup>290</sup> P-12, T. 196, pp. 53-54; T. 197, p. 17-20; T. 200, p. 72.

<sup>291</sup> P-12, T. 197, p. 21; T. 198, p. 38.

<sup>292</sup> P-12, T. 197, pp. 25-30; T. 201, pp. 23 and 31. See also T. 195, p. 5.

<sup>293</sup> P-12, T. 197, pp. 26 and 30-31; T. 201, p. 24.

<sup>294</sup> P-12, T. 197, p. 31. See also T. 201, p. 16.

<sup>295</sup> P-12, T. 197, pp. 27-28, 30 and 36; T. 201, p. 23.

<sup>296</sup> P-12, T. 201, p. 23.

<sup>297</sup> P-12, T. 197, p. 29.

<sup>298</sup> P-12, T. 197, pp. 31-32 and 71.

## b) Analysis

187. The Chamber notes that P-12's testimony is comprehensive and coherent. In the light of his demeanour in court and the detail of his replies, he appeared, in the view of the Chamber, to be a strong witness.

188. The Defence, however, took issue with the protection measures afforded to him. It considered that the relocation of P-12 and his family abroad constitutes a substantial remuneration that may have prompted him to exaggerate or invent part of his testimony to satisfy the investigators from the Office of the Prosecutor.<sup>299</sup> The Chamber underlines, however, that there is nothing to suggest that, upon being afforded relocation, P-12 knew that the Office of the Prosecutor investigators were interested specifically in Germain Katanga and Mathieu Ngudjolo on account of their alleged role in the attack on Bogoro. Therefore, it considers that the witness could not have incriminated the Accused for the sole purpose of being admitted into the Court's witness protection programme.

189. The Chamber notes that P-12 left Ituri in April 2002, returned there only briefly in late July 2002 and resettled there on 17 March 2003,<sup>300</sup> which means he was not *in situ* at the time of the events which lie before the Chamber for determination. Accordingly, the Chamber notes that not only does a significant part of his testimony comprise information based on hearsay, in varying degrees of detail, but also that several parts of his testimony are the result of a retrospective analysis of the events that may have varied over time.

190. The Chamber will specifically analyse the credibility of P-12's testimony on the statements allegedly made by Germain Katanga at a dinner which he attended. It notes that the meal took place in 2004 and that, in the light of P-12's summary of it, on that occasion Germain Katanga seems to have given a detailed

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<sup>299</sup> [Defence Closing Brief](#), paras. 308 and 343.

<sup>300</sup> P-12, T. 198, p. 21; T. 200, p. 22.

account not only of his participation in the battle of Bogoro but also of his motives at the time.

191. In this regard, the Chamber underlines from the outset that an analysis of such statements cannot be separated from an analysis of Witness P-160's statements. Indeed, the two witnesses, P-12 and P-160, testified that during the meal Germain Katanga had "[TRANSLATION] told" them how and "[TRANSLATION] explained why" he allegedly, in the first instance, planned and ordered and, in the second instance, took part in the attacks on Bogoro and Mandro.<sup>301</sup> The Chamber cannot, however, disregard the nature of the ties which bind the two witnesses and the fact that they see each other constantly.

192. In the *Ngudjolo* Judgment,<sup>302</sup> the Chamber took no position on the credibility of P-12's statements as a whole concerning the dinner, as they were mainly related to Germain Katanga's involvement in this attack. It considered, however, that the witness was credible on this point, whilst stating that it would attach very little probative value to the witness's recollections of Mathieu Ngudjolo's participation in the battle of Bogoro.

193. As for the statements allegedly made by Germain Katanga concerning his own participation and motives, which was the main subject of the conversation, the Chamber considers that that part of P-12's testimony is also credible. Indeed, the witness reported in depth statements which he himself heard, provided much detail about who attended the dinner and how the dinner itself proceeded, and lastly noted that Germain Katanga was speaking for the second time on the subject. Moreover, P-12 was able to nuance his statements whilst confirming them during cross-examination.<sup>303</sup>

194. Furthermore, in commenting on an excerpt of his previous statement and confronted with a different version of the events, P-12 acknowledged in court that

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<sup>301</sup> P-12, T. 197, p. 26; P-160, T. 210, p. 63; T. 212, p. 56.

<sup>302</sup> [Ngudjolo Judgment](#), para. 441.

<sup>303</sup> P-12, T. 201, pp. 16-25.

he had subsequently been able to restore the true chronology of the battles of Bogoro and Mandro after some thought, and he made his views on the matter clear.<sup>304</sup>

195. It is, however, more difficult to assess P-160's account of this same conversation. Indeed, the Chamber notes that the witness claimed in court that Germain Katanga had told her that he planned and gave the order for the attack on Bogoro with the assistance of Mathieu Ngudjolo's Lendu.<sup>305</sup> In her previous statement to the Office of the Prosecutor, however, she stated that she could not recall whether the Accused had mentioned such information, adding that she assumed that only the Ngiti from the FRPI had attacked the village.<sup>306</sup> Whereas the Chamber accepts that it is possible the witness may have recalled in court an additional detail of the conversation, it also cannot rule out that her efforts to refresh her memory led her to ascribe to Germain Katanga statements that instead reflect her perception of the truth when she met with the investigators of the Office of the Prosecutor. The variations in P-160's testimony give the Chamber reason to fear she conflated the Accused's statements with what other sources told her of the attack on Bogoro.

196. Admittedly, the Chamber recognises that P-12 and P-160's accounts of their conversation with Germain Katanga are consistent and that such corroboration could appear to attest to reliability. It seems odd, however, that at the end of her examination-in-chief P-160 added unprompted that Germain Katanga had explained that the attack on Bogoro was aimed at sabotaging efforts in Uganda towards Hema and Lendu rapprochement,<sup>307</sup> giving the impression she was seeking to corroborate the account of P-12 – it cannot be ruled out that the two

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<sup>304</sup> P-12, T. 201, pp. 28-31.

<sup>305</sup> P-160, T. 210, p. 63; T. 212, p. 56.

<sup>306</sup> P-160, T. 212, pp. 56-58.

<sup>307</sup> P-160, T. 211, pp. 31-32; T. 212, pp. 37-38.

had conferred.<sup>308</sup> Consequently, the Chamber will treat any corroboration with caution.

### c) Conclusion

197. The Chamber ultimately considers that P-12 is a reliable witness, but that all of the information he provided on events in which he had no personal and direct part must be treated with caution. As to the particular instance of Germain Katanga allegedly confiding in him as regards his participation in the attack on Bogoro and the fact that he allegedly claimed responsibility for the victory, the Chamber will rely on his evidence only to the extent that it is corroborated by evidence other than P-160's testimony alone.

## 2. P-132

### a) Main subject areas covered by Witness P-132's testimony

198. P-132 testified before the Court on 10, 11, 12, 14, 17 and 19 May 2010.<sup>309</sup>

199. She testified that she was in her family home in Bogoro on 24 February 2003 with several family members when she awoke to gunfire at around 5 a.m. When she went outside the house, she saw that Bogoro was encircled, in the grip of violence, and people were fleeing in all directions.<sup>310</sup> After the events the witness allegedly learnt from her sister that several family members had perished in the attack.<sup>311</sup>

200. P-132 testified that, after leaving her home, she fled towards the valley, heading for Waka mountain, and hid in the grass by the river.<sup>312</sup> She stated that

<sup>308</sup> See [Ngudjolo Judgment](#), para. 441.

<sup>309</sup> T. 138-T. 143.

<sup>310</sup> P-132, T. 138, pp. 76 and 78.

<sup>311</sup> P-132, T. 138, pp. 73-76; T. 140, pp. 42-43.

<sup>312</sup> P-132, T. 139, pp. 8-9; T. 142, pp. 26-27; T. 143, p. 69.

she was injured by gunfire as she fled.<sup>313</sup> P-132 testified that she saw that some fugitives' throats were slit, whereas others had been hacked by machete or shot.<sup>314</sup> She claimed she was captured,<sup>315</sup> combatants ordered her to undress and three of them then raped her.<sup>316</sup> Her attackers then forced her to follow them to a Ngiti camp in Walendu-Bindi.<sup>317</sup>

201. In the camp, P-132 was allegedly questioned about why she was in Bogoro,<sup>318</sup> and was sent to "[TRANSLATION] prison"<sup>319</sup> and forced to carry out household chores.<sup>320</sup> The witness claimed that some militia members forced her to have sexual intercourse in the bush,<sup>321</sup> whilst others entered the prison to rape the female detainees.<sup>322</sup>

202. According to the witness, it was the head of the camp<sup>323</sup> who decided where she would live<sup>324</sup> and ordered that she marry one of the men in the camp.<sup>325</sup> Lastly, P-132 claimed that she saw Germain Katanga three times in the camp.<sup>326</sup>

## **b) Analysis**

203. In the course of her meetings with the investigators of the Office of the Prosecutor, P-132 provided different versions of her experience in the aftermath of the attack on Bogoro.<sup>327</sup> She mentioned two different places of birth, changed the name of the camp where she was imprisoned as well as the place and initial

<sup>313</sup> P-132, T. 138, p. 83; T. 139, p. 8; See also P-418, T. 126, p. 20 and 22; EVD-OTP-00055 Conf: Forensics report (DRC-OTP-1033-0034 to DRC-OTP-1033-0036, paras. 55-59).

<sup>314</sup> P-132, T. 138, p. 79.

<sup>315</sup> P-132, T. 139, pp. 9-11; T. 141, p. 37.

<sup>316</sup> P-132, T. 139, pp. 11-14 and 19-21; T. 141, pp. 37-38.

<sup>317</sup> P-132, T. 139, pp. 19 and 21-22.

<sup>318</sup> P-132, T. 139, pp. 22-23.

<sup>319</sup> P-132, T. 139, pp. 26-27.

<sup>320</sup> P-132, T. 139, pp. 59-60.

<sup>321</sup> P-132, T. 139, pp. 52-54.

<sup>322</sup> P-132, T. 139, pp. 48-52.

<sup>323</sup> P-132, T. 139, p. 40; T. 140, pp. 4-5.

<sup>324</sup> P-132, T. 139, pp. 63-64.

<sup>325</sup> P-132, T. 140, pp. 19-21; T. 142, pp. 49-50.

<sup>326</sup> P-132, T. 140, pp. 5-12.

<sup>327</sup> See, in this regard, [Defence Closing Brief](#), paras. 971-986.

information she had provided on those with whom she had been held, and stated that she admitted to her captors that she was Hema but subsequently stated she had concealed her ethnicity.<sup>328</sup> The Chamber notes that despite these contradictions, the version the witness provided in court is consistent with the last statement she gave to the Office of the Prosecutor.<sup>329</sup> In addition, it must be noted that the witness herself acknowledged this inconsistency, stating that she was afraid to tell the truth to the investigators.<sup>330</sup>

204. The Chamber recalls in this regard that victims of sexual violence are particularly vulnerable witnesses. Of note is that the Court's Victims and Witnesses Unit underscored that P-132 was still highly traumatised by her experience and that it required "[TRANSLATION ] considerable effort" for her to testify before the Court.<sup>331</sup> Moreover, a member of that Unit's staff remained by her side throughout her testimony. The Chamber is alive to the fact, as recalled by the witness,<sup>332</sup> that women who are victims of such acts run a very high risk of being rejected by their own community when they decide to tell the truth about their ordeal. It is therefore understandable that P-132 wished to know which guarantees and protective measures the Court could provide her before telling the truth to the Prosecution's investigators.

205. In the present case, the Chamber does in fact note that during the trial P-132 stood by the version of events which she had gradually furnished to the Prosecution investigators and did not significantly contradict herself when giving evidence. Such consistency deserves to be underlined because the Chamber notes that, on several occasions when testifying in court and despite the particular care with which the proceedings were conducted, P-132 was overwhelmed by emotion and had to stop when she broke down in tears, leading to the hearing's

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<sup>328</sup> See, in particular, P-132, T.143, pp. 13-14, 20-23, 25 and 74.

<sup>329</sup> P-132, T. 143, pp. 27-30.

<sup>330</sup> P-132, T. 143, pp. 20-21.

<sup>331</sup> P-132, T. 138, p. 17.

<sup>332</sup> See, for example, P-132, T. 139, p. 17.

adjournment.<sup>333</sup> Despite the undeniable difficulties the witness encountered in recalling tragic events and, further, talking about them, the Chamber considers that her testimony's coherence reinforces her credibility. It notes moreover that on the subject of P-132, several witnesses stated that they had heard an account which corresponds in many respects to the witness's testimony before the Chamber.<sup>334</sup>

206. As to the circumstances of P-132's abduction, the Chamber notes that her testimony appears inconsistent with that of P-353. Indeed, according to P-353, she was apprehended together with P-132 in the house where two other young women were present.<sup>335</sup> P-132 testified that she had been captured in the bush, where she was hiding after fleeing the family house.<sup>336</sup> On a photograph shown to her in court, P-353 recognised P-132 as one of the four survivors of the massacre of the inhabitants of the house in which, according to P-353, they had hidden.<sup>337</sup> She confirmed that the person in the photograph was one of the women whose first name she had previously volunteered.<sup>338</sup> P-353 then stated that P-132 had been abducted with her<sup>339</sup> and taken to the Institute before being split into different groups and parting ways.<sup>340</sup>

207. The Defence submitted that P-132 had not been forcibly married but instead developed a consensual relationship with one of the men in the camp.<sup>341</sup> Despite many attempts to make the witness accept this version of the events, P-132 stood by her account.<sup>342</sup> The Chamber will examine this aspect of the witness's

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<sup>333</sup> See, for example, P-132, T. 138, pp. 73-74 and 79-80; T. 139, pp. 13-15 and 54-55; T. 140, pp. 42-43, T. 142, pp. 50-51.

<sup>334</sup> See Annex E.

<sup>335</sup> See Annex E.

<sup>336</sup> P-132, T. 138, pp. 76-77; T. 142, p. 23. See also T. 139, pp. 8-11.

<sup>337</sup> P-353, T. 215, pp. 56-57.

<sup>338</sup> P-353, T. 213, p. 26; T. 215, p. 25.

<sup>339</sup> P-353, T. 215, p. 57.

<sup>340</sup> See Annex E.

<sup>341</sup> [Defence Closing Brief](#), paras. 980-981.

<sup>342</sup> P-132, T. 143, pp. 53-60.

testimony in the section of the Judgment addressing the crime of sexual enslavement.

208. As to P-132's personal experience, the Chamber notes that her testimony is corroborated on several points by that of another witness, including as regards her claim that she was captured by combatants on patrol and that she had stated that she was not Hema when questioned about her ethnicity, as well as the name of the camp to which she was allegedly taken and held captive.<sup>343</sup> Furthermore, that other witness mentioned that the woman, who was the namesake of P-132 and whom he escorted to the camp, had sustained a bullet wound precisely on the same body part mentioned by P-132. Still, P-132 testified that she had indeed sustained a bullet wound in flight, which can moreover be seen on the photographs admitted into the record.<sup>344</sup> Therefore, it is established that on 24 February 2003, P-132 sustained a bullet wound in Bogoro.

209. In the Chamber's view, P-132 gave a fairly detailed account not only of her flight<sup>345</sup> but also of her time in hiding, recounting what she had then heard<sup>346</sup> and providing clarification where requested.<sup>347</sup> The Chamber also notes several commonalities in P-132 and P-249's accounts concerning what P-132 saw and heard during that day of fighting.<sup>348</sup> Therefore, although P-353's testimony could cast some uncertainty as to P-132's account of the circumstances of her abduction, it cannot however affect her testimony as a whole.

210. In the Chamber's view, whether one refers to P-132's testimony or that of P-353, it is established that P-132 was indeed in Bogoro on 24 February 2003 and was therefore in a position to see what was happening there. It is further

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<sup>343</sup> See Annex E.

<sup>344</sup> EVD-OTP-00115, EVD-OTP-00116: Photographs of the witness's scar. See also EVD-OTP-00055: Forensics Report (DRC-OTP-1033-0034 to DRC-OTP-1033-0036, paras. 55-59). Witness P-418's report considers that the scar is consistent with a firearm projectile wound and dates to 24 February 2003.

<sup>345</sup> See, for example, P-132, T. 138, p. 82.

<sup>346</sup> P-132, T. 139, pp. 9-12.

<sup>347</sup> See, for example, P-132, T. 143, p. 27; T. 143, p. 69.

<sup>348</sup> See, in particular, P-249, T.135, pp. 41-42.

established, in the light of these two testimonies, that she was abducted in Bogoro, even though the exact circumstances of her abduction and the route she took are not consistent with P-353's statements. According to her own testimony and that of Witness D02-148, P-132 was captured in Bogoro and taken against her will to a camp where she was allegedly sexually enslaved. Lastly, as previously underlined, the very existence of her wound cannot be disputed, and this observation is also consistent with D02-148's account.

211. The discrepancies noted between the accounts of P-353 and P-132 and the uncertainties which may result from their respective testimony can thus be attributed to the witnesses' vulnerability at that time and when they were testifying before the Court. In this specific context, neither testimony should be given precedence over the other as regards the circumstances of P-132's abduction, and the Chamber must rely only on that which it considers consistent and credible. For instance, this holds true for the witness's account of what she saw on 24 February 2003 in Bogoro, where it is established that she was present and captured before being taken to a Ngiti camp.

### **c) Conclusion**

212. The Chamber does not doubt P-132's presence in Bogoro on 24 February 2003 and her captivity in a camp of the Ngiti militia of Walendu-Bindi *collectivité*. However, given that various contradictions may affect her testimony, the Chamber will rely only on those parts of the witness's testimony whose credibility, in its view, cast no doubt.

### 3. P-161

#### a) Main subject areas covered by P-161's testimony

213. Witness P-161 testified before the Court on 26 February 2010 and on 2, 3, 4, 8, 9 and 15 March 2010.<sup>349</sup>

214. At the material time, P-161 was a cattle herder in Bogoro and lived in a house on the slopes of the Waka mountain, from which Bogoro Institute, about one kilometre away, could be seen.<sup>350</sup> He testified that he became a farmer after his cattle were stolen.<sup>351</sup> He stated that the village of Bogoro was subjected to several successive attacks between 2000 and 2003, adding in this respect that the attack of 24 February 2003 “[TRANSLATION] was more intense than the previous fighting”.<sup>352</sup>

215. According to the witness, before the battle of 24 February 2003, the UPC had intercepted radio messages exchanged before the attack between Ngiti and Lendu and that could be understood by some of the village's inhabitants who knew the Ngiti language.<sup>353</sup> P-161 himself allegedly had a part in intercepting the messages and even spoke during the discussions over the radio.<sup>354</sup>

216. On the day of the attack, at around 5 a.m., after hearing the initial gunfire,<sup>355</sup> P-161 woke up his family members and asked them to shelter in their usual hiding-place near the Waka spring.<sup>356</sup> He claimed that he stayed at home to tend to his herd of cows and await the return of other family members who were at the hospital.<sup>357</sup>

<sup>349</sup> P-161, T. 109-T.114 and T. 116.

<sup>350</sup> P-161, T. 109, p. 26; T. 113, p. 6; T. 116, p. 6.

<sup>351</sup> P-161, T. 109, p. 17.

<sup>352</sup> P-161, T. 114, pp. 14-17 and 21.

<sup>353</sup> P-161, T. 111, pp. 21-22.

<sup>354</sup> P-161, T. 111, p. 23; T. 113, p. 29.

<sup>355</sup> P-161, T.109, pp. 32 and 37; T.113, p. 22; T. 114, pp. 30 and 47.

<sup>356</sup> P-161, T.112, pp. 44 and 62; T. 114, pp. 47-48.

<sup>357</sup> P-161, T. 109, pp. 37-38; T. 112, p. 62; T. 113, pp. 20-22.

217. At around 7 a.m. P-161 allegedly saw a group of Ngiti attackers coming from the Songolo road to capture Waka mountain.<sup>358</sup> He claimed to have seen, at about 8 a.m., UPC soldiers and some civilians at the Bogoro Institute fleeing and the attackers taking over the buildings.<sup>359</sup> He allegedly also saw a man in a white shirt urging the combatants not to kill the civilian population.<sup>360</sup> According to P-161, the attackers replied that they had to do the work that had brought them to Bogoro and had to kill the Hema.<sup>361</sup>

218. P-161 allegedly then went to a hiding-place near the river, about 25 metres from his house,<sup>362</sup> from where he saw the Ngiti and Lendu attackers lock fugitives in his house before setting it on fire<sup>363</sup> and stealing his cattle.<sup>364</sup> He also claims to have seen women stealing flour stored in his home.<sup>365</sup> The witness further stated that he had heard women and children shouting in Kingiti and mentioning Germain Katanga and Mathieu Ngudjolo by name.<sup>366</sup>

219. At the end of the day, he allegedly fled towards Bunia along the road to Lengabo, where he arrived on 25 February 2003.<sup>367</sup> Lastly, P-161 stated that he lost many family members during the attack.<sup>368</sup>

## **b) Analysis**

220. In the Chamber's view, Witness P-161 was in Bogoro during the 24 February 2003 attack, a point, moreover, unchallenged by the parties.

<sup>358</sup> P-161, T. 112, pp. 71 and 73-74; T. 113, pp. 22-23.

<sup>359</sup> P-161, T. 109, pp. 35-36, 46-48 and 53; T. 112, pp. 62-64 and 72; T.113, p. 22, T. 114, pp. 37-38 and 48-49; T.116, p. 17.

<sup>360</sup> P-161, T. 109, p. 48; T. 110, p. 54; T. 112, pp. 72-73; T. 113, pp. 54-55.

<sup>361</sup> P-161; T. 109, p. 48; T. 113, pp. 5-56.

<sup>362</sup> P-161, T. 109, pp. 51-52 ; T. 113, pp. 23-24 ; [Site Visit Report](#), para. 83.

<sup>363</sup> P-161, T. 109, pp. 52-53.

<sup>364</sup> P-161, T. 111, pp. 13-14.

<sup>365</sup> P-161, T. 113, pp. 56-57.

<sup>366</sup> P-161, T.109, pp. 45-46. See also T.111, pp. 53-54; T.113, pp. 56-57.

<sup>367</sup> P-161, T. 111, pp. 11-12. See also T. 113, pp. 46 and 53; T. 114, p. 49; T. 116, p. 39.

<sup>368</sup> P-161, T. 110, pp. 67-70.

221. The Chamber recalls that, when giving evidence, he was very animated and, at times, particularly talkative, entering into much detail. When asked by the Defence for Mathieu Ngudjolo at the end of his cross-examination why he had wished to testify publicly, he replied: “[TRANSLATION] Everything that took place did so in the open. I want everyone to know that I came from Bogoro, that I am from Bogoro”.<sup>369</sup>

222. Returning now to the analysis of the consistency of his testimony, the Chamber noted several contradictions, which should not however all be afforded the same importance. The Chamber therefore does not find fault with the witness for having initially said in his earlier statement that he had heard the recording of enemy communications intercepted by the UPC<sup>370</sup> and for subsequently claiming in court that he had taken part in such conversations whilst they were being held.<sup>371</sup> Indeed, the Chamber considers that in court the witness merely supplemented the incomplete information, which he had previously provided to the Office of the Prosecutor’s investigators.

223. Whereas the Chamber is mindful that the witness has had to contend with extremely violent events affecting his family members, it must, nonetheless, raise questions concerning certain fluctuations in his testimony. The Chamber notes that he claimed that he had seen his sister being killed<sup>372</sup> and also maintained only that he had heard her final screams,<sup>373</sup> and that in his statement he said that he had witnessed the murder of one his sons,<sup>374</sup> then stated that his wife had told him about the incident,<sup>375</sup> before claiming unclearly that he had “[TRANSLATION] seen the child being killed”.<sup>376</sup> The Chamber also noted that P-161 testified that he

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<sup>369</sup> P-161, T. 116, p. 47.

<sup>370</sup> P-161, T. 113, p. 31.

<sup>371</sup> P-161, T. 111, p. 23; T. 113, p. 29.

<sup>372</sup> P-161, T. 111, pp. 5-6.

<sup>373</sup> P-161, T. 110, p. 69; T. 113, pp. 39-40.

<sup>374</sup> P-161, T. 113, p. 43.

<sup>375</sup> P-161, T. 110, p. 68.

<sup>376</sup> P-161, T. 113, pp. 43-44.

“[TRANSLATION] knew Germain Katanga well” and that Germain Katanga also knew him since he had worked in places in Walendu-Balendu *collectivité*,<sup>377</sup> but the witness subsequently stated he had never met him and never heard of him before the war.<sup>378</sup>

224. Furthermore, during its judicial site visit to the DRC<sup>379</sup> the Chamber realised that P-161 could not have seen, as he so claimed, Pastor Babona being killed in front of the Bogoro Institute,<sup>380</sup> whilst he himself was fleeing his house, some distance away,<sup>381</sup> to make his way to a hiding-place near the Waka river.<sup>382</sup> Similarly, the Chamber’s on-site observations from the hiding-place in which the witness had allegedly sought refuge<sup>383</sup> suggest that the witness could have had the feeling or suspected that his house had just been destroyed. However, it appears very unlikely that he could have seen combatants lock prisoners in the house before setting it ablaze<sup>384</sup> or that he saw some of them making off with his belongings.<sup>385</sup>

225. In addition, in the Chamber’s view, P-161’s claim that the attackers cheered the names of Germain Katanga and Mathieu Ngudjolo is imprecise and insufficiently consistent to merit the Chamber’s attention. Indeed, the witness first stated that, after the attackers had killed the residents of Bogoro, he had heard the women and children shout: “[TRANSLATION] You, inhabitants of Bogoro, today you’ll see. Today Germain Katanga himself, in person, has taken over” and “[TRANSLATION] Germain Katanga, oye!”.<sup>386</sup> When questioned further on the matter, the witness stated that, from his hiding-place, after the wife of a man

<sup>377</sup> P-161, T. 111, pp. 56-57.

<sup>378</sup> P-161, T. 112, p. 26

<sup>379</sup> [Site Visit Report](#), paras. 72-73 and 78-83.

<sup>380</sup> P-161, T. 109, pp. 55-56.

<sup>381</sup> P-161, T. 109, p. 26; T. 113, p. 6; T. 116, p. 6.

<sup>382</sup> P-161, T. 109, pp. 45 and 51-52; T. 112, p. 62; T. 114, pp. 48-49.

<sup>383</sup> [Site Visit Report](#), paras. 83 and 84, p. 36.

<sup>384</sup> P-161, T. 109, pp. 52-53.

<sup>385</sup> P-161, T. 111, pp. 13-14.

<sup>386</sup> P-161, T. 109, pp. 45-46.

called Laurent had just been killed, he heard Lendu and Ngiti arguing about money and, afterwards, the women and children singing and shouting in Kingiti: “[TRANSLATION] Germain Katanga and Ngudjolo have done something today. Ngudjolo and Germain Katanga have done something remarkable today”.<sup>387</sup> Finally, whilst still in his hiding-place he claimed to have heard women and children entering his home to steal his food and saying: “[TRANSLATION] Today, Germain Katanga and Ngudjolo have done some work.”<sup>388</sup> The Chamber is not in a position to determine whether the variations noted in P-161’s account can be explained by the fact that the witness allegedly heard the Accused’s name cheered several times during the attack or whether such variations reflect, on the contrary, the fact the witness may have changed his account of the events several times. The Chamber will not rely therefore on these statements, which concern an essential element of Germain Katanga’s criminal responsibility.

226. Likewise, the Chamber will not rely on the witness’s evidence that he heard, although he did not wish to state his source, that Germain Katanga was one of the commanders present in Bogoro.<sup>389</sup> In addition, the Chamber further recalls that Witness D02-176 asserted that P-161 had participated in the hostilities. D02-176 described him as a brave civilian who had contributed to the camp’s defence during the enemy attacks of 24 February 2003.<sup>390</sup> This version of events directly contradicts the testimony of P-161, who claims to have hidden near his house throughout the attack. The Chamber noted that D02-176 was able to provide very specific details about P-161’s participation in the battle, and his testimony, which has already been found to be credible on the whole, can only cast doubt on the reliability of P-161’s claim to have been near his house during the fighting.

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<sup>387</sup> P-161, T. 111, pp. 53-54.

<sup>388</sup> P-161, T. 113, p. 57.

<sup>389</sup> P-161, T. 110, p. 58; T. 111, pp. 61-64.

<sup>390</sup> D02-176, T. 255, pp. 42-43.

### c) Conclusion

227. The Chamber considers that Witness P-161 was indeed present in Bogoro at the material time. Despite the inaccuracies and contradictions discerned as he gave evidence and doubts as to his participation in the battle, this finding therefore allows the Chamber to rely on his account – only where it is sufficiently detailed and corroborated – of how the attack itself proceeded and some of the criminal events that took place in the course of it.

228. Furthermore, the Chamber recognises that P-161 did indeed lose several family members during the attack on Bogoro.<sup>391</sup> Although the names of P-161's family members do not appear on any list of victims presented to the Chamber,<sup>392</sup> it has no valid reason to doubt the death of his relatives. The Chamber further notes in this respect that D02-176 confirmed that one of P-161's sons had been murdered.<sup>393</sup> Therefore, the Chamber will not require any corroboration on this point. Likewise, it accepts that P-161 may have listened to radio messages in the Ngiti language concerning a possible attack on Bogoro.<sup>394</sup>

229. However, the Chamber attaches no probative value to the witness's account of what he saw and heard in the UPC camp, whilst he was about one kilometre away and could not see precisely what was happening. It was therefore impossible for him to see Pastor Babona being killed in front of the Bogoro Institute or discern a man in a white shirt. Lastly, in view of the variations in his account of Germain Katanga's involvement in the battle of Bogoro, the Chamber cannot attach any probative value to the account, since this matter, pivotal to the case, may incur the criminal responsibility of the Accused.

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<sup>391</sup> See Annex F.

<sup>392</sup> EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003.

<sup>393</sup> D02-176, T. 255, pp. 43-44.

<sup>394</sup> See "Section VII(D) Preparations for the attack on Bogoro in Walendu-Bindi *collectivité*", para. 694.

#### 4. P-250

##### a) Main subject areas covered by P-250's testimony

230. P-250 testified before the Chamber on 27, 28 and 29 January 2010 and 1, 2, 4, 8, 9, 10, 11, 12, 15, 16, 18, 22 and 23 February 2010.<sup>395</sup>

231. According to his testimony, Witness P-250 was on holiday in Bunia at the time of Governor Lompondo's downfall in August 2002 and then fled the fighting to Zumbe with several members of his family.<sup>396</sup> He explained that Bedu-Ezekere *groupement* became progressively militarised in order to fend off UPC attacks.<sup>397</sup> P-250 claimed that he went there only because of the war, but subsequently became a combatant.<sup>398</sup>

232. P-250 described the military structure of the Bedu-Ezekere *groupement*,<sup>399</sup> and stated that one of his brothers had acted as secretary to the company headed by a commanders of the *groupement*,<sup>400</sup> a position he himself had temporarily held.<sup>401</sup> He added that some of the commanders of the *groupement* were his uncles.<sup>402</sup>

233. P-250 testified that, at the behest of Mathieu Ngudjolo,<sup>403</sup> he accompanied a delegation which Mathieu Ngudjolo had dispatched to Germain Katanga in Aveba<sup>404</sup> and, he claimed, en route the decision was taken to attack Bogoro.<sup>405</sup> After one month, one week and four days,<sup>406</sup> the delegation members allegedly returned to Zumbe with ammunition provided by Germain Katanga.<sup>407</sup>

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<sup>395</sup> T. 91-T. 106.

<sup>396</sup> P-250, T. 100, pp. 29-30 and 32; T. 101, pp. 21 and 23.

<sup>397</sup> P-250, T. 91, pp. 23-24.

<sup>398</sup> P-250, T. 91, pp. 28-29.

<sup>399</sup> P-250, T. 91, pp. 46-58 and 72-74.

<sup>400</sup> P-250, T. 102, p. 60.

<sup>401</sup> P-250, T. 91, p. 38; T. 101, pp. 44-45.

<sup>402</sup> P-250, T. 92, pp. 78-79.

<sup>403</sup> P-250, T. 93, pp. 26-27; T. 101, p. 65.

<sup>404</sup> P-250 T. 92, pp. 57-59 and 67; T. 93, pp. 26-27; T. 95, p. 14; T. 101, p. 65 and 67-68; T. 104, p. 64.

<sup>405</sup> P-250, T. 92, pp. 68-72; T. 102, pp. 7-8.

<sup>406</sup> P-250, T. 92, p. 68.

<sup>407</sup> P-250, T. 95, pp. 29-32.

234. According to his testimony, a few days after the delegation had returned, Commander Bahati de Zombe addressed the combatants in Ladile, informing them of the plan of attack on Bogoro.<sup>408</sup> On the eve of the attack, all the combatants mustered in Kavelega.<sup>409</sup> At around 5.30 a.m., he alleged, the FNI and FRPI troops attacked Bogoro together,<sup>410</sup> and Commander Bahati de Zombe, leading an FNI contingent,<sup>411</sup> communicated with the FRPI via a hand-held radio.<sup>412</sup>

235. P-250 described the strategy pursued to secure victory and gave details of the routes taken by the various commanders.<sup>413</sup> He stated that the civilian population had already left Bogoro,<sup>414</sup> which, at the time of the attack, was no more than a military “[TRANSLATION] fortress”.<sup>415</sup>

236. After the battle, Mathieu Ngudjolo and Germain Katanga allegedly sat under the mango trees<sup>416</sup> near the Bogoro Institute, to receive reports from the commanders.<sup>417</sup> The town was then temporarily placed under the control of Commander Lobo Tchamangere.<sup>418</sup>

## **b) Analysis**

237. The Office of the Prosecutor and the Defence disagreed on a pivotal aspect of P-250’s testimony which is of import to his ability to testify to the facts of the case. In the view of the Chamber, the question arises as to whether, between September 2002 and July 2003, the witness was a militia member stationed in Zombe or a

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<sup>408</sup> P-250, T. 94, p. 4.

<sup>409</sup> P-250, T. 94, pp. 8-9.

<sup>410</sup> P-250, T. 94, p. 83. T. 103, p. 30.

<sup>411</sup> P-250, T. 93, p. 45.

<sup>412</sup> P-250, T. 94, pp. 80-82.

<sup>413</sup> EVD-OTP-00022: Sketch drawn by P-250; P-250, T. 94, pp. 4, 8-9 and 15-17.

<sup>414</sup> P-250, T. 93, pp. 37-38; T. 104, p. 49.

<sup>415</sup> P-250, T. 93, pp. 34-36; T. 94, pp. 69-70.

<sup>416</sup> P-250, T. 94, pp. 52-53.

<sup>417</sup> P-250, T. 94, pp. 54-55 and 69.

<sup>418</sup> P-250, T. 98, p. 36.

student dividing his time between Kagaba and Gety, or whether he engaged in both activities simultaneously.

**i. Witness P-250's testimony**

238. In its Closing Brief, the Prosecution emphasised that the level of detail provided by P-250 shows his “[TRANSLATION] intimate knowledge” of the workings of Bedu-Ezekere *collectivité*, underscoring that his account provided details of the presence of the 12th APC battalion in Zumbe, the military structure and the various commanders within Bedu-Ezekere *groupement*, and the planning meetings for the attack upon Bogoro and how the attack was carried out.<sup>419</sup>

239. The Chamber considers that P-250's description of the living conditions in Zumbe after the downfall of Governor Lompondo<sup>420</sup> has an undeniable ring of sincerity and that he furnished valuable information on the route taken by the 12th APC battalion to Beni.<sup>421</sup> He also described clearly and with a manifest attempt at accuracy<sup>422</sup> the military positions within Bedu-Ezekere *groupement* and those of the various commanders in charge.<sup>423</sup> Lastly, the Chamber notes that P-250 gave a reasonably clear description of the military discipline in force within the militia, and useful details of the names of the commanders who were so tasked<sup>424</sup> and the workings of the military tribunal in Zumbe.<sup>425</sup>

240. Nevertheless, P-250's testimony was by no means as accurate when discussing other subject areas during his testimony. His statements as to the level of authority Mathieu Ngudjolo wielded within the militia seemed particularly diffident. Within a short time span in the course of his testimony, Witness P-250 stated that soldiers were not authorised to meet Mathieu Ngudjolo on an

<sup>419</sup> [Prosecution Closing Brief](#), para. 774.

<sup>420</sup> See, for example, P-250, T. 100, p. 52.

<sup>421</sup> See, in particular, P-250, T. 91, pp. 25-28; T. 92, pp. 56-57; T. 104, pp. 42-44.

<sup>422</sup> P-250, T. 91, p. 33; T. 104, p. 54.

<sup>423</sup> See, for example, P-250, T. 91, pp. 33-36 and 71-72; T. 101, pp. 13-14; T. 104, p. 54.

<sup>424</sup> P-250, T. 92, pp. 26-28.

<sup>425</sup> P-250, T. 92, pp. 22 and 45-46.

individual basis,<sup>426</sup> only to claim in apparent contradiction or at the very least extemporaneously, that even an ordinary soldier could report to the Accused or provide him with information directly.<sup>427</sup> In addition, the Chamber found the testimony of P-250 particularly nebulous on the subject of the “*phonie*” linking Zumbe (Bedu-Ezekere *groupement*) and Chyekele (Walendu-Bindi *collectivité*).<sup>428</sup> In this respect, the Chamber notes that Witness P-250’s testimony regarding the range of the device contradicted his previous evidence that there were no modern means of communication capable of contacting positions outside of Bedu-Ezekere *groupement*.<sup>429</sup>

241. Furthermore, Witness P-250 contradicted his previous testimony about the delegation led by Commander Boba Boba<sup>430</sup> which Mathieu Ngudjolo allegedly dispatched to Aveba.<sup>431</sup> Indeed, P-250 maintained during his testimony that Commander Bahati de Zumbe was the delegation “[TRANSLATION] head of mission”<sup>432</sup> and served as a guide on the journey to Aveba,<sup>433</sup> whereas in the statement he made to the Office of the Prosecutor in December 2006, he had stated that Commander Bahati was one of the officers whom the delegation had met in Aveba.<sup>434</sup>

242. Likewise, when testifying to the final preparations in Ladile before the attack on Bogoro, P-250 stated under examination-in-chief that he went to Ladile, where he took part in a parade before Mathieu Ngudjolo’s Command Staff,<sup>435</sup> and where he was allegedly informed of the plan to attack Bogoro.<sup>436</sup> He withdrew that statement under cross-examination, however, stating that he had not been present

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<sup>426</sup> P-250, T. 92, p. 30.

<sup>427</sup> P-250, T. 92, p. 34.

<sup>428</sup> P-250, T. 92, pp. 43-44; T. 104, p. 59.

<sup>429</sup> P-250, T. 92, p. 29.

<sup>430</sup> P-250, T. 104, pp. 62-63, T. 93, pp. 28-29; T. 92, pp. 57-58.

<sup>431</sup> P-250, T. 92, p. 73.

<sup>432</sup> P-250, T. 101, p. 71.

<sup>433</sup> P-250, T. 93, p. 30; T. 101, p. 68; T. 102, p. 8.

<sup>434</sup> P-250, T. 102, pp. 25-26.

<sup>435</sup> P-250, T. 93, pp. 73-75.

<sup>436</sup> P-250, T. 94, pp. 4-5; T. 93, p. 73; T. 103, p. 8.

and that only his Company Commander, Lone Nunye, went to Ladile to receive the plan.<sup>437</sup>

243. Lastly, the Chamber cannot fail to note that on occasion P-250 made curious statements and at times his demeanour in court appeared odd. It will be recalled that he threatened to interrupt his testimony and, on one day, even refused to appear in court.<sup>438</sup> He claimed that Lead Counsel for Germain Katanga had visited his father during the 1990s<sup>439</sup> and, when presented with his school reports, stated that the battle of Bogoro had taken place in 2005.<sup>440</sup> The Chamber is mindful that his demeanour could have been affected by his experiences during the war, but also notes that none of the other witnesses considered vulnerable behaved in such a peculiar manner.

#### ii. Assessment of documentary evidence

244. According to the Defence for Mathieu Ngudjolo, the witness was studying in Walendu-Bindi *collectivité* during the material time and was therefore not a militia member in Bedu-Ezekere *groupement*. In support of this claim, it presented several school reports certifying his enrolment at the Kagaba Institute between 1999 and 2004.<sup>441</sup>

245. As the Defence for Mathieu Ngudjolo recalled,<sup>442</sup> when questioned on this specific subject, P-250 acknowledged that the various school reports presented to him in turn did concern his school attendance,<sup>443</sup> yet was surprised to see documents he thought had been lost in a fire at his family home.<sup>444</sup>

<sup>437</sup> P-250, T. 103, pp. 8-10.

<sup>438</sup> P-250, T. 104, pp. 1-2; T. 105, pp. 59-61.

<sup>439</sup> P-250, T. 106, pp. 54-56; T. 106, pp. 60 and 62.

<sup>440</sup> P-250, T. 106, pp. 9-10.

<sup>441</sup> EVD-D03-00006; EVD-D03-00007; EVD-D03-00008; EVD-D03-00009: School reports.

<sup>442</sup> [Closing Brief of the Defence for Mathieu Ngudjolo](#), para. 1048.

<sup>443</sup> P-250, T. 105, pp. 56, 64, 66 and 68-69.

<sup>444</sup> P-250, T. 106, p. 34.

246. Document EVD-D03-00008 must be singled out as being by far the most important of the school reports in that it confirms that P-250 was a student at the Kagaba Institute during the 2002-2003 academic year, which is also the period during which he claims to have served in a Bedu-Ezekere militia. The Chamber considers that the aforementioned document can be deemed authentic when juxtaposed with the comprehensive series of school reports covering the entire period of the witness's attendance at the Kagaba Institute.

247. The Prosecution did not challenge the authenticity of the school reports in its Closing Brief. In its oral decision of 23 February 2010 on the admission of the aforementioned documents into evidence, the Chamber noted that the Prosecution had not shown any intention of seeking a second, expert opinion on the school reports authenticated by Witness P-250.<sup>445</sup> In its closing statements, the Prosecution merely regretted that the Defence for Mathieu Ngudjolo had failed to present the school reports to Witness D03-100 during his testimony, whereas he would, on the face of it, have been particularly well-placed to comment on them as he is related to P-250.<sup>446</sup>

248. The Chamber acknowledges that it would have been useful to show the documents to the aforementioned witness for him to be able to confirm their provenance. Nevertheless, it recalls that the burden of proof lies upon the Prosecution, and that even if the Defence for Mathieu Ngudjolo did not choose to put the school reports to the Witness during his testimony, nothing prevented the Prosecution from doing so during its cross-examination. The Chamber therefore finds that the Defence for Mathieu Ngudjolo discharged its obligations by stating the source of these school reports in the document's chain of custody and that it was for the Prosecution to seek any information it deemed necessary if it had not already done so.

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<sup>445</sup> T. 106, p. 61.

<sup>446</sup> [Prosecution Closing Statements, T. 340](#), pp. 41-42.

249. After a thorough examination of the school reports, and absent a Prosecution request for an expert opinion, the Chamber considers that these documents have some probative value and go to prove that P-250 was indeed studying in Kagaba in the year 2002-2003. However, the Chamber does not consider that these documents alone are sufficient to cast doubt on the credibility of P-250.

**iii. Other testimonial evidence**

250. The Defence for Mathieu Ngudjolo called Witness D03-100, who is related to P-250, to testify before the Court. He was questioned on P-250's activities in the year 2002-2003. D03-100 stated that P-250 left for Kagaba in 2000 or 2001 to complete his first year of secondary school,<sup>447</sup> and that he remained there to complete his second and third years.<sup>448</sup> However, due to the unrest caused in Kagaba by Commander Yuda in 2003, P-250 spent part of that academic year in Gety before once again returning to Kagaba when Gety in turn became a dangerous place.<sup>449</sup>

251. Providing no further detail, the Prosecution contended during its closing statements that D03-100's testimony on the subject of P-250's school attendance was not consistent with the school reports presented in court.<sup>450</sup> On comparing the testimony of Witness D03-100 and the school reports, the Chamber also noted that the report for the year 2002-2003 did not mention that P-250's school year had been divided between Gety and Kagaba. However, the Chamber holds that it was the Prosecution's obligation, if it deemed necessary, to show D03-100 P-250's school reports in order to highlight any contradictions.

252. Whatever its precise objective, the Prosecution clearly intended to impugn the credibility of Witness D03-100 who, in its opinion, had not come to testify in order

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<sup>447</sup> See Annex E.

<sup>448</sup> See Annex E.

<sup>449</sup> See Annex E.

<sup>450</sup> [Prosecution Closing Statements, T. 340](#), p. 42.

to tell the truth but to put a stop to alleged “[TRANSLATION] death threats” made by Mathieu Ngudjolo’s family against the witness’s own family.<sup>451</sup> However, as noted by the Defence for Mathieu Ngudjolo,<sup>452</sup> D03-100 spoke unprompted of “[TRANSLATION] conflict” between the two families during his examination-in-chief,<sup>453</sup> subsequently adding that the family of the Accused had “[TRANSLATION] said some bad things”.<sup>454</sup> The Chamber considers that this statement is indicative of the witness’s desire to be transparent and should be taken into account when assessing his credibility. Nevertheless, it is incumbent on the Chamber to examine whether the threats mentioned by Witness D03-100 himself could have adversely affected his testimony.

253. Therefore, in order to measure the impact of any possible tension or threats from Mathieu Ngudjolo’s family, the Chamber considered the witness’s testimony in the light of that of other witnesses who had useful information about P-250’s schooling in the year 2002-2003. It noted in this regard that four witnesses attested to the presence of Witness P-250 in Gety during the 2002-2003 academic year:

- D03-66 claimed that Witness P-250 was a student in Gety during the war and that he did not live in Bedu-Ezekere *groupement* with his parents;<sup>455</sup>
- D03-55 claimed to have lived in Bedu-Ezekere *groupement* from 2002. He maintained that P-250 was a family member and that he was a schoolboy in Gety at the material time;<sup>456</sup>
- D02-160 stated that he had studied in Gety between 2002 and 2004 and that P-250 was a pupil at Gety Institute during the 2002-2003 school year;<sup>457</sup>

<sup>451</sup> [Prosecution Closing Brief](#), para. 778.

<sup>452</sup> [Closing Brief of the Defence for Mathieu Ngudjolo](#), para. 1062.

<sup>453</sup> See Annex E.

<sup>454</sup> See Annex E.

<sup>455</sup> See Annex E.

<sup>456</sup> See Annex E.

<sup>457</sup> See Annex E.

- D02-161 claimed that P-250 was attending school in Gety, that he regularly came to Aveba to visit friends and that she had never seen him in military garb, nor had she seen him carrying a weapon or heard him talk about any fighting.<sup>458</sup>

254. The four witnesses come from different environments. Whilst the two witnesses called by the Defence for Mathieu Ngudjolo were living in Bedu-Ezekere *groupement* at the time, those testifying for the Defence of Germain Katanga were students in Walendu-Bindi *collectivité*. These corroborative testimonies from four witnesses are all the more convincing by virtue of their different circumstances, reinforcing the credibility of D03-100's statement that P-250 was studying in Walendu-Bindi *collectivité* at the material time.

255. On the other hand, the Chamber notes that none of the witnesses claiming to have themselves been in the militia in Bedu-Ezekere were able to confirm that P-250 was present in Zombe or the surrounding area, or even that he was a member of the militia. The Chamber was particularly surprised that P-250 recognised Witness P-279, saying that the last time he had seen him was in 2001 or 2002<sup>459</sup> when he was studying at Songolo Institute, and that Witness P-279 said he did not know Witness P-250's name and had never played football with him in Songolo.<sup>460</sup> Insofar as the two witnesses claimed to have served in the same militia during the same period and in the same camp, the Chamber had expected their testimonies to be mutually corroborative.

256. The Chamber cannot disregard the fact that Witness P-28, who testified about the role of Germain Katanga and whose credibility was analysed earlier, claimed that P-250 was a member of the delegation which had travelled from Zombe to

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<sup>458</sup> See Annex E.

<sup>459</sup> P-250, T. 104, pp. 22-23.

<sup>460</sup> P-279, T. 151, p. 34.

Aveba.<sup>461</sup> However, it discerns a number of signs that Witnesses P-28 and P-250 may have conferred before testifying:

- P-28 claimed to have known P-250 before the conflict began,<sup>462</sup> adding that he had sought to avoid him when their paths crossed in Kinshasa in 2009,<sup>463</sup> yet struggled to recognise his name and a photograph of him in court;<sup>464</sup>
- P-250 had no difficulty in recognising P-28's name, claiming that he had seen him in Kinshasa in 2009, and he did not explicitly deny that he had discussed his testimony with him;<sup>465</sup>
- Witness D02-161 stated that P-28 had told him that he had to go to Kinshasa where P-250 had gone to live, adding that the latter had given him news of P-28 when he was passing through Bunia between late 2009 and early 2010;<sup>466</sup>
- > Witnesses P-28 and P-250 were approached by the same intermediary from the Office of the Prosecutor who had allegedly persuaded P-28 to lie to the investigators about the circumstances of his abduction, as P-28 claimed in court.<sup>467</sup>

257. The Chamber is aware that P-250 travelled to Bunia on the dates stated by Witness D02-161.<sup>468</sup> It is therefore of the view that any corroboration between the respective testimonies of P-28 and P-250 must be assessed in the light of any risk of collusion or even suspected collusion between the two witnesses. Accordingly, the Chamber attaches very little probative value to P-28's confirmation of P-250's testimony.

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<sup>461</sup> P-28, T. 217, p. 39.

<sup>462</sup> P-28, T. 222, pp. 15 and 20.

<sup>463</sup> P-28, T. 222, pp. 32-33.

<sup>464</sup> P-28, T. 222, pp. 20 and 30.

<sup>465</sup> P-250, T. 104, p. 22.

<sup>466</sup> See Annex E.

<sup>467</sup> P-250, T. 104, pp. 26-27; P-28, T. 221, pp. 20-21 and 31.

<sup>468</sup> Registry, "Second Rapport de l'Unité d'aide aux victimes et aux témoins sur la situation du témoin DRC-OTP-P-0250", 7 January 2011, ICC-01/04-01/07-2641-Conf-Exp, with confidential *ex parte* annexes (ICC-01/04-01/07-2641-Conf-Red).

258. Turning lastly to the scenario of the witness studying in Kagaba whilst being a militia member in or around Zumbe, the Chamber underlines that to perform both roles simultaneously, the witness would have had to have made frequent round trips between Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement*. It recalls that Zumbe camp and the Kagaba Institute were located on either side of the front line. P-250 would therefore have had to have passed through Bogoro or the surrounding area on a regular basis to attend school in Kagaba, taking a route that he himself considered impossible and which, according to his testimony, “[TRANSLATION] only dogs used”.<sup>469</sup> Moreover, the Chamber notes that the hazards of such a route, either by road or through the bush, were also mentioned by D03-66<sup>470</sup> and D03-88.<sup>471</sup>

### c) Conclusion

259. Having analysed the testimony, whose imprecisions, contradictions and peculiarities it has underscored, the Chamber notes that placed before it for consideration are school reports showing that P-250 studied in Kagaba, the testimony of four witnesses who claimed that he studied in Gety and the testimony of D03-100 who maintained that the witness divided his time between Kagaba and Gety during the 2002-2003 school year.

260. Mindful that the school reports do not accurately reflect the journeys the witness may have made between Kagaba and Gety, the Chamber however considers that that body of evidence forms a sufficiently coherent whole to cast doubt on P-250’s membership of the Bedu-Ezekere *groupement* militia.

261. Considering also that it is highly unlikely that P-250 could have simultaneously been a militia member in Zumbe and a student in Kagaba, and given that his testimony was based specifically on his status as a militia member

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<sup>469</sup> P-250, T. 100, pp. 52-53.

<sup>470</sup> D03-66, T. 296, p. 21; T. 297, pp. 9-10.

<sup>471</sup> D03-88, T. 300, p. 32.

the Chamber finds that it is not in a position to rely on his testimony in the case at bar.

## 5. P-279

### a) Main subject areas covered by Witness P-279's testimony

262. P-279 testified before the Chamber on 20, 21, 25, 27 and 28 May 2010 and on 7, 8, 9 and 10 June 2010.<sup>472</sup>

263. P-279 stated that he was born on 30 August 1990.<sup>473</sup> If the date is correct, he would have been 12 years old at the time of the attack on Bogoro. In its Closing Brief, the Prosecution does not however challenge the authenticity or contemporaneity of the documents demonstrating that the witness would have in fact been older than 18 at the time of the attack launched on 24 February 2003.<sup>474</sup>

264. The witness stated that he and his family had fled the village of Dele for Zumbe “[TRANSLATION] at the time when there was a war in Bunia”,<sup>475</sup> that is, at the time of Governor Lompondo's downfall. According to his testimony, he settled there with his family for an uncertain period of time and then returned to Dele after the UPC had left Bunia.<sup>476</sup> However, upon returning to his village, he was allegedly abducted by a commander from Bedu-Ezekere.<sup>477</sup>

265. According to P-279, “[TRANSLATION] chief Ngudjolo” was in charge of three camps: Zumbe, Lagura and Ladile.<sup>478</sup> Commander Boba Boba was the military leader at Ladile camp,<sup>479</sup> and Commander Kute headed Lagura camp.<sup>480</sup> The day

<sup>472</sup> T. 144 -T. 154.

<sup>473</sup> P-279, T. 144, p. 14.

<sup>474</sup> [Prosecution Closing Brief](#), para. 788. See also EVD-D02-00124, Birth certificate of P-279; EVD-D02-00125, Birth certificate of P-279; EVD-D02-00126, Invoice.

<sup>475</sup> P-279, T. 144, p. 18; T-151, pp. 53-54; T-152, pp. 7-10; T-153, pp. 39 and 45.

<sup>476</sup> P-279, T. 153, pp. 39-45.

<sup>477</sup> P-279, T. 144, p. 19; T-152, pp. 8-11; T-154, p. 20.

<sup>478</sup> P-279, T. 146, p. 48.

<sup>479</sup> P-279, T. 146, p. 17.

<sup>480</sup> P-279, T. 144, p. 58.

after his arrival at Zumbe camp, P-279 allegedly started military training,<sup>481</sup> which consisted of learning to load a rifle.<sup>482</sup>

266. Also according to the witness, before battle, the combatants had to go to the camp “[TRANSLATION] laboratory” to be given fetishes [*fétiches*].<sup>483</sup> The “[TRANSLATION] doctors” would accompany the soldiers and also take part in combat.<sup>484</sup> Ultimately, the fetishes would be effective only if the fetish-priest’s prohibitions on killing and rape were followed during combat.<sup>485</sup>

267. According to the witness, Germain Katanga visited Zumbe camp with his men to discuss the attack on Bogoro with Mathieu Ngudjolo. En route, he allegedly passed the witness, who was on guard at one of the entry points to Zumbe.<sup>486</sup>

268. Mathieu Ngudjolo allegedly gave the order to attack Bogoro.<sup>487</sup> At around 5 a.m., the civilians started to flee<sup>488</sup> – and some were killed<sup>489</sup> unintentionally and others not.<sup>490</sup> Bogoro was littered with corpses<sup>491</sup> and Mathieu Ngudjolo allegedly ordered their burial.<sup>492</sup> P-279 stated that when the battle had ended, near the market<sup>493</sup> he saw “[TRANSLATION] chief Ngudjolo” and “[TRANSLATION] chief Germain Katanga” enter the Bogoro school hall.<sup>494</sup>

269. After the attack on Bogoro, P-279 and one of his friends were allegedly designated as bodyguards of the wife of one of the commanders for a brief

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<sup>481</sup> P-279, T. 144, pp. 37 and 39; T. 152, pp. 21-22.

<sup>482</sup> P-279, T. 144, pp. 37 and 43.

<sup>483</sup> P-279, T. 144, pp. 47-48.

<sup>484</sup> P-279, T. 148, p. 29.

<sup>485</sup> P-279, T. 149, pp. 14-15.

<sup>486</sup> P-279, T. 144, p. 49; T. 152, pp. 36-37.

<sup>487</sup> P-279, T. 144, p. 50; T. 145, p. 20.

<sup>488</sup> P-279, T. 145, p. 28.

<sup>489</sup> P-279, T. 144, p. 50; T. 145, p. 28; T. 148, p. 22.

<sup>490</sup> P-279, T. 145, p. 29.

<sup>491</sup> P-279, T. 145, p. 29.

<sup>492</sup> P-279, T. 144, p. 50; T. 145, p. 29.

<sup>493</sup> P-279, T. 153, p. 14.

<sup>494</sup> P-279, T. 144, p. 51; T. 145, pp. 28 and 33-34; T. 153, p. 3.

while.<sup>495</sup> Then, after the attack on Bogoro, they fled towards Dele.<sup>496</sup> The witness claimed to have spent a total of one month and several weeks in the militia.<sup>497</sup>

## **b) Analysis**

270. The parties disagreed on a pivotal aspect of P-279's testimony which is of import to his ability to testify to the facts of the case. The question arises as to whether the witness's claim that he participated in the attack on Bogoro as a combatant of the Bedu-Ezekere *groupement* militia is credible or whether he should instead be regarded as an ordinary refugee in Zombe, which he subsequently left for Aveba before the attack on Bogoro.

### **i. Testimony of P-279**

271. In its Closing Brief, the Prosecution submitted that P-279's testimony was credible, detailed and corroborated in that he describes the military structure in Zombe and other camps of Bedu-Ezekere *groupement*, training of the *groupement's* combatants, the use of fetishes in battle and the preparations before the attack, and finally, the attack on Bogoro itself. In the Prosecution's opinion, the events as recounted by the witness "[TRANSLATION] are consistent with the account of someone who personally experienced them".<sup>498</sup>

272. The Chamber noted the details provided by P-279 on the use of fetishes. It also noted the ease with which he expressed himself on the subject during his testimony and his ability to provide details on practices difficult to describe and rarely disclosed. In this regard, the Chamber noted that some witnesses seemed

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<sup>495</sup> P-279, T. 145, p. 28; T. 146, pp. 9-10.

<sup>496</sup> P-279, T. 145, p. 28; T. 146, pp. 9-48; T. 149, p. 47.

<sup>497</sup> P-279, T. 150, p. 33.

<sup>498</sup> [Prosecution Closing Brief](#), para. 785.

wary of questions put to them on the subject in court and were very concerned about any consequences their answers might have on their lives.<sup>499</sup>

273. The fact remains that, although P-279's account was consistent on the use of fetishes, it is unlike the rest of his testimony, which changed in the course of the hearings. During examination-in-chief, P-279 claimed that a commander had come to Dele to enlist him forcibly into the Zumbe militia.<sup>500</sup> During cross-examination, he admitted fleeing from Dele with his family and travelling to Zumbe of his own volition in order to escape the troops which had just defeated those of Governor Lompondo.<sup>501</sup> When challenged with these contradictory versions, the witness finally stated that he had been abducted after his family returned to Dele.<sup>502</sup>

274. In more general terms, the Chamber notes that the details provided by P-279 do not permit it to clearly trace the chronology of his account. Albeit alive to the difficulties of remembering events now in the distant past, the Chamber notes that the witness remained very unclear and even silent on this episode of his life.<sup>503</sup> Despite managing to recall that he returned to Dele with his family after the UPC had left the locality,<sup>504</sup> he could not remember how much time had elapsed between his return and the moment he was abducted by the commander from Bedu-Ezekere.<sup>505</sup>

275. The Chamber observes that the witness claimed to have remained in the Bedu-Ezekere *groupement* militia for a period of one month and a few weeks, and to have left it a few weeks after the attack on Bogoro.<sup>506</sup> Given that the attack occurred on 24 February 2003, it can be inferred that the commander would have

<sup>499</sup> See, for example, P-28, T-217, pp. 45-47.

<sup>500</sup> P-279, T. 144, pp. 34-35; T. 149, p. 47.

<sup>501</sup> P-279, T. 153, pp. 39-40 and 44.

<sup>502</sup> P-279, T. 152, pp. 8-11.

<sup>503</sup> P-279, T. 151, pp. 51-52; T. 152, pp. 10-11; T. 153, p. 48; T. 154, pp. 19 and 20.

<sup>504</sup> P-279, T. 153, p. 41.

<sup>505</sup> P-279, T. 152, p. 11; T. 154, p. 20.

<sup>506</sup> P-279, T. 150, p. 33.

abducted the witness in or around late January 2003.<sup>507</sup> In other words, P-279's family would have fled Dele for Zumbe in August 2002, returning to settle in Dele on an unspecified date and the commander would have come to abduct the witness in late January 2003. However, the Chamber recalls that Dele is a suburb of Bunia and that the UPC was not driven from Bunia until 6 March 2003, temporarily at first and more permanently once the United Nations forces arrived in June of the same year. If the witness's claim that he returned to Dele with his family only after the UPC had been defeated is to be believed, it would have been impossible for him to have been abducted in late January 2003.

276. Therefore, it would seem to the Chamber that the various stages of P-279's school attendance and the sequence of events he claims to have experienced are inconsistent, at least in the manner in which they were reported in his testimony.

277. Moreover, the Chamber noted contradictions in other statements made by P-279. During the hearing, P-279 claimed to have worked as a bodyguard for the wife of one of the Bedu-Ezekere commanders, whereas in his previous statement he had mentioned being made bodyguard for this same commander.<sup>508</sup> In addition, P-279 testified that he had seen Germain Katanga go to Zumbe shortly before the attack on Bogoro, claiming that he was able to identify him thanks to the other soldiers on guard with him. However, in his previous statement, he claimed that Germain Katanga was accompanied by Commanders Cobra Matata and Oudo Mbafele and that he was able to recognise the Accused as he had previously crossed paths with him with his father before being abducted.<sup>509</sup>

278. Finally, there is also a problem with P-279's statements that he had seen Germain Katanga and Mathieu Ngudjolo enter a school near the military camp in order to hold a meeting. Indeed, the witness said that he was near the market in

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<sup>507</sup> P-279, T. 149, p. 49.

<sup>508</sup> P-279, T. 146, p. 21.

<sup>509</sup> P-279, T. 147, p. 43; T. 152, pp. 40-42.

Bogoro when the Accused persons entered the school.<sup>510</sup> Yet on its site visit the Chamber noted that the camp and the market are in fact too far apart for the witness to have been able to see the Accused persons enter the Bogoro Institute.<sup>511</sup> In its closing statements, however, the Prosecution contended that P-279 was in fact referring to a secondary position of the UPC located at Kavali School,<sup>512</sup> and that the school building was indeed near the market. In the Chamber's view, the issue of whether P-279 was referring to the Bogoro Institute or Kavali School should have been clarified by the Prosecution during the witness's testimony. The Chamber considers that the explanations provided by the Prosecution on the subject are only one interpretation, amongst others, of the witness's testimony.

279. Finally, the Chamber would emphasise two aspects of the witness's testimony which considerably reduce any faith which might be invested in his testimony as a whole: the contradictions with regard to his date of birth and his claim that he did not know Witness P-280.

280. With regard to P-279's age, the Chamber recalls that the Prosecution did not challenge the authenticity of documents EVD-D02-00124, EVD-D02-00125 and EVD-D02-00126,<sup>513</sup> which show that the witness would have been over 18 years of age when the attack on Bogoro occurred. The situation of this witness, however, is different from that of P-280 and P-28. Indeed, P-280 stated in court that he was unsure of his precise age and that he wished to have an identity document issued stating his true date of birth. P-28 admitted to having falsified school reports in order to continue his studies and to having provided false information regarding his age in order to be accepted into the demobilisation programme for adults. P-279 also admitted to attempting to appear older when giving his date of birth as 30 August 1984 for the issuance of his voter's card. He claimed that this card

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<sup>510</sup> P-279, T. 144, p. 51; T. 145, pp. 28 and 33; T. 153, pp. 13-14.

<sup>511</sup> [Site Visit Report](#), paras. 45-46.

<sup>512</sup> [Prosecution Closing Statements, T-336](#), p. 75.

<sup>513</sup> [Prosecution Closing Brief](#), para. 788.

would guarantee his security should FARDC forces conduct an identity check.<sup>514</sup> The fact remains that the witness proved highly reticent when efforts were made in court to determine his precise age. What is more, when presented with various documents pertaining to his date of birth and asked a series of questions on the subject by the Defence for Germain Katanga, the witness lapsed into lengthy silence,<sup>515</sup> appeared somewhat unwilling to respond and sank into a negative frame of mind, without really attempting to explain the contradictions discerned.

281. For this reason, the Chamber does not intend to rely upon a school document concerning his sister's age which was issued at the request of the Defence for Germain Katanga, to which the Prosecution mounted a robust challenge.<sup>516</sup> However, the Chamber cannot fail to note that the witness seemed particularly muddled when, unprompted, he at first acknowledged that his sister was 22 years old in 2010,<sup>517</sup> only to state subsequently that he had forgotten her age,<sup>518</sup> before recalling that she was in fact three years younger than him.<sup>519</sup> Moreover, he provided no satisfactory explanation as to why neither his name nor his sister's appeared in an employment contract issued to his father by his employer on 7 December 2007, mentioning the names of the minors still dependent on his father.<sup>520</sup>

282. In assessing the credibility of P-28 and P-280, the Chamber considered with great circumspection the weight to be attached to contradictions identified in the witnesses' statements concerning their dates of birth. P-279's behaviour when testifying to this issue is considered to be of some weight, as his general attitude was one of denial and he also refused to acknowledge that he knew P-280.

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<sup>514</sup> P-279, T. 151, pp. 16 and 23; T-154, pp. 48 and 49.

<sup>515</sup> See, for example, T-151, pp. 24 and 28.

<sup>516</sup> [Prosecution Closing Brief](#), para. 789.

<sup>517</sup> P-279, T. 149, p. 68.

<sup>518</sup> P-279, T. 149, p. 71.

<sup>519</sup> P-279, T. 150, p. 47.

<sup>520</sup> EVD-D02-00037: Employment contract; P-279, T. 151, pp. 33-34.

283. It has been established that there were good neighbourly relations between the families of D02-147 and D02-146, who were both closely related to P-279 and P-280 respectively.<sup>521</sup> However, the Chamber was surprised that, when P-280's name was mentioned to him, P-279 stated repeatedly that he did not remember that name<sup>522</sup> and did not recognise P-280 from a photograph.<sup>523</sup> This is all the more surprising as P-280 claimed to have also been a combatant in the Bedu-Ezekere militia. The Chamber's doubts are further reinforced by its observation that P-280 also claimed to have had a solitary childhood, and never spontaneously mentioned P-279,<sup>524</sup> whereas Witnesses D02-146<sup>525</sup> and D02-147<sup>526</sup> claimed to have seen an intermediary from the Office of the Prosecutor in conversation with both P-279 and P-280.<sup>527</sup>

284. In its closing statements, the Prosecution challenged Witnesses P-280 and P-279's claims that they did not know one another, pointing out that the Defence for Germain Katanga had not shown P-279 the photograph of him with P-280 and had not explicitly asked P-280 whether he knew P-279.<sup>528</sup> The Chamber considers, however, that the Defence discharged its obligations by first putting to P-279 the name and then the photograph of P-280.<sup>529</sup> These details inevitably contribute to the Chamber's concerns as to the possibility of collusion between Witnesses P-279 and P-280 in order to conceal any connection between them.

285. In the Chamber's opinion, P-279's attitude of denial in court explains the difficulties he encountered in answering the questions put to him by the Defence teams. These difficulties were entirely unlike like those experienced by other

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<sup>521</sup> See Annex E.

<sup>522</sup> P-279, T. 151, pp. 47 and 49-50; T. 152, pp. 43-47.

<sup>523</sup> EVD-D02-00039: Photograph; P-279, T. 152, pp. 43-47.

<sup>524</sup> P-280, T. 161, pp. 70-71.

<sup>525</sup> See Annex E.

<sup>526</sup> See Annex E.

<sup>527</sup> Intermediary 143. As the Chamber has disposed of the credibility of Witnesses P-279 and P-280's on the basis of material other than that which strictly concerns that intermediary's involvement, the present Judgment does not address the parties' arguments on the matter.

<sup>528</sup> [Prosecution Closing Statements](#), T-336, pp. 73-75.

<sup>529</sup> P-279, T. 151, p. 47; T. 152, pp. 43-47.

Prosecution witnesses. The Chamber noted over 70 prolonged silences on the part of the witness in the transcripts. Without minimising the fact, as emphasised by the Prosecution, that the Witness is considered vulnerable,<sup>530</sup> it is undeniable that P-279 most often remained silent when confronted with his own contradictions which he could not surmount.

**ii. Other testimonial evidence**

286. D02-147, a relative of P-279, was called by both Defence teams to testify to the witness's activities in 2002-2003.<sup>531</sup>

287. D02-147 considered mendacious P-279's claims that he was abducted in Dele by a commander from Bedu-Ezekere, joined the *groupement* militia and took part in an attack.<sup>532</sup> D02-147 claimed to have fled Dele in August 2002 with other family members and headed to Zumbe "[TRANSLATION] because he was afraid" as "[TRANSLATION] members of the UPC were trying to kill [him]".<sup>533</sup> After UPC troops attacked Zumbe in December 2002, he allegedly sent his family to Aveba,<sup>534</sup> whilst he remained behind in Zumbe for a few days to tend to his herd of goats<sup>535</sup> before heading for the bush.<sup>536</sup> After soldiers from the Ugandan army ("the UPDF") left Ituri, he in turn allegedly fled to Aveba,<sup>537</sup> where he claimed to have lived for three years<sup>538</sup> with all his family members, including P-279.<sup>539</sup>

288. The Prosecution argued that D02-147's testimony was implausible when he claimed never to have seen any combatants in Zumbe during his four-month stay there, despite having made claims to the contrary in an earlier statement. In the

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<sup>530</sup> [Prosecution Closing Brief](#), para. 786.

<sup>531</sup> See Annex E.

<sup>532</sup> See Annex E.

<sup>533</sup> See Annex E.

<sup>534</sup> See Annex E.

<sup>535</sup> See Annex E.

<sup>536</sup> See Annex E.

<sup>537</sup> See Annex E.

<sup>538</sup> See Annex E.

<sup>539</sup> See Annex E.

Prosecution's opinion, his credibility was damaged when he stated that he had never seen a military camp in Zumbe, that he did not know whether Mathieu Ngudjolo was the leader and that he had never heard of the battle in Bogoro. It was also implausible, in the Prosecution's opinion, for D02-147 to have lived in Aveba for three years without ever noticing the military camp or hearing about the demobilisation site there. Finally, the Prosecution underscored that the Witness was lying when he maintained that he did not know that P-279 had been relocated by the Court, as he admitted to having had dealings himself with officials from the Court on the subject.<sup>540</sup>

289. The Chamber notes, however, that D02-147 merely pointed out during the hearing that it was difficult to distinguish between combatants and civilians and that he had not stated that there were no combatants in Zumbe.<sup>541</sup> Nevertheless, the Chamber agrees that D02-147's statements were indeed surprising in many respects, with regard to life in both Zumbe and in Aveba. It will assess the credibility of each of the above statements one by one should the need arise.

290. More importantly, the Chamber observes that Witness D02-147 was most guarded on the subject of militia activity in Aveba, causing it to treat with circumspection any probative value to be attributed to the information provided by the witness regarding the life led by P-279 in 2002 and 2003.

### **c) Conclusion**

291. Witness P-279's assertions regarding his presence within the ranks of the Zumbe combatants at the time of the attack on Bogoro are, as previously noted, overly inaccurate and contradictory. Furthermore, his attitude of denial regarding his precise age and his relationship with P-280 affects the general credibility of his testimony. Moreover, the Chamber notes that the testimony of D02-147, despite

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<sup>540</sup> [Prosecution Closing Brief](#), para. 790.

<sup>541</sup> See Annex E.

its relative probative value, further contributes to its doubts as to his ability to testify to the events in the case.

292. For all these reasons, the Chamber finds that it is not able to rely on the testimony of P-279 in this case.

## 6. P-280

### a) Main subject areas covered by P-280's testimony

293. Witness P-280 testified on 15, 16, 17, 21, 22, 23, 28 and 29 June 2010.<sup>542</sup>

294. P-280 stated that he was born on 11 November 1990.<sup>543</sup> If this date is correct, he would have been 12 years old at the time of the attack on Bogoro. When shown a number of documents concerning his civil status during the hearing, the Witness himself expressed doubts as to his date of birth.<sup>544</sup> In its Closing Brief, the Prosecution does not challenge the authenticity or contemporaneity of the documents showing that the witness would have in fact been older than 15 at the time of the attack on Bogoro.<sup>545</sup>

295. The witness said that he lived near Bunia until the downfall of Governor Lompondo in August 2002,<sup>546</sup> when he fled in the direction of Zumbe hill and was abducted whilst he was fleeing by a commander from Bedu-Ezekere *groupement*.<sup>547</sup>

296. He was taken to Lagura camp, where he said he underwent military training which was frequently interrupted by fighting.<sup>548</sup> During his training, he was

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<sup>542</sup> P-280, T. 155 to T-162.

<sup>543</sup> P-280, T-155, p. 16.

<sup>544</sup> P-280, T-162, pp. 46-48.

<sup>545</sup> [Prosecution Closing Brief](#), para. 781.

<sup>546</sup> P-280, T-155, pp. 23 and 26; T-160, p. 66; T-161, pp. 68 and 70.

<sup>547</sup> P-280, T-155, pp. 27 and 28; T-160, pp. 65 and 69; T-161, pp. 73-74.

<sup>548</sup> P-280, T-155, p. 37; T. 160, p. 70.

taught how to fire a rifle and follow a plan of attack.<sup>549</sup> He said he was also told repeatedly that it was necessary to fight against all Hema.<sup>550</sup>

297. The witness described Lagura camp, providing details of two underground prisons<sup>551</sup> and the weapons depot.<sup>552</sup> He also drew a sketch of Zumbe village,<sup>553</sup> indicating the position of the airport, the market, the camp and Mathieu Ngudjolo's house.<sup>554</sup> According to P-280, Mathieu Ngudjolo was "[TRANSLATION] the greatest",<sup>555</sup> "[TRANSLATION] the one with the biggest camp",<sup>556</sup> and "[TRANSLATION] the Chief of Staff".<sup>557</sup>

298. P-280 stated that Germain Katanga was based in Bolo camp,<sup>558</sup> which, the witness explained, was also known as "BCA",<sup>559</sup> and that he was part of the FRPI leadership, alongside Cobra Matata, Yuda, Alpha and others whose names he did not recall.<sup>560</sup>

299. P-280 stated that the combatants would take fetishes before every battle and that these were distributed with specific conditions of use, which were to be respected.<sup>561</sup> P-280 claimed that the conditions might vary according to the village targeted, adding that they were given "[TRANSLATION] the green light" whenever they attacked a Hema village.<sup>562</sup>

300. According to P-280, it was Commander Kute who ordered the combatants to attack Bogoro.<sup>563</sup> The witness stated that he merely followed the Commander's

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<sup>549</sup> P-280, T-155, pp. 32-33.

<sup>550</sup> P-280, T-155, p. 38.

<sup>551</sup> P-280, T-156, pp. 3-5.

<sup>552</sup> P-280, T-155, pp. 62-63.

<sup>553</sup> EVD-D03-00023: Sketch of Zumbe village by P-280; P-280, T. 162, pp. 37-38.

<sup>554</sup> P-280, T-162, pp. 39-40.

<sup>555</sup> P-280, T-155, pp. 58 and 64.

<sup>556</sup> P-280, T-158, p. 22.

<sup>557</sup> P-280, T-156, pp. 9 and 11.

<sup>558</sup> P-280, T. 156, p. 21.

<sup>559</sup> P-280, T. 156, p. 21 ; T. 159, pp. 65 and 68.

<sup>560</sup> P-280, T. 156, pp. 19 and 20.

<sup>561</sup> P-280, T. 157, pp. 7-8 and 17-19.

<sup>562</sup> P-280, T. 157, pp. 18-19.

<sup>563</sup> P-280, T. 156, pp. 9 and 18-19.

instructions, without knowing the plan of attack and that it was during the battle that he realised the militia members of Bedu-Ezekere *groupement* had encircled Bogoro with the help of those from Walendu-Bindi *collectivité*.<sup>564</sup>

301. According to his account of the attack, it was difficult to tell combatants and civilians apart,<sup>565</sup> as the civilians were armed<sup>566</sup> and he had been told that all Hema were his enemy.<sup>567</sup> In addition to the attack on Bogoro, P-280 claimed to have taken part in the attacks on Mandro and Kasenyi.<sup>568</sup>

## **b) Analysis**

302. The Prosecution and the Defence teams for Germain Katanga and Mathieu Ngudjolo disagreed on a pivotal aspect of P-280's testimony which is of import to his ability to testify to the facts of the case. It is important to ascertain whether the witness fled Dele in August 2002 to become a militia member in Bedu-Ezekere *groupement* or whether he did not flee his village until May 2003 to seek temporary refuge in Aveba with his family.

### **i. Testimony of P-280**

303. In its Closing Brief, the Prosecution submitted that the level of detail provided by P-280 shows "[TRANSLATION] an intimate knowledge" of Lagura camp, the military structure of the Bedu-Ezekere *groupement* combatants, the execution of the attack on Bogoro and its occupation by Commander Yuda's group once the fighting had ceased. In addition, the Prosecution maintained that his admissions as to his participation in the crimes committed in Bogoro are an important indicator of the credibility of his testimony.<sup>569</sup>

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<sup>564</sup> P-280, T. 157, pp. 22-23.

<sup>565</sup> P-280, T. 160, p. 39; T. 162, p. 7.

<sup>566</sup> P-280, T. 156, p. 39.

<sup>567</sup> P-280, T. 159, pp. 79-80.

<sup>568</sup> P-280, T. 156, p. 9.

<sup>569</sup> [Prosecution Closing Brief](#), para. 780.

304. The Chamber has felt the need to focus on the description provided by the witness of the workings of the Bedu-Ezekere *groupement* militia and his account of the battle of Bogoro. In addition to the level of detail he provided, the plausibility of his account may first and foremost lie in the fact that it reflects the viewpoint of a low-ranking soldier with only limited access to information. He thus claims to have merely crossed paths with Mathieu Ngudjolo without approaching him directly<sup>570</sup> and to have participated in the fighting in Bogoro without any knowledge of the plan of attack.<sup>571</sup> This relatively important information could indeed be consistent with the witness's position within the militia. In like vein, the Chamber paid particular attention to the witness's statements with regard to the crimes he claims to have himself committed during the fighting. Nevertheless, in view of the contradictions and inaccuracies noted in his testimony which will be clarified and which raise serious questions about his presence in Zombe and even more about his presence in Bogoro on the day of the events, the Chamber does not consider that it may rely on the witness's testimony on these various points.

305. Unlike for the testimony of P-279, the Chamber does not attach any particular importance to the contradictions noted in this witness's statements with regard to his date of birth. Note was taken that he endeavoured to foil the efforts by Counsel for the Defence to ascertain his precise age. He was reluctant to talk about his school attendance<sup>572</sup> and was incapable of stating his current age or that of his younger brother.<sup>573</sup> The fact remains that he seemed genuinely surprised when presented with various possible dates of birth, claiming that he would like to have an identity card issued in order to know his true date of birth.<sup>574</sup>

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<sup>570</sup> P-280, T. 158, pp. 34 and 41.

<sup>571</sup> P-280, T. 157, p. 22.

<sup>572</sup> P-280, T. 155, pp. 65-66.

<sup>573</sup> P-280, T. 160, pp. 79-81; T-161, pp. 24-25.

<sup>574</sup> P-280, T. 162, pp. 46-48.

306. Nevertheless, the Chamber cannot ignore several peculiarities and even contradictions throughout P-280's testimony. The witness did not recall the name of the commander who appointed him as a member of the military police,<sup>575</sup> or the names of those who led the parades, with the exception of Kute,<sup>576</sup> and had no recollection of the speeches given to the combatants on this occasion.<sup>577</sup> P-280 also provided an extremely unclear account of his demobilisation.<sup>578</sup> His account of the manner in which he was turned away by CONADER is singularly impenetrable.<sup>579</sup>

307. Above all, with regard to his account of the battle of Bogoro, the Chamber notes major contradictions between his previous statement and the evidence he gave in court. In his statement, the witness claimed that Commander Kute passed himself off as a UPC guard so as to allow his men to penetrate the enemy camp in silence and that the combatants then killed the UPC soldiers when they woke up. In court, he claimed that the combatants first used bladed weapons to kill the inhabitants whom they found in their houses, before opening fire on the UPC soldiers and subsequently overrunning the camp. When asked to explain this contradiction, P-280 claimed that he must have confused several battles.<sup>580</sup> In the Chamber's opinion, that answer does not account for such a radical change in his account. In this regard, the Chamber notes that the witness described all the other battles in which he claimed to have participated without ever mentioning the subterfuge employed by Commander Kute to allow his soldiers to infiltrate the enemy camp unbeknownst to its occupants.

308. Accordingly, the utmost circumspection is required when considering his evidence to the Chamber given the sometimes unclear explanations and

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<sup>575</sup> P-280, T. 155, pp. 45-46.

<sup>576</sup> P-280, T. 155, pp. 39-40.

<sup>577</sup> P-280, T. 155, p. 40.

<sup>578</sup> P-280, T. 161, pp. 28-30; T-162, pp. 44-45.

<sup>579</sup> P-280, T. 162, pp. 51-52.

<sup>580</sup> P-280, T. 161, pp. 55-58.

contradictions. In particular, the contradiction noted between his earlier statement and his in-court testimony with regard to the sequence of the attack on Bogoro particularly affects the apparent credibility of what initially appeared to be a plausible and measured account of the attack.

309. Finally, the Chamber is surprised at P-280's silence with regard to P-279,<sup>581</sup> in view of the alleged relationship between them. Once again, the Chamber must consider the possibility of collusion between the two men, as already examined in the assessment of P-279's credibility.

*Sketch of Zumbe drawn by P-280*

310. Witness P-280 drew a map of Zumbe,<sup>582</sup> on which he indicated the location of the airport, the market, the camp, Mathieu Ngudjolo's house and the church.<sup>583</sup> During its judicial site visit to the DRC, the Chamber was able to compare the sketch with the situation on the ground. It found that it was difficult to place the airport at the location indicated by the witness.<sup>584</sup> Having considered the parties' Closing Briefs, the Chamber finds it difficult to rely on P-280's claim that there was an airport in Zumbe.

311. In its Closing Brief, the Prosecution conceded that in assessing P-280's credibility, the Chamber would need to bear in mind that his testimony in this regard was extremely vague. However, the Prosecution made it clear that this was only a "[TRANSLATION] peripheral detail" of his testimony and that the witness had merely stated that he had heard that this landing strip served as an airport.<sup>585</sup>

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<sup>581</sup> P-280, T. 161, pp. 70-71.

<sup>582</sup> EVD-D03-00023: Sketch of Zumbe village by P-280.

<sup>583</sup> P-280, T. 162, pp. 39-40.

<sup>584</sup> [Site Visit Report](#), para. 32.

<sup>585</sup> [Prosecution Closing Brief](#), para. 784.

312. The Chamber recalls that P-280 claimed to have lived in Zombe before leaving Bedu-Ezekere *groupement*.<sup>586</sup> The Chamber was therefore justified in expecting the witness to have a good level of local knowledge. In its view, the description he provided should therefore be factored into the assessment of his credibility. Furthermore, P-280's error in claiming the existence of an airport is more troublesome than the Prosecution cares to admit when juxtaposed with the excerpt from his 2007 statement, which was read out in court, in which he stated that a "[TRANSLATION] group from Zombe airport" attacked Bogoro alongside his own group.<sup>587</sup> This reference to the existence of a "[TRANSLATION] group from Zombe airport" participating in the attack on Bogoro makes it impossible to consider the non-existence of an airport in Zombe as a mere "peripheral detail" of his testimony.

313. Aside from the issue of the existence of an airport in Zombe, the Chamber found it necessary to examine the sketch in more general terms. According to the sketch of Zombe drawn by P-280, the military camp is located at the end of a road starting west of the market, and the airstrip is to be found along another road running north of the same market. However, during the judicial site visit to Ituri, the Chamber noted that this representation of the village of Zombe was in fact more consonant with the topography of the village of Aveba. Confirmation of this view requires only a comparison of P-280's sketch with EVD-D02-00153, drawn by Witness D02-258 to describe Aveba and to note that, as represented in the diagram, the locations of the market, the airport and the camp are one and the same.<sup>588</sup>

314. In the light of this analysis, the Chamber cannot rule out the possibility that the witness transposed what he had seen of Aveba to flesh out his description of

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<sup>586</sup> P-280, T. 158, pp. 40-41; T-159, pp. 62-64; T. 162, p. 44.

<sup>587</sup> P-280, T. 161, p. 48.

<sup>588</sup> See also the topographical survey made by the Registry for the Chamber's visit to Ituri. [Site Visit Report](#), p. 31.

Zumbe. The analysis of this sketch and the witness's claims as to the existence of a "[TRANSLATION] group from Zumbe airport" can only leave the Chamber sceptical. Moreover, the Chamber recalls that, according to Germain Katanga himself, a military group was present at Aveba airport and the troops who were there took part in the attack on Bogoro,<sup>589</sup> which are additional facts that support the Chamber's analysis.

**ii. Other testimonial evidence**

315. The Defence teams called D02-146, who is related to Witness P-280, to testify to P-280's activities during 2002-2003.<sup>590</sup> D02-146 stated that he had remained in Dele with P-280 until the departure of the Ugandans from Bunia which, it should be recalled, took place in May 2003. Having sought refuge in Aveba for three months, he allegedly returned to his village when the French forces arrived in Bunia.<sup>591</sup> Whilst in Aveba, he said that was taken in by the family of Witness D02-147, who had fled Dele as early as August 2002.<sup>592</sup> According to D02-146, P-280 lived with him throughout the war, was never a member of the militia and did not take part in the attack on Bogoro.<sup>593</sup>

316. The Prosecution challenged D02-146's credibility, claiming that it should be assessed in the light of the pressure exerted by his community to provide exonerating testimony. The Prosecution recalled that it was unlikely that he had never seen Germain Katanga during his stay in Aveba although it was a small place, and that he had lied in claiming that the Court had failed to inform him of P-280's relocation.<sup>594</sup>

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<sup>589</sup> D02-300, T. 318, p. 4.

<sup>590</sup> See Annex E.

<sup>591</sup> See Annex E.

<sup>592</sup> See Annex E.

<sup>593</sup> See Annex E.

<sup>594</sup> [Prosecution Closing Brief](#), para. 783. See Annex E.

317. Admittedly, D02-146's account is corroborated by the testimony of Witness D02-147, who confirmed that his family took in P-280's family in Aveba as of May 2003.<sup>595</sup> However, the fact remains that the families of these two witnesses lived in the same locality and have been on friendly terms for a long time.<sup>596</sup> In view of these close ties and the attendant risk of collusion, it is difficult for the Chamber to attach a high probative value to these two testimonies.

### **c) Conclusion**

318. As previously noted, P-280's account of his presence within the ranks of the Zumbe combatants at the time of the attack on Bogoro is excessively imprecise and contradictory. Moreover, the Chamber cannot exclude the possibility that the witness transposed what he knew of Aveba to flesh out his description of Zumbe. In addition, the Chamber notes that D02-146's account, albeit of relative probative value, further fuelled its doubts as to his ability to testify to the facts of the case. Finally, taken as a whole, the testimony of P-280 implicitly confirms D02-146's testimony that P-280 fled Dele for Aveba and never visited Bedu-Ezekere *groupement*.

319. For all these reasons, the Chamber finds that it is unable to rely on the testimony of P-280 in this case.

## **7. P-317**

### **a) Main subject areas covered by Witness P-317's testimony**

320. Witness P-317 gave evidence before the Chamber on 6, 7, and 8 December 2011.<sup>597</sup> She stated that she arrived in the DRC in December 2002 to set up the Investigations Unit of the MONUC Human Rights Division.<sup>598</sup> The witness

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<sup>595</sup> See Annex E.

<sup>596</sup> See Annex E.

<sup>597</sup> T. 228-T. 230.

<sup>598</sup> P-317, T. 228, p. 10; T. 229, pp. 35-37.

explained that the purpose of the investigations was to establish the truth and to pave the way for justice, commencing with Congolese justice.<sup>599</sup>

321. As part of her remit, P-317 wrote first an interim report on the situation in Ituri on 20 June 2003<sup>600</sup> and then an official report addressed to the Security Council on 16 July 2004.<sup>601</sup> One of the nine missions carried out during the course of the investigation, which took place from 24 March to 7 April 2003, had been undertaken precisely as a result of the attack on Bogoro on 24 February 2003.<sup>602</sup>

322. During her investigations, P-317 learnt from the UPDF leadership that the forces based in the area of Bogoro were under the command of Mathieu Ngudjolo.<sup>603</sup> Furthermore, the Ugandan authorities allegedly took the trouble to seek Mathieu Ngudjolo's authorisation to enter Bogoro so that the witness could go there with her team.<sup>604</sup>

323. P-317 stated that, having arrived in Bogoro on 26 March 2003, at approximately 10 a.m., she stayed there for a little less than an hour<sup>605</sup> and was able to meet with Commander Dark for around half an hour.<sup>606</sup> Commander Dark allegedly informed her that he was in charge of the Lendu forces from Bogoro and that Germain Katanga was his superior.<sup>607</sup>

## **b) Analysis**

324. P-317's testimony appeared most coherent. She expressed herself with authority and demonstrated much aplomb and ease during both the examination-in-chief and the Defence teams' cross-examinations.

<sup>599</sup> P-317, T. 229, pp. 15-16.

<sup>600</sup> P-317, T. 228, pp. 50-52; EVD-OTP-00205: MONUC interim report on the events in Ituri.

<sup>601</sup> P-317, T. 228, pp. 47-50; EVD-OTP-00285: MONUC report on the events in Ituri.

<sup>602</sup> P-317, T. 228, pp. 21-22; T. 229, pp. 37-38.

<sup>603</sup> P-317, T. 228, p. 26.

<sup>604</sup> P-317, T. 228, pp. 25-26.

<sup>605</sup> P-317, T. 228, p. 26.

<sup>606</sup> P-317, T. 228, pp. 28 and 30-31; T. 229, pp. 53-55.

<sup>607</sup> P-317, T. 228, pp. 29 and 31.

325. Her investigation report is entitled “Special report on the events in Ituri, January 2002-December 2003”.<sup>608</sup> P-317 explained clearly the methodology adopted by her team to carry out its investigation and made considered and knowledgeable comments on certain parts of her report.

326. The Chamber considers that P-317’s report provides useful information on the events that took place in Ituri at the material time. Speaking of the features specific to investigations into human rights violations, she emphasised that she included information directly concerning the attack on Bogoro only when it was corroborated by other sources. As the witness herself pointed out,<sup>609</sup> the Chamber wishes to recall that the preparation of a report on an investigation of human rights violations is not subject to the same criteria as those for a criminal investigation. Reports are prepared in a non-adversarial manner; they are essentially based on oral testimony, sometimes derived from hearsay, and the identity of the sources is always redacted.

### **c) Conclusion**

327. The Chamber considers that P-317 is credible and that it can therefore rely on her testimony in the present case. The Chamber specifies that any reference to excerpts of the Report on the events in Ituri in the Judgment will be included on the proviso that the information relating directly to the events of Bogoro has been corroborated beforehand by other evidence.

## **8. P-353**

### **a) Main subject areas covered by Witness P-353’s testimony**

328. Witness P-353 testified before the Chamber on 3, 4 and 8 November 2010.<sup>610</sup>

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<sup>608</sup> EVD-OTP-00285: MONUC report on the events in Ituri.

<sup>609</sup> P-317, T. 228, p. 15.

<sup>610</sup> T. 212, T. 213 and T. 215.

329. The witness stated that she remembered arriving in Bogoro at the end of 2002<sup>611</sup> and attending one of the local schools,<sup>612</sup> but having to stop her education when the school closed.<sup>613</sup> She stated that, on 24 February 2003, the attack started in the morning<sup>614</sup> and that she took refuge in her home with persons fleeing from the neighbouring houses.<sup>615</sup> She claimed that the attackers broke down the front door and entered the house.<sup>616</sup>

330. The witness testified that she heard gunshots as well as the screams of people in the room next to hers, who were begging for their lives to be spared.<sup>617</sup> Among the many victims she saw being killed, P-353 remembered two four-year old children who were hacked with machetes.<sup>618</sup>

331. The witness and three other young women who were with her said they were not Hema; the attackers then asked them to leave.<sup>619</sup> An argument then allegedly broke out between two attackers about to whom P-353 would be allocated.<sup>620</sup> P-353 testified that the group then headed towards a Ngiti camp in Walendu-Bindi *collectivité*.<sup>621</sup> Upon arrival in the camp, two men allegedly forced her to have sexual intercourse with them,<sup>622</sup> and thenceforth on a daily basis for several months.<sup>623</sup>

332. The witness stated that, approximately three months after she had come to the camp, she heard a person arriving by car, whom the combatants greeted by

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<sup>611</sup> P-353, T. 215, p. 36. See also T. 213, p. 11.

<sup>612</sup> P-353, T.215, pp. 36-37.

<sup>613</sup> P-353, T. 215, pp. 37 and 39-40.

<sup>614</sup> P-353, T. 213, pp. 11-12.

<sup>615</sup> P. 353, T. 213, pp. 14-15; T. 215, p. 44.

<sup>616</sup> P-353, T. 213, p. 18-19.

<sup>617</sup> P-353, T. 213, p. 19-20.

<sup>618</sup> P-353, T. 213, p. 20.

<sup>619</sup> P-353, T. 213, pp. 21 and 22.

<sup>620</sup> P-353, T. 213, p. 41.

<sup>621</sup> P-353, T. 213, pp. 46-47; P-353, T. 215, pp. 12-13 and 45.

<sup>622</sup> P-353, T. 213, pp. 49-52.

<sup>623</sup> P-353, T. 213, p. 53.

shouting “[TRANSLATION] President”.<sup>624</sup> She claims to have stayed in that place for over three months.<sup>625</sup>

## b) Analysis

333. P-353 replied frankly and candidly to the questions put to her by the Prosecution and the Defence. When overwhelmed by emotion at certain questions, she would inform the parties and participants.<sup>626</sup> The Chamber considered her testimony to be very coherent and noted that she testified clearly, despite the extreme gravity of the crimes of which she claims to have been a victim.

334. The Defence analysis of P-353’s testimony cast doubt on several points. It noted that the witness did not recognise the CECA 20 church in Bogoro from a photograph shown to her;<sup>627</sup> she claimed to have attended school in 2002 at a time when her school had been moved to Bunia; she confused the Bogoro Institute with the Muzora Institute and, lastly, P-353 claimed that Ugandan soldiers were protecting Bogoro in 2003, although they had already left the village.<sup>628</sup>

335. The Chamber notes that some contextual information provided by P-353 is in fact incorrect. In particular, sufficient evidence lies before the Chamber for it to affirm that, when the Ugandan troops who had been in Bogoro left, UPC troops took their place in August 2002.<sup>629</sup> However, the Chamber recalls that these are distant events and P-353 was under the age of 18 on 24 February 2003,<sup>630</sup> which, in the Chamber’s view, explains why she was unable to identify precisely which armed group was defending Bogoro at the material time.

<sup>624</sup> P-353, T. 215, pp. 61-63; T. 215, p. 61; T. 215, p. 61.

<sup>625</sup> See, for example, P-353, T. 213, pp. 54-55.

<sup>626</sup> See, for example, P-353, T. 213, pp. 54-55.

<sup>627</sup> [Defence Closing Brief](#), para. 988.

<sup>628</sup> [Defence Closing Brief](#), para. 989.

<sup>629</sup> EVD-OTP-00202: Witness P-166’s previous statement (DRC-OTP-1007-0010-R04, para. 47); P-233, T. 87, pp. 59-60; T. 88, pp. 9 and 63.

<sup>630</sup> P-353, T. 212, p. 66.

336. Similarly, during its visit to Ituri, it became apparent to the Chamber that the photograph shown to the witness in court was of the CECA 20 church.<sup>631</sup> The Chamber recalls, however, that P-353 was not from Bogoro<sup>632</sup> and notes that Witness V-2 stated that there was another church called CECA 20 in the village.<sup>633</sup> Insofar as there were other places of worship of the same denomination there, the Chamber considers that it cannot be ruled out that the photograph of the CECA 20 church, which the Defence showed to the witness, was not of the church mentioned in her testimony.<sup>634</sup> Accordingly, the Chamber cannot find fault with the witness's inability to identify the building.

337. Lastly, the Chamber is of the view that P-353's claim to have attended a school in Bogoro in 2002 should also be scrutinised insofar as credible witnesses stated that the schools in Bogoro closed or were moved to Bunia in 2001.<sup>635</sup> However, P-353's account shows that her schooling in Bogoro was of fairly short duration. Although the witness claimed that she studied there, she also stated that her sister asked her to stop and that, owing to unrest, the school closed for several months before the attack of 24 February 2003.<sup>636</sup>

338. In conclusion, the Chamber recalls that P-353 is a vulnerable witness who did her utmost to try to forget the events she experienced in Bogoro on 24 February 2003 and their tragic consequences. In particular, she stated that out of shame she systematically avoided any conversation on the attack;<sup>637</sup> she wished never to return to the village;<sup>638</sup> her father had asked her never to bring up what had happened;<sup>639</sup> and she put great effort into erasing these painful events from her

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<sup>631</sup> [Site Visit Report](#).

<sup>632</sup> P-353, T. 215, p. 34.

<sup>633</sup> V-2, T. 232, p. 40.

<sup>634</sup> P-353, T. 215, p. 34.

<sup>635</sup> V-2, T. 232, pp. 56-57; P-166, T. 226, p. 33.

<sup>636</sup> P-353, T. 215, pp. 34, 36-37 and 39-40.

<sup>637</sup> P-353, T. 215, p. 27.

<sup>638</sup> P-353, T. 215, p. 21

<sup>639</sup> P-353, T. 215, p.27

memory.<sup>640</sup> Given the circumstances, the Chamber considers that the inaccuracies noted in P-353's evidence only reflect her difficulty in recalling in court events that she had endeavoured to forget in order to survive in a particularly harsh social environment, which is hostile to women who have been raped.

### **c) Conclusion**

339. The Chamber considers Witness P-353 is credible. The consistency of her testimony and the precision of the replies furnished unequivocally attest to her reliability.

## **C. VICTIM CALLED AS A WITNESS**

### **1. V-2**

#### **a) Main subject areas covered by Witness V-2's testimony**

340. Witness V-2, who has participating victim status, testified before the Chamber on 21, 22 and 23 February 2011.<sup>641</sup>

341. In February 2003, V-2 lived in Bogoro with her husband and four of her children.<sup>642</sup> She lived in a straw house<sup>643</sup> and owned a business<sup>644</sup> and some cattle.<sup>645</sup>

342. In late 2002, V-2 heard rumours among the inhabitants of Bogoro of an imminent attack on the village by the Lendu and Ngiti.<sup>646</sup> She stated that she had been informed of it by her own parents<sup>647</sup> and that the rumours were spread by

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<sup>640</sup> P-353, T. 215, p. 40.

<sup>641</sup> T. 231-T. 233.

<sup>642</sup> V-2, T. 231, pp. 15 and 27; T. 232, pp. 10 and 48.

<sup>643</sup> V-2, T. 231, p. 46.

<sup>644</sup> V-2, T. 231, p. 15.

<sup>645</sup> V-2, T. 231, p. 46.

<sup>646</sup> V-2, T. 231, pp. 21-27; T. 232, p. 24.

<sup>647</sup> V-2, T. 231, pp. 23, 25 and 50; T. 232, p. 44; T. 233, pp. 9-10.

women who came to the market in Bogoro.<sup>648</sup> On the basis of what she had been told, the witness stated that Germain Katanga was among those responsible for the attack on the village. The Chamber notes, however, that she received this information from a group of women “[TRANSLATION] who came from Beni”<sup>649</sup> to visit Bogoro market and who said, “[TRANSLATION] Germain Katanga [was] training young people in Gety”.<sup>650</sup>

343. V-2 stated that on the day of the attack she had been woken up by gunfire at around 5 a.m.<sup>651</sup> She then left her house with her husband and children, to take refuge at the camp.<sup>652</sup> Having realised that there was no way to get there, they headed for Waka mountain and were then forced to separate.<sup>653</sup>

344. At around 6 a.m.,<sup>654</sup> before she could reach Waka mountain, the attackers caught up with her.<sup>655</sup> She then felt a machete strike her and saw that her child had been savagely killed.<sup>656</sup> She kept running and hid in the bush<sup>657</sup> before continuing towards Bunia.<sup>658</sup>

## b) Analysis

345. The Chamber considers V-2’s testimony coherent and detailed. She volunteered useful clarifications and rarely contradicted herself when giving evidence. She also declined to answer certain questions when she felt unqualified to do so,<sup>659</sup> which, *prima facie*, attests to her credibility.

<sup>648</sup> V-2, T. 231, pp. 23, 50-51; T. 232, p. 24; T. 233, p. 9.

<sup>649</sup> V-2, T. 231, p. 50.

<sup>650</sup> V-2, T. 232, pp. 24-25. See also T. 231, pp. 50-51; T. 232, 43-44.

<sup>651</sup> V-2, T. 231, p. 28.

<sup>652</sup> V-2, T. 231, pp. 28-30; T. 232, p. 38.

<sup>653</sup> V-2, T. 231, pp. 29 and 31; T. 232, p. 38.

<sup>654</sup> V-2, T. 231, p. 32.

<sup>655</sup> V-2, T. 231, pp. 31-33 and 36.

<sup>656</sup> V-2, T. 231, pp. 31, 36 and 40.

<sup>657</sup> V-2, T. 231, p. 41.

<sup>658</sup> V-2, T. 231, p. 42.

<sup>659</sup> See for example, V-2, T. 232, p. 38.

346. In its Closing Brief, the Defence nevertheless expressed doubt that V-2 was present during the attack on Bogoro.<sup>660</sup> However, the Chamber has no reason to doubt that she was in Bogoro in 2003, as confirmed by Witness V-4.<sup>661</sup> Furthermore, Witness V-2 correctly stated that she had obtained a death certificate for her child in Kansenyi, since that is where the office for the *collectivité* was located.

347. The Defence also observed that V-2 was unable to remember the name of the business she had been running in Bogoro at the material time.<sup>662</sup> On this point the Chamber notes that, although V-2 claimed to have run it for several months,<sup>663</sup> the business was only one of her activities, in addition to keeping livestock<sup>664</sup> and tending the fields,<sup>665</sup> and one she had only recently started in the context of the war.<sup>666</sup> It further notes that V-2 gave detailed information about her business, stating its location and nature of its clientele.<sup>667</sup> The Chamber does not therefore hold this lapse of memory against the witness.

348. The Defence further noted that V-2 was unable to name the commander of the military camp in Bogoro at the material time.<sup>668</sup> In the Chamber's view, this has no bearing on the witness's credibility, since she simply told the court that she did not know his name because she had no interest in military matters.<sup>669</sup>

349. The Defence further cast doubt as to the witness's description of her flight during the 24 February 2003 attack. It specifically argued that it made little sense, given the location of V-2's house, for her to have fled towards the Institute. In its submission, she should have avoided the fighting by taking the Bunia road

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<sup>660</sup> [Defence Closing Brief](#), paras. 419-422.

<sup>661</sup> See Annex E.

<sup>662</sup> [Defence Closing Brief](#), para. 421.

<sup>663</sup> V-2, T. 232, p. 17.

<sup>664</sup> V-2, T. 231, p. 46.

<sup>665</sup> V-2, T. 231, p. 48.

<sup>666</sup> V-2, T. 232, p. 17.

<sup>667</sup> V-2, T. 231, p. 48.

<sup>668</sup> [Defence Closing Brief](#), para. 422.

<sup>669</sup> V-2, T. 232, p. 23.

instead. Nonetheless, the Chamber finds the explanation offered by V-2, who recalled that the civilians usually went to the Institute in the event of an attack,<sup>670</sup> to be entirely satisfactory and corroborated by V-4's evidence.<sup>671</sup>

350. The Defence lastly refuted the claim that, during a trip to Bogoro market in December 2002 and January 2003, Ngiti women and women from the north had forewarned the witness of preparations for an attack on Bogoro, commanded by Germain Katanga and Mathieu Ngudjolo.<sup>672</sup> Since these were mere rumours, the Chamber affords them only limited probative value.

351. Finally, as regards the imminence of an attack, of which the witness learnt through her parents on the basis of information they had received from a relative who was called to give evidence, the Chamber notes that that relative denied having conveyed any information whatsoever on the preparations for the attack on Bogoro.<sup>673</sup> Whilst not calling V-2's good faith into question, the Chamber cannot therefore rely on this part of her testimony.

### **c) Conclusion**

352. Having completed its analysis, the Chamber considers that Witness V-2 is credible and that it can rely on her testimony, in particular on how the attack on Bogoro proceeded.

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<sup>670</sup> V-2, T. 232, p. 39.

<sup>671</sup> V-4, T. 233, pp. 61-62; T. 234, pp. 3-4.

<sup>672</sup> [Defence Closing Brief](#), paras. 407-408 and 410-412; See also [Closing Brief of the Defence for Mathieu Ngudjolo](#), para. 709.

<sup>673</sup> See Annex E.

## D. DEFENCE WITNESSES

### 1. D03-88

#### a) Main subject areas covered by Witness D03-88's testimony

353. Witness D03-88 testified before the Chamber on 26, 29 and 30 August 2011, 1 September 2011, from 5 to 9 September and on 12 September 2011.<sup>674</sup> He stated that he had held the position of customary chief of Bedu-Ezekere *groupement* from 2001 to 2005.<sup>675</sup>

354. Although called by the Defence for Mathieu Ngudjolo, it should be recalled that D03-88 had met with the Office of the Prosecutor on three occasions, first in Bunia in 2009,<sup>676</sup> then in Entebbe, Uganda, from 19 to 21 March 2009,<sup>677</sup> and during a visit to Zombe on 10 July 2009,<sup>678</sup> by the then Prosecutor of the Court, Mr Moreno-Ocampo.

355. According to the witness, scores of people displaced by the war left the places where they lived and sought refuge in Zombe, Bedu-Ezekere *groupement*.<sup>679</sup> Such was the case of the APC battalion led by Commander Faustin. D03-88 underscored that Zombe was attacked daily, in both the morning and afternoon,<sup>680</sup> and that during the last attack, the UPC and UPDF laid many anti-personnel mines.<sup>681</sup>

356. At the invitation of the RCD-ML authorities,<sup>682</sup> the witness allegedly went to Beni in late 2002 with three other persons from Zombe.<sup>683</sup> En route, he spent

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<sup>674</sup> T. 299-T. 308.

<sup>675</sup> D03-88, T. 299, p. 13; T. 303, pp. 3-4.

<sup>676</sup> D03-88, T. 302, pp. 17-18.

<sup>677</sup> D03-88, T. 302, p. 61; T. 308, p. 10.

<sup>678</sup> D03-88, T. 299, p. 19; T. 303, p. 4; T. 308, p. 10.

<sup>679</sup> D03-88, T. 299, p. 43; T. 303, p. 21.

<sup>680</sup> D03-88, T. 299, p. 49.

<sup>681</sup> D03-88, T. 299, pp. 50-52 and 61.

<sup>682</sup> D03-88, T. 301, p. 36.

<sup>683</sup> D03-88, T. 301, p. 32.

between one and two weeks in Aveba,<sup>684</sup> where he allegedly stayed with Germain Katanga.<sup>685</sup> D03-88 stated that there the members of his delegation wrote a letter to alert the Congolese Government to the difficulties faced by the Lendu in Djugu territory.<sup>686</sup>

357. D03-88 stated that he then left for Beni with Germain Katanga<sup>687</sup> but, unlike Germain Katanga, he did not attend meetings held for a military purpose.<sup>688</sup> He allegedly learnt, however, that the “[TRANSLATION] council” had decided to cut the supplies from Uganda to the UPC by taking control of Bogoro.<sup>689</sup> Having returned to Zumbe with 12 sacks of ammunition, each containing 100 bullets,<sup>690</sup> the witness allegedly prohibited the population of Zumbe from taking part in the attack on Bogoro.<sup>691</sup>

#### **b) Analysis**

358. D03-88 led Bedu-Ezekere *groupement* from 2001 to 2005, and as such can be considered particularly well-qualified to testify to the workings of the *groupement* and the events that took place there between August 2002 and March 2003.<sup>692</sup>

359. The Chamber notes that the Prosecution cast doubt as to the reliability of D03-88’s testimony concerning Mathieu Ngudjolo’s responsibility but acknowledged that the witness had provided useful information on Germain Katanga’s responsibility. As the Prosecution succinctly put it in its Closing Brief, D03-88 had “[TRANSLATION] provided credible information about Katanga, but his testimony

<sup>684</sup> D03-88, T. 301, p. 40; T. 304, p. 37.

<sup>685</sup> D03-88, T. 304, p. 40.

<sup>686</sup> EVD-D03-00098: Grievance Letter; D03-88, T. 300, pp. 51-52; T. 301, pp. 32, 41 and 46.

<sup>687</sup> D03-88, T. 304, p. 48.

<sup>688</sup> D03-88, T. 301, pp. 57-58.

<sup>689</sup> D03-88, T. 306, p. 28.

<sup>690</sup> D03-88, T. 301, pp. 61 and 63.

<sup>691</sup> D03-88, T. 300, pp. 62-63; T. 306, pp. 25-29.

<sup>692</sup> [Closing Brief of the Defence for Mathieu Ngudjolo](#), para. 239.

about Ngudjolo is biased".<sup>693</sup> The Prosecution recalled that the witness knew Mr Ngudjolo very well and that he openly defended him.<sup>694</sup>

360. The Defence for Germain Katanga, meanwhile, did not call into question the reliability of the information given by D03-88. It even acknowledged that upon returning to Beni the witness left again for Zumbe with a handful of ammunition,<sup>695</sup> whereas the Accused had claimed that he had not granted his request for ammunition.<sup>696</sup>

361. The Chamber notes that, throughout his testimony, D03-88 appeared quite natural, coherent and clear, and was quick to specify the extent of his knowledge in response to questions that did not directly concern Mathieu Ngudjolo's responsibility or the position he held before 24 February 2003. Such was the case, for example, for the questions on his journey to Beni, the set-up in Walendu-Bindi and Bedu-Ezekere, Germain Katanga's status and the dynamics of Lendu and Hema relations.

362. However, D03-88 appeared much more evasive, often replying with questions, and at times even seemed defensive when answering questions that directly concerned Mathieu Ngudjolo, or just himself. The Chamber has already ruled on the probative value of the witness's statements regarding Mathieu Ngudjolo's role when it handed down judgment against him.

### **c) Conclusion**

363. The Chamber considers that D03-88's testimony is on the whole credible as regards Germain Katanga's status in Aveba and Walendu-Bindi *collectivité*, and in particular as regards the trips to Beni and the matters of the receipt, storage and distribution of weapons and ammunition.

<sup>693</sup> [Prosecution Closing Brief](#), para. 363.

<sup>694</sup> [Prosecution Closing Brief](#), para. 363.

<sup>695</sup> [Defence Closing Brief](#), para. 1210.

<sup>696</sup> D02-300, T. 322, pp. 27-29.

## 2. D02-176

### a) Main subject areas covered by Witness D02-176's testimony

364. Witness D02-176 testified on 6, 9 and 10 May 2011.<sup>697</sup>

365. In February 2003, the witness lived in Bogoro and was part of the UPC troops there.<sup>698</sup> He asserted that the UPC soldiers there learnt before 24 February 2003, from radio interceptions, that an attack was to be launched against Bogoro.<sup>699</sup> The operator had heard the attackers say: “[TRANSLATION] People of Bogoro, be prepared; we are going to come and work our fields there, in Bogoro.”<sup>700</sup>

366. On the day of the attack, D02-176 was living in a small straw house in the camp.<sup>701</sup> After sustained fighting, the witness noticed, at around 10-10.30 a.m., that the enemy had entered the camp.<sup>702</sup> The commander then announced to them that they had lost the battle and that everyone should flee.<sup>703</sup>

367. The UPC soldiers had instructed the civilians to take refuge in the camp in the event of attacks.<sup>704</sup> On 24 February 2003, D02-176 saw babies, children, women and elderly people among them.<sup>705</sup> He stated that, when the attackers entered the camp, they killed many of those who were inside the classrooms.<sup>706</sup>

368. D02-176 stated that he lost many close family members that day.<sup>707</sup> According to him, the 24 February 2003 attack was on a wide scale.<sup>708</sup> The attackers were more numerous, better organised and better armed than on the occasion of an

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<sup>697</sup> D02-176, T. 255-T. 257.

<sup>698</sup> D02-176, T. 255, pp. 14-15 and 23.

<sup>699</sup> D02-176, T. 255, p. 26.

<sup>700</sup> D02-176, T. 255, pp. 26-27.

<sup>701</sup> D02-176, T. 255, pp. 31 and 34-35.

<sup>702</sup> D02-176, T. 255, p. 36.

<sup>703</sup> D02-176, T. 255, p. 36.

<sup>704</sup> D02-176, T. 256, p. 31.

<sup>705</sup> D02-176, T. 256, p. 32.

<sup>706</sup> D02-176, T. 256, p. 34.

<sup>707</sup> D02-176, T. 255, p. 19; T. 256, pp. 12-13. See Annex E.

<sup>708</sup> D02-176, T. 256, p. 46.

earlier attack on 10 February 2003 and even better armed than UPC troops.<sup>709</sup> D02-176 further claimed to have heard the name Germain Katanga for the first time in May 2003.<sup>710</sup>

### **b) Analysis**

369. The Chamber notes that the testimonies of D02-176 and P-287<sup>711</sup> diverge considerably on several key points.

370. According to P-287, Witness D02-176 never joined the UPC forces and was not a soldier.<sup>712</sup> P-287 further stated that D02-176 lived in a house in the village of Bogoro, and not in the camp.<sup>713</sup>

371. In the Chamber's view, the consistency of D02-176's account confirms that he was a UPC soldier at the material time. Not only did he demonstrate a familiarity with the UPC's military activities in Bogoro,<sup>714</sup> but he was also able to explain in detail the action he took on 24 February 2003 to defend his position.<sup>715</sup> The Chamber therefore considers that the witness's claim to have been a UPC soldier engaged in the defence of Bogoro on 24 February 2003 is credible.

372. Furthermore, P-287 stated that she lost two children in the attack on Bogoro,<sup>716</sup> whereas D02-176 claimed that one of them had in fact died before the events of 24 February 2003.<sup>717</sup> The Chamber notes that P-287's statements to United Nations staff in 2003 differ on this point from her in-court testimony. When interviewed by the MONUC investigators, P-287 stated that she had lost only one child in the

<sup>709</sup> D02-176, T. 256, p. 49.

<sup>710</sup> D02-176, T. 255, pp. 15 and 39.

<sup>711</sup> D02-176, T. 255, p. 18. See Annex E.

<sup>712</sup> See Annex E.

<sup>713</sup> See Annex E.

<sup>714</sup> See, *inter alia*, D02-176, T. 255, pp. 26 and 31; T. 256, pp. 45 and 49-50.

<sup>715</sup> D02-176, T. 255, pp. 34-37.

<sup>716</sup> Annex E.

<sup>717</sup> D02-176, T. 255, pp. 18-19.

attack on Bogoro.<sup>718</sup> Taking note of this marked change in the witness's account, the Chamber cannot find fault with Witness D02-176 on account of inconsistencies in P-287's statements.

373. The Chamber notes that the parties and participants considered that D02-176, whom, moreover, the Prosecution referred to as the "[TRANSLATION] 25<sup>th</sup> Prosecution witness",<sup>719</sup> had given a reliable account of the battle of Bogoro.

374. In its Closing Brief, the Prosecution nevertheless finds it surprising that D02-176 had not heard the name Germain Katanga until May 2003.<sup>720</sup> The Chamber is of the opinion that he strains credibility in this regard, inasmuch as in handing down judgment against Mathieu Ngudjolo the Chamber considered him to be particularly well placed to state which military commanders were at enemy positions, given his role in the UPC forces in Bogoro.<sup>721</sup>

### c) Conclusion

375. The Chamber is of the view that D02-176 is generally credible and that it can rely on his testimony in the present case, in particular regarding the account he gave, as a UPC soldier, of the organisation of the attack on Bogoro, the way in which it proceeded and its exceptional scale.

376. As to P-287, the Chamber takes note of the inconsistencies between the statements she gave to the MONUC investigators and in court, as well as the inconsistencies between her testimony and that of D02-176, whom it finds credible. However, it does not consider that these inconsistencies significantly undermine her credibility. Save for the points affected by inconsistencies, the Chamber considers that it can rely on P-287's account of the events which took place during the 24 February 2003 attack.

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<sup>718</sup> See Annex E.

<sup>719</sup> [Prosecution Closing Statements, T. 336](#), p. 40.

<sup>720</sup> [Prosecution Closing Brief](#), para. 265.

<sup>721</sup> [Ngudjolo Judgment](#), para. 432.

### 3. D02-228

#### a) Main subject areas covered by Witness D02-228's testimony

377. Witness D02-228, Pierre Célestin Iribi Mbodina, known as Pitchou, aged 29 at the material time, testified before the Chamber on 18, 19, 20 and 21 April and 2 May 2011.<sup>722</sup>

378. He had been incarcerated in Makala prison in Kinshasa and detained since 9 March 2005<sup>723</sup> when he came to testify at the Defence's request under a cooperation agreement with the DRC.<sup>724</sup>

379. On 12 April 2011, before his testimony began, Counsel for D02-228 moved the Chamber to order that his client be "presented" to the Dutch authorities for the purposes of asylum and not to return him to the DRC immediately after his testimony.<sup>725</sup>

380. D02-228 testified that he was in Bunia at the time of Governor Lompondo's downfall in August 2002,<sup>726</sup> serving as an RCD-ML intelligence officer.<sup>727</sup> After two weeks, he fled by aeroplane to Beni<sup>728</sup> where he was appointed territorial director of intelligence in or around early December 2002.<sup>729</sup>

381. According to D02-228, the FRPI was founded in October 2002 in Beni<sup>730</sup> at the end of a two-day meeting held at the Casino Hotel.<sup>731</sup> On this occasion, Floribert Ndjabu, Witness D02-236, was elected coordinator and Dr Adirodu appointed

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<sup>722</sup> T. 249-T. 253.

<sup>723</sup> D02-228, T. 249, p. 30.

<sup>724</sup> See Annex A.

<sup>725</sup> Duty Counsel, "Application for leave to present Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to the authorities of the Netherlands for the purposes of asylum", 12 April 2011, ICC-01/04-01/07-2830-Conf-tENG.

<sup>726</sup> D02-228, T. 249, pp. 42-43.

<sup>727</sup> D02-228, T. 249, p. 43.

<sup>728</sup> D02-228, T. 250, p. 61.

<sup>729</sup> D02-228, T. 249, pp. 43-44; T. 251, pp. 11-12.

<sup>730</sup> D02-228, T. 250, p. 52.

<sup>731</sup> D02-228, T. 249, p. 45.

himself FRPI spokesperson.<sup>732</sup> The two men's rival ambitions,<sup>733</sup> he alleged, prompted Floribert Ndjabu to create the FNI rather than bringing the prominent figures of Kpandroma into the FRPI.<sup>734</sup>

382. D02-228 stated that the Kinshasa government forged diplomatic and political ties with the RCD-ML that led to the creation of EMOI, a coalition of armed groups that initially consisted of the FAC and APC, and subsequently included the Mai Mai and the FRPI.<sup>735</sup>

383. According to that witness, the attack on Bogoro was organised by EMOI from Beni, North Kivu.<sup>736</sup> Although that Command Staff supplied logistical and human resources,<sup>737</sup> as a general rule no operation could take place without the approval of prominent local figures such as the fetish-priest Kakado.<sup>738</sup>

384. D02-228 stated that he met Germain Katanga for the first time in Beni in or around December 2002 when the Accused was on assignment in Beni to meet the RCD-ML authorities.<sup>739</sup> He stated that he himself travelled from Beni to Aveba on an aeroplane transporting APC officers, weapons and ammunition.<sup>740</sup> He emphasised that he had no further contact with the Accused until the Kampala peace talks in April 2003.<sup>741</sup> The witness informed the court that he had been told that Germain Katanga had been unable to take part in the attack on Bogoro as security issues had forced him to remain in Aveba.<sup>742</sup>

385. Lastly, the witness stated that he went to Kampala after the attack on Bogoro to take part in negotiations on the creation of the FIPI, an alliance of the FNI and

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<sup>732</sup> D02-228, T. 251, pp. 21, 24 and 61.

<sup>733</sup> D02-228, T. 250, pp. 53-54.

<sup>734</sup> D02-228, T. 252, pp. 71-72.

<sup>735</sup> D02-228, T. 249, pp. 60-61.

<sup>736</sup> D02-228, T. 250, p. 9.

<sup>737</sup> D02-228, T. 249, p. 61.

<sup>738</sup> D02-228, T. 252, pp. 64-65.

<sup>739</sup> D02-228, T. 250, p. 7.

<sup>740</sup> D02-228, T. 249, p. 64.

<sup>741</sup> D02-228, T. 251, pp. 58-59.

<sup>742</sup> D02-228, T. 250, p. 11; T. 252, p. 68.

other armed groups.<sup>743</sup> According to him, he travelled to Kampala at D02-236's behest, *inter alia*, to confirm, that the FRPI was the armed wing of the FNI.<sup>744</sup>

## b) Analysis

386. In its Closing Brief, the Prosecution cast doubt on the credibility of D02-228, specifically questioning whether he could usefully testify to the facts of the case.<sup>745</sup>

The Prosecution maintains that it is unlikely that EMOI would have tasked the witness with a supply mission, as he so claimed, given that he had no connection with that Command Staff or even with the APC. The Prosecution underscores in this regard that his role in intelligence or in defence within the FRPI did not allow him to participate in meetings on the planning of the attack on Bogoro.

387. Contrary to the Prosecution's submission, the Chamber notes a dual connection between D02-228 and the APC. As the RCD-ML territorial intelligence director, he held a prominent position, which necessarily brought him into contact with the APC leadership, the armed wing of the party. Further, his role in defence matters within the FRPI specifically required him to facilitate the integration of combatants who had taken refuge in Beni within APC ranks.<sup>746</sup>

388. As the witness was a specialist in intelligence matters, the Chamber is entitled to expect a high degree of detail from him. In this connection, and with regard to the operation concerning supplies to Aveba, it notes that the witness was able to state when it occurred,<sup>747</sup> list the APC commanders whom he accompanied at the time<sup>748</sup> and identify the key figures in Aveba who were present during his visit.<sup>749</sup> The Chamber also notes that the witness was able to state where in Beni the

<sup>743</sup> D02-228, T. 250, pp. 12-13.

<sup>744</sup> D02-228, T. 251, pp. 55-56.

<sup>745</sup> [Prosecution Closing Brief](#), paras. 609-612.

<sup>746</sup> D02-228, T. 251, p. 23.

<sup>747</sup> D02-228, T. 249, pp. 66-67.

<sup>748</sup> D02-228, T. 249, p. 67.

<sup>749</sup> D02-228, T. 252, pp. 70-71.

meetings to plan the attack on Bogoro were held,<sup>750</sup> list the local commanders who attended<sup>751</sup> and describe the content of a meeting with Colonel Aguru, Chief of Staff of EMOI.<sup>752</sup>

389. The Chamber therefore finds credible the witness's claim that he had a part in planning meetings in Beni and in the provision of APC troops and deliveries of weapons and ammunition to Aveba in late January 2003.

390. The Chamber considers that D02-228 provided valuable first-hand information on the founding of the FRPI, which he witnessed, FNI and FRPI relations, the structure of EMOI, the planning meetings held in Beni, EMOI's provision of supplies to Lendu and Ngiti positions and the proceedings of the Ituri Pacification Commission.

391. In its Closing Brief, the Prosecution drew the Chamber's attention to possible collusion between D02-228 and D02-236<sup>753</sup> and to the fact that D02-228 and Germain Katanga were acquainted, which could affect the credibility of the testimony.<sup>754</sup> In order to evaluate properly the significance of D02-228's testimony, the Chamber must make a determination on the weight to be given to the various aspects of the testimonies of those witnesses who may corroborate each other.

392. In this regard, the Prosecution regards any corroboration between Witnesses D02-228 and D02-236 with suspicion. It recalls that the two witnesses claimed to have lied when they told President Museveni that the FRPI was the armed wing of the FNI and, more specifically, the Prosecution maintained that D02-228 came to Kampala to lend support to the mendacious statements made by D02-236.<sup>755</sup> The Chamber notes that those claims fall within the strategically crucial context of

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<sup>750</sup> D02-228, T. 250, p. 9.

<sup>751</sup> D02-228, T. 252, pp. 57-58.

<sup>752</sup> D02-228, T. 252, p. 60.

<sup>753</sup> [Prosecution Closing Brief](#), paras. 739-743.

<sup>754</sup> [Prosecution Closing Brief](#), para. 609.

<sup>755</sup> [Prosecution Closing Brief](#), para. 742.

preparations for the Ituri Pacification Commission. For D02-228<sup>756</sup> and D02-236,<sup>757</sup> it was a matter of specifically convincing the Ugandan Head of State that the Lendu were politically united so as to ensure their optimal representation in the future running of Ituri. The Chamber observes, however, that when testifying before the Court, the two witnesses were speaking in circumstances very different from a political forum, since they were under oath.

393. Moreover, it should be recalled that, although the Registry took measures to isolate the witnesses to prevent them from conferring during their journey to and stay in The Hague before giving evidence, the two witnesses had been held in the same Congolese prison for several years in conditions worlds apart from those of the detention centre in The Hague and that they have had a close relationship for a long time. Their closeness requires the Chamber to treat any possible corroboration between their evidence on a case-by-case basis and with the utmost circumspection.

394. Lastly, the Prosecution considered D02-228 to be very close to Germain Katanga, having lived with him during a stay in Aveba and that he was also detained with the Accused for around two years in Kinshasa.<sup>758</sup> Such closeness, in the view of the Prosecution, completely discredits his testimony and any corroboration of the Accused's evidence in particular. The Chamber notes that D02-228 stated that he lived for no more than two weeks in Aveba, near Germain Katanga's house.<sup>759</sup>

395. Nevertheless, a comparison of the two testimonies shows certain divergences. First, D02-228 unhesitatingly claimed that Germain Katanga had taken part in the battle of Mandro,<sup>760</sup> which the Accused denied in court.<sup>761</sup> Furthermore, the

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<sup>756</sup> D02-228, T. 250, pp. 14-15.

<sup>757</sup> D02-236, T. 247, pp. 23-24; T. 246, p. 23.

<sup>758</sup> [Prosecution Closing Brief](#), para. 609 and footnote 2056; D02-300, T. 319, p. 64; D02-236, T. 246, p. 58.

<sup>759</sup> D02-228, T. 250, pp. 21-22.

<sup>760</sup> D02-228, T. 252, p. 25.

<sup>761</sup> D02-300, T. 318, p. 34.

witness's account of the signing of the "Agreement to End the Hostilities" differs from that given by Germain Katanga in that the witness claimed that MONUC insisted that they sign at the end of the document,<sup>762</sup> whereas the Accused maintained that General Kale Kayihura asked him to sign and that he obeyed on condition that D02-228 also signed.<sup>763</sup> Therefore the Chamber considers that the mere fact that D02-228 and Germain Katanga had been acquainted does not particularly affect D02-228's credibility.

### c) Conclusion

396. The Chamber finds Witness D02-228 credible. However, given the close ties between that witness and D02-236, it underscores that any corroboration between their testimonies must be treated with caution.

## 4. D02-236

### a) Main subject areas covered by Witness D02-236's testimony

397. Witness D02-236, who was called by both Defence teams, testified before the Chamber on 30 March and 5, 6, 8, 13, 14 and 15 April 2011.<sup>764</sup> Before giving evidence to the Chamber, he had been questioned as a suspect by the Office of the Prosecutor on 18 and 19 June 2007.<sup>765</sup>

398. D02-236 came to testify under a cooperation agreement with the DRC, which was concluded whilst he was incarcerated in Makala prison, Kinshasa, where he had been detained since 27 February 2005.<sup>766</sup> He was one of the three witnesses who were temporarily transferred to the Court.

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<sup>762</sup> D02-228, T. 250, p. 19.

<sup>763</sup> D02-300, T. 318, pp. 43 and 46.

<sup>764</sup> T. 242-T. 248.

<sup>765</sup> D02-236, T. 242, p. 29; T. 246, pp. 64, 69 and 71.

<sup>766</sup> D02-236, T. 242, p. 32. See [Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile" \(articles 68 and 93\(7\) of the Statute\), 9 June 2011, ICC-01/04-01/07-3003-tENG](#), para. 30.

399. During his testimony, Counsel for D02-236 moved the Chamber to order the presentation of D02-236 and the two other detained witnesses to the Dutch authorities for the purposes of asylum. Counsel argued that the local protective measures proposed by the Registry were insufficient in view of their situation, and moved the Chamber not to return them to the DRC immediately after their testimony.<sup>767</sup>

400. Witness D02-236 is 42 years of age and a Lendu politician.<sup>768</sup> He began his political career in the RCD-ML,<sup>769</sup> then in September and October 2002 took part in the first meetings that led to the creation of the FRPI.<sup>770</sup>

401. At the behest of Colonel Aguru, EMOI Chief of Staff, Witness D02-236 took part in supplying weapons and ammunition from Beni to Mongbwalu and Rethy in Ituri.<sup>771</sup> A second assignment took the witness to Kpandroma, and he was a member of a delegation invited to Uganda by its President, Mr Museveni. D02-236 dates the beginnings of the FNI in Kpandroma to that time, November 2002.<sup>772</sup> He stated that he did not have a direct part in its founding, but was elected President in late December of the same year.<sup>773</sup>

402. Moreover, D02-236 said that he travelled to Uganda to take part in the peace negotiations held in Arua and then in Kampala, where a new platform called the FIPI was launched.<sup>774</sup> As FNI President, he subsequently took part in meetings

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<sup>767</sup> Duty Counsel, "Application for leave to present Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to the authorities of the Netherlands for the purposes of asylum", 12 April 2011, ICC-01/04-01/07-2830-Conf-tENG.

<sup>768</sup> D02-236, T. 242, pp. 20 and 28.

<sup>769</sup> In court, the witness at first stated that he had joined that political party in 2001 (D02-236, T. 247, p. 35), then that he became a member in 2000 (D02-236, T. 248, p. 29).

<sup>770</sup> See, in particular, D02-236, T. 242, pp. 38-39 and 50.

<sup>771</sup> D02-236, T. 242, pp. 47-50.

<sup>772</sup> D02-236, T. 242, p. 52; T. 243, p. 9; T. 245, pp. 25 and 45-50.

<sup>773</sup> D02-236, T. 243, pp. 9-10; T. 245, p. 68.

<sup>774</sup> D02-236, T. 243, pp. 10-12.

held in Dar es Salaam, Tanzania, in February 2003 that were attended, *inter alia*, by President Joseph Kabila.<sup>775</sup>

403. The witness testified that he signed the Agreement to End the Hostilities in Ituri on behalf of the FNI in Bunia on 18 March 2003,<sup>776</sup> and that he was involved in the work of the Ituri Pacification Commission.<sup>777</sup> He allegedly attempted to forge closer ties between the FRPI and the FNI, but to no avail.<sup>778</sup>

404. The witness specified that he had not met Germain Katanga until August 2003 in Bunia,<sup>779</sup> at a CCGA meeting,<sup>780</sup> although he acknowledged that previous attempts at contact had been made with a view to creating an FRPI command staff, but without success.<sup>781</sup>

#### **b) Analysis**

405. D02-236, who wished to testify in French, expressed himself with ease and gave a precise account of events, and proved to be very capable, owing, in particular, to his education and professional experience, as well as his in-depth understanding and firm grasp of political and legal language.

406. The Chamber notes that his testimony was, in the main, coherent, but that he tended to make use of effective rhetorical techniques to avoid answering questions where necessary. Moreover, it seems to the Chamber that D02-236's version of events tended above all to protect his own interests and that, in any event, it was strategically directed.

407. Thus, the Chamber had occasion to observe that the witness, who undoubtedly grasps the political issues at stake in a given situation, was capable

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<sup>775</sup> D02-236, T. 243, pp. 13-14.

<sup>776</sup> D02-236, T. 243, pp. 28-29; T. 246, p. 42. See also EVD-D03-00044: Agreement to End the Hostilities in Ituri.

<sup>777</sup> D02-236, T. 243, p. 30.

<sup>778</sup> D02-236, T. 246, pp. 38-39 and 44-45; T. 247, pp. 23-24.

<sup>779</sup> D02-236, T. 242, p. 29; T. 243, p. 29.

<sup>780</sup> D02-236, T. 243, pp. 34-35.

<sup>781</sup> D02-236, T. 243, p. 35; T. 246, p. 45.

of taking unilateral action out of pure opportunism. It noted that on two occasions D02-236 knowingly misrepresented the truth. As regards the claim of responsibility for the attack on Bogoro, D02-236 explained in court that he heard of the attack one or two days after the event<sup>782</sup> and that he then gave an interview to Radio France Internationale (RFI).<sup>783</sup> He stated that anything that could contribute to destroying the UPC had to be welcomed and this was why he had made the false claim.<sup>784</sup>

408. Similarly, during his testimony the witness demonstrated that the protection of his own interests could take precedence over his undertaking to tell the truth. Thus, his statements regarding the presence of child soldiers within the FNI cannot not under any circumstances be considered credible. D02-236 stated that he had not recruited child soldiers and that the FNI had never had a military training centre. However, at the Prosecution's request, a video was shown of a meeting between that witness and a journalist during a parade of children at his home in Kpandroma in June 2003.<sup>785</sup> That notwithstanding, D02-236 continued to assert that he had never recruited children or seen a military training centre in Kpandroma and, among the explanations that he gave for the presence of children in the video, he said that one of the children had in fact belonged to a group of orphans who would keep coming back to the soldiers as soon as they were chased away.<sup>786</sup> The Chamber is not satisfied by such explanations and considers the witness's credibility to be affected on this point.

409. As regards his statements regarding the role played by the Kinshasa authorities and EMOI in planning the attack on Bogoro, the Chamber cannot consider that the version of the events that he gave in court was entirely fabricated with a view solely to his testimony before the Court. In this connection,

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<sup>782</sup> D02-236, T. 243, p. 27.

<sup>783</sup> D02-236, T. 243, p. 25.

<sup>784</sup> D02-236, T. 248, p. 26.

<sup>785</sup> D02-236, T. 246, pp. 74-76 and 79-81.

<sup>786</sup> D02-236, T. 246, pp. 82-83; T. 247, pp. 4-5.

the Chamber recalls that D02-236 wrote several documents in 2007 that expounded on the main subjects covered by his testimony,<sup>787</sup> whether on EMOI's role and activities, the meetings in February 2003 in Dar es Salaam, and the fact that "[TRANSLATION] at no point have [the] Armed Groups of Ituri gone it alone".<sup>788</sup> Therefore, his testimony on these various points must on the whole be considered credible.

410. However, the Chamber considers the witness was unreliable, when, after a particularly unclear line of argument,<sup>789</sup> he claimed not to recognise his signature on the document entitled "[TRANSLATION] FNI proposals for the establishment of the Ituri Pacification Commission" dated 13 March 2003.<sup>790</sup> Similarly, the Chamber has reservations about D02-236's assertions, also advanced with great difficulty, that the FNI did not begin to look for ways to arm itself until March 2003.<sup>791</sup>

### c) Conclusion

411. In the Chamber's view, a large part of D02-236's testimony may be considered credible as he was an informed observer of a number of events in Ituri and, furthermore, could give a detailed account of many of them in court.

412. Referring to its analysis of D02-228's credibility, the Chamber recalls that it will consider any corroboration between D02-236 and the latter witness with caution.

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<sup>787</sup> EVD-OTP-00233: Letter written by D02-236; EVD-OTP-00234: Report on the general situation in Ituri dated November 2003; EVD-OTP-00230: Memorandum addressed to the Minister of Justice and Keeper of the Seals dated 31 January 2007.

<sup>788</sup> EVD-OTP-00230: Memorandum addressed to the Minister of Justice and Keeper of the Seals dated 31 January 2007 (DRC-OTP-0172-0012).

<sup>789</sup> D02-236, T. 246, p. 39; T. 246, p. 41.

<sup>790</sup> EVD-OTP-00252: Letter signed by D02-236.

<sup>791</sup> D02-236, T. 247, pp. 61-62.

## 5. D02-350

### a) Main subject areas covered by Witness D02-350's testimony

413. Witness D02-350 testified before the Chamber on 2 and 3 May 2011.<sup>792</sup> Incarcerated in Makala prison, Kinshasa, at the time,<sup>793</sup> he came to testify at the request of the Defence under a cooperation agreement concluded with the DRC.<sup>794</sup> He confirmed that before his imprisonment he had been coordinator of the FPJC (*Front populaire pour la justice au Congo*) [Popular Front for Justice in the Congo], which, according to him, was a political and military opposition movement.<sup>795</sup>
414. On 12 April 2011, counsel for D02-350 moved the Chamber to order that his client be “[TRANSLATION] presented” to the Dutch authorities for the purposes of asylum and not to return him to the DRC immediately after his testimony.<sup>796</sup>
415. In 2002 D02-350 lived in Beni with Witnesses D02-236 and D02-228, who held posts in the RCD-ML.<sup>797</sup> According to him, the Iturian refugees in Beni were forced to accede to every demand of RCD-ML President Mbusa Nyamwisi.<sup>798</sup> He also stated that the FRPI was created after the MLC and UPC offensive against the APC.<sup>799</sup> Colonel Aguru, he alleged, gave weapons to the refugees who were at the Casino Hotel in Beni,<sup>800</sup> and Mbusa Nyamwisi set up the FRPI to replace the APC<sup>801</sup> and continue fighting, even though it had been decided at a meeting with the MLC and the UPC that hostilities had to cease.<sup>802</sup>

<sup>792</sup> T. 253-T. 254.

<sup>793</sup> D02-350, T. 253, p. 33.

<sup>794</sup> See Annex A.

<sup>795</sup> D02-350, T. 253, pp. 33-34.

<sup>796</sup> Duty Counsel, “*Requête tendant à obtenir présentations des témoins DRC-D02-P-0236 DRC-D02-P-0228 et DRC-D02-P-0350 aux autorités néerlandaises aux fins d’asile*”, 12 April 2011, ICC-01/04-01/07-2830-Conf.

<sup>797</sup> D02-350, T. 253, p. 40.

<sup>798</sup> D02-350, T. 253, p. 42; T. 254, pp. 21-22.

<sup>799</sup> D02-350, T. 253, pp. 37 and 39.

<sup>800</sup> D02-350, T. 253, p. 37; T. 254, p. 27.

<sup>801</sup> D02-350, T. 253, p. 43.

<sup>802</sup> D02-350, T. 254, p. 24.

416. D02-350 specified that Colonel Aguru led the operations to regain control of Bunia.<sup>803</sup> At a meeting, that officer apparently pointed out on a map the strategic positions occupied by UPC and UPDF troops – Bogoro, Mongbwalu, Nyakunde and Mahagi – which had to be recaptured to achieve that objective.<sup>804</sup>
417. D02-350 said that he had little information on the battle of Bogoro.<sup>805</sup> However, he stated that the attack had been prepared in Beni and that it was merely a stage in reconquering Bunia.<sup>806</sup>
418. Lastly, D02-350 allegedly met Germain Katanga for the first time in Beni, where, like all the commanders based in Ituri, Katanga had come to get supplies.<sup>807</sup> Germain Katanga was in charge in Aveba.<sup>808</sup> The witness also specified that those who were to attack Bogoro were based in the surrounding area, in particular in Kagaba, the place of which Yuda was in charge.<sup>809</sup> According to him, everyone had to conduct “[TRANSLATION] resistance operations” wherever they were: Yuda in Kagaba and Germain Katanga in Aveba.<sup>810</sup>

## **b) Analysis**

419. The Chamber notes that D02-350 stated that he had taken part in three meetings that took place at different stages during the conflict between the APC and the UPC:<sup>811</sup> he allegedly attended a first meeting held in September 2002 during which Colonel Aguru, EMOI Chief of Staff, used a map to locate the UPC positions that EMOI wanted to reconquer.<sup>812</sup> During a second meeting held just before Christmas 2002, Colonel Aguru handed out weapons from his home to

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<sup>803</sup> D02-350, T. 254, pp. 19-20.

<sup>804</sup> D02-350, T. 254, p. 19.

<sup>805</sup> D02-350, T. 253, p. 46.

<sup>806</sup> D02-350, T. 254, pp. 6-7.

<sup>807</sup> D02-350, T. 253, p. 43.

<sup>808</sup> D02-350, T. 253, p. 44.

<sup>809</sup> D02-350, T. 253, p. 46.

<sup>810</sup> D02-350, T. 253, p. 46.

<sup>811</sup> D02-350, T. 254, p. 17.

<sup>812</sup> D02-350, T. 254, pp. 17 and 19-20.

displaced Iturians in Beni, and to the witness, so that they could fight Jean-Pierre Bemba's troops.<sup>813</sup> D02-350 also allegedly took part in a meeting called by Mbusa Nyamwisi during which the latter, who had barely returned from negotiations in Équateur province, allegedly decided to launch an offensive to reconquer the whole of Ituri.<sup>814</sup>

420. The Prosecution alleged that D02-350 could not justifiably attend EMOI planning meetings, and it recalls in that connection that the witness was in charge only of supplying food for Beni's refugees.<sup>815</sup>

421. The Chamber underscores that D02-350 claimed to have gone voluntarily to Colonel Aguru's home to take part in EMOI activities<sup>816</sup> and that he had therefore not been invited to attend on account of the duties he performed. It also notes that D02-228 testified to D02-350's presence at meetings held in Beni<sup>817</sup> and that, in particular, he mentioned one where Colonel Aguru used a map of positions to be retaken in Ituri.<sup>818</sup> Although D02-228 maintained that D02-350 was not present at the second meeting at the Casino Hotel,<sup>819</sup> the Chamber notes, however, that D02-236 confirmed that D02-350 did attend.<sup>820</sup> In view of this evidence, the Chamber has no reason to doubt his credibility on that point and, therefore, his presence at the meetings to which he referred.

422. In the Prosecution's view, D02-350's credibility is also affected by the witness's defence of a point of view that it considers untenable in that the witness claims that Mbusa Nyamwisi temporarily renamed APC troops with the initialism "FRPI" to enable his soldiers to continue the fight to reconquer Ituri.<sup>821</sup>

<sup>813</sup> D02-350, T. 253, pp. 37-38; T. 254, p. 17.

<sup>814</sup> D02-350, T. 253, p. 44; T. 254, pp. 7 and 14-15.

<sup>815</sup> [Prosecution Closing Brief](#), para. 615.

<sup>816</sup> D02-350, T. 253, pp. 37-38.

<sup>817</sup> D02-228, T. 252, p. 57.

<sup>818</sup> D02-228, T. 252, pp. 55 and 60.

<sup>819</sup> D02-228, T. 251, pp. 17-18.

<sup>820</sup> D02-236, T. 242, p. 39.

<sup>821</sup> [Prosecution Closing Brief](#), para. 614.

423. In the Chamber's view, D02-350 is indeed the only witness to have furnished such an explanation, but nonetheless it cannot be considered implausible. Further, the originality of the claim would seem to rule out any collusion between that witness and Witnesses D02-236 and D02-228.

424. Lastly, according to the Prosecution, D02-350's reliability is also affected by a contradiction discerned between his previous statement and his testimony in court.<sup>822</sup> Whereas in his statement dated 25 March 2011 he stated that he knew nothing of Bogoro, in court he testified that Mbusa Nyamwisi promised to supply 200 weapons along with reinforcements.<sup>823</sup>

425. The Chamber notes, however, that D02-350 did repeat in court that he did not have detailed information on the attack on Bogoro, before presenting the information that he possessed on its planning.<sup>824</sup> The Chamber cannot, therefore, see in this a real contradiction that would affect the witness's credibility.

### **c) Conclusion**

426. It is the Chamber's view that Witness D02-350 is credible and that it can therefore rely on his testimony in the present case.

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<sup>822</sup> [Prosecution Closing Brief](#), para. 616.

<sup>823</sup> D02-350, T. 253, p. 44.

<sup>824</sup> D02-350, T. 253, p. 46; T. 254, pp. 6-7 and 12.

## VI. BACKGROUND

### A. INTRODUCTION

427. The Chamber recalls that the present case concerns events that occurred in Bogoro on 24 February 2003 in the context of an armed conflict taking place on the territory of the DRC, in Ituri district, Orientale province, during a period extending, according to the Pre-Trial Chamber, from August 2002 to May 2003.<sup>825</sup> The Chamber has already provided various clarifications as to the district's location.<sup>826</sup>

428. In this section of the Judgment, the Chamber will review the main events that occurred in that area, and will start, as did Trial Chamber I in *Lubanga*, not with an account of the DRC's colonial past,<sup>827</sup> but with May 1997. In that month, President Mobutu fell and Laurent-Désiré Kabila seized power, marking the creation of the new "Democratic Republic of the Congo" to replace "Zaire", the name previously used to denote the same territory.<sup>828</sup>

429. In undertaking such review, the Chamber has had regard not only to documentary evidence, of which the MONUC report on the events in Ituri and the Judgment of the International Court of Justice ("ICJ") of 19 December 2005 form two essential exhibits, but also to testimonies of witnesses considered broadly credible, in particular Witness P-12, member of a political and military party at the material time, Witness D02-236, a local political leader, and Witness D02-228, an intelligence officer posted to Beni during the period in question, all of whom personally experienced many of the political events in Ituri in 2002 and 2003 and who associated with several protagonists in the conflict. It should be

<sup>825</sup> [Decision on the confirmation of charges](#), para. 239.

<sup>826</sup> See "Section I(A) Location of Bogoro". See also EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-00336 to DRC-OTP-0129-00338, paras. 12-16).

<sup>827</sup> [Lubanga Judgment](#), para. 70.

<sup>828</sup> See, in particular, EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0682 and DRC-OTP-0180-0683 to DRC-OTP-0180-0684, paras. 29 and 36).

underscored that no expert witness was called by the parties or participants in the case at bar.

430. The Chamber's rehearsal of the main events in this section is, therefore, based on the body of the evidence on record. Thus, it is not limited solely to evidence undisputed by the parties and participants. Of note, however, is that the account which follows is not intended to pass in review the historical events which occurred in Ituri; it seeks merely to relate the main episodes as described in the case at bar by various witnesses or as recounted in the documentary evidence. Moreover, the witnesses to whom the Chamber makes reference were above all protagonists in the conflict, and their accounts can in no way be likened to that of an expert. The Chamber therefore wishes to emphasise that, with the exception of the part on methods of warfare, this section does not constitute a body of findings of fact: it is simply an account, inevitably incomplete, that seeks to facilitate understanding of some aspects of the situation in the DRC and, more particularly, of the conflict which raged in Ituri at that time.

431. Mention should be made in this regard that the Prosecution did not see fit to include a detailed exposition of the main events in Ituri in its Closing Brief. Such an account would, however, have greatly facilitated the Chamber's grasp and understanding, in particular of any points of divergence between the parties. It is commonly acknowledged that establishment of the facts is particularly difficult when it comes to the relationship that may have existed between States and armed groups, the frequently imprecise dates on which splits or shifts in alliances took place and the reasons for such about-turns.

432. At the outset, it should be recalled that the Second Congo War, which broke out on 2 August 1998, brought several States and rebel movements into conflict on the territory of the DRC. Various armed groups operating under different political umbrellas fought for control over Ituri. At no time during the material period was the central government in Kinshasa able to fully exercise its

sovereignty over that district,<sup>829</sup> although, as will be explained below, it engaged in a counter-offensive at the end of 2002.

433. Armed hostilities took place in Ituri between August 2002 and July 2003. They involved several armed groups or militias that formed the armed wings of certain political and military groups, including, *inter alia*, the *Union des patriotes congolais* [Union of Congolese Patriots] (“the UPC”), the *Front des nationalistes et intégrationnistes* [National Integrationist Front] (“the FNI”), the *Force de résistance patriotique en Ituri* [Patriotic Force of Resistance in Ituri] (“the FRPI”), the *Armée du peuple congolais* [Congolese People’s Army] (“the APC”) and the *Parti pour l’unité and la sauvegarde de l’intégrité du Congo* [Party for Unity and Safeguarding of the Integrity of Congo] (“PUSIC”). Those hostilities also involved a foreign national army, the Ugandan army (“the UPDF”).<sup>830</sup>

434. It should be further recalled that Ituri shares a border with South Sudan to the north and Uganda to the east, whereas North Kivu, which adjoins Ituri to the south, is bordered by Rwanda. Most of the district is separated from Uganda by Lake Albert, although there is a land border in the south formed by a very narrow strip of land at the mouth of the River Semliki. Moreover, this territory has immense assets in terms of forest and mineral resources, in particular gold and potentially oil. Indeed, the Kilo Moto gold deposit is one of the largest in the world.<sup>831</sup> The armed hostilities thus involved several actors, some of whom were international, as will be described below.

<sup>829</sup> On this point, see [Defence Closing Brief](#), para. 2.

<sup>830</sup> See, on this point, “Section IX(B)(3)(a)(v) UPDF intervention in the hostilities”.

<sup>831</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0338, para. 16). See also P-12, T. 199, p. 35.

## B. MAIN POLITICAL EVENTS AND INCIDENTS

### 1. Creation of the Democratic Republic of the Congo and the First Congo War (October 1996 to May 1997)

435. After the 1994 Rwandan genocide against the Tutsis and moderate Hutus and Paul Kagame's rise to head of the Rwandan State, several hundred thousand Hutu, including perpetrators of the genocide, had to flee from Rwanda to neighbouring Zaïre. The refugees gathered in camps on the Zaïre side of the Rwandan border, in particular in South Kivu, a region located to the south of Ituri.<sup>832</sup>

436. Overt support for the Hutu by then DRC President Mobutu Sese Seko is said to have provoked Rwanda and Uganda into creating an alliance against him and bringing Laurent-Désiré Kabila to power.<sup>833</sup> That alliance, the *Alliance des forces démocratiques pour la libération du Congo-Zaïre* [Alliance of Democratic Forces for the Liberation of Congo-Zaire] ("the AFDL"), would seem to have brought together anti-Mobutu forces in the Congo as well as Uganda and Rwanda,<sup>834</sup> who feared that the Hutu forces would regroup on their borders. According to some witnesses, the phenomenon of child soldiers began with the creation of the AFDL.<sup>835</sup>

437. Moreover, Germain Katanga explained that it was during fighting between the *Forces armées zaïroises* [Zairian Armed Forces] ("the FAZ") and the AFDL that his maternal uncle, who had brought him up and was living on an FAZ military base in Isiro, had been killed.<sup>836</sup> This incident prompted the Accused's departure

<sup>832</sup> [Defence Closing Brief](#), paras. 549.

<sup>833</sup> [Defence Closing Brief](#), para. 549. It should be noted that Uganda argued before the ICJ that it was the various rebel Congolese groups united under the AFDL banner and the Rwandan army who toppled President Mobutu's regime in Zaïre (EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo*, [DRC-OTP-0180-0683, para. 36]).

<sup>834</sup> P-267, T. 171, p. 33. See also the account of Witness D02-350, T. 253, p. 31, who as a young man joined "[TRANSLATION] the rebellion", the AFDL, for several weeks; D02-300, T. 314, p. 35.

<sup>835</sup> P-267, T. 171, p. 33; P-12, T. 197, p. 56.

<sup>836</sup> D02-300, T. 314, pp. 29-30.

to Walendu-Bindi *collectivité*, where he found his biological father.<sup>837</sup> The Accused's military training in the Isiro civil guard was interrupted by the war with the AFDL.<sup>838</sup>

438. Laurent-Désiré Kabila thus became President of the Congolese State in May 1997 owing to AFDL support<sup>839</sup> and, consequently, Ugandan and Rwandan backing.<sup>840</sup> That date marks the end of what is generally known as the First Congo War. Some members of the AFDL joined the FAC, the new DRC national army that replaced the FAZ, the national army under President Marshal Mobutu.

## **2. The DRC's rift with Uganda and Rwanda, birth of the DRC rebel movement and its migration to Orientale province: the Second Congo War (1998-2002)**

439. Several months after assuming power, Laurent-Désiré Kabila declared his intention to dismiss Rwandan officers from his army and Rwandans and Ugandans from posts in his administration.<sup>841</sup> Thereupon, in August 1998, a rebel movement, the *Rassemblement congolais pour la démocratie* ("the RCD"),<sup>842</sup> was formed, led by Ernest Wamba dia Wamba, its first President, and backed by the Ugandan and Rwandan armies.<sup>843</sup> In mid-1998, the RCD moved into eastern Congo, sparking an armed rebellion against Laurent-Désiré Kabila that marked the start of the Second Congo War.

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<sup>837</sup> D02-300, T. 314, pp. 35-36.

<sup>838</sup> D02-300, T. 314, p. 32.

<sup>839</sup> EVD-OTP-00229: *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0682 and DRC-OTP-0180-0685, paras. 29 and 43); D02-300, T. 314, p. 32; D02-228, T. 249, pp. 34 and 35.

<sup>840</sup> [Defence Closing Brief](#), para. 549.

<sup>841</sup> ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0687 to DRC-OTP-0180-0688, paras. 48 to 53).

<sup>842</sup> D02-228, T. 249, p. 35. See also [Defence Closing Brief](#), para. 549.

<sup>843</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0682 to DRC-OTP-0180-0683 and DRC-OTP-0180-0685, paras. 32 and 41); P-12, T. 199, p. 21; P-267, T. 171, p. 36; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0338 to DRC-OTP-0129-0339, para. 18).

440. That backing enabled the RCD rebel movement to rapidly assume control of a large part of eastern DRC, and in particular Ituri district, from August 1998.<sup>844</sup> As an RCD ally, Uganda, like Rwanda, sent its national army, the UPDF, to Orientale province in north-eastern Congo, *inter alia* Ituri.<sup>845</sup> It is not clear how responsibilities were shared between the UPDF and the RCD during the period in which the region's administration was being set up; the available sources do not elucidate that point.

441. In any event, in late 1998 and in 1999, the Ugandan army moved into Ituri in considerable numbers. The UPDF then set up a military base in Bunia and maintained a constant presence in the region<sup>846</sup> by also training men in the Ndromo military camp.<sup>847</sup> At that time, the UPDF forces in Ituri district were commanded by the Chief of Staff, General Kazini, who rapidly established himself as the key authority in the region.<sup>848</sup>

### **3. UPDF presence in Ituri and deterioration in relations between the various ethnic groups**

442. As the MONUC report on the events in Ituri notes, several land disputes broke out in 1999 between the Hema-Gegere communities (northern Hema) and the Lendu in Walendu-Pitsi *collectivité*, Djugu territory.<sup>849</sup> The UPDF allegedly

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<sup>844</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0338 to DRC-OTP-0129-0339, para. 18). See also P-267, T. 171, p. 36.

<sup>845</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0333 to DRC-OTP-0129-0334, para. 4); EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0701 to DRC-OTP-0180-0702, para. 4); P-12, T. 199, pp. 21-22.

<sup>846</sup> D02-236, T. 244, pp. 27-29; P-12, T. 199, pp. 21-22.

<sup>847</sup> P-12, T. 199, p. 21.

<sup>848</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0701 to DRC-OTP-0180-0702, para. 114). See also P-12, T. 201, p. 76.

<sup>849</sup>EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339, para. 19).

fanned the flames of existing ethnic conflicts,<sup>850</sup> certain witnesses referring to “[TRANSLATION] poor political governance” on the part of General Kazini.<sup>851</sup>

443. In 1999, General Kazini clearly sided with one ethnic group, namely the Hema-Gegere,<sup>852</sup> by sending UPDF officers to defend their concessions and launch large-scale punitive attacks<sup>853</sup> against the Lendu population who traditionally occupied those concessions<sup>854</sup> and who for many years believed that the Hema had unjustly acquired land and businesses.<sup>855</sup>

444. Moreover, in June 1999, General Kazini appointed Adèle Lotsove, of Hema-Gegere ethnicity, as Ituri’s first Governor,<sup>856</sup> with the seat of the administration located in Bunia. Adèle Lotsove belonged to one of the prominent Hema-Gegere trader families, the Savo family,<sup>857</sup> and supported the interests of the Gegere (northern Hema) cattle herders and traders of Ituri province.<sup>858</sup> The other ethnic groups, in particular Lendu farmers and Nande traders, who were the commercial rivals of the Hema-Gegere traders, decided to respond to Uganda’s overt bias.<sup>859</sup>

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<sup>850</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0723, para. 209); EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0333 to DRC-OTP-0129-0334, para. 4).

<sup>851</sup> P-12, T. 201, pp. 76 and 77.

<sup>852</sup> It must be underscored that the Hema-Gegere community included farmers and cattle herders, and that cattle herding was particularly important to the economies of some *collectivités*. In addition, certain prominent Gegere families also formed family trading groups (EVD-OTP-00285: MONUC report on the events in Ituri [DRC-OTP-0129-0337 and DRC-OTP-0129-0339, paras. 14 and 19]).

<sup>853</sup> The punitive actions entailed killing by burning down villages in Walendu-Pitsi *collectivité* and then in Walendu-Djatsi *collectivité* (EVD-OTP-00285: MONUC report on the events in Ituri [DRC-OTP-0129-0339, para. 19]).

<sup>854</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339, para. 19).

<sup>855</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0337 to DRC-OTP-0129-0338, para. 15).

<sup>856</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339 to DRC-OTP-0129-0340, para. 20); P-12, T. 201, pp. 76 and 77.

<sup>857</sup> See, in particular, EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339, para. 19).

<sup>858</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339 to DRC-OTP-0129-0340, para. 20).

<sup>859</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339 to DRC-OTP-0129-0340, paras. 20-21); P-317, T. 229, p. 31.

445. In June 1999, General Kazini unilaterally decreed Ituri a “province”<sup>860</sup> named “Kibali-Ituri”,<sup>861</sup> elevating it from mere “district” of Orientale province to a status with greater administrative autonomy.

#### 4. Developments within the RCD

446. In May 1999, following disagreements between the supporters of Rwanda and Uganda within the RCD, the movement split because of the ousting of Wamba dia Wamba, who had initially been very close to Rwanda.<sup>862</sup> Wamba dia Wamba then created the *Rassemblement congolais pour la démocratie-Kisangani* [Congolese Rally for Democracy-Kisangani] (“the RCD-K”) and established himself in Kisangani, capital of Orientale province.<sup>863</sup> Two factions thus emerged: the RCD-Goma and the RCD-K, the former supported by Rwanda and the latter by Uganda.<sup>864</sup> Wamba dia Wamba, the RCD-K leader, subsequently created the *Rassemblement congolais pour la démocratie-Kisangani/Mouvement de liberation* [Congolese Rally for Democracy-Kisangani/Liberation Movement] (“the RCD-K/ML”).<sup>865</sup>

447. The RCD-K/ML and the RCD-Goma, bolstered by the national armies that backed them, the Rwandan and Ugandan armies, fought each other in a battle in Kisangani in August 1999.<sup>866</sup> The Rwandan armed forces and the Ugandan armed forces (UPDF) deployed heavy weaponry in the fight for control of Orientale province. The battle ended with the Rwandan faction defeating the RCD-K/ML of Wamba dia Wamba, who left Kisangani and returned to Bunia.<sup>867</sup>

<sup>860</sup> P-12, T. 201, pp. 76-77.

<sup>861</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0714, para. 175).

<sup>862</sup> P-12, T. 200, p. 40.

<sup>863</sup> P-12, T. 199, p. 21.

<sup>864</sup> P-12, T. 199, p. 21. See also P-267, T. 171, p. 36.

<sup>865</sup> P-12, T. 199, p. 21; T. 203, pp. 6 and 7.

<sup>866</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0694 to DRC-OTP-0180-0695, para. 80); P- 267, T. 171, p. 36. See also [Defence Closing Brief](#), para. 549.

<sup>867</sup> P-12, T. 200, p. 10; P-267, T. 171, p. 36. See also on the redeployment of the RCD-ML in Bunia, EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0693, para. 73).

448. Sometime thereafter, in late 2000, an internal rebellion sparked an important development within the RCD-K/ML.<sup>868</sup> Wamba dia Wamba's deputy, Mbusa Nyamwisi, took control of it in Bunia,<sup>869</sup> and Wamba left the town in late 2000, reportedly withdrawing to Uganda.<sup>870</sup> John Tibassima, Wamba dia Wamba's deputy, took control over the RCD-K/ML in Beni, North Kivu, a DRC province bordering Ituri. That location would therefore also become a rear base for Mbusa Nyamwisi.<sup>871</sup> Reference in the Chamber's analysis to that political and military group will denote Mbusa Nyamwisi's RCD-K/ML.<sup>872</sup>

449. RCD-Goma, backed by Rwanda, was based in Goma, North Kivu.<sup>873</sup> Mbusa Nyamwisi's RCD-ML, which was headquartered in Bunia,<sup>874</sup> took control of Ituri,<sup>875</sup> supported by Uganda and strengthened by its rear base in Beni.<sup>876</sup> Adèle Lotsove was still Governor of Ituri province, and would remain so until 16 December 1999. The RCD-ML set up its own army, the *Armée du peuple congolais* [Congolese People's Army] ("the APC"). The Chamber is unable to date the emergence of that armed wing with any greater precision.

## 5. Shift of the conflict to southern Ituri

450. Throughout 1999, conflict between the Hema and Lendu to the north of Bunia claimed numerous casualties and sizeable population displacements in the two

<sup>868</sup> P-12, T. 199, pp. 21 and 22.

<sup>869</sup> D02-236, T. 242, p. 31; T. 248, p. 29; D02-228, T. 249, p. 39. See also P-267, T. 171, p. 37; P-12, T. 199, p. 21.

<sup>870</sup> P-12, T. 199, p. 48. P-267 claimed however that Wamba dia Wamba withdrew to Tanzania (see T. 171, p. 37). According to Witness P-12, once in Uganda, Wamba created the RCD-New Look (P-12, T. 199, p. 48).

<sup>871</sup> On this point, see EVD-D03-00035: UPC press release.

<sup>872</sup> The Chamber also refers to the group as the "RCD-ML".

<sup>873</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0338 to DRC-OTP-0129-0339, para. 18).

<sup>874</sup> P-12, T. 199, p. 21; T. 200, p. 10; D02-236, T. 242, p. 31.

<sup>875</sup> P-12, T. 199, p. 21; D02-228, T. 252, p. 46.

<sup>876</sup> The RCD-ML, it is alleged, had three infantry brigades (EVD-D02-00065: (DRC-OTP-0106-0092). See also P-12, T. 199, p. 29.

communities.<sup>877</sup> Both sides also began to organise themselves into self-defence groups.<sup>878</sup> Germain Katanga described these population movements and the attacks on them by the Ugandan army using heavy weaponry, which caused extreme distress to his community.<sup>879</sup>

## **6. The Lusaka Agreement and provision for the withdrawal of foreign troops from the DRC**

451. On 10 July 1999,<sup>880</sup> a ceasefire agreement was signed in Lusaka, Zambia, by all the countries involved in the Second Congo War, including the DRC, Rwanda and Uganda. The Lusaka Agreement provided for the withdrawal of all foreign forces from the national territory of the DRC according to a timetable established by the signatories.<sup>881</sup> However, that Agreement was not fully implemented in accordance with the agreed conditions.<sup>882</sup>

## **7. Creation of the UPC and the alliance between the RCD-ML and MLC**

452. In December 1999,<sup>883</sup> Mbusa Nyamwisi, President of the RCD-ML and, as such, an ally of Uganda, as the foregoing explained, decided to replace Adèle Lotsove with Uringi Padolo as Governor of Ituri. Padolo hence became the second Governor of Ituri.

453. In July 2000, a mutiny took place within the APC, the military wing of the RCD-ML,<sup>884</sup> at the instigation of Hema officers who believed that the interests of their ethnic group were no longer sufficiently protected and who criticised the

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<sup>877</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0333 to DRC-OTP-0129-0334, paras. 4 and 21).

<sup>878</sup> [Defence Closing Brief](#), para. 555. See also "Section VII(A)(1). Creation of self-defence groups".

<sup>879</sup> D02-300, T. 314, pp. 39-40. See also D03-88, T. 299, pp. 42-46.

<sup>880</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0697, para. 94).

<sup>881</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0697 to DRC-OTP-0180-0698, para. 97).

<sup>882</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0698, para. 101).

<sup>883</sup> P-267, T. 163, p. 42.

<sup>884</sup> D02-300, T. 315, pp. 23-24.

RCD for training Lendu youths in a military camp near Beni.<sup>885</sup> The mutiny opposed the policy pursued by the RCD-ML President. The mutineers united under the banner of the “Chui Mobile Force”.<sup>886</sup>

454. The mutineers, it was alleged, had undergone intensive training in Uganda.<sup>887</sup> According to P-12, the training was attended by Chief Kahwa, who claimed to lead the Chui Mobile Force,<sup>888</sup> Kyaligonza,<sup>889</sup> Rwandan-born Bosco Ntaganda, and Floribert Kisembo who was to become his bodyguard.<sup>890</sup>
455. Of note is that those who had undergone the training in turn instructed Congolese youths in Ituri and, according to P-12, Chief Kahwa asked Congolese Hema *collectivité* chiefs to send young recruits to that end.<sup>891</sup>
456. In January 2001,<sup>892</sup> a new alliance known as the *Front de libération du Congo* [Congo Liberation Front] (“the FLC”) was formed by the RCD-ML and the *Mouvement de libération du Congo* [Movement for the Liberation of the Congo] (“MLC”) with Ugandan backing.<sup>893</sup> However, the FLC alliance soon disintegrated<sup>894</sup> and the RCD-ML regained control of Ituri.<sup>895</sup>
457. By the time the aforementioned mutineers left Uganda for Bunia in 2001, Thomas Lubanga was their spokesman and the *Union des patriotes congolais* (UPC), a political and military group which had drawn up a programme on 15

<sup>885</sup> P-12, T. 194, pp. 35 and 36.

<sup>886</sup> P-12, T. 200, p. 25.

<sup>887</sup> P-12, T. 200, pp. 12 and 13.

<sup>888</sup> P-12, T. 200, p. 25.

<sup>889</sup> P-12, T. 200, pp. 14-15 and 23.

<sup>890</sup> P-12, T. 200, pp. 15 and 23.

<sup>891</sup> P-12, T. 200, p. 16.

<sup>892</sup> Of note is that President Laurent-Désiré Kabila was assassinated on 16 January 2001 and succeeded by his son, Joseph Kabila.

<sup>893</sup> D02-236, T. 248, p. 29.

<sup>894</sup> For the reasons behind the failure of that alliance, see P-12, T. 200, pp. 27-28. According to him, on returning to the DRC after training in Uganda, the Chui Mobile Force joined the *Front de libération du Congo* [Congo Liberation Front] (FLC) at John Tibasima’s initiative. Problems among the leadership, in particular between Mbusa Nyamwisi and Jean-Pierre Bemba, meant that the Hema soldiers had to walk back to Bunia, and remained unoccupied at Thomas Lubanga’s home. It was then that they revolted against Mbusa Nyamwisi.

<sup>895</sup> D02-236, T. 248, p. 30; D02-228, T. 252, p. 46.

September 2000,<sup>896</sup> was in existence.<sup>897</sup> Chief Kahwa was its co-founder<sup>898</sup> and became the group's Minister of Defence. It should be emphasised that Thomas Lubanga was Hema-Gegere and Adèle Lotsove, former Governor of Ituri, was allegedly his longstanding supporter.<sup>899</sup>

458. P-12 further stated that, in addition to acting as RCD-ML Minister of Defence, Thomas Lubanga represented the Hema, and the UPC was their military movement.<sup>900</sup> Germain Katanga underscored that thenceforth "[TRANSLATION] Hema militia members rall[ied] around the UPC".<sup>901</sup> Some witnesses described the UPC as a "[TRANSLATION] predominantly Hema militia".<sup>902</sup> Witness P-2 also explained that the UPC was a monoethnic group and that the Lendu and those from other ethnic groups who were active within it held little sway.<sup>903</sup>

459. It should also be noted that the UPC programme referred to the Kinshasa government as a dictatorial regime and favoured the organisation of the State along federal lines with federate states enjoying broad autonomy.<sup>904</sup> According to P-12, the UPC was a threat to Congo's integrity.<sup>905</sup> Thomas Lubanga allegedly told him in August 2003 that he was President of the Independent State of Ituri.<sup>906</sup>

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<sup>896</sup> EVD-D03-00065: UPC programme (bearing Thomas Lubanga's signature). See also P-12, T. 202, p. 57.

<sup>897</sup> P-12, T. 200, pp. 26 and 27.

<sup>898</sup> P-12, T. 194, p. 43.

<sup>899</sup> P-12, T. 200, p. 25 (with regard to his title of UPC President). See also P-12, T. 202, p. 14.

<sup>900</sup> P-12, T. 202, pp. 29-30; T. 194, p. 40. See also T. 194, p. 35. The witness specified that Thomas Lubanga was of Northern Hema or Gegere ethnicity, whilst Chief Kahwa, who was Munyohagi, considered himself southern Hema (P-12, T. 202, p. 25).

<sup>901</sup> D02-300, T. 321, p. 49.

<sup>902</sup> [Defence Closing Brief](#), para. 3. See also P-12, who stated that UPC troops were predominantly, though not entirely, Hema (T. 200, p. 31), and then referred to the UPC as the "[TRANSLATION] Hema military movement" (T. 202, p. 29).

<sup>903</sup> EVD-OTP-00144: Previous statement of P-2, para. 22.

<sup>904</sup> EVD-D03-00065: UPC programme.

<sup>905</sup> P-12, T. 202, p. 15. See also on this point P-30, T. 182, p. 72.

<sup>906</sup> P-12, T. 203, p. 28.

## 8. Discord between the RCD-ML and the UPC

460. Upon the mutineers' return from training in Uganda, a lengthy dispute ensued between Governor Lompondo and Mbusa Nyamwisi and Thomas Lubanga, developing into a situation of confrontation between the newly-created UPC forces and the RCD-ML, *viz.* the APC.

461. The APC gradually lost most of its Hema members to the UPC. The tension between the supporters of Thomas Lubanga and those of Mbusa Nyamwisi<sup>907</sup> led to skirmishes in April 2002, when Claude Kiza, an APC soldier and Mbusa Nyamwisi's trusted aide, was killed by a UPC member.<sup>908</sup>

462. The rivalry brought the RCD-ML and its armed wing, the APC, politically closer to Lendu elements, the term being understood in a broad sense. Lendu were sent for training at the Nyaleke camp near Beni.<sup>909</sup> Germain Katanga claimed that in this way Governor Lompondo demonstrated willingness to put in place a strategy of "[TRANSLATION] balance" between the communities through rapprochement with the Lendu, this word, again, being understood in a broad sense.<sup>910</sup> In this connection, it should be emphasised that Lompondo had forged ties with Lendu combatants, mainly of Ngiti origin,<sup>911</sup> and drew closer to Kandro, who was operating in Walendu-Bindi at that time.<sup>912</sup>

463. P-12 testified that, although at first he had tried to mend strained relations between the RCD-ML and UPC at a meeting in Kasese<sup>913</sup> under the auspices of

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<sup>907</sup> EVD-OTP-00144: Previous statement of P-2, para. 23.

<sup>908</sup> P-12, T. 194, p. 35; P-12, T. 201, p. 64; P-2, T. 191, p. 52. P-2 thought that Thomas Lubanga was the RCD-ML Minister of Defence at that time. (P-2, T. 191, p. 53).

<sup>909</sup> P-12, T. 194, p. 36.

<sup>910</sup> D02-300, T. 315, p. 25; EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic Conflict; EVD-OTP-00144: Previous statement of P-2, para. 23 (Witness P-2 apparently had Lendu friends who actually received weapons from Mbusa Nyamwisi whereas the Nande had none).

<sup>911</sup> P-267, T. 171, p. 40.

<sup>912</sup> D02-300, T. 315, p. 25; P-267, T. 171, p. 40; P-12, T. 195, p. 16.

<sup>913</sup> P-12, T. 201, pp. 69 and 74.

General Kazini, Uganda ultimately undertook to back the UPC.<sup>914</sup> P-12 explained that Mbusa Nyamwisi had been bitterly disappointed by this stance.<sup>915</sup>

### 9. Initial defining moments in Walendu-Bindi and the surrounding area

464. The evidence on record shows that the first attack on Bogoro took place on 9 January 2001.<sup>916</sup> Witness P-166 stated that northern Lendu militias attacked the village and killed around 110 civilians before the UPDF troops drove them out.<sup>917</sup>

465. On 10 January 2001, a UPDF helicopter, equipped with a rocket launcher and flown by the Ugandan officer Edison Muzora,<sup>918</sup> attacked CODECO, a Lendu agricultural cooperative in Walendu-Bindi *collectivité*.<sup>919</sup> The cooperative, of economic importance to the *collectivité*, was founded by an influential figure within the Ngiti community (the southern Lendu), a fetish-priest named Bernard Kakado.<sup>920</sup>

466. On 19 January 2001, it was the turn of Ngiti and Lendu combatants, armed mainly with bladed weapons and some assault rifles,<sup>921</sup> to attack the UPDF base at Bunia airport in a vain attempt to destroy the Ugandan helicopter that had been used during the attacks.<sup>922</sup> According to Germain Katanga, this move was disastrous for the Lendu community, understood in a broad sense.<sup>923</sup>

<sup>914</sup> D02-236, T. 242, p. 35; P-12, T. 201, pp. 69-70.

<sup>915</sup> P-12, T. 201, pp. 68-70.

<sup>916</sup> P-166, T. 225, p. 15; EVD-OTP-00202: Previous statement of P-166, para. 25; P-233, T. 87, pp. 9, 17 and 24; T. 88, pp. 11 and 49; D03-707, T. 332, pp. 25 and 26.

<sup>917</sup> EVD-OTP-00202: Previous statement of P-166, paras. 25, 27 and 28.

<sup>918</sup> D02-300, T. 314, pp. 40 and 42-43. See also T. 321, pp. 30-33.

<sup>919</sup> D02-300, T. 319, p. 21.

<sup>920</sup> D02-300, T. 314, p. 40; T. 319, p. 21.

<sup>921</sup> D02-300, T. 314, p. 42.

<sup>922</sup> D02-300, T. 314, pp. 43-44 and 49; T. 321, pp. 32-33; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0340 to DRC-OTP-0129-0341, para. 22).

<sup>923</sup> D02-300, T. 314, pp. 43 and 44.

467. In late July and early August 2001, the Bira of Andisoma *collectivité*, with UPDF and Hema support, attacked the Ngiti and Lendu of Nyakunde<sup>924</sup> – the first attack on the village – and Germain Katanga was forced to flee to Aveba.<sup>925</sup>

### **10. The Sun City Agreement**

468. In early 2002, negotiations opened in Pretoria, South Africa, between the Kinshasa central government and certain rebel movements,<sup>926</sup> namely the RCD-ML and Jean-Pierre Bemba's MLC. According to Witness D02-236, the negotiations concluded with the Sun City Agreement of 19 April 2002, entailing rapprochement between the RCD-ML and the DRC Government.<sup>927</sup> The negotiations and subsequent agreement culminated in Jean-Pierre Bemba's appointment as DRC Prime Minister<sup>928</sup> and the decision to appoint an RCD-ML member as the President of the DRC National Assembly.<sup>929</sup> However, the prevailing sentiment seems to be that the agreement was not implemented effectively.<sup>930</sup>

### **11. Fall of Bunia in August 2002 and flight of the APC and Lendu civilian population**

469. On 9 August 2002, UPC forces supported by the Ugandan army<sup>931</sup> expelled Molondo Lomondo, whom Mbusa Nyamwisi had appointed Governor of Ituri in February 2002,<sup>932</sup> from Bunia and took control of the city.<sup>933</sup> It must be recalled

<sup>924</sup> [Defence Closing Brief](#), para. 558.

<sup>925</sup> D02-300, T. 315, pp. 16-17 and 21. See also [Defence Closing Brief](#), para. 553.

<sup>926</sup> P-12, T. 199, pp. 23 and 24.

<sup>927</sup> D02-236, T. 244, p. 37. See also [Defence Closing Brief](#), para. 560.

<sup>928</sup> P-12, T. 199, p. 24.

<sup>929</sup> EVD-OTP-00281: Sun City Agreement (DRC-OTP-1063-0032).

<sup>930</sup> EVD-D02-00147: Operational instructions (DRC-D02-0001-0932).

<sup>931</sup> [Defence Closing Brief](#), para. 561. See also [Agreement as to evidence](#), admission 3.

<sup>932</sup> [Defence Closing Brief](#), para. 561.

<sup>933</sup> D02-300, T. 315, pp. 24-25; D02-236, T. 242, p. 35; P-267, T. 163, p. 42.

that Bunia was the RCD-ML headquarters and capital of Ituri.<sup>934</sup> According to P-12, the operations were launched from the home of Thomas Lubanga.<sup>935</sup>

470. As described above, the APC, the armed wing of the RCD-ML which had already “lost” its initial Hema members, was therefore forced to flee Bunia, as were a large part of the town’s Lendu and Ngiti civilian population, RCD-ML officials, and Governor Lompondo and his inner circle.<sup>936</sup> In this connection, D02-228 explained that the war then escalated in Ituri, as a conflict broke out in Mongwalu resulting in population displacement to North Kivu.<sup>937</sup>

471. Those pursued by the UPC headed towards the south of the province in an attempt to reach the city of Beni in North Kivu.<sup>938</sup> Beni was to become the new headquarters for members of the RCD-ML Bunia bureau, who thus came to the group’s seat in that city, which, it will be recalled, had already been established there.<sup>939</sup>

472. Thus, Thomas Lubanga’s UPC troops, which included a large Hema contingent, now controlled Bunia.<sup>940</sup> The UPC also threatened to overrun Beni and at Butembo to amalgamate the North Kivu territories hitherto controlled by the RCD-Goma (Rwanda).<sup>941</sup>

## **12. Escalation of the conflict south of Bunia; rout and dispersal of the APC**

473. Faced with defeat, an APC contingent dispersed and went to Songolo, whereas some from the “Twelfth Battalion” led by Commander Faustin found refuge in Zumbe, where they were welcomed by the chief of Bedu-Ezekere

<sup>934</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0341 to DRC-OTP-0129-0342, para. 24); [Agreement as to evidence](#), admission 3.

<sup>935</sup> P-12, T. 202, p. 30.

<sup>936</sup> D02-236, T. 242, pp. 35 and 37; P-267, T. 163, p. 43.

<sup>937</sup> D02-228, T. 249, p. 45. See also P-267, T. 163, pp. 43-44.

<sup>938</sup> D02-228, T. 249, p. 45; D02-236, T. 242, pp. 38-39.

<sup>939</sup> D02-236, T. 242, pp. 37-38.

<sup>940</sup> See on this point EVD-D03-00042: Video excerpt of a UPC rally; P-30, T. 182, p. 70 *et seq.*

<sup>941</sup> EVD-D02-00202: Evaluation and monitoring of ongoing operations in Ituri (DRC-D02-0001-0938).

*groupement*.<sup>942</sup> According to Germain Katanga, that rout and dwindling troops forced Commander Faustin to “[TRANSLATION] seek protection [...] in the Lendu area [...] [which was] the only protection the APC had at the time”.<sup>943</sup> D03-88 testified that there were perhaps between 200 and 300 men there, accompanied by their wives, some of whom were pregnant, and their children.<sup>944</sup> They were a burden on the population, especially when they began to “[TRANSLATION] extort” it to such an extent that it began to consider them enemies.<sup>945</sup>

474. Thereafter, seeking to reach Beni via Gety and forced to overcome the obstacle which UPC-held Bogoro presented, the APC contingent failed twice to take the village,<sup>946</sup> D03-88 having moreover refused to provide them with combatants from Bedu-Ezekere *groupement*.<sup>947</sup> According to several witness accounts, a second attack on Bogoro was therefore mounted on 14 August 2002.<sup>948</sup> Witness P-166 testified that Lendu militias and APC soldiers then attacked the village but were pushed back by the UPDF troops.<sup>949</sup>

475. Later, once D03-88 had made contact with Colonel Kandro, referred to as “[TRANSLATION] the military authority” and the “[TRANSLATION] leader of the Songolo combatants”,<sup>950</sup> those same troops left Zumbe in two stages for Songolo and then Singo<sup>951</sup> in late August 2002<sup>952</sup> with a view to joining Kandro and other

<sup>942</sup> D03-66, T. 296, pp. 13-17; D03-88, T. 300, pp. 39-40; D02-300, T. 315, pp. 37-38; D02-148, T. 279, p. 7; D02-01, T. 277, pp. 29-30; T. 278, pp. 35-37; D03-55, T. 293, pp. 49-50; D03-307, T. 327, p. 48.

<sup>943</sup> D02-300, T. 315, p. 38.

<sup>944</sup> D03-88, T. 300, pp. 39-40.

<sup>945</sup> D03-88, T. 299, p. 39.

<sup>946</sup> D03-66, T. 296, pp. 15-16; D02-300, T. 315, pp. 38-39.

<sup>947</sup> D03-88, T. 300, pp. 41-42.

<sup>948</sup> P-166, T. 225, p. 15; EVD-OTP-00202: Previous statement of P-166, para. 31; P-233, T. 87, pp. 17-18; T. 88, pp. 63-66; D03-707, T. 332, pp. 25-27.

<sup>949</sup> EVD-OTP-00202: Previous statement of P-166, para. 31.

<sup>950</sup> D03-88, T. 300, p. 41.

<sup>951</sup> D03-88, T. 300, p. 41; T. 304, pp. 13 and 15; D02-01, T. 277, p. 29; D03-66, T. 296, pp. 12-15; D03-307, T. 332, p. 20.

<sup>952</sup> D02-300, T. 315, pp. 26-27.

APC troops, in particular combatants who had remained loyal to Governor Lompondo.<sup>953</sup>

476. P-267 explained that, in pursuit of the southbound APC troops, the UPC began to launch attacks, including on Walendu-Bindi, giving rise to a sense among the Lendu community that “[TRANSLATION] the Hema tribe” was seeking to exterminate it.<sup>954</sup> In late August 2002, the UPC, helped by Bira troops, attacked the village of Songolo where a large number of Ngiti had taken refuge following the first attack on Nyakunde. The purpose of the operation was apparently to attack the neighbouring Ngiti areas.<sup>955</sup> On 5 September 2002, Nyakunde was subjected to a joint Ngiti, APC and Mai Mai counter-attack.<sup>956</sup>

### **13. Negotiations resume: the Luanda Agreement and the Pacification Commission**

477. Mounting international pressure led to an acceleration of the Congo peace process in 2002, with the DRC government entering into negotiations with the Rwandan and Ugandan governments. A bilateral security agreement between the DRC and Rwanda, under which Rwanda agreed to withdraw its troops from the DRC within three months, was signed in Pretoria, South Africa, on 30 July 2002.<sup>957</sup> On 6 September 2002, as a result of political negotiations held in Angola, the DRC and Uganda signed a bilateral agreement known as the Luanda Agreement.<sup>958</sup>

478. Under that agreement, Uganda undertook to withdraw its forces unilaterally from Gbadolite, Beni and the surrounding area with immediate effect and its troops from Bunia by the end of 2002. The agreement provided that in the meantime a pacification commission, the Ituri Pacification Commission, would be

<sup>953</sup> D03-307, T. 327, p. 47. See also D02-300, T. 315, p. 27; D02-148, T. 279, p. 47; P-28, T. 218, p. 4.

<sup>954</sup> P- 267, T. 171, pp. 41 and 44 with regard to EVD-D02-00045.

<sup>955</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0350, para. 50).

<sup>956</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0350, para. 52).

<sup>957</sup> EVD-OTP-00207: UN Security Council resolution 1445. See also [Defence Closing Brief](#), para. 560.

<sup>958</sup> EVD-D03-00066: Agreement between the Governments of the DRC and the Republic of Uganda on withdrawal of Ugandan troops from the DRC. See also P. 267, T. 171, p. 45 and 46. [Defence Closing Brief](#), para. 560.

established.<sup>959</sup> The agreement also stipulated that Ugandan troops based in the Ruwenzori Mountains would remain in place until a joint security mechanism at the border between the DRC and Uganda was established.<sup>960</sup> Of note is that the DRC agreed only to the UPDF's presence in the Ruwenzori Mountains.<sup>961</sup> As regards the other UPDF positions, the Luanda Agreement merely recorded Uganda's undertaking to move its troops out of the DRC according to a set timetable.

479. P-267 stated that despite its undertaking, Uganda delayed its withdrawal from Ituri for economic reasons.<sup>962</sup> According to the Defence, Uganda and Rwanda both continued to establish and support local groups in the region.<sup>963</sup>

#### **14. Organisation of "resistance" in Beni. Creation of the FRPI and then the FNI in autumn 2002**

480. RCD-ML forces, then regrouped in Beni, had renewed their alliance with Kinshasa following the above-mentioned Sun City Agreement. Having arrived pell-mell in Beni after their defeat in Bunia, the RCD-ML officials, certain APC members, displaced persons from Bunia<sup>964</sup> and prominent Lendu<sup>965</sup> eventually met at the Casino Hotel in October 2002 with representatives from Kinshasa who were members of an entity known as EMOI, to be addressed later.

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<sup>959</sup> EVD-D03-00066: Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on withdrawal of Ugandan troops from the Democratic Republic of the Congo (DRC-D03-0001-0454).

<sup>960</sup> EVD-D03-00066: Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on withdrawal of Ugandan troops from the Democratic Republic of the Congo (DRC-D03-0001-0454).

<sup>961</sup> EVD-D03-00066: Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on withdrawal of Ugandan troops from the Democratic Republic of the Congo (DRC-D03-0001-0454, Articles 1-4).

<sup>962</sup> P-267, T. 171, p. 40.

<sup>963</sup> [Defence Closing Brief](#), para. 560 and footnote 781.

<sup>964</sup> D02-228, T. 249, p. 45.

<sup>965</sup> D02-236, T. 250, p. 52; D02-228, T. 253, p. 37.

481. According to D02-228 and D02-236, the FRPI was created there as a result of that two-day meeting attended by some 30 people<sup>966</sup> and in which the two witnesses personally took part.<sup>967</sup> D02-228 stated that the FRPI was as much the initiative of refugees and displaced persons as it was of combatants, seeking to join forces to address their extremely difficult situation and to create an organisation that would answer their needs.<sup>968</sup> D02-236 testified that Mbusa Nyamwisi's RCD-ML and the Kinshasa government needed to decide how to realise their common design of regaining control of Ituri through a counter-offensive.<sup>969</sup> D02-228 also emphasised that, for the Lendu combatants who had fled Bunia and Mongwalu, this meeting was above all an opportunity to identify a framework that could fulfil their aims of mounting resistance.<sup>970</sup> Prominent Lendu, in particular Bernard Kakado, mentioned above with reference to the CODECO cooperative, held great sway over the process of the FRPI's creation.<sup>971</sup>

482. According to D02-228, the meeting essentially discussed a possible name for the movement which would spear-head the counter-offensive and the election of the person who would represent it.<sup>972</sup> He recalled that Dr Adirodu, an adviser to the RCD-ML presidency of Mbusa Nyamwisi who had arrived from Kinshasa the day after the first day of the meeting, successfully proposed that the name "*Force de résistance patriotique en Ituri*" or "FRPI" be adopted, as that name was already in use in Kinshasa.<sup>973</sup> Dr Adirodu reportedly declared that he was the only person qualified to represent the movement and cooperate with the government officially.<sup>974</sup>

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<sup>966</sup> D02-228, T. 251, p. 31. See also [Prosecution Closing Brief](#), para. 136 *et seq.*; [Defence Closing Brief](#), para. 585 *et seq.*

<sup>967</sup> D02-228, T. 249, p. 45; T. 250, p. 52; D02-236, T. 242, p. 38.

<sup>968</sup> D02-228, T. 249, pp. 45-48.

<sup>969</sup> D02-236, T. 242, pp. 38-39.

<sup>970</sup> D02-228, T. 249, pp. 45 and 46.

<sup>971</sup> D02-228, T. 250, pp. 52 and 53.

<sup>972</sup> D02-228, T. 251, p. 17.

<sup>973</sup> D02-228, T. 249, pp. 45-47; D02-236, T. 242, pp. 40-41.

<sup>974</sup> D02-236, T. 242, pp. 40 and 41.

483. In this connection, the Prosecution contended that Dr Adirodu was one of the FRPI's founders and its spokesman,<sup>975</sup> which the two aforementioned witnesses confirmed. <sup>976</sup> D02-236 stated that he gave the impression of not wanting to "[TRANSLATION] leave the political arena to others".<sup>977</sup> Germain Katanga meanwhile stated that the FRPI was the "[TRANSLATION] private affair" of Dr Adirodu, who wanted "[TRANSLATION] everything to take place in a closed group"<sup>978</sup> and that it was difficult, at least at the beginning, to know who, apart from Dr Adirodu and Sambidhu, his younger brother, made up the FRPI hierarchy.<sup>979</sup> A conflict of authority apparently existed between Dr Adirodu and Floribert Ndjabu (Witness D02-236), who was the FRPI's first coordinator for a few hours.<sup>980</sup> Very soon afterwards, Ndjabu founded his own group, the FNI, which will be subsequently addressed. D02-236 specified that the FRPI did not have a president at the time and that it did not set up its own political structure until later, in the course of 2004.<sup>981</sup> That explanation was corroborated by the testimony of D02-228, who believed that the FRPI was not an organisation in the traditional sense at the time of its creation, as its structure amounted to only a coordination committee consisting of a coordinator (D02-236), his deputy (Sambidhu) and two advisers (one of whom was D02-228).<sup>982</sup>

484. It also bears emphasising that the APC subsequently came under intense pressure in November and December 2002 and had to confront the forces of the UPC, Jean-Pierre Bemba's MLC and the RCD-National, which had formed a coalition at the time of Operation Clean Slate [*Effacer le tableau*] for the purpose of taking Beni which, according to Germain Katanga, directly weakened the APC's

<sup>975</sup> [Prosecution Closing Brief](#), para. 136.

<sup>976</sup> D02-236, T. 242, p. 43; D02-228, T. 250, pp. 50 and 52.

<sup>977</sup> D02-236, T. 242, pp. 39-40 and 43.

<sup>978</sup> D02-300, T. 316, p. 63.

<sup>979</sup> D02-300, T. 316, p. 63.

<sup>980</sup> D02-236, T. 242, p. 39; D02-228, T. 251, p. 21.

<sup>981</sup> D02-236, T. 242, pp. 43-44.

<sup>982</sup> D02-228, T. 249, p. 46.

rear base.<sup>983</sup> The APC also faced attacks from the RCD-Goma in Kivu, as the Accused mentioned when describing the battle of Kanya Bayonga – a town located in North Kivu on the front line between the RCD-Goma and the RCD-ML<sup>984</sup> – in which numerous combatants from Walendu-Bindi were said to have taken part to help the APC to fight that coalition.<sup>985</sup>

485. In this connection, D02-350 explained that the FRPI was founded at the end of the conflict which pitted an alliance consisting, just before Christmas 2002, of MLC and UPC soldiers against an alliance of the APC, the Kinshasa central government and the Mai Mai,<sup>986</sup> in particular during the battle of Eringeti, in which Germain Katanga and combatants from Aveda are alleged to have taken part.<sup>987</sup> The government's military forces were pushed back by the MLC and UPC attack, whose objective was to recapture Beni. Thomas Lubanga announced on the radio that he would take control of that area on 25 December 2002.<sup>988</sup>

486. According to D02-350, it was against this background that after travelling to Équateur province to conclude an agreement with Jean-Pierre Bemba,<sup>989</sup> and because he did not wish to lose Ituri, Mbusa Nyamwisi formed the FRPI to “[TRANSLATION] replace” the APC on the ground, which meant changing the APC's name to the FRPI.<sup>990</sup> As Mbusa Nyamwisi did not want Bemba to know that he was continuing to fight him, he allegedly sought to make Bemba believe in the intervention of a new enemy, the FRPI.<sup>991</sup> In the view of D02-228, the RCD-ML accepted the Kinshasa government's operating on its territory so as to counter

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<sup>983</sup> D02-300, T. 317, pp. 9-10; D02-350, T. 253, pp. 37-39. See also D02-236, T. 248, pp. 23-24; D02-228, T. 249, pp. 39 and 40; [Defence Closing Brief](#), para. 601.

<sup>984</sup> D02-236, T. 243, p. 24.

<sup>985</sup> D02-300, T. 316, p. 63; T. 317, pp. 11-12 and 16-17.

<sup>986</sup> D02-350, T. 253, p. 37.

<sup>987</sup> D02-300, T. 317, pp. 10-13 and 19.

<sup>988</sup> D02-350, T. 253, pp. 37 and 39; T. 254, p. 15.

<sup>989</sup> D02-350, T. 254, pp. 23-24.

<sup>990</sup> D02-350, T. 254, p. 7. D02-350, T. 253, p. 42.

<sup>991</sup> D02-350, T. 254, p. 24.

the advance by the MLC and the RCD-Goma,<sup>992</sup> which wanted to keep Ituri in their grip and conquer North Kivu.<sup>993</sup>

### **15. The Kampala Understanding**

487. On 15 November 2002, the President of Uganda convened a meeting of the RCD-ML and the UPC, which was attended by the groups' respective leaders, Mbusa Nyamwisi and Thomas Lubanga. The DRC Government was also represented as an observer by Colonel Etumba. The meeting was held in Kampala, Uganda, and culminated in the Kampala Understanding.<sup>994</sup>

488. Under the Kampala Understanding, the RCD-ML and the UPC agreed to cease hostilities on all fronts in Ituri and find a solution to the conflict through the Ituri Pacification Commission ("the Pacification Commission" or "the Commission"), in accordance with the terms established by the above-mentioned Luanda Agreement.<sup>995</sup> In addition, to facilitate the Commission's work and the implementation of a ceasefire between the two parties, Uganda agreed under the same agreement to deploy its troops in Komanda and Gety.<sup>996</sup> It should be noted that, although the DRC acted as an observer, it was not itself a party to the agreement.

### **16. Crystallisation of the alliance between the central government and the RCD-ML through EMOI**

489. After the UPC established its power in Bunia, negotiations between the RCD-ML and the central DRC Government led to rapprochement between the two

<sup>992</sup> D02-228, T. 249, pp. 60-61; EVD-D02-00147: Operational instructions.

<sup>993</sup> EVD-D02-00147: Operational instructions (DRC-D02-0001-0932 to DRC-D02-0001-0933).

<sup>994</sup> EVD-D03-00063: Kampala Understanding between the RCD-ML and the UPC.

<sup>995</sup> EVD-D03-00063: Kampala Understanding between the RCD-ML and the UPC (DRC-OTP-0106-0187).

<sup>996</sup> EVD-D03-00063: Kampala Understanding between the RCD-ML and the UPC (DRC-OTP-0106-0188).

parties and an ensuing alliance for the recapture of Ituri.<sup>997</sup> The APC had neither the human or material resources to accomplish the task single-handed.<sup>998</sup>

490. Colonel Aguru was reportedly sent to Beni by the Kinshasa authorities to open the regional office of EMOI, the *État-major opérationnel intégré* [Integrated Operational Staff], and to muster all those who had been displaced from Ituri.<sup>999</sup> Thus a coalition of forces was formed that initially brought together the Kinshasa government's army (the FAC) and the APC, later joined by the Mai Mai and the FRPI.<sup>1000</sup> According to D02-236, the Mai Mai were based in Opieng and comprised combatants who had mostly come from Kivu to join forces against all the foreigners who, as they saw it, intended to invade the DRC.<sup>1001</sup>

491. According to D02-236, EMOI was led by FAC officers,<sup>1002</sup> *inter alia* Colonel Aguru,<sup>1003</sup> an Iturian<sup>1004</sup> who reported directly to the Congolese Head of State's "*Maison Militaire*" and who always sought Kinshasa's approval before sending logistical support to the operation in Ituri.<sup>1005</sup>

492. EMOI members therefore included Colonel Aguru who, according to D02-236, was the first Chief of Staff,<sup>1006</sup> as well as Colonel Kibelebele, Colonel Duku and Colonel Ekuba. Those officers had come directly from Kinshasa to advance the central government's interests.<sup>1007</sup>

493. D02-228 testified that EMOI sought to counter the advance by the UPC<sup>1008</sup> and its MLC allies, Jean-Pierre Bemba's movement formed in late 2002.<sup>1009</sup> D02-236

<sup>997</sup> D02-236, T. 242, p. 38; D02-228, T. 253, p. 40.

<sup>998</sup> EVD-D02-00147: Operational instructions (DRC-D02-0001-0933).

<sup>999</sup> D03-88, T. 253, pp. 37-39. See also [Defence Closing Brief](#), para. 605 *et seq.*

<sup>1000</sup> D02-228, T. 249, pp. 60 and 61; D02-236, T. 242, pp. 44-45.

<sup>1001</sup> D02-236, T. 242, p. 46; T. 243, p. 8. See also EVD-D02-00119: Map.

<sup>1002</sup> D02-236, T. 242, p. 44.

<sup>1003</sup> D02-236, T. 242, p. 46.

<sup>1004</sup> D02-350, T. 253, p. 38; D02-228, T. 249, pp. 61 and 62.

<sup>1005</sup> D02-236, T. 242, p. 47.

<sup>1006</sup> D02-236, T. 242, p. 46; D02-350, T. 253, pp. 39-40.

<sup>1007</sup> D02-236, T. 242, p. 46.

<sup>1008</sup> In D02-228's view, EMOI and UPC "[TRANSLATION] relations were of the worst enmity" (D02-228, T. 249, p. 61).

stated that EMOI's mission was to reconquer the territory of Ituri<sup>1010</sup> and to restructure armed groups with a view to integrating them into the FAC.<sup>1011</sup> Where necessary, it also organised and planned military operations in the region, helped to supply weapons and ammunition, and managed and provided logistical support.<sup>1012</sup> The weapons and ammunition were supplied by the central government.<sup>1013</sup>

494. Also of note is that, in Germain Katanga's own words, Mbusa Nyamwisi, the RCD-ML leader and then an ally of the Kinshasa government,<sup>1014</sup> told Lendu combatants who were in Beni in November 2002 that the APC was their "[TRANSLATION] umbrella" and that this armed group was protecting them.<sup>1015</sup> Moreover, the strategic ties forged between the RCD-ML, the APC and the Ngiti were not new.<sup>1016</sup>

## 17. Creation of the FNI

495. The FNI was created in Kpandroma in November 2002.<sup>1017</sup> Floribert Ndjabu (Witness D02-236), who has already been mentioned, was allegedly appointed

<sup>1009</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0338, para. 17); D02-350, T. 253, pp. 38-39.

<sup>1010</sup> EVD-D02-00147: Operational Instructions; EVD-D02-00202: Report of the Armed Forces of the Democratic Republic of the Congo on the ongoing operations in Ituri; EVD-D02-00148; EVD-D02-00203; EVD-D02-00149; EVD-D03-00136: Letter from the Immediate Office of the President of the DRC to the Joint Chiefs of Staff]. See also [Defence Closing Brief](#), para. 631 *et seq.*

<sup>1011</sup> D02-228, T. 249, p. 60; D02-236, T. 242, p. 44.

<sup>1012</sup> D02-228, T. 249, pp. 61, 67 and 68; T. 250, pp. 4-12; T. 252, pp. 54-56; D02-350, T. 254, pp. 7, 14, 15, 19 and 20; T. 253, p. 4; D02-300, T. 317, pp. 6-8; EVD-OTP-00253: Handwritten letter by Floribert Ndjabu (DRC-1008-0093 to DRC-OTP-1008-0094). On the preparation for the attack on Bogoro, see also D02-300, T. 325, pp. 16-22.

<sup>1013</sup> D02-228, T. 249, p. 64. See also D02-300, T. 317, pp. 6-7; T. 325, p. 16.

<sup>1014</sup> P-12, T. 203, p. 8; D02-228, T. 249, p. 60.

<sup>1015</sup> D02-300, T. 316, pp. 63-64.

<sup>1016</sup> P-12, T. 194, pp. 35 and 40; T. 195, pp. 15-16; T. 202, pp. 29-30; D02-228, T. 252, p. 73; D02-300, T. 321, pp. 59-60.

<sup>1017</sup> D02-236, T. 243, p. 9; T. 245, pp. 47 and 49; D02-350, T. 253, p. 43; D02-228, T. 249, p. 55.

President in late 2002.<sup>1018</sup> In November 2002, the primarily Lendu FNI<sup>1019</sup> was a political and military movement<sup>1020</sup> but had no military command staff.<sup>1021</sup>

496. Shortly after his election, Floribert Ndjabu and an FNI delegation attended peace negotiations in Arua, Uganda, organised by the Ugandan authorities.<sup>1022</sup> A delegation from Thomas Lubanga's UPC/RP also took part.<sup>1023</sup> During the meeting, it was decided that the conflicting parties should announce a ceasefire, set up a committee for the pacification of Ituri and implement a framework for monitoring that agreement.<sup>1024</sup>

497. The UPC did not sign the ceasefire agreement<sup>1025</sup> and, according to D02-236, that meeting in January 2003 can be considered as the date when the UPC broke with Uganda once and for all.<sup>1026</sup>

### **18. Creation of PUSIC by Chief Kahwa**

498. According to P-12, Chief Kahwa left the UPC as he felt side-lined by Thomas Lubanga, who was acting as minister of defence in his stead.<sup>1027</sup> Furthermore, the Kinshasa authorities sought to use Chief Kahwa's elder sister Anita as an intermediary to persuade him to help crush the obstacle represented by the UPC and Thomas Lubanga to the work of the Pacification Commission.<sup>1028</sup>

499. P-12 further maintained that Uganda, which had ceased its support to Thomas Lubanga, encouraged Chief Kahwa to make contact with President Kabila and

<sup>1018</sup> D02-236, T. 243, p. 10; T. 244, p. 7.

<sup>1019</sup> The Chamber uses the term "Lendu" *sensu stricto* (Section VIII(A)(1). Terminology).

<sup>1020</sup> D02-236, T. 244, p. 7.

<sup>1021</sup> D02-236, T. 243, p. 38, T. 244, p. 7.

<sup>1022</sup> D02-236, T. 243, p. 10. See also T. 245, p. 69.

<sup>1023</sup> D02-236, T. 243, p. 11.

<sup>1024</sup> D02-236, T. 243, p. 11.

<sup>1025</sup> D02-236, T. 243, p. 11.

<sup>1026</sup> D02-236, T. 248, pp. 5-6.

<sup>1027</sup> P-12, T. 194, p. 44. On the inimical relations between Chief Kahwa and Thomas Lubanga, see also P-12, T. 202, pp. 15-17 and pp. 24-25.

<sup>1028</sup> P-12, T. 194, p. 44. See also EVD-D03-00041: Video excerpt – meeting between MONUC and the UPC regarding P-30, T. 182, pp. 54-57.

create a movement that could divide the Hema and act as a counter-weight to the UPC which, moreover, was threatening the country's territorial integrity,<sup>1029</sup> in order to allow the Pacification Commission to be set up.<sup>1030</sup>

500. And so Chief Kahwa created the *Parti pour l'unité and la sauvegarde de l'intégrité du Congo* ("PUSIC") in December 2002.<sup>1031</sup> P-12 specified, however, that he did not know the exact date when the party was formed, but that 21 November 2002 appeared in the official founding documents in reference to the point when Chief Kahwa had left the UPC.<sup>1032</sup>

501. P-12 further testified that PUSIC, a political and military party, was initially founded by soldiers and Chief Kahwa to rally in defence of their community.<sup>1033</sup> The movement then allegedly became political, and on Ugandan advice<sup>1034</sup> included people who were not solely Hema or Iturians in order to be better understood by foreign countries.<sup>1035</sup> However, P-12 maintained that PUSIC was exclusively Hema<sup>1036</sup> other than himself and the Chief of Staff, who in any case was but a sham chief of staff, and other members who subsequently left the movement.<sup>1037</sup> He later retracted this statement and described the ideals that had motivated him to join the movement, stating that initially most of the "staff" had not been Hema.<sup>1038</sup>

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<sup>1029</sup> P-12, T. 202, pp. 14 and 15.

<sup>1030</sup> P-12, T. 194, pp. 44-45. The same witness explained that President Kabila's support for the creation of PUSIC was connected to the signing of an agreement in June 2002 with the company Heritage Oil on oil production on the Kasenyi plain. However, according to the witness, the planned operation could not be undertaken whilst the UPC was present in Ituri (P-12, T. 202, p. 52).

<sup>1031</sup> P-12, T. 194, pp. 43-45.

<sup>1032</sup> P-12, T. 194, pp. 45-46.

<sup>1033</sup> P-12, T. 194, p. 45.

<sup>1034</sup> On ties between Uganda and PUSIC, see P-12, T. 200, p. 42; EVD-D02-00070, EVD-D02-00071: Invoices.

<sup>1035</sup> P-12, T. 194, p. 45.

<sup>1036</sup> In P-2's view, since PUSIC protected Hema traders and their property and they spoke the same language, it was possible that PUSIC was supported by these business communities (P-2, T. 185, p. 11).

<sup>1037</sup> P-12, T. 200, pp. 31-32.

<sup>1038</sup> P-12, T. 200, pp. 32-33.

## 19. Creation of the FIPI

502. In early 2003, the Ugandan President allegedly invited representatives of the FNI, FPDC and PUSIC to Kampala<sup>1039</sup> for negotiations on the creation of the *Front pour l'Intégration et la Paix en Ituri* [Front for Integration and Peace in Ituri] (“the FIPI”), an alliance between the FNI, the FPDC and PUSIC that had no apparent programme other than to expel the UPC from Bunia and weaken its position.<sup>1040</sup> D02-236 took the view that the FIPI did not survive because of the turpitude of its members.<sup>1041</sup>

503. P-12, who was present,<sup>1042</sup> reported that the three presidents of the aforementioned parties signed an agreement on 4 February 2003.<sup>1043</sup> They travelled to Dar es Salaam, probably between 5 and 8 February 2003.<sup>1044</sup> P-12 went on to say that the Ugandan Government wished to demonstrate to Kinshasa its willingness to “[TRANSLATION] break the deadlock” in Ituri.<sup>1045</sup> Thomas Lubanga, who rejected any rapprochement between the UPC and the FNI, nevertheless decided to end his relations with Uganda.<sup>1046</sup>

## 20. The UPC alliance with Rwanda

504. According to D02-236, the Luanda Agreement and Kampala Understanding had essentially failed to take into consideration the interests of local rebel

<sup>1039</sup> D02-236, T. 243, pp. 12 and 13.

<sup>1040</sup> D02-228, T. 250, p. 13; EVD-OTP-00285: MONUC report on the events in Ituri(DRC-OTP-0129-0343, para. 28).

<sup>1041</sup> D02-236, T. 244, p. 42. See also T. 246, p. 23.

<sup>1042</sup> P-12, T. 194, pp. 58 and 61.

<sup>1043</sup> EVD-OTP-00193: *Accord de la création d'une plate-forme politico-militaire regroupant le F.N.I, le F.P.D.C. and le P.U.S.I.C. pour la pacification de l'Ituri.*

<sup>1044</sup> P-12, T. 194, p. 60.

<sup>1045</sup> P-12, T. 194, pp. 61-62. According to P-12, attempts to bring peace to Ituri needed Uganda's blessing, as it was its responsibility, as occupying power, to “[TRANSLATION] organise [...] Ituri's internal affairs” (P-12, T. 194, p. 47). See also T. 203, pp. 8-9.

<sup>1046</sup> P-12, T. 194, pp. 61-62. On the UPC's meeting with the Ugandan General Salim Saleh on 23 January 2003, see P-30, T. 181, p. 58 *et seq.*; EVD-D03-00037, EVD-D03-00038, EVD-D03-00039 and EVD-D03-00040: Video excerpts. With regard to the press conference held by Thomas Lubanga in Kampala on 11 February 2003 on his return from Dar es Salaam, see P-30, T. 181, p. 10 *et seq.*; EVD-D03-00027 to EVD-D03-00031. See also P-2, T. 191, pp. 59 and 60; T. 192, pp. 17 and 18.

groups.<sup>1047</sup> As a result, by late 2002, the UPC had found a new ally in the Rwandan-backed RCD-Goma.<sup>1048</sup>

505. According to P-12, Rwanda had started to supply weapons to the UPC even before Chief Kahwa's departure in November 2002.<sup>1049</sup> Chief Kahwa had set up the military training camp in Mandro, and the first weapons and ammunition from Rwanda were dropped in that area on 2 August 2002.<sup>1050</sup> Bosco Ntaganda,<sup>1051</sup> who has already been mentioned, was allegedly sent there as an instructor.<sup>1052</sup> Further, Chief Kahwa allegedly told P-12 that the Rwandans had proved as efficient as the Ugandans in providing support to the UPC.<sup>1053</sup>

506. P-12 also testified that between 12 and 45 Hema youths left for heavy-weapons training in Rwanda<sup>1054</sup> and that it was Bosco Ntaganda who decided to use such weaponry.<sup>1055</sup>

507. Ultimately, the Rwandan Government, it is alleged, supplied weapons to the UPC camps in Mandro, Tchomia, Bule, Bulukwa and Dhego and sent military experts to train the Hema militias.<sup>1056</sup>

## **21. Rapprochement between the DRC and Uganda for the reconquest of Ituri**

508. It was reported that in early 2003, the UPDF increased its military presence in Ituri, particularly in Bunia.<sup>1057</sup> In February 2003, the DRC and Uganda amended

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<sup>1047</sup> D02-236, T. 243, p. 15.

<sup>1048</sup> D02-236, T. 244, p. 36.

<sup>1049</sup> P-12, T. 200, pp. 21-22 and T. 202, pp. 15-17.

<sup>1050</sup> P-12, T. 200, p. 22 and T. 202, pp. 17, 23 and 24-26.

<sup>1051</sup> According to Witness P-2, Bosco Ntaganda was at that time "[TRANSLATION] UPC Deputy Chief of Staff, with responsibility for operations" (EVD-OTP-00144, previous statement of P-2, para. 29).

<sup>1052</sup> P-12, T. 202, p. 23. On Chief Kahwa's rapprochement with Rwanda, see P-12, T. 202, pp. 15-17.

<sup>1053</sup> P-12, T. 202, p. 28.

<sup>1054</sup> On the types of weapons delivered, see P-12, T. 202, pp. 43-45.

<sup>1055</sup> P-12, T. 202, pp. 44 and 46.

<sup>1056</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0343 to DRC-OTP-0129-0344, para. 29). Witness D02-228 told the court that local radio stations had announced at the time that Rwanda was dropping weapons and ammunition for the UPC militias of Mando, but that the information was not confirmed (D02-228, T. 252, p. 17).

<sup>1057</sup> [Agreement as to evidence](#), admission 4.

the Luanda Agreement during a parallel meeting in Dar es Salaam.<sup>1058</sup> The amended agreement set a new time frame whereby the Pacification Commission would be established by 17 February 2003 and the withdrawal of UPDF troops from Bunia would be completed on 20 March 2003.<sup>1059</sup>

509. On 9 February 2003, an informal meeting reportedly took place in President Kabila's suite in Dar es Salaam, where the FNI (northern Lendu) and PUSIC (Hema) were both represented.<sup>1060</sup> According to D02-236, who attended the meeting, its purpose was to define a coherent strategy to expel the UPC from Ituri and regain control of the region.<sup>1061</sup>

510. Instructions for the UPC expulsion from Bunia were allegedly issued two days later by President Kabila, who invited D02-236 and his delegation, together with PUSIC representatives, to a meeting in Kinshasa.<sup>1062</sup> The Chamber will analyse the body of evidence on the DRC's tactical rapprochement with Uganda in the section of the judgment concerning the existence of an armed conflict.<sup>1063</sup>

## **22. February and March 2003 attacks in Ituri**

511. On 24 February 2003, Bogoro was attacked. Bunia was still in the hands of the UPC.<sup>1064</sup> The attack is the subject of the case at bar. On 26 February 2003, the population of Bunia reportedly held a pro-UPC demonstration.<sup>1065</sup> At the time, Bunia was surrounded by two armed forces: the Ugandan army, and the UPC army that controlled the city. The UPC therefore rallied the population to call on

<sup>1058</sup> See also on the rapprochement between the DRC and Uganda, P-12, T. 194, pp. 47-48 and 60-65; T. 203, pp. 8-9; EVD-D03-00066: Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on withdrawal of Ugandan troops from the Democratic Republic of the Congo (specifically, DRC-D03-0001-0454, articles 2(2), 2(3), 2(4) and 5).

<sup>1059</sup> EVD-D03-00067: Amendment to the Luanda Agreement between the DRC and Uganda.

<sup>1060</sup> D02-236, T. 243, p. 16; T. 244, p. 43.

<sup>1061</sup> D02-236, T. 243, p. 16; T. 247, p. 74. Witness D02-236 testified that the 24 February 2003 attack on Bogoro was not mentioned at the meeting (D02-236, T. 247, p. 74).

<sup>1062</sup> D02-236, T. 247, pp. 74-75; T. 243, pp. 14-16. The witness testified that the 24 February 2003 attack on Bogoro was not mentioned at this meeting either.

<sup>1063</sup> See "Section IX(B)(3)(a) Existence and nature of the armed conflict".

<sup>1064</sup> P-2, T. 192, p. 19.

<sup>1065</sup> P-2, T. 192, p. 12.

it for help and demand the withdrawal of the Ugandans.<sup>1066</sup> During the demonstration, Mileyo was installed as the UPC governor.<sup>1067</sup> On 4 March 2003, Mandro, another UPC stronghold, came under attack.<sup>1068</sup> On 6 March 2003, the UPDF attacked Bunia, supported by Lendu armed groups.<sup>1069</sup> In the aftermath of the clashes, the UPC retreated from Bunia to various camps, whereas the UPDF remained in Bunia.<sup>1070</sup> As regards these two events, the Chamber refers to the section of the judgment concerning the existence of an armed conflict.<sup>1071</sup>

### **23. 18 March 2003 Agreement to End the Hostilities**

512. On 18 March 2003, several major parties involved in the conflict raging in Ituri, including the FNI, the FRPI, PUSIC, the FPDC, the RCD-ML, the UPC and the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUC”) signed another ceasefire agreement in Bunia, which provided that MONUC would oversee its implementation.<sup>1072</sup>

513. On 4 April 2003, talks under the aegis of the Pacification Commission commenced.<sup>1073</sup> According to P-2, the Ugandan army was charged with ensuring security so that the Commission could complete its work.<sup>1074</sup> The talks aimed to adopt an interim peace mechanism for Ituri and mostly focused on the withdrawal of Ugandan troops from that region. However, given the high risk of

<sup>1066</sup> P-2, T. 192, p. 12.

<sup>1067</sup> P-2, T. 192, p. 13.

<sup>1068</sup> P-12, T. 194, p. 66; P-160, T. 210, p. 67.

<sup>1069</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0342, para. 25). See also P-267, T. 171, pp. 47 and 48; P-30, T. 176, pp. 64 and 65; P-12, T. 194, p. 64; P-2, T. 192, p. 15.

<sup>1070</sup> P-2, T. 192, pp. 18-20. On this point, see “Section IX(B)(3)(a)(i) Military occupation”.

<sup>1071</sup> See “Section IX(B)(3)(a)(iv) Intensity of the conflict”.

<sup>1072</sup> EVD-D03-00044: Agreement to End the Hostilities in Ituri (DRC-OTP-0043-0203); D02-236, T. 243, p. 28; P-12, T. 195, pp. 27 and 38-40; D02-228, T. 250, p. 15.

<sup>1073</sup> EVD-OTP-00195: Final report of the Ituri Pacification Commission; P-30, T. 176, pp. 34 and 45. P-2 stated that after the ceasefire agreement had been signed on 18 March 2003, meetings took place between various groups and the MONUC, and official ceremonies were organised for the opening and closing of the Ituri Pacification Commission (P-2, T. 190, p. 13). However, the Commission continued its work even after its official closing on 14 April 2003 and the withdrawal of Ugandan troops in May 2003. Various meetings were held between Angola, Uganda, the Kinshasa government and MONUC (P-2, T. 190, p. 15).

<sup>1074</sup> P-2, T. 192, p. 57.

a power vacuum and ensuing violence, the international community pressed for gradual withdrawal, a principle eventually accepted by Uganda.<sup>1075</sup>

#### **24. Withdrawal of the Ugandan army and resumption of the cycle of violence**

514. On 6 May 2003,<sup>1076</sup> the Ugandan army left almost all of the positions that it occupied in Bunia.<sup>1077</sup> The UPDF withdrawal from Bunia, which, according to D02-236, was supposed to take place in three phases,<sup>1078</sup> unleashed a spiral of violence pitting the UPC against the Lendu militias that remained after the Ugandan troops withdrew.<sup>1079</sup> The fighting between the two groups culminated in the UPC's regaining control of Bunia.<sup>1080</sup>

515. During May and June 2003, acts of violence, resulting in numerous casualties, spread further inland, with battles taking place, particularly in Tchomia, between the FRPI and PUSIC, which had allied itself with the UPC against the Lendu.<sup>1081</sup> Against this background of violence, the Ugandan army finally completed its withdrawal from the DRC.<sup>1082</sup> Although the majority of Ugandan forces had withdrawn from the area as of 6 May 2003, the last UPDF troops left Ituri on

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<sup>1075</sup> EVD-OTP-00195: Final report of the Ituri Pacification Commission (DRC-OTP-0107-0230 to DRC-OTP-0107-0231). See also D02-236, T. 244, pp. 27-28.

<sup>1076</sup> EVD-OTP-00141: Video excerpt showing withdrawal of Ugandan troops; P-12, T. 177, p. 48.

<sup>1077</sup> P-30, T. 177, pp. 48-49; P-267, T. 163, p. 61.

<sup>1078</sup> D02-236, T. 244, pp. 27 and 28.

<sup>1079</sup> D02-236, T. 243, p. 32.

<sup>1080</sup> P-267, T. 163, pp. 60 and 61. In this connection, D02-228 described the ensuing population displacement to North Kivu (D02-228, T. 250, pp. 21 and 22). With regard to the situation in Bunia in May 2003, see EVD-D03-000135, EVD-OTP-000137, EVD-OTP-00138. See also P-30, T. 178, pp. 18-21; T. 179, p. 46.

<sup>1081</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0358 to DRC-OTP-0129-0359, paras. 84-87); P-12, T. 196, p. 26. As regards this attack, see also P-12, T. 202, p. 40. According to the witness, Bosco Ntaganda, at the behest of Kigali and the Hema traders who backed him, launched the attack against the Hema in Tchomia for financial reasons, in order to levy customs (P-12, T. 203, p. 23). Still according to that witness, Kigali gave orders directly to Floribert Kisembo, Bosco Ntaganda, Thomas Lubanga and Rafai [Rafiki], who was Rwandophone and working in the military intelligence services (P-12, T. 202, p. 40).

<sup>1082</sup> EVD-OTP-00178, EVD-OTP-00179, EVD-OTP-00180: Video excerpts – Meeting at Bunia airport on 7 March 2003.

2 June 2003.<sup>1083</sup> General Kale Kayihura, a representative of the Ugandan army, seems to have played an important role in the withdrawal operations.<sup>1084</sup>

### C. METHODS OF WARFARE

516. The evidence in the case clearly demonstrates that all the militias present in the district of Ituri between 2002 and 2003 and which launched attacks assaulted unarmed civilians who had no part in combat, killing, pillaging and destroying houses, and subjecting women to sexual violence. Furthermore, several witnesses in the case described the extreme violence which was generally meted out to civilians in Ituri at the material time. The burning of straw houses that could be sheltering sleeping civilians was frequently employed as a method of warfare.<sup>1085</sup>

517. In this connection, it is useful to refer to the MONUC report on events in Ituri, which reads:

During attacks on localities occupied by the ethnic groups of the opposite side and often hosting a UPC battalion or a local Lendu militia group deployed for the “protection” of civilians, fighting between the armed groups would most often be intense and of short duration. Attackers often ended up killing civilians, destroying homes and social infrastructures, abducting women for sexual abuse and looting the entire village. Lendu militias and UPC justified their actions, stating that all civilians were part of the armed groups since most of them were given weapons for self-protection. [...] Several other attacks were orchestrated by both sides, with hundreds of civilian victims, for example in Mahagi, Komanda, Dungu, Ambe, Gety, Mitega and Fataki.<sup>1086</sup>

518. P-12 explained that the civilian population was always attacked, that the attackers very frequently took it by surprise and that murders and theft of property or livestock ensued.<sup>1087</sup> D02-148 stated that “[TRANSLATION] [w]hen the

<sup>1083</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo*, para. 264. With regard to the gradual withdrawal of Ugandan troops, see P-30, T. 179, pp. 39-40; P-2, T. 190, pp. 53 and 54.

<sup>1084</sup> P-12, T. 195, pp. 18 and 40. See also P-2, T. 194, pp. 3, 4 and 8; EVD-D02-00062: Video excerpt regarding P-2, T. 190, p. 64; EVD-D03-00054: Video excerpt; EVD-OTP-00160: Video excerpt - Speech by General Kale Kayihura.

<sup>1085</sup> See for example P-12, T. 195, p. 69; T. 197, p. 46; P-28, T. 218, pp. 6-9; P-160, T. 211, p. 38.

<sup>1086</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0347, para. 41). See also EVD-OTP-00222: Human Rights Watch, *“Le fléau de l’or”*, (DRC-OTP-0163 to 0394 *et seq.*).

<sup>1087</sup> P-12, T. 197, p. 72.

enemy comes to your house, he can kill you and carry off your belongings”<sup>1088</sup> – a fact also confirmed by P-267 and D02-136 in relation to the attacks carried out by the Ugandans.<sup>1089</sup> Germain Katanga himself noted that, especially in 2002, the civilian population suffered greatly and that the DRC had its own brand of warfare: “[TRANSLATION] war is not waged the way it is in Europe. In Europe people take cover in their homes. In our part of the world, it’s the opposite. If you stay at home, your home will be set on fire and then [...] you’ll burn inside it”.<sup>1090</sup> He described the violence of the attacks perpetrated by the UPC, particularly in Songolo, where attackers killed, pillaged and burned houses,<sup>1091</sup> showing his awareness of the phenomenon.

519. As specifically regards pillaging, the Chamber observes that it was common practice despite prohibitions by fetish-priests but that it was not the work only of professional soldiers. P-12 reported that “[TRANSLATION] the military expeditions that were organised focused on property”, whether weapons, ammunition and cows that would be sold in Beni or other property, and stated that “[TRANSLATION] this was the case for example among the Ngiti and Lendu”.<sup>1092</sup> Similarly, the MONUC report on the events in Ituri underlines that all armed groups pillaged when attacks took place.<sup>1093</sup> The Chamber considers, therefore, that far from being committed exclusively by professional soldiers, as Germain

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<sup>1088</sup> D02-148, T. 280, p. 55.

<sup>1089</sup> P-267, T. 171, p. 31; D02-136, T. 241, p. 57.

<sup>1090</sup> D02-300, T. 320, pp. 32-33. See also with regard to the attack on Songolo by UPC forces, T. 315, p. 26; T. 322, p. 66.

<sup>1091</sup> D02-300, T. 315, p. 26; T. 322, p. 66.

<sup>1092</sup> P-12, T. 196, p. 67. See also T. 197, p. 55.

<sup>1093</sup> EVD-OTP-00285: MONUC report on events in Ituri (DRC-OTP-0129-0345-DRC-OTP-0129-0346, DRC-OTP-0129-0355-DRC-OTP-0129-0356 and DRC-OTP-0129-0375-DRC-OTP-0129-0376, paras. 35, 72, 73 and 150).

Katanga maintained,<sup>1094</sup> pillaging in fact constituted a method of warfare in a very real sense as well as a form of “pay”, “booty” or gain for the attackers.<sup>1095</sup>

520. With regard to sexual violence against women belonging to the enemy group, it appears that it was a frequent practice to capture them and turn them into sex slaves.<sup>1096</sup>

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<sup>1094</sup> D02-300, T. 324, p. 54.

<sup>1095</sup> D02-300, T. 316, p. 40 (“[TRANSLATION] They asked us to leave the population alone [...]. But, as we didn’t get a salary, well, you can imagine, when you found something, ‘you grabbed it’.” See also D02-148, T. 280, pp. 56-58.

<sup>1096</sup> P-12, T. 196, pp. 28 and 65-66; P-28, T. 218, p. 22; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0345 to DRC-OTP-0129-0347, paras. 35-36 and 41); EVD-OTP-00240: PUSIC political declaration (DRC-OTP-0041-0104). It should, however, be emphasised that as far as the Ngiti combatants were concerned, the fetish-priests reportedly forbade rape before and during combat (P-28, T. 218, pp. 57-58 and 61).

## VII. CREATION, EVOLUTION AND ORGANISATION OF THE GROUP OF COMMANDERS AND COMBATANTS OF WALENDU-BINDI COLLECTIVITÉ AND OBJECTIVES PURSUED

521. In the *Decision on the confirmation of charges*, Pre-Trial Chamber I found that:

There is sufficient evidence to establish substantial grounds to believe that the FRPI, over which Germain Katanga had the command, was a hierarchically organised group. This is shown in particular by the fact that:

- i. the FRPI was organised into camps within the Irumu territory, in the Walendu Bindi *collectivité* and that each of these camps had a commander;
- ii. Germain Katanga was the commander of the Aveba camp which served as the headquarters of the FRPI;
- iii. the FRPI was a military structured organisation divided into sectors, battalions and companies;
- iv. FRPI commanders had the ability to communicate with each other through hand-held short range radios; there was also a *phonie* at Germain Katanga's headquarters in Aveba; Germain Katanga notably used these assets to give his orders;
- v. Germain Katanga, in his powers as a superior leader, had the ability to jail and adjudicate [...].<sup>1097</sup>

522. It should be recalled that the Prosecution case laid before the Chamber concerns the activities of a Ngiti militia in Walendu-Bindi *collectivité*, which was characterised by “[TRANSLATION] its members’ ethnic allegiance” and which was allegedly involved in the conflicts in Ituri district from late 2000 and early 2001.<sup>1098</sup> The Prosecution submitted that in late 2002, the militia comprised a network of camps located in each of the five *groupements* of the *collectivité*, and a military command structure.<sup>1099</sup> According to the Prosecution, the militia constituted a

<sup>1097</sup> [Decision on the confirmation of charges](#), para. 543 (footnotes omitted).

<sup>1098</sup> [Prosecution Closing Brief](#), para. 126.

<sup>1099</sup> [Prosecution Closing Brief](#), para. 133.

structured organisation and remained so at the time of the attack on Bogoro, 24 February 2003.<sup>1100</sup>

523. The Defence vigorously contested the claim, arguing that at the time of the events *sub judice*, the militia had very little structure, the camps in Walendu-Bindi *collectivité* were autonomous, there was no organisation with a proper structure, be it horizontal or vertical, as regards their commanders, and that, therefore, it was very difficult to instil any form of discipline in the various autonomous local combatant groups. According to the Defence, only after the attack on Bogoro did the FRPI become a structured organisation.<sup>1101</sup> The Defence contended that the attack was part of a broader plan formulated and orchestrated by the Kinshasa government, EMOI, the APC and the RCD-ML to allow the central authorities to regain control of Ituri province,<sup>1102</sup> which, moreover, constituted a legitimate political and strategic plan directed against the UPC.<sup>1103</sup>

524. The Chamber will present below its conclusions of fact on the body of evidence relating to the existence, in Walendu-Bindi *collectivité* in February 2003, of a structured Ngiti militia with a hierarchical chain of command within the *collectivité*.<sup>1104</sup> To that end, it will give a chronological presentation, first setting out the main features of Ngiti combatant groups up to September 2002, then describing how they developed in the run-up to the attack on Bogoro in February

<sup>1100</sup> [Prosecution Closing Brief](#), para. 133.

<sup>1101</sup> See, in particular, [Defence Closing Brief](#), paras. 574 and 1289-1289; [Defence for Germain Katanga, "Defence observations on article 25\(3\)\(d\)", 15 April 2013, ICC-01/04-01/07-3369 \("First Defence observations on article 25\(3\)\(d\)"\)](#), paras. 80 and 99; [Defence for Germain Katanga, "Defence observations on article 25\(3\)\(d\) of the Rome Statute", 25 October 2013, ICC-01/04-01/07-3417 \("Third Defence observations on article 25\(3\)\(d\)"\)](#), paras. 52 and 54.

<sup>1102</sup> See, for example, [First Defence observations on article 25\(3\)\(d\)](#), para. 53.

<sup>1103</sup> See, for example, [First Defence observations on article 25\(3\)\(d\)](#), para. 76; [Third Defence observations on article 25\(3\)\(d\)](#), para. 58.

<sup>1104</sup> [Prosecution Closing Brief](#), para. 152. See also [Common legal representative of the main group of victims, "Observations du représentant légal quant à la responsabilité de G. Katanga en vertu de l'article 25-3-d\) du Statut", 8 April 2013, ICC-01/04-01/07-3365 \("First observations of the common legal representative of the main group of victims on article 25\(3\)\(d\)"\)](#), paras. 37-39.

2003, and last explaining the workings of the organisation which they constituted shortly before the battle.

## A. COMBATANT GROUPS IN WALENDU-BINDI *COLLECTIVITÉ* UP TO SEPTEMBER 2002

### 1. Creation of self-defence groups

525. It is the Prosecution's submission that as a result of repeated UPDF attacks, the inhabitants of Walendu-Bindi *collectivité* became actively involved, as from late 2000 and early 2001, in the conflict in Ituri and that they organised themselves into a community self-defence movement.<sup>1105</sup> According to the Prosecution, "[TRANSLATION] [r]elentless attacks on the *collectivité* demanded solidarity and cooperation among the Ngiti combatants to counter the enemy."<sup>1106</sup>

526. The formation of self-defence groups in Walendu-Bindi *collectivité* to repel the many UPDF attacks was not per se contested by the Defence.<sup>1107</sup> In fact, the Defence acknowledged that from late 2000, local combatants were forced to defend themselves "by force of circumstance"<sup>1108</sup> and that defence efforts were made to this end in Walendu-Bindi *collectivité* as a whole and involved everyone, as the community's survival depended on it.<sup>1109</sup> The Defence submits that the activities were organised at a very local level but that the combatants were constantly on battle alert.<sup>1110</sup> As there is no dispute about this part of the record, the Chamber will not dwell much on it and will not refer to the content of the evidence on record regarding this topic.<sup>1111</sup>

<sup>1105</sup> [Prosecution Closing Brief](#), para. 126.

<sup>1106</sup> [Prosecution Closing Brief](#), para. 128.

<sup>1107</sup> [Defence Closing Brief](#), paras. 553 and 555; [Defence Closing Statements, T. 338](#), p. 10.

<sup>1108</sup> [Defence Closing Statements, T. 338](#), p. 8.

<sup>1109</sup> [Defence Closing Brief](#), para. 1290; [Defence Closing Statements, T. 338](#), p. 10.

<sup>1110</sup> [Defence Closing Brief](#), para. 1290.

<sup>1111</sup> See for example, D02-136, T. 240, pp. 17-18; T. 241, p. 57; D02-148, T. 278, p. 62; T. 279, pp. 45, 52 and 60; D02-501, T. 260, pp. 14-16; P-12, T. 195, pp. 68-71; T. 197, pp. 46-47; EVD-OTP-00285: MONUC Report on the events in Ituri (DRC-00129-340, paras. 21 and 23).

527. Germain Katanga stated that between 2001 and 2002, when he was poaching elephants and okapis, whenever he heard explosions from attacks by Ugandan forces he would go to defend his territory – Aveba and its surroundings.<sup>1112</sup> According to him, “*combattantisme*”, an expression which he used and which he described as a “[TRANSLATION] self-defence phenomenon”,<sup>1113</sup> started in 2000 “[TRANSLATION] when the Ugandans came up from Boga, bound for Bukiringi” and entered Walendu-Bindi *collectivité*.<sup>1114</sup>

528. The Accused further stated that in early 2001, the elders in his community decided to launch an offensive against the Ugandans before they could consolidate their position in Gety-Etat, that is, before they could set up a military communication channel and mount their defence.<sup>1115</sup> During the battle of Kazana, which marked the community and in which Germain Katanga took part, the combatants finally forced the Ugandans to retreat. In so doing, however, the Ugandans took control of the road leading from Gety, Monobi, Kaswara, Aveba, Badjanga to Bukiringi.<sup>1116</sup> Germain Katanga testified that the Ugandans then set fire to all the houses along their way.<sup>1117</sup> He stated, however, that in or around mid-2001, realising that they were on the wane and after an intense period of fighting, the Ugandans ended operations and remained encamped.<sup>1118</sup>

529. The Chamber has no doubt that in 2001 and early 2002, the general state of mind of the population in Walendu-Bindi *collectivité* was to defend their community at all cost from all outside attackers and, where necessary, to go on the offensive as part of the resistance effort. It notes that the general mobilisation described would arise with the need to defend themselves against the Ugandan

<sup>1112</sup> D02-300, T. 315, p. 22; T. 324, p. 62.

<sup>1113</sup> D02-300, T. 315, p. 42. See also D03-66, T. 297, p. 39.

<sup>1114</sup> D02-300, T. 314, pp. 50-52.

<sup>1115</sup> D02-300, T. 314, pp. 54-55.

<sup>1116</sup> D02-300, T. 314, pp. 57-58.

<sup>1117</sup> D02-300, T. 314, pp. 57-58.

<sup>1118</sup> D02-300, T. 314, p. 58.

enemies and observes that it proceeded in the same way when they subsequently had to resist UPC combatants.<sup>1119</sup>

530. The Chamber also notes that in 2001 and 2002, the combatants in Walendu-Bindi were mainly armed with traditional weapons such as spears and arrows although sometimes they succeeded in seizing firearms from their adversaries in the aftermath of battle.<sup>1120</sup> According to Germain Katanga, for many villagers, the term “combatant” merely meant “[TRANSLATION] a man who [fights] with arrows, [in other words], traditional weapons.”<sup>1121</sup>

531. The Prosecution also submitted that each village had a defence force acting under the command of local leaders.<sup>1122</sup> The Defence also acknowledged that each location had one military leader, “if not more”.<sup>1123</sup> It however contested the importance attached to those who headed the self-defence groups, arguing that only the elders and fetish-priests exerted real authority over these groups.<sup>1124</sup>

532. As pointed out by the Prosecution,<sup>1125</sup> the Chamber notes, however, that according to Witnesses D02-148 and D02-160, who both lived in Walendu-Bindi *collectivité*, by 2001 and in 2002 some Ngiti commanders were already prominent figures, for example Kandro who led a battalion of combatants called “*Garrison*”.<sup>1126</sup> In this regard, and with respect to December 2001, Witness D02-160 also mentioned by name Colonel Kandro, Colonel Cobra Matata and Commanders Kisoro, Nyamulongi, Move and Dodova who had taken part in

<sup>1119</sup> See, for example, D02-136, T. 241, p. 58.

<sup>1120</sup> D02-136, T. 240, p. 17 and 20; T. 241, pp. 22-24; P-267, T. 171, p. 3; D02-228, T. 249, p. 51; D02-300, T. 315, pp. 59- 60; T. 317, p. 40; P-28, T. 217, p. 24; EVD-D02-0126-0416: Resistance Manifesto, [Defence Closing Statement, T. 338](#), p. 10.

<sup>1121</sup> D02-300, T. 315, p. 42.

<sup>1122</sup> [Prosecution Closing Brief](#), para. 127.

<sup>1123</sup> [Defence Closing Brief](#), para. 1290.

<sup>1124</sup> [Defence Closing Brief](#), para. 556.

<sup>1125</sup> [Prosecution Closing Brief](#), para. 127.

<sup>1126</sup> D02-148, T. 279, p. 12.

combat, further stating that some of the Ngiti commanders were regarded locally almost as “[TRANSLATION] celebrities”.<sup>1127</sup>

533. The Chamber therefore finds that in early 2002 there were self-defence groups in Walendu-Bindi *collectivité* which grew out of a spontaneous and collective mobilisation as part of what Germain Katanga called “*combattantisme*”, viz. a resistance movement which sometimes went on the offensive, particularly against the Ugandan threat. They had a minimal degree of organisation and some were under the authority of commanders who sometimes had recognition within the *collectivité*. The Chamber is nevertheless not in a position to ascertain the conditions under which the authority was exerted.

## 2. Colonel Kandro’s troops in September 2002

### a) Centralisation of command

534. The Prosecution submitted that owing to persistent attacks against Walendu-Bindi *collectivité*, centralisation of command over the combatants became necessary. In this respect, the Prosecution claimed that in August 2002, in addition to commanding a battalion of combatants known as “*Garrison Mobile*”, Colonel Kandro was also the supreme commander of all Ngiti combatants in Walendu-Bindi *collectivité*.<sup>1128</sup>

535. The Defence contested the existence of a single leader and that Kandro was in charge of all combatants, arguing that he exerted power only over his own group, the “*Garrison Mobile*”.<sup>1129</sup> Lastly, the Defence submitted that Kandro’s importance and popularity was largely attributable to his relationship at the time with the Governor of Ituri, Molondo Lompondo, who was appointed by Mbusa Nyamwisi, hence associating Kandro with the APC,<sup>1130</sup> as well as to the fact that

<sup>1127</sup> D02-160, T. 272, p. 55.

<sup>1128</sup> [Prosecution Closing Brief](#), para. 129.

<sup>1129</sup> [Defence Closing Brief](#), para. 1291.

<sup>1130</sup> [Defence Closing Brief](#), paras. 561 and 571.

Kakado, a fetish-priest who was particularly important in the *collectivité*, had authorised him to set up a camp in Songolo.<sup>1131</sup>

536. Firstly, the Chamber notes that Witness D02-129, who lived in Bunia until December 2002 and was therefore not present in Nyakunde in September of the same year,<sup>1132</sup> stated, based on hearsay, that as far he was aware, Colonel Kandro was not the leader of all the Ngiti commanders but only those of “*Garrison*”.<sup>1133</sup>

537. However, Witness D02-148, who was one of Kandro’s bodyguards and hence particularly well-placed to testify to Kandro’s position, confirmed that Kandro was the “[TRANSLATION] supreme commander of all Ngiti combatants”.<sup>1134</sup> Witness D02-148 so testified in response to a general question unconnected to any battle, regarding the period prior to the battle of Nyakunde and concerning the downfall of Governor Lompondo in August 2002.<sup>1135</sup> He further stated that Kandro was “[TRANSLATION] a well-known, intelligent, courageous and very respectful commander. And everyone counted on him.”<sup>1136</sup> He further stated that many combatants trusted him, which, according to him, did not appear to be the case for Colonel Cobra Matata, mentioned above.<sup>1137</sup> Germain Katanga also stated that contrary to Cobra Matata, whom he described as a “[TRANSLATION] raging lion”, Colonel Kandro was popular.<sup>1138</sup>

538. Several other witnesses, including three who lived in Walendu-Bindi *collectivité* in September 2002,<sup>1139</sup> also testified that Kandro was in a position of authority at the time. Witness D02-501 twice confirmed that Kandro was the leader of Ngiti combatants during the 5 September 2002 battle of Nyakunde,<sup>1140</sup> as

<sup>1131</sup> [Defence Closing Brief](#), para. 557.

<sup>1132</sup> D02-129, T. 271, p. 7.

<sup>1133</sup> D02-129, T. 271, p. 57.

<sup>1134</sup> D02-148, T. 279, p. 46.

<sup>1135</sup> D02-148, T. 279, p. 46.

<sup>1136</sup> D02-148, T. 279, p. 46.

<sup>1137</sup> D02-148, T. 279, p. 8.

<sup>1138</sup> D02-300, T. 315, p. 47.

<sup>1139</sup> D02-161, T. 268, p. 12; T. 269, p. 20; D02-501, T. 260, pp. 14, 26 and 58-59; D02-160, T. 273, pp. 75-76.

<sup>1140</sup> D02-501, T. 260, p. 34.

did D02-01, a Ngiti militia member who was the secretary of Commander Move.<sup>1141</sup> According to Witness D02-161, who lived in Aveba, Kandro was the leader of the Ngiti combatants in Nyakunde.<sup>1142</sup> The statement appears to be confirmed by D02-136, who testified that regarding the commanders who had attacked Nyakunde, Kandro's name was "[TRANSLATION] renowned" and "[TRANSLATION] his group" had attacked Nyakunde.<sup>1143</sup> Witness D02-134, who grew up with Kandro in Nyakunde, testified to having heard through hearsay that in 2002, Kandro was the leader of all the combatants of Walendu-Bindi *collectivité*.<sup>1144</sup> Witness D02-160 stated that "[TRANSLATION] the combatants, who at the time were led by Colonel Kandro, attacked Nyakunde."<sup>1145</sup> Finally, the Chamber notes that D03-88, who was the leader of Bedu-Ezekere *groupement*, stated that Kandro was the military authority and the leader of the Sangolo combatants,<sup>1146</sup> given that Songolo was where a large number of Ngiti combatants were assembled at the time.

539. The Chamber notes further that Germain Katanga also testified that in July 2002, Kandro "[TRANSLATION] assumed [the] position [of real leader of the combatants of] the [resistance] after Cobra", becoming more well-known than Cobra Matata who was the most "[TRANSLATION] senior" in the *collectivité*<sup>1147</sup> and referred to as the "[TRANSLATION] master of the field".<sup>1148</sup> The Chamber notes that the "*Protocole d'accord relatif aux résolutions des conflits inter-ethniques Hema-lendu et Bira en territoire d'Irumu*" [Memorandum of Understanding on the Resolution of Hema-Lendu and Bira Inter-ethnic Conflict in Irumu Territory], which was signed

<sup>1141</sup> D02-01, T. 277, pp. 26 and 52.

<sup>1142</sup> D02-161, T. 269, pp. 36-37.

<sup>1143</sup> D02-136, T. 241, p. 21.

<sup>1144</sup> D02-134, T. 259, p. 20.

<sup>1145</sup> D02-160, T. 272, p. 62.

<sup>1146</sup> D03-88, T. 300, p. 41.

<sup>1147</sup> D02-300, T. 315, p. 46.

<sup>1148</sup> D02-300, T. 321, p. 52.

in Bunia on 5 June 2002, mentioned the need to dismantle Kakado's and Kandro's networks, further attesting to Kandro's influence in Irumu territory.<sup>1149</sup>

540. The Chamber notes in this regard that several witnesses suggested that there was rivalry between Colonel Kandro and Colonel Cobra Matata.<sup>1150</sup> According to Germain Katanga, Kandro's death, shortly after the attack on Nyakunde, was "[TRANSLATION] the result of a leadership tussle" between the two men.<sup>1151</sup> He further explained that, akin to Cobra Matata, alongside his combatant activities, Kandro earned a living as a trader, namely by mining gold, since Baviba *groupement* was renowned for small-scale gold mining in Walendu-Bindi *collectivité*. The Accused stated furthermore that Kandro's "[TRANSLATION] life" consisted in pursuing "[TRANSLATION] gold diggers", which also held true for Cobra Matata. However, unlike Cobra Matata, Kandro only attacked diggers who were not from his village, which was not the case of Cobra and this, from the outset, differentiated them in the eyes of the population.<sup>1152</sup> Germain Katanga, however, emphasised that at that time Kandro and Cobra's men "[TRANSLATION] cooperated".<sup>1153</sup> On account of the rivalry between the two colonels for the gold market and, more generally, for the acquisition of new property, it would appear, but cannot be ascertained, that such cooperation only became necessary as part of activities related to "*combattantisme*."

541. In the view of the Chamber, the evidence above demonstrates that in September 2002, Colonel Kandro was indeed considered the leader of all the Ngiti combatants in Walendu-Bindi *collectivité*. However, it is not in a position to ascertain the concrete implications of such a position, as the aforementioned witnesses did not provide details of how Kandro performed his duties, the orders

<sup>1149</sup> EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic Conflict (DRC-OTP-0136-0206-R01).

<sup>1150</sup> D02-148, T. 279, pp. 8-9; T. 280, p. 9; D02-01, T. 277, p. 52-53. See also D02-300, T. 315, pp. 46-47.

<sup>1151</sup> D02-300, T. 315, p. 46.

<sup>1152</sup> D02-300, T. 315, pp. 48-49.

<sup>1153</sup> D02-300, T. 315, p. 48.

he gave or the exact workings or effectiveness of a chain of military command, if any. Absent additional information about the organisation referred to by the Prosecution, the Chamber is not in a position to find, as alleged by the Prosecution, that there was an effective centralisation of command. Nevertheless, in the light of the position of military authority he held and the reputation he enjoyed, Kandro was a key figure in Walendu-Bindi *collectivité* who was acknowledged by all the Ngiti combatants and behind whom they were prepared to rally.

#### **b) Troop numbers**

542. As regards the number of combatants available to Colonel Kandro, the Prosecution submitted that Ngiti ranks swelled when large numbers of Ngiti soldiers from the APC joined his militia.<sup>1154</sup> The Prosecution recalls that the APC forces, which had to leave Bunia in August 2002 in the wake of the downfall of the Governor of Ituri, Molondo Lompondo, were retreating at the time.<sup>1155</sup> In that connection, whilst noting that the APC troops had effectively fled Bunia in early August 2002,<sup>1156</sup> the Defence argued that despite its defeat, the APC remained a regular army, whose soldiers were well armed and well trained, and that the RCD-ML had moved its party headquarters from Bunia to Beni.<sup>1157</sup> It did, nevertheless, recognise that in the aftermath of the fall of Bunia, the APC soldiers, who took flight with Governor Lompondo, went to Songolo (suggesting that they could have amounted to one battalion) and were bound for Singo, whilst other APC soldiers ended up in Zumbe before also heading to Songolo or to other Lendu or Ngiti areas in Ituri.<sup>1158</sup>

<sup>1154</sup> [Prosecution Closing Brief](#), para. 130.

<sup>1155</sup> [Prosecution Closing Brief](#), para. 131.

<sup>1156</sup> [Agreement as to Evidence](#), admission 3.

<sup>1157</sup> [Defence Closing Brief](#), para. 561.

<sup>1158</sup> [Defence Closing Brief](#), para. 562.

543. In the light of these various arguments, the Chamber must address two pivotal issues related to the situation of the APC after the capture of Bunia of 9 August 2002.

544. The first issue is whether Ngiti troop numbers effectively increased after the fall of Bunia and, if so, to what extent. The Chamber notes firstly that APC troop numbers had already declined even before the UPC overran Bunia, to the extent that, as the Defence noted, the APC was thus “significantly weaken[ed]”.<sup>1159</sup> Germain Katanga stated that in April 2002, the APC had lost half of its soldiers in Ituri, who had mutinied and joined the UPC.<sup>1160</sup> Furthermore, the Chamber underlines that the UPC’s capture of Bunia was a heavy defeat for the APC, throwing its troops into disarray and forcing it, as of August 2002, to retreat pell-mell to the south of Bunia, towards Songolo, Nyakunde and Komanda, and even as far as Beni, in North Kivu.<sup>1161</sup>

545. The Chamber notes that APC troops, driven in rout from Bunia, headed straight to Songolo, Colonel Sandro’s territory, alongside Governor Lompondo, who had come to take refuge there before continuing on to Beni.<sup>1162</sup> According to D02-148, half of the Governor’s forces who fled with him stayed on in Songolo, in particular “[TRANSLATION] the Iturians”.<sup>1163</sup> Germain Katanga stated that by August 2002 and as of Governor Lompondo’s flight, scores of Ngiti soldiers from the APC had joined Colonel Kandro’s troops in Songolo, swelling their ranks significantly.<sup>1164</sup> In this regard, the Accused stated that there were a significant number of Ngiti soldiers within the APC, which is why they joined Colonel

<sup>1159</sup> [Defence Closing Brief](#), para. 561. See also in this regard “Section VI(B) Background: Main political events and incidents”.

<sup>1160</sup> D02-300, T. 315, pp. 24-25; T. 321, pp. 49, 54 and 62. See also D03-707, T. 327, p. 47.

<sup>1161</sup> D02-300, T. 321, p. 56; P-12, T. 194, pp. 36-37 and 39; P-267, T. 171, p. 41; P-28, T. 217, p. 34; T. 218, p. 4; D03-707, T. 327, pp. 47-48; D02-350, pp. 36-37. See also EVD-D02-00147: Operational instructions (DRC-D02-0001-0933), which states that the APC lacks the requisite personnel and equipment.

<sup>1162</sup> See, for example, D02-300, T. 315, p. 26; D03-707, T. 327, pp. 47-48; D02-228, T. 252, pp. 72-73. See also [Agreement as to Evidence](#), admission 3.

<sup>1163</sup> D02-148, T. 279, p. 47.

<sup>1164</sup> D02-300, T. 315, pp. 53-54; T. 321, pp. 55-56.

Kandro's troops.<sup>1165</sup> For that reason, Commander Yuda and his men, as well as Move, Alpha Bebi and Garimbaya<sup>1166</sup> – all Ngiti<sup>1167</sup> – had also moved to Songolo with Kandro.<sup>1168</sup> The Chamber thus notes that a number of APC soldiers, some of whom were Ngiti, boosted Kandro's troops in August 2002. Furthermore, according to the Accused, the APC was diminished at the time, as all its positions had come under UPC attack,<sup>1169</sup> and fled, "[TRANSLATION] offering no resistance", which did nothing to foster a sense among the "[TRANSLATION] villagers" of Walendu-Bindi *collectivité* that they were being protected.<sup>1170</sup>

546. The second issue concerns the status of these combatants and whether, by joining the local combatants, they remained part of the APC. On this matter, the Accused's testimony is put before the Chamber. After August 2002, since the APC was, as Germain Katanga put it, "[TRANSLATION] nothing" by that point,<sup>1171</sup> a number of Ngiti combatants in its ranks<sup>1172</sup> had to disperse throughout Walendu-Bindi *collectivité*. Germain Katanga testified that they thus became "[TRANSLATION] almost independent" from the APC.<sup>1173</sup> When questioned specifically on this point, the Accused stated that it remained the case in December and January 2003, until Mike 4, the APC's head of communications, went to Aveba in order to "[TRANSLATION] identify" the former APC combatants.<sup>1174</sup> P-28 explained that some APC elements had "[TRANSLATION] preferred" to live with the combatants and that they travelled with them from battle to battle.<sup>1175</sup>

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<sup>1165</sup> D02-300, T. 321, pp. 57 and 64.

<sup>1166</sup> D02-300, T. 321, p. 57.

<sup>1167</sup> D02-300, T. 321, p. 58.

<sup>1168</sup> D02-300, T. 315, pp. 53-54.

<sup>1169</sup> D02-300, T. 316, p. 57.

<sup>1170</sup> D02-300, T. 316, p. 64. See also D03-88, T. 322, pp. 15-16.

<sup>1171</sup> D02-300, T. 315, p. 38.

<sup>1172</sup> D02-300, T. 321, pp. 57 and 64.

<sup>1173</sup> D02-300, T. 321, p. 47.

<sup>1174</sup> D02-300, T. 321, p. 47.

<sup>1175</sup> P-28, T. 218, p. 6.

547. Lastly, as regards the Defence submission that the APC troops remained a regular army after the fall of Bunia,<sup>1176</sup> the Chamber refers to the evidence of the APC's much weakened position in that part of Ituri immediately after Governor Lompondo was forced to flee,<sup>1177</sup> even if that army still held some other positions in the province.<sup>1178</sup>

548. The Chamber is satisfied that as a result of the fall of Bunia in August 2002, and on account of their ethnic ties, a number of Ngiti combatants from the APC were compelled to join Colonel Kandro's group of combatants. By so doing, these APC combatants became "[TRANSLATION] almost independent" from the then weakened armed group, swelling the ranks of Colonel Kandro's group of combatants. However, the Chamber is unable to establish the exact extent to which troop numbers increased.

**c) Participation of Ngiti combatants in the battle of Nyakunde on  
5 September 2002**

549. In the Prosecution's submission, the regrouping of forces alongside Colonel Kandro and the resulting centralisation allowed the Ngiti combatants of Walendu-Bindi *collectivité*, reinforced by part of the retreating APC troops, to successfully organise and execute an offensive operation such as the 5 September 2002 attack on Nyakunde. According to the Prosecution, the Ngiti forces at the time also included Germain Katanga, Cobra Matata, Nyamulongi, Kisoro, Yuda, Move and Bahati de Zumbe, who, it alleged, all took part in the Nyakunde attack.<sup>1179</sup>

<sup>1176</sup> [Defence Closing Brief](#), para. 561.

<sup>1177</sup> See, for example, D02-136, T. 240, p. 21; D02-300, T. 315, pp. 24-25, 28 and 38; T. 316, pp. 57 and 64; T. 317, pp. 9-10; T.321, pp. 49, 54, 57, 64 and 62; D03-88, T. 300, pp. 39-40; see also EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0352, para. 61).

<sup>1178</sup> EVD-D03-00063: The Kampala Understanding between the RCD-ML and the UPC. P-12, T. 201, pp. 70-72.

<sup>1179</sup> [Prosecution Closing Brief](#), para. 131.

550. The Defence did not dispute that Nyakunde was the target of an offensive by Colonel Kandro's Ngiti troops and the APC's 12th battalion led by Commander Faustin.<sup>1180</sup> In the Defence view, this event, in retaliation for the massive attack against Songolo by the UPC and Bira elements, was the first joint APC and Ngiti operation<sup>1181</sup> and shows the significant role of the APC at the time.<sup>1182</sup> The Defence further argued that the evidence tendered does not show that this attack was planned and executed by the same organised group or groups nor by the same persons as those who attacked Bogoro on 24 February 2003.<sup>1183</sup> It was of the opinion that the circumstances of the Nyakunde attack differed greatly from those of the Bogoro attack.<sup>1184</sup>

551. Firstly, the Chamber notes that many witnesses stated that the battle of Nyakunde was waged jointly by the Ngiti and APC combatants.<sup>1185</sup> Several witnesses also reported that the Ngiti combatants played a significant role in the attack.

552. According to D02-148, who, as aforementioned, was Colonel Kandro's bodyguard and fought in Nyakunde, the APC elements who had come from Zumbe and recently moved to Singo after the fighting in Songolo<sup>1186</sup> had "[TRANSLATION] helped" the Ngiti combatants to complete that difficult operation, which he also described as "[TRANSLATION] large-scale".<sup>1187</sup> The

<sup>1180</sup> [Defence Closing Brief](#), para. 565.

<sup>1181</sup> [Defence Closing Brief](#), paras. 564-566; [Defence for Germain Katanga, "Corrigendum to the Defence Observations on the Decision transmitting additional legal and factual material \(regulation 55\(2\) and 55\(3\) of the Regulations of the Court\)", 3 June 2013, ICC-01/04-01/07-3379-Conf-Corr \("Second Defence Observations on article 25\(3\)\(d\)"\), para. 45.](#)

<sup>1182</sup> [Defence Closing Brief](#), para. 1292.

<sup>1183</sup> [Defence Closing Brief](#), para. 804.

<sup>1184</sup> [Defence Closing Brief](#), para. 804; [First Defence observations on article 25\(3\)\(d\)](#), para. 70; [Second Defence observations on article 25\(3\)\(d\)](#), para. 45.

<sup>1185</sup> See, for example, D02-01, T. 276, pp. 10-11; T. 277, pp. 26-27; D03-88, T. 304, pp. 24-25; D03-707, T. 332, p. 20; D02-136, T. 240, p. 23; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-00129-350, para. 52).

<sup>1186</sup> D02-148, T. 279, pp. 7-8 and 48. See also D02-01, T. 277, pp. 26-29; D03-88, T. 304, pp. 13-14; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0350, paras. 50-51).

<sup>1187</sup> D02-148, T. 279, pp. 7-8 and 48.

witness claimed that the “[TRANSLATION] the most important” commanders during that attack were Kandro and Cobra Matata, but that Faustin from the APC was also present, meaning that he was also one of the main commanders.<sup>1188</sup> Lastly the witness stated that following the battle of Nyakunde, “[TRANSLATION] the combatants” were victorious.<sup>1189</sup>

553. D02-134, who was not in Nyakunde on 5 September 2002, testified that displaced persons who knew Kandro very well and had come to seek refuge in Oicha, had “[TRANSLATION] confirmed” to him that the attack had been “[TRANSLATION] led” by Kandro and that Cobra Matata and Yuda had both participated, and that, on the basis of what he had been told, Yuda belonged to Kandro’s troops then.<sup>1190</sup> However, the witness volunteered no information on the presence of Commander Faustin or APC troops. D02-160 asserted, also on the basis of hearsay, that Nyakunde had been attacked by the “[TRANSLATION] combatants” led by Colonel Kandro,<sup>1191</sup> as did P-28<sup>1192</sup> and D02-161.<sup>1193</sup> P-317, a MONUC investigator, testified that when she had been investigating the battle of Nyakunde, numerous witnesses had told her “[TRANSLATION] that APC forces fought *alongside* the Lendu”.<sup>1194</sup>

554. According to Germain Katanga, Commander Faustin still had at least 300 men,<sup>1195</sup> the figure also advanced by D03-88.<sup>1196</sup> According to the Accused, Kandro was in charge of over 100 men, boosted by combatants from different regions, in respect of whom he could not provide a precise breakdown, including Cobra Matata’s men, who mustered over 60.<sup>1197</sup> D02-148 stated several times that

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<sup>1188</sup> D02-148, T. 279, p. 7.

<sup>1189</sup> D02-148, T. 279, p. 8.

<sup>1190</sup> D02-134, T. 259, p. 65.

<sup>1191</sup> D02-160, T. 272, p. 62.

<sup>1192</sup> P-28, T. 218, p. 7.

<sup>1193</sup> D02-160, T. 268, p. 19; T. 269, p. 37.

<sup>1194</sup> P-317, T. 229, p. 32 (emphasis added).

<sup>1195</sup> D02-300, T. 321, p. 67.

<sup>1196</sup> D03-88, T. 300, pp. 39-40.

<sup>1197</sup> D02-300, T. 321, p. 67.

a large number of combatants were present but was unable to give a precise figure.<sup>1198</sup> The Chamber further notes that the witness did not dispute the Prosecution's figure of approximately 1,000 men having participated in the fighting, but instead confirmed that on that occasion the attack was large-scale and that "[TRANSLATION] the aim was to send a large number of combatants".<sup>1199</sup> The Chamber also observes that according to D02-148, Commander Faustin and his 12th Battalion, based in Zumbe, took part in the battle of Nyakunde. The witness stated that some of the troops remained in Zumbe and that Faustin left with around 40 men.<sup>1200</sup>

555. From the body of evidence laid before it, the Chamber finds that the Ngitu combatants under the command of Colonel Kandro constituted one of the main forces present at the attack on Nyakunde and that they were undeniably assisted by APC troops. The evidence tendered shows that Cobra Matata, Yuda, Move and Garimbaya<sup>1201</sup> were in Nyakunde, as was Bahati de Zumbe.<sup>1202</sup>

556. As to whether local or APC combatants mustered greater numbers, the Chamber is of the view, on the basis of the evidence before it, that local combatants were more numerous. The evidence of D02-148, who was very well acquainted with the planning of the attack on Nyakunde and whom the Chamber considers particularly credible on this specific point, emphasised the significant numbers of local combatants involved in this battle.<sup>1203</sup> He stated on several occasions that a large number of combatants belonging to his group were present that day, including around 200 who were armed (with ordinary weapons), whilst the remaining combatants had bladed weapons.<sup>1204</sup>

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<sup>1198</sup> D02-148, T. 279, p. 8.

<sup>1199</sup> D02-148, T. 279, p. 48.

<sup>1200</sup> D02-148, T. 279, p. 7; T. 278, p. 5.

<sup>1201</sup> D02-300, T. 321, p. 68. See also D02-148, T. 279, pp. 7 and 65.

<sup>1202</sup> D02-300, T. 321, p. 67.

<sup>1203</sup> D02-148, T. 279, p. 8.

<sup>1204</sup> D02-148, T. 279, p. 8.

557. As to how the attack proceeded, the Prosecution maintained that it was a perfect example of the kind of action fuelled by vengeance, entailing the targeting of civilians and the commission of grave crimes against persons and their property.<sup>1205</sup> It pointed out that the capture of Nyakunde on 5 September 2002 gave rise to the most egregious massacre to be committed in Ituri.<sup>1206</sup>

558. In the Chamber's view, the record of the case clearly shows that the crimes committed by the attackers in Nyakunde were particularly grave, as Germain Katanga himself noted when testifying that he had gone to the *locus in quo* in the aftermath of the battle, which he described as a "[TRANSLATION] disaster".<sup>1207</sup> Several witnesses told the Court of the scale of the violence perpetrated, confirming that many civilians had been killed<sup>1208</sup> and that the town had been looted,<sup>1209</sup> in particular its large hospital.<sup>1210</sup> MONUC investigators inquiring into the events in Ituri who went to the scene<sup>1211</sup> also gave a relatively detailed description of the violence of the crimes committed during the attack.<sup>1212</sup>

559. According to D02-148, the number of civilians killed by bladed weapon was exaggerated.<sup>1213</sup> He did, however, confirm his earlier statement that the town centre had been pillaged by Colonel Kandro's forces and by all the combatants present.<sup>1214</sup> He also testified that some of Cobra Matata's combatants had pillaged part of the hospital before returning to Bavi but that Kandro had objected to the

<sup>1205</sup> [Prosecution Closing Brief](#), para. 654.

<sup>1206</sup> [Prosecution Closing Brief](#), para. 655.

<sup>1207</sup> D02-300, T. 315, pp. 39-40.

<sup>1208</sup> P-28, T. 218, pp. 7-9; D02-129, T. 271, pp. 46-47; D02-148, T. 279, pp. 50-52; D03-307, T. 332, pp. 20-21.

<sup>1209</sup> P-28, T. 218, pp. 8-9.

<sup>1210</sup> D02-161, T. 269, P. 36; D02-129, T. 271, p. 47; D02-148, T. 279, p. 8; T. 280, p. 5; D02-300, T. 315, p. 40; D03-307, T. 332, pp. 21 and 23.

<sup>1211</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0344, para. 32). The report states that a considerable number of persons – 80 survivors – were interviewed. (DRC-OTP-0129-0351 to DRC-OTP-0129-0352, para. 58).

<sup>1212</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0351, paras. 56-57).

<sup>1213</sup> D02-148, T. 279, p. 50.

<sup>1214</sup> D02-148, T. 280, p. 6.

pillaging of the facility.<sup>1215</sup> The witness also stated that only two weeks after the battle, the hospital was pillaged by the APC forces who controlled Nyakunde.<sup>1216</sup> The Chamber accepts the testimony of D02-148 on Kandro's participation in the pillaging of the hospital with a degree of circumspection, in that, as Kandro's bodyguard, he appears in fact to have sought to downplay Kandro's role in the commission of these various crimes. In particular, the Chamber attaches no credibility to the witness's claim that he only heard that civilians had been killed at Nyakunde hospital during the attack, whereas he had been on the battlefield and had entered the hospital.

560. Germain Katanga stated that in general, the pillaging was not necessarily the work of local combatants<sup>1217</sup> but rather the doing of professional armies who "[TRANSLATION] also pillage professionally" and who "[TRANSLATION] even encouraged the combatants to join them in the pillaging".<sup>1218</sup> The Chamber is unpersuaded by such generalities, accepting instead the evidence of D02-148, which specifically concerns the involvement of Cobra Matata's troops in the battle of Nyakunde, in which he took part.<sup>1219</sup>

561. The Chamber notes, moreover, that according to MONUC and the statements MONUC took from 80 survivors, the crimes were committed mainly by Ngiti forces.<sup>1220</sup> In this regard, the report states that the APC committed widespread acts of pillaging and extortion, but that according to some statements its troops intervened on a number of occasions to prevent the massacres or allow the evacuation of survivors.

562. In any event, the Chamber recalls that the fighting in Songolo and in Nyakunde are closely connected. The connection between these two battles gives

<sup>1215</sup> D02-148, T. 279, p. 8; T. 280, p. 5.

<sup>1216</sup> D02-148, T. 279, p. 53.

<sup>1217</sup> D02-300, T. 324, p. 54.

<sup>1218</sup> D02-300, T. 324, pp. 53-54.

<sup>1219</sup> D02-148, T. 280, p. 5.

<sup>1220</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0351-DRC-OTP-00129-352, paras. 58 and 61).

an insight into the mindset of the local combatants in Nyakunde and the objective they were then pursuing. In fact, the record of the case shows that the Ngiti combatants' motivations were not only military and strategic, but also ethnic.<sup>1221</sup>

563. The Defence itself pointed out that, whereas the APC soldiers were primarily seeking a way out of Ituri, as their objective was highly strategic,<sup>1222</sup> the Ngiti combatants were acting out of "anger" and their main objective was to attack the Bira.<sup>1223</sup> It referred to the conflict which was then taking place between the Ngiti and the Bira community living in Nyakunde and noted that in August 2001, the Bira had "chased out" the Ngiti from their territory, hacking them down with machetes in the very presence and to the knowledge of the Ugandan troops.<sup>1224</sup> The Defence further submitted that the Ngiti had another reason for attacking Nyakunde: on 31 August 2002, Colonel Kandro's camp, based in Songolo, was attacked by the UPC, which had since established itself in Nyakunde, and Ngiti civilians were killed in the fighting.<sup>1225</sup>

564. Indeed, the Chamber notes that several witnesses told the Court that the attack on Nyakunde was launched in reprisal for the battle of Songolo<sup>1226</sup> and that it was, in fact, an act of vengeance or revenge by the Ngiti against those who had attacked them in Songolo,<sup>1227</sup> namely the Bira, who were then allied to the UPC and the UPDF.<sup>1228</sup> It further appears that the attack on Songolo launched by the UPC and the Bira had led to a "[TRANSLATION] massacre",<sup>1229</sup> mainly of Ngiti women, children and elderly people.<sup>1230</sup> Germain Katanga also stated that the

<sup>1221</sup> See in this regard "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants".

<sup>1222</sup> [Defence Closing Brief](#), para. 808.

<sup>1223</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 70. See also [Second Defence observations on article \(25\)\(3\)\(d\)](#), para. 45.

<sup>1224</sup> [Defence Closing Brief](#), para. 809; [First Defence observations on article 25\(3\)\(d\)](#), para. 70.

<sup>1225</sup> [Defence Closing Brief](#), para. 810; [First Defence observations on article 25\(3\)\(d\)](#), para. 70.

<sup>1226</sup> D02-129, T. 271, pp. 20-21; D02-160, T. 272, p. 62; D02-161, T. 269, p. 36.

<sup>1227</sup> D02-160, T. 272, p. 62.

<sup>1228</sup> D02-148, T. 278, p. 63; T. 279, pp. 6-7.

<sup>1229</sup> Germain Katanga's exact words (D02-300, T. 321, p. 69).

<sup>1230</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0350, paras. 50-51); EVD-D03-00098: Grievance Letter.

events in Songolo had marked the community.<sup>1231</sup> Furthermore, they were among some of the “[TRANSLATION] bloody and grim events” enumerated by representatives of the Lendu community in a grievance letter which will be addressed below.<sup>1232</sup>

565. The record of the case clearly shows that the Ngiti combatants were pursuing their own objectives, driven by vengefulness against the ethnic group that had just violently attacked them in Songolo. It would appear, therefore, that the attack on Nyakunde in fact had two objectives: one specific to the Ngiti, entailing retaliation for the attack on Songolo, and one pursued by Commander Faustin, *viz.* to open a road to Komanda and then Beni and thus weaken UPC troops in Ituri.<sup>1233</sup>

566. On the basis of the aforementioned evidence, the Chamber finds that the Ngiti Commanders Cobra Matata, Yuda, Move and Garimbaya went to fight in Nyakunde on 5 September 2002 and at the time were driven by vengefulness rooted in ethnic considerations. During that attack, inhabitants were killed and houses destroyed and pillaged; some such acts targeted persons and/or civilian property belonging to the Bira ethnic group and included the plunder of a hospital. Lastly, the Chamber notes that, although it cannot state that the Ngiti combatants were the sole perpetrators of murder and other such crimes during the battle, their participation therein was extensive.

567. As to the importance to be attached to the ethnic dimension of the conflict, particularly during the battle of Nyakunde, the Chamber refers to the findings which it will set out in the relevant section of the judgment.<sup>1234</sup>

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<sup>1231</sup> D02-300, T. 325, p. 58.

<sup>1232</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0349 to DRC-OTP-0194-0350).

<sup>1233</sup> D02-136, T. 240, pp. 22-23; D03-88, T. 304, pp. 24-25.

<sup>1234</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

## B. EVOLUTION OF THE GROUP OF NGITI COMMANDERS AND COMBATANTS OF WALENDU-BINDI *COLLECTIVITÉ* AS OF OCTOBER 2002 INCLUDING IN PREPARATION FOR THE ATTACK ON BOGORO

568. The Prosecution submits that when the interethnic conflict escalated in late 2002, the Ngiti decided to join the Lendu combatants of Bedu-Ezekere in a common front against UPC actions.<sup>1235</sup> Various undertakings, to which the Chamber will now turn, were, it is alleged, therefore pursued within Walendu-Bindi *collectivité*.

569. Regard must first be had to the Prosecution's reference to the encirclement of Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement* and the resultant impossibility of securing supplies in food and goods.<sup>1236</sup> Both the Prosecution and Defence drew attention to repeated attacks by the UPDF and later the UPC against both territorial entities.<sup>1237</sup>

570. The Chamber wishes to dwell specifically on the situation in Walendu-Bindi *collectivité* and notes that between August and November 2002 the UPC militia and its then allies launched multiple offensives against that *collectivité*. Several witnesses – specifically, P-12,<sup>1238</sup> P-317,<sup>1239</sup> D02-136,<sup>1240</sup> D02-148,<sup>1241</sup> D02-161<sup>1242</sup> and D03-88<sup>1243</sup> – spoke of the attacks, the insecurity within Walendu-Bindi *collectivité*, and the fact that its inhabitants were encircled and hemmed in. The MONUC

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<sup>1235</sup> [Prosecution Closing Brief](#), paras. 134 and 137.

<sup>1236</sup> [Prosecution Closing Brief](#), paras. 3 and 504-510; [Prosecution Closing Statements, T. 33Z](#), pp. 13 and 14.

<sup>1237</sup> [Defence Closing Brief](#), paras. 553, 563 and 1132.

<sup>1238</sup> P-12, T. 200, p. 31.

<sup>1239</sup> P-317, T. 230, p. 9.

<sup>1240</sup> D02-136, T. 241, p. 58.

<sup>1241</sup> D02-148, T. 279, p. 6.

<sup>1242</sup> D02-161, T. 270, pp. 25-26.

<sup>1243</sup> D03-88, T. 299, pp. 39-40 and 47; EVD-D03-00096: Photograph of a blackboard. See also D03-88, T. 300, pp. 19-22.

report on the events in Ituri also describes the situation.<sup>1244</sup> The suffering then endured by the Ngiti civilian population of Walendu-Bindi is therefore undeniable.

571. Commander Dark, who controlled Bogoro after the 24 February 2003 attack,<sup>1245</sup> explained that an ethnic war had been waged “[TRANSLATION] because we were hemmed in, we were invested by the UPC [...] under conditions which made us feel as if we were no longer Congolese. So, we were forced to break down the curtain which [...] kept us from our Congolese brothers”.<sup>1246</sup> That suffering, Germain Katanga explained,<sup>1247</sup> was a prime factor supporting reinforcement of the alliance with the Beni authorities which will be described below.

### **1. Delegation of prominent figures from Bedu-Ezekere *groupement* to Aveba in November 2002**

572. The Prosecution maintains that to resolve the problem the UPC posed to the Lendu communities, a delegation of prominent figures from Bedu-Ezekere *groupement* led by Witness D03-88, the leader of that *groupement*, travelled to Aveba in November 2002 to meet with Ngiti representatives. The meeting, the Prosecution contends, culminated in a letter of 15 November 2002, addressed, *inter alia*, to the President of the RCD-K/ML<sup>1248</sup> and handed to him in Beni by a delegation which included Germain Katanga and which will be discussed below.<sup>1249</sup> The letter, in the Prosecution view, shows that the Lendu and the Ngiti then took the initiative to forge ties and made an entreaty to the RCD-ML for

<sup>1244</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0340, para. 21). See also EVD-OTP-00173: Video excerpt – 30 March 2003 televised debate on the Ituri Pacification Commission.

<sup>1245</sup> EVD-OTP-00166: Video excerpt – Meeting at Bunia airport on 7 March 2003; P-2, T. 186, p. 18; D02-300, T. 318, p. 32.

<sup>1246</sup> EVD-OTP-000173: Video excerpt – 30 March 2003 televised debate on the Ituri Pacification Commission. See also D03-707, T. 331, pp. 18-19.

<sup>1247</sup> D02-300, see, in particular, T. 316, pp. 57 and 65; T. 322, p. 66; T. 325, pp. 55-58.

<sup>1248</sup> EVD-D03-00098: Grievance Letter.

<sup>1249</sup> [Prosecution Closing Brief](#), paras. 135 and 517-519.

assistance.<sup>1250</sup> The Defence does not dispute that the delegation travelled to Aveba or that the Grievance Letter was written but takes the view that it went to Beni at the invitation of the APC leadership.<sup>1251</sup>

573. The Grievance Letter of 15 November 2002 paints a very vivid picture of the sheer insecurity and utter abandonment afflicting “[TRANSLATION] the grassroots Lendu community”, which had to contend with unrelenting attacks by the UPC and its Ugandan and Rwandan allies. The letter, addressed to “[TRANSLATION] the President of RCD.Kis/ML in Beni” and copied to the highest authorities in the DRC, Uganda and the United Nations, advanced a number of proposals, all aimed at “[TRANSLATION] restoring the power” of the RCD-ML and which ranged from the immediate withdrawal of occupying troops to the condemnation of the UPC.<sup>1252</sup>

574. D03-88 told the court that members of the delegation from Zumbe had had a hand in the final version of the Grievance Letter.<sup>1253</sup> He stated that, in any event, the letter had been planned before he even came to the area<sup>1254</sup> and that he merely had a part in its drafting once he had arrived there.<sup>1255</sup> He claimed to have sought the inclusion of a reference to the suffering of the Lendu population of Djugu territory at the hands of the Ugandans and Rwandans,<sup>1256</sup> by which, his *viva voce* testimony made clear, he meant the UPDF and the UPC.<sup>1257</sup>

575. Germain Katanga, for his part, denied being behind the meeting of the representatives of Bedu-Ezekere *groupement* and of the *chefferie* of Walendu-Bindi.<sup>1258</sup> He acknowledged that it could have taken place in Aveba and that he

<sup>1250</sup> [Prosecution Closing Brief](#), para. 519; [Prosecution Closing Statements, T. 336](#), p. 41.

<sup>1251</sup> [Defence Closing Brief](#), para. 581.

<sup>1252</sup> EVD-D03-00098: Grievance Letter.

<sup>1253</sup> D03-88, T. 300, pp. 51-52.

<sup>1254</sup> D03-88, T. 300, pp. 51-52.

<sup>1255</sup> D03-88, T. 301, p. 46.

<sup>1256</sup> D03-88, T. 300, p. 52.

<sup>1257</sup> D03-88, T. 301, pp. 41 and 44.

<sup>1258</sup> D02-300, T. 322, p. 15.

saw the signatories to the Grievance Letter there, although he had not attended their meeting.<sup>1259</sup> He confirmed his awareness of the document's existence<sup>1260</sup> and of its preparation in Aveba, but claimed that, whilst in the DRC, he had never acquainted himself with its content,<sup>1261</sup> which he denied discussing with D03-88, even though, as the Chamber notes, he put him up in his home<sup>1262</sup> and was to travel with him to Beni several days later. The contradictions noted and the manner of Germain Katanga's circumvention of the Prosecution's questions as to his knowledge of the purpose of the meeting and the content of the Grievance Letter<sup>1263</sup> do not allow the Chamber to consider his testimony credible in this regard. In fact, the Accused headed to Beni with a delegation whose precise objective was to deliver the letter to the RCD-ML, discuss it upon arrival and obtain answers to questions raised, thus precluding his ignorance of its content, given, moreover the role he would be required to play in Beni.

576. The Chamber notes that the intention of the letter's authors was "[TRANSLATION] to bring to the fore the litany of various bloody and grim events which resulted from [the] [UPC] policy and the ensuing consequences, and to put forward some suggestions to the competent authorities".<sup>1264</sup> It notes that the Grievance Letter is, moreover, as its title states, a "[TRANSLATION] condemnation of the planned extermination of grassroots resistance in Ituri by the UPC and its allies, Uganda and Rwanda"<sup>1265</sup> and "[TRANSLATION] sounds the alarm" "[TRANSLATION] to central government",<sup>1266</sup> amongst others, then represented in Ituri by the RCD-ML. It notes that the document also deplors "[TRANSLATION] the total paralysis and inertia of administrative activities throughout the Walendu

<sup>1259</sup> D02-300, T. 322, pp. 17-18.

<sup>1260</sup> D02-300, T. 316, p. 56; T. 322, p. 24.

<sup>1261</sup> D02-300, T. 322, pp. 14 and 18-19.

<sup>1262</sup> D02-300, T. 322, pp. 18-19.

<sup>1263</sup> D02-300, T. 322, pp. 17-19.

<sup>1264</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0349).

<sup>1265</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0349).

<sup>1266</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0352 *in fine*).

*collectivités*” and local communities’ sense of abandonment by the RCD-ML and even by central government.<sup>1267</sup> Suggestions are then advanced to “[TRANSLATION] restore the RCD-KIS/ML’s power in the territory which it controlled” and for “[TRANSLATION] the reinstatement of State power in Ituri”.<sup>1268</sup>

577. The Chamber regards the Grievance Letter as a joint entreaty of the Lendu of Bedu-Ezekere *groupement* and the Ngiti of Walendu-Bindi *collectivité* to the RCD-ML leadership. In its view, the document is significant in that it reflects the mindset of certain prominent figures and combatants of Walendu-Bindi *collectivité* in November 2002. In this respect, the Chamber refers to its analysis of the ethnic character of the conflict in Ituri at the material time.<sup>1269</sup>

## **2. Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003**

578. The Prosecution contends that the FRPI, officially established in Beni in late 2002 with the ambition to unite the various Lendu and Ngiti self-defence forces in Ituri, pursued the objective of countering UPC aggression and the oppression of the non-Hema population in Ituri. It claims that such objectives, as described in a document of January 2003 entitled “*Manifeste de la résistance*” [Resistance Manifesto], corresponded to those of the Lendu and Ngiti combatants, and that the combatants thus took on the name “FRPI”, without, moreover, any ensuing structural changes on the ground.<sup>1270</sup>

579. In the Defence view, the creation of the FRPI ensued from the RCD-ML defeat in August 2002 and arose out of the geopolitical ambitions harboured by Mbusa Nyamwisi’s RCD-ML and the Kinshasa government, who were intent on

<sup>1267</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0352).

<sup>1268</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-035).

<sup>1269</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>1270</sup> [Prosecution Closing Brief](#), paras. 136-139.

regaining control over the territory of Ituri at all costs.<sup>1271</sup> The Defence submits that the Resistance Manifesto demonstrates that the FRPI was not a Ngiti organisation, let alone a military outfit.<sup>1272</sup>

580. The Chamber will now turn to the body of Prosecution allegations which emphasise the decisions the commanders and combatants of Walendu-Bindi *collectivité* took as of November 2002 to forge relations with other groups or entities harbouring similar interests and objectives, specifically the authorities in Beni and the FRPI.

**a) Delegation to Beni and inception of cooperation between EMOI and local combatants**

581. According to the Prosecution, after the aforementioned Grievance Letter was written, on or around 21 November 2002, a delegation, including Germain Katanga, travelled on foot from Aveba to Beni for the purpose of meeting, amongst others, RCD-ML representatives and delivering the letter.<sup>1273</sup> The delegation, it is submitted, comprised combatants and civilians from Walendu-Bindi *collectivité* (such as Emile Muhito, Germain Katanga's political adviser, and one Pascal Alezo Sipa) and members of the delegation from the Bedu-Ezekere *groupement* described above (in particular, Witness D03-88, Adolphe Liga, Martin Banga and Bahati de Zumbe). Others allegedly joined them en route.<sup>1274</sup> In the light of the evidence tendered, the Chamber has no reason to doubt the delegation's journey and notes, furthermore, that it is not contested by the Defence, which considers that the delegation included over 60 combatants and

<sup>1271</sup> [Defence Closing Brief](#), para. 585.

<sup>1272</sup> [Defence Closing Brief](#), para. 593.

<sup>1273</sup> [Prosecution Closing Brief](#), paras. 135, 519 and 520.

<sup>1274</sup> [Prosecution Closing Brief](#), para. 520.

elders and was the latter's brainchild.<sup>1275</sup> Nor does the Defence dispute that they met RCD-ML President Mbusa Nyamwisi there on the day after their arrival.<sup>1276</sup>

582. Various pieces of evidence establish that by October 2002 the authorities in Beni had started to involve the local combatants in Mbusa Nyamwisi's political and military design to regain positions in Ituri. As previously explained, combatants who had come to seek refuge in Beni after Bunia was overrun were apprised of the FRPI in October 2002 by Dr Adirodu, who was then an adviser to the RCD-ML Presidency and who, moreover, had previously put Governor Molondo Lompondo and Colonel Kandro in contact.<sup>1277</sup>

583. The Accused testified that once the delegations from Bedu-Ezekere and Walendu-Bindi had reached Beni, Mbusa Nyamwisi told their members attending the meetings there that their community owed its life to him and that they were protected by "[TRANSLATION] his army", the APC. The Accused further stated that Mbusa Nyamwisi had added that the UPC, described as the Hema-Tutsi force, was going to invade them and grab their land.<sup>1278</sup> Finally, Germain Katanga commented that such statements by Mbusa Nyamwisi "[TRANSLATION] always guaranteed success", that is "[TRANSLATION] brought back" the combatants on to his side and thus mobilised them.<sup>1279</sup> It must be further noted that PUSIC subsequently condemned this "[TRANSLATION] exploitation" of the Hema-Lendu interethnic conflict.<sup>1280</sup>

584. The Chamber observes that the effect of the ensuing situation was twofold: the RCD-ML increased its chances of "regaining" Ituri with troop support from the Lendu – the adversary of the Hema as an ethnic group – whilst local combatants

<sup>1275</sup> [Defence Closing Brief](#), para. 582.

<sup>1276</sup> [Defence Closing Brief](#), paras. 582-584.

<sup>1277</sup> D02-300, T. 315, p. 26.

<sup>1278</sup> D02-300, T. 316, p. 64.

<sup>1279</sup> D02-300, T. 316, p. 64.

<sup>1280</sup> EVD-OTP-00240: PUSIC political declaration (DRC-OTP-0041-0104).

were thus “[TRANSLATION] supported”<sup>1281</sup> and able to give their struggle a patriotic dimension and prevent foreign powers’ annexation of their territory, by joining the RCD-ML fight against the secessionist UPC, which by then was allied to Rwanda.<sup>1282</sup>

585. In this regard, it is clear that in that specific political climate, the fear of a Hima-Tutsi empire, which Mbusa Nyamwisi had depicted to the combatants in the plainest of terms, united the ethnic and patriotic struggles. Further, in this regard, Commander Dark’s aforesaid statements on the “[TRANSLATION] ethnic war”, to which he lent a patriotic dimension, are a specific case in point.<sup>1283</sup> Real cooperation thus crystallised between EMOI and the combatants of Walendu-Bindi *collectivité*.

586. The Prosecution submits that the delegation from Bedu-Ezekere *groupement* and Walendu-Bindi *collectivité* went to Beni in November 2002, specifically to secure logistical assistance, and weapons for the attack on Bogoro.<sup>1284</sup> This produced an agreement on the supply of weapons, ammunition and logistical assistance to the Ngiti combatants.<sup>1285</sup> The Defence nonetheless maintains that EMOI in Beni had set down in writing the general plan of the attack on Bogoro and that APC commanders subsequently attended to the details of its execution.<sup>1286</sup> The Prosecution strenuously objected to the submission that the plan was contrived by EMOI, the RCD-ML and the APC.<sup>1287</sup>

<sup>1281</sup> EVD-OTP-00240: PUSIC political declaration (DRC-OTP-0041-0104).

<sup>1282</sup> See “Section VI(B) Main political events and incidents”; “Section IX(B)(3)(a)(iii) Indirect intervention of other States”.

<sup>1283</sup> EVD-OTP-00173: Video excerpt – 30 March 2003 televised debate on the Ituri Pacification Commission. See also T. 331, pp. 18-19.

<sup>1284</sup> [Prosecution Closing Brief](#), paras. 520, 521 and 523; [Prosecution Closing Statements, T. 336](#), p. 41.

<sup>1285</sup> [Prosecution Closing Brief](#), para. 521.

<sup>1286</sup> [Defence Closing Brief](#), paras. 697, 1131(5) and 1157-1159; [First Defence observations on article 25\(3\)\(d\)](#), para. 53.

<sup>1287</sup> [Prosecution Closing Brief](#), paras. 585-618; [Prosecution Closing Statements, T. 336](#), pp. 47-49.

587. Germain Katanga explained that by the time the delegation had arrived, the mission to recapture Bunia and Bogoro had already been laid down and the local combatants were simply told that they would help the APC retake the town of Bunia.<sup>1288</sup> He added that the necessary operations and the extent of assistance from local forces to the APC's recapture of its positions had been discussed at a meeting.<sup>1289</sup> Witnesses D02-350 and D02-228 furthermore confirmed that they had attended a meeting in Beni during which Colonel Aguru, an officer of the Congolese national army and EMOI Chief of Staff, had shown them on a map of Ituri which areas had to be recaptured in order to retake Bunia and on that occasion he indicated, amongst others, the position of Bogoro, which the UPC then held.<sup>1290</sup>

588. Tasked, as D02-236 testified, with recapturing the territory of Ituri,<sup>1291</sup> EMOI was to organise and plan the military operations in the region, oversee and supply the necessary logistical resources so that the combatants could accomplish their mission,<sup>1292</sup> and ultimately restructure the armed groups with a view to their integration into the Congolese armed forces.<sup>1293</sup> EMOI therefore sent human resources – trainers and combatants<sup>1294</sup> – as confirmed by the letter of 23 November 2002 from Professor Samba, Deputy Director of the Immediate Office of the President of the DRC, to the “[TRANSLATION] Head of the Joint Chiefs of Staff”.<sup>1295</sup>

589. D02-228 explained that as a serving intelligence officer in Beni, he had undertaken a mission to Aveba in late January or February 2003.<sup>1296</sup> At the time,

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<sup>1288</sup> D02-300, T. 325, pp. 16 and 18.

<sup>1289</sup> D02-300, T. 325, p. 18.

<sup>1290</sup> D02-350, T. 254, p. 19; D02-228, T. 252, p. 55.

<sup>1291</sup> D02-236, T. 242, p. 44. See also D02-300, T. 316, p. 65.

<sup>1292</sup> D02-236, T. 242, p. 44; D02-228, T. 249, p. 60.

<sup>1293</sup> D02-236, T. 242, p. 44.

<sup>1294</sup> D02-228, T. 249, p. 61.

<sup>1295</sup> EVD-D03-00136: Letter from the Immediate Office of the President of the DRC to the Head of the Joint Chiefs of Staff.

<sup>1296</sup> D02-228, T. 249, pp. 65-66.

he flew with ten or so APC soldiers, including five officers,<sup>1297</sup> which D02-160 confirmed.<sup>1298</sup> In the view of D02-228, these officers had been tasked with reorganising troops in Aveba and Kagaba and in the FRPI more generally.<sup>1299</sup> D02-228 further stated that the aircraft was transporting weapons and ammunition which were intended for Aveba in particular, where they could be distributed to local commanders.<sup>1300</sup>

590. Lastly, Germain Katanga had a personal part in bringing about the then nascent cooperation between the authorities in Beni and local combatants. Thus, between November 2002 and February 2003, he took part in several strategic meetings with senior EMOI military authorities, including its Chief of Staff, Colonel Aguru; Lieutenant-Colonel Duku; the APC Chief of Staff, Kasereka; and Uringi-Padolo,<sup>1301</sup> whose “[TRANSLATION] importance [was] paramount”.<sup>1302</sup> He was also provided with means of communication (specifically, a satellite telephone) so as to remain in constant contact with APC President Mbusa Nyamwisi and the military leadership, such as Colonel Aguru and Lieutenant-Colonel Duku.<sup>1303</sup> Germain Katanga further testified that the mission he had to undertake to Aveba following his trip to Beni in November 2002 was to show the local combatants that the APC troops were “[TRANSLATION] allies”,<sup>1304</sup> “[TRANSLATION] comrades”, “[TRANSLATION] fellows” and that in case of trouble, they would not abandon them but, on the contrary, would “[TRANSLATION] assist” them.<sup>1305</sup>

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<sup>1297</sup> D02-228, T. 249, pp. 66-67.

<sup>1298</sup> D02-160, T. 272, pp. 68-69.

<sup>1299</sup> D02-228, T. 249, pp. 66-67.

<sup>1300</sup> D02-228, T. 249, p. 65.

<sup>1301</sup> D02-300, T. 316, pp. 64-65 ; T. 317, pp. 5-7.

<sup>1302</sup> D02-300, T. 317, p. 7.

<sup>1303</sup> [Defence Closing Brief](#), para. 643; D02-300, T. 317, pp. 7 and 50. See also “Section X(A)(7)(b)(i) Germain Katanga: facilitator for the local commanders and the APC”; “Section X(A)(4) Germain Katanga: delegation leader and the Beni authorities’ figure of choice from November 2002”.

<sup>1304</sup> D02-300, T. 324, p. 68.

<sup>1305</sup> D02-300, T. 342, p. 68.

## b) Rapprochement between the FRPI and local combatants

591. Germain Katanga stated that upon his return to Beni in the second week of December 2002, the local combatants had “[TRANSLATION] appropriated” the acronym “FRPI” because it was important to them to have a name and they felt it “[TRANSLATION] represented” them.<sup>1306</sup> He claimed that the combatants, initially called “[TRANSLATION] the farmers”, subsequently became “[TRANSLATION] the self-defence” and then the “[TRANSLATION] combatants”, and, little by little, ultimately “[TRANSLATION] took on” the name “FRPI”.<sup>1307</sup> Lastly, he asserted that “[TRANSLATION] this transition from self-defence movement to FRPI [...] is a purely intellectual notion”.<sup>1308</sup>

592. The Defence argued that the existence of the FRPI did not significantly affect the situation on the ground in Walendu-Bindi *collectivité*<sup>1309</sup> and that the rapprochement between the FRPI and the combatants from Walendu-Bindi was in fact first and foremost one of convenience.<sup>1310</sup> It recalled that Germain Katanga had been unaware of the FRPI’s goals and only learnt of them in February 2003, when he read the “[TRANSLATION] booklet”<sup>1311</sup> (the Resistance Manifesto). The Defence, in whose estimation “[t]hings were on the move”, further argued that the formation of the FRPI “was important to the people in Walendu-Bindi”, as it was a movement with political support from those sympathetic to their cause.<sup>1312</sup>

593. The Prosecution submitted that the FRPI did not impose any structural changes to the existing hierarchy of the combatant groups which it sought to unite<sup>1313</sup> and that its statute appears in the January 2003 Resistance Manifesto.<sup>1314</sup>

<sup>1306</sup> D02-300, T. 317, p. 20.

<sup>1307</sup> D02-300, T. 317, pp. 20-21.

<sup>1308</sup> D02-300, T. 316, p. 63.

<sup>1309</sup> [Defence Closing Brief](#), para. 663.

<sup>1310</sup> [Defence Closing Brief](#), para. 592.

<sup>1311</sup> D02-300, T. 316, p. 52; T. 317, pp. 22-23.

<sup>1312</sup> [Defence Closing Brief](#), para. 592.

<sup>1313</sup> [Prosecution Closing Brief](#), para. 139.

<sup>1314</sup> [Prosecution Closing Brief](#), para. 136.

As stated above, the Prosecution also maintained that the FRPI's goals, as set out in the Resistance Manifesto, perfectly suited those of the Lendu and Ngiti combatants: to respond to the aggression and oppression which they were suffering at the hands of the UPC.<sup>1315</sup>

594. As to the Manifesto, the Chamber notes that D02-228 stated that no FRPI founding document had been drafted at the movement's inaugural meetings at the Casino Hotel.<sup>1316</sup> He claimed not to have been involved in drafting the Resistance Manifesto, which, he asserted, was an initiative of Dr Adirodu, who wrote it only later.<sup>1317</sup> For his part, D02-350 stated that he had learnt that his name appeared on the document<sup>1318</sup> but claimed that he had never signed<sup>1319</sup> or even seen it.<sup>1320</sup> The Chamber has no reason not to take these two witnesses at their word on this point.

595. Consequently, whilst noting that the Resistance Manifesto is unquestionably the work of Dr Adirodu, a key figure at the time of the FRPI's founding, the evidence on record does not establish that the document constitutes the FRPI's official statute. It should, nevertheless, be noted that, according to Germain Katanga, in February 2003 the document was circulating at least in Aveba and was read by the local combatants in order to understand the FRPI's objectives.<sup>1321</sup>

596. Regarding specifically the matter of whether the FRPI's goals corresponded to those of the local combatants, the testimonies of D02-228, D02-236 and P-12 are laid before the Chamber.<sup>1322</sup> D02-228 explained that the ties, "[TRANSLATION] the connivance", between the RCD-ML and the Lendu combatants did not date from the FRPI's inception because "[TRANSLATION] [they] were striving for the same

<sup>1315</sup> [Prosecution Closing Brief](#), paras. 136 and 138.

<sup>1316</sup> D02-228, T. 249, p. 49.

<sup>1317</sup> D02-228, T. 249, p. 50.

<sup>1318</sup> D02-350, T. 253, p. 42.

<sup>1319</sup> D02-350, T. 254, pp. 5-6.

<sup>1320</sup> D02-350, T. 253, p. 42; T. 254, p. 5.

<sup>1321</sup> D02-300, T. 316, p. 52; T. 317, pp. 22-23.

<sup>1322</sup> P-12, T. 195, pp. 15-16; T. 198, pp. 29 and 47-48.

objectives".<sup>1323</sup> He further stated that the displaced people and the Lendu combatants who had taken refuge in Beni had joined forces under the aegis of the RCD-ML leadership and met to devise a framework, a structure, namely the FRPI, to "[TRANSLATION] channel their ideal".<sup>1324</sup> D02-236 asserted that Dr Adirodu had only intended to form "[TRANSLATION] a sort of armed group" about which he alone knew the precise details.<sup>1325</sup> On this point he stated that one of the particularities of the FRPI was that it was formed to "[TRANSLATION] resist specific aggression", unlike the FNI, which he claimed was working, more broadly, "[TRANSLATION] towards a new social [and] political order".<sup>1326</sup>

597. Moreover, the Chamber notes that the very substance of the Manifesto accords with the content of the Grievance Letter. Both describe a large-scale conflict interwoven with both patriotic and ethnic concerns. According to the Grievance Letter, popular self-defence sought to "[TRANSLATION] safeguard the integrity of Congolese national territory".<sup>1327</sup> Two months later, under the heading "[TRANSLATION] Objective", the Resistance Manifesto did in fact state, "[TRANSLATION] Resisting aggression/occupation in order to maintain national territorial integrity is the principle objective of the FRPI's struggle".<sup>1328</sup>

598. The Chamber notes that the patriotic objective of resistance advocated in the two documents, which were an entreaty to higher authorities (the RCD-ML, the Congolese State, the African Union, the UN Secretary-General, the permanent members of the Security Council and the International Criminal Court), is connected to the polarisation of the interethnic conflict between the Hema, held up as allies, accomplices or instruments of foreign powers, and the Lendu,

<sup>1323</sup> D02-228, T. 249, p. 48. See also T. 252, p. 241.

<sup>1324</sup> D02-228, T. 249, p. 45.

<sup>1325</sup> D02-236, T. 242, p. 41.

<sup>1326</sup> D02-236, T. 247, p. 66-67.

<sup>1327</sup> EVD-D03-00098: Grievance Letter. See also EVD-D02-00231: Report of the Immediate Office.

<sup>1328</sup> EVD-D02-00063: Resistance Manifesto.

described as the vanguard of authentic Congolese resistance, both the prime victims of the aggression and occupation and its main resistance.

599. From that observation it is apparent that the concerns specific to the local combatants were to be found in the objectives pursued by the FRPI, which, it should be noted here, was none other than “the *Patriotic Force of Resistance in Ituri*”. Moreover, these same combatants unhesitatingly used seals or stamps of this new organisation on some of the correspondence between them<sup>1329</sup> from January 2003, if not before.<sup>1330</sup>

### c) Conclusion

600. It is apparent from all of the foregoing that from November 2002 and the visit by the delegation of prominent figures and combatants from Bedu-Ezekere *groupement* and Walendu-Bindi *collectivité* to Beni, the members of the delegation and the civilian and military leaders in Beni realised that their respective interests were aligned. As the Grievance Letter shows, the combatants’ aim, in addition to the recapture of a territory, was first and foremost to fight the UPC/Hema force seeking to exterminate them; the Beni authorities wanted to retake Ituri, which was then in the grip of UPC military forces. Numerous close operational links were thus established.

601. The Chamber is also in a position to conclude that Ngiti combatants “[TRANSLATION] appropriated” the name of the recently formed FRPI, whose name had been decided in Beni; that some were thus able to identify with the organisation and that they were able to use its stamps. However, it does not find that between December 2002 and February 2003 *all* the Ngiti combatants were effectively part of the FRPI, whose precise organisation and modus operandi remained unclear. Nor is it in a position to conclude that the Resistance Manifesto

<sup>1329</sup> EVD-OTP-00025: Soap letter; EVD-OTP-00278: “Prohibition on bearing arms” letter; EVD-OTP-00239: “Gold tax levy” letter; EVD-D02-00231: Report of the Immediate Office.

<sup>1330</sup> EVD-OTP-00025: Soap letter.

constituted the authoritative document accepted by *all* the combatants or the official statute of the new organisation. Indeed, it must be noted that certain pieces of contemporaneous correspondence in Walendu-Bindi *collectivité* refer at times to a “movement” or to the “FRPI”, which demonstrates that the use of the name, however real it may have been, was still haphazard. In this regard, several exhibits show that the two terms – “movement” and “FRPI” – were often connected and used interchangeably.<sup>1331</sup>

602. Finally, the Chamber concurs with the Prosecution that the founding of the FRPI ultimately did not fundamentally change the structure of the group of Walendu-Bindi combatants, whose specific *modus operandi* will be analysed below. Nevertheless, it may reasonably be argued that the adoption of the name FRPI by the local combatants of Walendu-Bindi reinforced their sense of belonging to a community of combatants which could be identified and placed geographically, even if they did not wear the same attire or uniforms,<sup>1332</sup> and who were pursuing the common goal of recovering Ituri and eliminating the UPC/Hema enemy from, among other places, Bogoro.<sup>1333</sup>

### **3. Relations established between Ngiti combatants and representatives of Bedu-Ezekere *groupement* in late 2002 for the purpose of attacking Bogoro**

603. The Chamber recalls the Prosecution’s assertion that “[TRANSLATION] in late 2002, the Ngiti militia joined the Lendu combatants of Bedu-Ezekere in order to confront the relentless oppression of their communities by their common enem[ies], the UPC”<sup>1334</sup> and “[TRANSLATION] the Hema”.<sup>1335</sup>

<sup>1331</sup> P-12, T. 194, p. 70; T. 195, p. 12; P-160, T. 212, p. 17; P-166, T. 226, p. 42; D02-228, T. 249, pp. 46 and 49; T. 250, p. 52; D02-258, T. 289, p. 16.

<sup>1332</sup> D02-300, T. 316, pp. 64-65.

<sup>1333</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”. See also “Section VI(C) Methods of warfare”.

<sup>1334</sup> [Prosecution Closing Brief](#), paras. 134 and 515.

<sup>1335</sup> [Prosecution Closing Brief](#), para. 515.

604. In this connection, the Prosecution first referred to a meeting held for that purpose between the prominent figures of Irumu and Djugu in May and June 2002 which, it stated, “[TRANSLATION] marked the inception of Lendu/Ngiti cooperation”.<sup>1336</sup> The Prosecution argued that this collaboration and the 5 June 2002 Memorandum of Understanding<sup>1337</sup> made it possible “[TRANSLATION] to adopt resolutions intended to bring the inter-ethnic conflict an end”<sup>1338</sup> and that they demonstrate that “[TRANSLATION] two *collectivités* would sometimes forge a coalition to fight another *collectivité*”.<sup>1339</sup>

605. The Prosecution further contended that the delegation from Bedu-Ezekere, led by D02-88, which travelled to Aveba in November 2002 to meet Ngiti representatives and the Grievance Letter delivered at that time demonstrate additionally that the Lendu and Ngiti, on their own initiative, forged ties and approached the RCD-K/ML for assistance.<sup>1340</sup>

606. The Defence contended that there was barely any contact between Aveba and Zumbé before the negotiations in Bunia under the Ituri Pacification Commission in April and May 2003. It noted that these two places are very far from each other, separated by many hills, and that the Lendu in the north and the Ngiti in the south do not speak the same language or share a common culture. Thus, in the Defence’s view, there are no obvious ties between them, save the common threat posed to both by the UPC.<sup>1341</sup>

607. The Chamber notes that the content of the 5 June 2002 Memorandum of Understanding itself<sup>1342</sup> and the signatures it bears make clear that a meeting did

<sup>1336</sup> [Prosecution Closing Brief](#), para. 516; EVD-OTP-00275: Memorandum of Understanding on the resolution of inter-ethnic conflict.

<sup>1337</sup> EVD-OTP-00275: Memorandum of Understanding on the resolution of inter-ethnic conflict.

<sup>1338</sup> [Prosecution Closing Brief](#), para. 516.

<sup>1339</sup> [Prosecution Closing Brief](#), para. 134.

<sup>1340</sup> [Prosecution Closing Brief](#), para. 519. See, in this regard, “Section VII(B)(1) Delegation of prominent figures from Bedu-Ezekere *groupement* to Aveba in November 2002”.

<sup>1341</sup> [Defence Closing Brief](#), para. 1132.

<sup>1342</sup> EVD-OTP-00275: Memorandum of Understanding on the resolution of inter-ethnic conflict.

take place in Bunia in June 2002, “[TRANSLATION] with” Governor Lompondo, attended by the various chiefs and prominent figures from Irumu territory (Walendu-Tatsi and Walendu-Djatsi).<sup>1343</sup> D03-88 confirmed that he was present and noted that it was “[TRANSLATION] thanks to Lompondo’s efforts that people met at this meeting”.<sup>1344</sup>

608. That notwithstanding, the Chamber is not satisfied that, as the Prosecution asserted, the meeting was part of the efforts to resolve the problems caused by the UPC or of the struggle against the Hema community.<sup>1345</sup> It would seem that its purpose was primarily to seek a means to promote peace. The signatories to the Memorandum apparently professed their desire to restore “[TRANSLATION] lasting peace in Irumu territory”, declaring their “[TRANSLATION] common resolve to express their mutual grievances and propose solutions which might lead to reconciliation and lasting peace”.<sup>1346</sup>

609. However, the Chamber is satisfied that whilst the delegation from Bedu-Ezekere was in Aveba in November 2002, the Lendu from Bedu-Ezekere and the Ngiti achieved rapprochement to respond to the common problem posed by the UPC. This contact crystallised with the preparation of the aforementioned Grievance Letter, which was addressed and then delivered to the RCD-ML leadership in Beni.<sup>1347</sup>

610. The Prosecution also sought to prove that, as a result of the trip to Beni undertaken on or around 21 November 2002 by the delegation of combatants and

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<sup>1343</sup> The Memorandum was signed in Bunia on 5 June 2002 by Governor Jean-Pierre Molondo Lompondo in his capacity as operations commander and bears the note “*Vu pour approbation*” [seen for approval] (see, in this regard, D03-88, T. 305, p. 50). A series of signatures of traditional chiefs and prominent persons appears in a table. It should be noted that the signatories are from both Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement*.

<sup>1344</sup> D03-88, T. 305, pp. 50-52.

<sup>1345</sup> [Prosecution Closing Brief](#), para. 515.

<sup>1346</sup> EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic conflict (DRC-00136-205-R01).

<sup>1347</sup> See “Section VII(B)(1) Delegation of prominent figures from Bedu-Ezekere *groupement* to Aveba in November 2002”.

civilians from Walendu-Bindi and Bedu-Ezekere,<sup>1348</sup> Mathieu Ngudjolo sent a 24-member delegation from Bedu-Ezekere to Aveba towards the end of December 2002 to meet with Germain Katanga and that the purpose of the meeting was to agree upon the strategy for attacking Bogoro.<sup>1349</sup> According to the Prosecution, the delegation spent over a month in Aveba, subsequently travelling to Bavi, from where some of its members allegedly went to Medhu, before ultimately returning to Aveba in order receive weapons and return to Zumbe, its original destination.<sup>1350</sup>

611. In support of this factual allegation, the Prosecution relied principally on Witness P-250's testimony.<sup>1351</sup> It also relied on the testimony of Witness P-28 as well as on the "Soap letter",<sup>1352</sup> a letter dated 4 January 2003 and written in Bolo, Aveba, which the Prosecution considered to be "[TRANSLATION] a mainstay of [its] case".<sup>1353</sup> The letter is a "[r]equest for assistance", signed by Witness D03-66, who came to the Court to testify as Secretary of the delegation, and by one Martin Banga as "President of the delegation". The document is addressed to operator Oudo in Olongba and copied to Cobra Matata. It reads:

[...] We, the members of the Zumbe delegation to Aveba, present our compliments and have the great honour of approaching you with regard to the above matter. We would inform you that it has already been three (3) weeks since we left Bedu-Ezekere *groupement* on an official mission to W/Bindi *collectivité*, more specifically, to Aveba. However, although welcomed most warmly as brothers, we have found it impossible to secure any money to purchase soap. We are therefore turning to you. There are fifteen of us and we propose that we send a small delegation to Tatu market on Friday for your response, which we trust will be favourable. [...] <sup>1354</sup>

612. The Prosecution submitted that this document corroborates the testimony of P-28 and P-250 regarding the presence of a delegation from Zumbe in Aveba.<sup>1355</sup> It further argued that the authenticity of the letter is indisputable and that no

<sup>1348</sup> [Prosecution Closing Brief](#), paras. 520-524.

<sup>1349</sup> [Prosecution Closing Brief](#), para. 525; [Prosecution Closing Statements, T. 336](#), pp. 42-47; [T. 337](#), p. 25.

<sup>1350</sup> [Prosecution Closing Statements, T. 337](#), pp. 24 and 39.

<sup>1351</sup> [Prosecution Closing Statements, T. 337](#), pp. 24-26.

<sup>1352</sup> EVD-OTP-00025: Soap letter.

<sup>1353</sup> [Prosecution Closing Statements, T. 336](#), p. 42-44; [T. 337](#), p. 39.

<sup>1354</sup> EVD-OTP-00025: Soap letter.

<sup>1355</sup> [Prosecution Closing Brief](#), paras. 531; [Prosecution Closing Statements, T. 336](#), pp. 43-44.

credibility can be attached to the statements of Witness D03-66, the letter's author who, it claimed, during his testimony in court sought to minimise its probative value and misrepresent its significance.<sup>1356</sup>

613. The Defence for Germain Katanga, however, disputed that any such delegation existed and argued that the last visit to Aveba by a group from Bedu-Ezekere took place in November 2002,<sup>1357</sup> relying in particular on Germain Katanga's testimony.<sup>1358</sup>

614. In the light of its findings on the credibility of P-250, the Chamber will take note only of the testimony of P-28 and the content of the Soap letter.<sup>1359</sup> P-28 stated that after receiving the ammunition supplied from Beni, the combatants from Walendu-Bindi facilitated the establishment of links between the APC and the combatants of Zumbe.<sup>1360</sup> He stated that whilst he was in Aveba<sup>1361</sup> a delegation from Zumbe had come<sup>1362</sup> and remained there for several days.<sup>1363</sup> He asserted that the delegation, numbering about 25, counting the commanders and their bodyguards, was led by Boba Boba and by Commanders Kute and Bahati de Zumbe,<sup>1364</sup> with whom he was acquainted from his time in Nyakunde.<sup>1365</sup> He further stated that P-250 was also among their number.<sup>1366</sup> According to the witness, the members of the delegation were well received, by Germain Katanga<sup>1367</sup> at his father's home,<sup>1368</sup> where they were fed.<sup>1369</sup> Other commanders from the Ngiti militia were there, including Yuda and Move, as were prominent

<sup>1356</sup> [Prosecution Closing Brief](#), paras. 532-534.

<sup>1357</sup> [Defence Closing Brief](#), paras. 1142-1148.

<sup>1358</sup> [Defence Closing Brief](#), para. 1147.

<sup>1359</sup> EVD-OTP-00025: Soap letter.

<sup>1360</sup> P-28, T. 217, p. 35.

<sup>1361</sup> P-28, T. 223, p. 28.

<sup>1362</sup> P-28, T. 217, p. 34.

<sup>1363</sup> P-28, T. 223, p. 29.

<sup>1364</sup> P-28, T. 217, p. 38-39; T. 223, pp. 28 and 60-61.

<sup>1365</sup> P-28, T. 223, p. 61.

<sup>1366</sup> P-28, T. 217, p. 39.

<sup>1367</sup> P-28, T. 217, p. 40.

<sup>1368</sup> P-28, T. 217, p. 41.

<sup>1369</sup> P-28, T. 217, p. 39.

figures like Pascal Alezo Sipa and Émile Muhito.<sup>1370</sup> The witness initially stated that the delegation came twice,<sup>1371</sup> but later clarified that he doubted that the whole delegation came a second time but was certain that Bahati de Zumbe would regularly travel back and forth between Zumbe and Aveba.<sup>1372</sup>

615. The Chamber, which considers that Witness P-28 arrived in Aveba in early February 2003,<sup>1373</sup> is of the view that his evidence on the existence of a delegation constitutes hearsay,<sup>1374</sup> even though in the Soap letter, whose authenticity cannot be disputed,<sup>1375</sup> very clear reference is made to a delegation from Zumbe which arrived in Aveba in late December 2002. In the Chamber's view, the contents of the letter partially confirm the witness's hearsay evidence, inasmuch as it establishes that a delegation of at least 15 persons led by Martin Banga did indeed make the journey from Zumbe to Aveba in late December 2002, that it remained there for at least three weeks and that it was warmly received by the Ngiti community in Aveba.

616. Furthermore, the Chamber does not consider credible the assertion of D03-66, the author of the Soap letter,<sup>1376</sup> that it was merely a covering letter.<sup>1377</sup> It notes in this connection that D03-66 stated that he had claimed to be on an "[TRANSLATION] official mission"<sup>1378</sup> in order to meet administrative requirements, as all personal requests were rejected, and that he did not remember how much

<sup>1370</sup> P-28, T. 217, p. 40. The witness further stated that he had lived with the latter in Avenyuma (P-28, T. 216, p. 44).

<sup>1371</sup> P-28, T. 217, p. 35.

<sup>1372</sup> P-28, T. 217, p. 41; T. 218, p. 15; T. 223, p. 29.

<sup>1373</sup> See "Section V(A)(1) Credibility of P-28".

<sup>1374</sup> See, in this regard, [Defence Closing Brief](#), paras. 209-212; P-28, T. 221, pp. 63-64; T. 222, p. 12.

<sup>1375</sup> EVD-OTP-00025: Soap letter. Having regard to the evidence of Witness D03-66, who acknowledged in court that he wrote the letter at the time, the fact that it is sufficiently detailed to be considered a "[TRANSLATION] genuine contemporaneous document", the fact that it was seized by MONUC from the *Tribunal de Grande Instance* in Bunia and, finally, the fact that the Chamber has already ruled on the admissibility of the document, it is of the view, as is the Prosecution, that its authenticity is beyond dispute (T. 96, pp. 1-6). See also [Prosecution Closing Statements, T. 340](#), pp. 33-34.

<sup>1376</sup> EVD-OTP-00025: Soap letter.

<sup>1377</sup> D03-66, T. 296, p. 21; T. 297, pp. 31-33, 36 and 43. See also [Prosecution Closing Brief](#), paras. 531-534.

<sup>1378</sup> D03-66, T. 297, p. 34.

money was received or how much soap was purchased.<sup>1379</sup> Finally, it noted that during his testimony D03-66 appeared, on this specific point in particular, to omit certain details whilst providing others which were more favourable to the argument of the Defence for Mathieu Ngudjolo and more specific.

617. However, whilst the Chamber considers that the Soap letter confirms that a delegation travelled from Bedu-Ezekere *groupement* to Aveba, it was unable to ascertain the delegation's membership, the exact duration of its stay there, or indeed the purpose of its visit, such that P-28's statements alone are insufficient to establish the purpose of the meeting.

618. In the light of all of the foregoing, the Chamber is of the opinion that from November 2002, there was undoubtedly a rapprochement between the Lendu from Bedu-Ezekere *groupement* and the Ngiti from Walendu-Bindi *collectivité* in order to respond to the common problem then posed to them by the UPC and the Hema. Entreaties were made to the RCD-ML, a Grievance Letter was written, and a joint delegation travelled to Beni. In December 2003, a delegation from Zumbe also travelled to Aveba. Having regard to the evidence found credible, the Chamber cannot, at this juncture, state that the purpose of the rapprochement was to agree on the strategy of the battle to be waged in Bogoro.

### **C. ORGANISATION OF THE WALENDU-BINDI COLLECTIVITÉ COMBATANTS IN THE IMMEDIATE RUN-UP TO THE ATTACK ON BOGORO**

619. The Prosecution submitted that during the period preceding the battle of Bogoro, independently of the APC and the authorities in Beni, the Ngiti militia of Walendu-Bindi *collectivité* possessed a military command structure through which the commanders and civilian authorities alike reported to a single authority headquartered in Aveba. It alleges that the militia was organised in a structured fashion with a network of camps connected by an operational

<sup>1379</sup> D03-66, T. 297, p. 36; T. 298, pp. 41 and 42.

communications system and that the combatants were subject to a disciplinary regime and were better armed as a result of the weapons and ammunition supplied from Beni.<sup>1380</sup>

620. The Defence, however, disputed that the Ngiti combatants were part of a single “group”.<sup>1381</sup> In its view, there is no doubt that the camps were largely autonomous, that there was no organisation possessing any real structure as regards the commanders in the *collectivité*, whether horizontal or vertical, and that these groups were no more than a rag-tag collection among whom internal rivalries and competition prevailed.<sup>1382</sup> It further noted that the means of communication then available to Walendu-Bindi *collectivité* were relatively limited<sup>1383</sup> and that some of its commanders belonged to the APC, whilst others had retained direct links with it.<sup>1384</sup> Finally, it argued that the combatants were armed in an effort to turn them into a force which could work with and pursue interests of the Beni authorities. However, in its view, if they worked together at all, it was only on a temporary and consensual basis.<sup>1385</sup>

### 1. Main military camps and commanders

621. The Prosecution alleged that at the time of the attack on Bogoro, the combatants from Walendu-Bindi *collectivité* were organised into a network of camps spread throughout the five *groupements* of the *collectivité*. The camps differed in size, with Kagaba camp and the BCA (“*Bureau des combattants d’Aveba*” [Aveba Combatants Office] camp), which was located in Aveba, the largest. Some

<sup>1380</sup> See, in particular, [Prosecution Closing Brief](#), paras. 133 and 140. See also [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 49.

<sup>1381</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 98-99.

<sup>1382</sup> [Defence Closing Brief](#), paras. 572-575; [First Defence observations on article 25\(3\)\(d\)](#), paras. 80 and 99; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 51, 52 and 54.

<sup>1383</sup> [Defence Closing Brief](#), paras. 640-645.

<sup>1384</sup> [Defence Closing Statements, T. 340](#), pp. 7-14.

<sup>1385</sup> [Defence Closing Brief](#), para. 663; [First Defence observations on article 25\(3\)\(d\)](#), para. 80.

camps were set up in the centre of villages and the combatants occupied civilian homes.<sup>1386</sup>

622. Regarding the Aveba camp, the Prosecution and the Defence both noted that the combatants occupied at least three positions: Atele Nga, near the home of Germain Katanga's father, where Katanga was living at the time of the attack on Bogoro; Aéro camp, near the airport; and the BCA camp.<sup>1387</sup> This is confirmed by the evidence,<sup>1388</sup> and it should be noted that the Chamber was able to visit each of these three positions itself during the judicial site visit in January 2012.<sup>1389</sup>

623. The particular importance of Aveba bears emphasising at the outset.<sup>1390</sup> It was located away from the front line with the UPC at Kagaba,<sup>1391</sup> which meant it was relatively calm. The presence of an airstrip and several groups of combatants, with the resultant concentration of militia members, testified to its military importance. Aveba assumed further importance, as will subsequently be shown, as the depot which supplied weapons and ammunition, since it was where they were received, stored and distributed.

624. The parties do not disagree that the most senior commanders in Aveba in early 2003 included Garimbaya, at the camp at the airport;<sup>1392</sup> Mdabu, at the BCA camp;<sup>1393</sup> and Germain Katanga, at Atele Nga.<sup>1394</sup> The Chamber notes that the Accused referred to the BCA camp as the "*Bureau de coordination d'Aveba*" [Aveba

<sup>1386</sup> [Prosecution Closing Brief](#), paras. 142-143. See also [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 43.

<sup>1387</sup> [Prosecution Closing Brief](#), para. 145; [Defence Closing Brief](#), paras. 576-578.

<sup>1388</sup> See, in particular, P-28, T. 216, pp. 62-63; T. 217, p. 6; T. 221, p. 38; D02-134, T. 259, pp. 50-51; D02-300, T. 317, pp. 24-25 and 28; T. 322, pp. 2-3; T. 324, pp. 67 and 71-74.

<sup>1389</sup> [Site Visit Report](#), pp. 3, 5 and 8.

<sup>1390</sup> See, in this regard, [Prosecution Closing Brief](#), para. 144.

<sup>1391</sup> D02-300, T. 324, p. 71. See also p. 67.

<sup>1392</sup> [Prosecution Closing Brief](#), para. 146; [Defence Closing Brief](#), para. 577. See also P-28, T. 217, p. 6; D02-134, T. 259, pp. 50-51; D02-300, T. 322, pp. 2-3; T. 324, p. 67.

<sup>1393</sup> [Prosecution Closing Brief](#), para. 146; [Defence Closing Brief](#), para. 576. See also P-28, T. 217, p. 6; D02-300, T. 317, p. 24; T. 324, pp. 67 and 73-74.

<sup>1394</sup> [Prosecution Closing Brief](#), para. 145; [Defence Closing Brief](#), para. 578. See also P-28, T. 216, pp. 62-63; T. 221, p. 38; D02-300, T. 317, pp. 25 and 28; T. 324, pp. 71-72.

Coordination Office].<sup>1395</sup> However, that name was not used by any other witness in the present case, including in particular, such well-informed witnesses as D02-228, D02-236 or D02-350. Witness P-28, who purportedly arrived in Aveba in February 2003, referred to the BCA as the “*Bureau des combattants d’Aveba*”,<sup>1396</sup> an appellation which does not appear to have been contested, as such, by Witness D03-88, who himself had freely used it in an earlier statement given to the Office of the Prosecutor.<sup>1397</sup> Furthermore, the Chamber notes that the witnesses referred just as freely to the BCA as a “camp”.<sup>1398</sup> Therefore, the Chamber is of the opinion that in early 2003 the BCA was one of the military camps in Aveba and that it was, and remained at the material time, the “*Bureau des combattants d’Aveba*”. Apart from Aveba, Ngiti combatants were cantoned at Kagaba: This was the case, in particular, of “*Garnison Mobile*”, which in February 2003 was placed under the authority of Commander Yuda, whose second-in-command was Commander Dark.<sup>1399</sup> The commanders in Kagaba also included Major Ngurima and his men.<sup>1400</sup>

625. In Bavi *groupement*, Cobra Matata controlled Omi Ama camp in Olongba.<sup>1401</sup> Oudo Mbafele led a unit at the camp in Medhu and a military detachment at Tatu, its local marketplace.<sup>1402</sup> A position under the command of Lobo Tchamangere was also established at Lakpa,<sup>1403</sup> and Nyabiri camp was under the command of Move.<sup>1404</sup> Bukiringi camp was run by Commander Alpha Bebi,<sup>1405</sup>

<sup>1395</sup> D02-300, T. 316, p. 21. See also [Defence Closing Brief](#), para. 576.

<sup>1396</sup> P-28, T. 216, p. 63.

<sup>1397</sup> D03-88, T. 304, p. 42.

<sup>1398</sup> See, in particular, P-28, T. 216, pp. 63-64; D02-01, T. 278, p. 38; D02-148, T. 279, p. 14.

<sup>1399</sup> D02-01, T. 277, p. 50; D02-129, T. 271, pp. 21 and 23; D02-148, T. 279, p. 12; P-28, T. 217, p. 12; D02-300, T. 315, p. 54. See also EVD-OTP-00122: Map annotated by P-267.

<sup>1400</sup> D02-148, T. 279, p. 12. See also EVD-OTP-00238: “Evangelization” letter.

<sup>1401</sup> D02-01, T. 277, p. 50; D02-300, T. 315, p. 49. See also EVD-OTP-00278: “Prohibition on bearing arms” letter; EVD-OTP-00122: Map annotated by P-267.

<sup>1402</sup> P-28, T. 217, pp. 7; D02-01, T. 277, pp. 50-51; D02-300, T. 315, p. 52; T. 320, p. 71. T. 324, p. 78. See also EVD-OTP-00122: Map annotated by P-267.

<sup>1403</sup> P-28, T. 217, p. 10; D02-01, T. 277, pp. 50-51; D02-300, T. 320, p. 70.

<sup>1404</sup> D02-01, T. 277, p. 9; T. 276, p. 12; D02-300, T. 320, p. 68; T. 324, p. 79. See also EVD-OTP-00122: Map annotated by P-267.

and the position in Gety was under the control of Commander Joël Androzo.<sup>1406</sup> Commander Joël Anguluma commanded Mandre<sup>1407</sup> camp, and Kisoro the camp in Bulanzabo.<sup>1408</sup>

626. The evidence on record further shows that the commanders would change where they were encamped within Walendu-Bindi *collectivité*. This was so for the “Garrison Mobile”, which was led by a series of commanders and which, during that period, moved from Songolo to Avenyuma and was subsequently stationed in Kagaba.<sup>1409</sup> Likewise, Cobra Matata moved from Omi-Oma camp to Olongba camp.<sup>1410</sup> Move was based with his men in Nyabiri and then, in late 2003, in Aveba.<sup>1411</sup> Commander Anguluma was based in Mandre but later established a camp in Semiliki.<sup>1412</sup>

627. In this regard the Defence considered that a distinction should be made among the commanders of the various camps in Walendu-Bindi *collectivité*. In its view, there were those who were part of the group of local commanders not belonging to the APC: Mbadu, Cobra Matata, Kisoro, Oudo Mbafele, Anguluma, Safari Ndekote and Germain Katanga.<sup>1413</sup> Then there were those who, whilst being members of the group of local combatants, had direct links with the APC: Yuda and his second-in-command, Dark.<sup>1414</sup> The Defence stated that Yuda had received training and instruction from the APC and, in late 2002, had turned “freelance” whilst maintaining a direct connection with Beni and the APC, which

<sup>1405</sup> P-28, T. 217, p. 8; D02-01, T. 277, p. 51; D02-300, T. 320, p. 68; EVD-OTP-00278: “Prohibition on bearing arms” letter. See also EVD-OTP-00122: Map annotated by P-267.

<sup>1406</sup> P-28, T. 217, pp. 12 and 13; D02-01, T. 277, p. 51; D02-300, T. 325, p. 22; T. 324, p. 78; EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>1407</sup> P-28, T. 217, p. 11; D02-148, T. 280, p. 18; D02-300, T. 324, p. 78. See also EVD-OTP-00122: Map annotated by P-267.

<sup>1408</sup> See, for example, D02-300, T. 317, p. 57; [Defence Closing Brief](#), para. 683.

<sup>1409</sup> P-28, T. 217, pp. 9-10; D02-129, T. 271, pp. 21 and 23; D02-148, T. 279, pp. 7 and 12; D02-300, T. 315, p. 54.

<sup>1410</sup> D02-01, T. 277, p. 50; D02-300, T. 315, pp. 54-55; T. 320, p. 71.

<sup>1411</sup> D02-01, T. 277, pp. 10-12.

<sup>1412</sup> D02-148, T. 280, p. 18.

<sup>1413</sup> [Defence Closing Statements, T. 340](#), pp. 7 and 10-11.

<sup>1414</sup> [Defence Closing Statements, T. 340](#), p. 11.

enabled him to “circumvent” Germain Katanga.<sup>1415</sup> It highlighted in this regard Germain Katanga’s statement that Yuda had joined the local combatants together with the group of soldiers who had fled Bunia for Songolo in August 2002.<sup>1416</sup> Lastly, according to the Defence, there were those commanders who, whilst located in the *collectivité*, came under or pertained to the APC alone; in addition to Blaise Koka, Mutumbo, Kasereka and Mike 4, they were Garimbaya, Alpha Bebi, Kambale – known as Mbale – and Move.<sup>1417</sup> In the Defence’s view, Commander Garimbaya “perceived himself as an APC soldier” until February 2003 and therefore followed APC orders.<sup>1418</sup> Germain Katanga stated that Move and Garimbaya had both fled Songolo.<sup>1419</sup>

628. The Chamber is of the view that there is no doubt that in early 2003 the combatants from Walendu-Bindi were organised into a network of camps which could be moved around the *collectivité*.

## 2. Troop numbers in Walendu-Bindi *collectivité* in February 2003

629. After noting that the militia’s combatants were organised into battalions, companies, platoons and sections, with a battalion comprising between 600 and 720 combatants, the Prosecution alleged that in February 2003 there were at least four battalions in Walendu-Bindi *collectivité* (in Aveba, Medhu, Kagaba and Bukiringi), mustering approximately 2,400 strong. Relying on the Resistance Manifesto, the Prosecution submitted that, on balance, there were between 2,400 and 5,000 combatants.<sup>1420</sup> The Defence argued that the battalions did not yet have a set structure and name prior to the start of the Ituri Pacification Commission

<sup>1415</sup> [Defence Closing Statements, T. 340](#), pp. 7 and 8.

<sup>1416</sup> D02-300, T. 315, p. 28.

<sup>1417</sup> [Defence Closing Statements, T. 340](#), p. 10.

<sup>1418</sup> [Defence Closing Statements, T. 340](#), p. 9.

<sup>1419</sup> D02-300, T. 315, p. 28.

<sup>1420</sup> [Prosecution Closing Brief](#), para. 141. See also [First Observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 44.

negotiations in Bunia,<sup>1421</sup> that is, in March 2003. It further argued that the number of combatants in Walendu-Bindi in February 2003 was in fact unclear, owing to disorganisation in the *collectivité*.<sup>1422</sup>

630. The Chamber can accord only limited probative value to figures provided in the Resistance Manifesto, as it was drafted by Dr Adirodu, who was not in Walendu-Bindi *collectivité*.<sup>1423</sup> However, it notes that the figures stated in the document in respect of the *collectivité* amount to 5,000 combatants in January 2003. This figure is not entirely disproportionate with Germain Katanga's assertions that 3,000 persons claiming to be combatants were demobilised in 2004 during the pacification process.<sup>1424</sup>

631. Germain Katanga himself stated that in or around November 2002, there were at least 500 men at the BCA camp,<sup>1425</sup> 50 more at Aéro camp under Garimbaya,<sup>1426</sup> and that he himself had 60 men under his command in Atele Nga.<sup>1427</sup> The Chamber notes that Witness P-28 confirmed the existence of three battalions, one in Aveba – “*Léopard*” battalion – one in Medhu – “*Infanterie*” battalion – and *Garnison* stationed in Kagaba,<sup>1428</sup> which, on basis of the figures advanced by Germain Katanga, would mean at least 1,800 men.<sup>1429</sup> The Chamber notes that *Garnison* troops, a significant force, were located in Kagaba. Germain Katanga stated that there may have been about 300 men loyal to Yuda there, a figure which does not include the other local combatants from Kagaba.<sup>1430</sup> Finally, it should be recalled that there were other troops spread amongst several other camps in Walendu-Bindi *collectivité*, including Olongba, Medhu, Lakpa, Nyabiri,

<sup>1421</sup> [Defence Closing Brief](#), paras. 667 and 1295.

<sup>1422</sup> [Defence Closing Brief](#), para. 1301.

<sup>1423</sup> EVD-D02-00063: Resistance Manifesto.

<sup>1424</sup> D02-300, T. 319, p. 56.

<sup>1425</sup> D02-300, T. 315, pp. 57-58.

<sup>1426</sup> D02-300, T. 322, pp. 2-3.

<sup>1427</sup> D02-300, T. 317, T. 28; T. 324, pp. 67 and 71-72.

<sup>1428</sup> P-28, T.217, pp. 5-6, 8 and 10.

<sup>1429</sup> D02-300, T. 315, p. 57; T. 320, p. 69.

<sup>1430</sup> D02-300, T. 315, p. 58.

Bukiringi, Gety and Mandre.<sup>1431</sup> The Chamber notes that the APC, which, as already stated, was much diminished, decided to make use of local Ngiti forces precisely because they possessed a large number of combatants. Germain Katanga himself explained that the APC could not go to the front alone and would “[TRANSLATION] always need combatants”.<sup>1432</sup>

632. As for the number of APC troops in Aveba, the Chamber adverts first to the testimony of two eye-witnesses. P-28 stated that around 25 APC soldiers under Blaise Koka were stationed in Aveba before 24 February 2003<sup>1433</sup> and, subsequently, that he did not think any special APC reinforcements had arrived before the battle.<sup>1434</sup> This testimony was confirmed by D02-148, who, in response to questions by the Defence for Mathieu Ngudjolo as to whether APC troops were also involved in preparing the plan of attack against Bogoro, said that he had seen APC troops in Kagaba but not in great numbers.<sup>1435</sup> The witness affirmed that Yuda and his second-in-command, Dark, had prepared the attack and that the APC troops were there “[TRANSLATION] as reinforcement”.<sup>1436</sup> D02-148 further stated that the name Blaise Koka did not ring a bell.<sup>1437</sup>

633. The Chamber further adverts to the testimony of Witnesses D02-228 and D02-350, who both stated that the APC commanders had been dispatched to Aveba by EMOI to, *inter alia*, train the combatants, reorganise the fighting forces, and lead the preparations for the attack on Bogoro.<sup>1438</sup> D02-228 stated that there were ten or so APC members aboard the aeroplane which he took in early 2003, including five prominent figures: Commander Blaise Koka and Bipe, Mutembo, Mike-4 and

<sup>1431</sup> See “Section VII(C)(1) Main military camps and commanders”.

<sup>1432</sup> D02-300, T. 317, p. 45.

<sup>1433</sup> P-28, T. 218, p. 5; T. 219, p. 19.

<sup>1434</sup> P-28, T. 219, p. 19.

<sup>1435</sup> D02-148, T. 279, p. 32.

<sup>1436</sup> D02-148, T. 279, p. 32.

<sup>1437</sup> D02-148, T. 279, p. 16.

<sup>1438</sup> D02-350, T. 253, pp. 44-45; T. 254, pp. 22-23. See also D02-228, T. 250, p. 4.

Roger.<sup>1439</sup> According to the witness, to fulfil their mission and prepare the attack on Bogoro, the APC officers first stayed in Aveba before travelling to Kagaba.<sup>1440</sup> D02-350, meanwhile, gave the names of Mutumbo, Kasereka and Blaise Koka.<sup>1441</sup> The Chamber notes, however, that these witnesses did not state that the officers were accompanied by rank-and-file soldiers, even though D02-350's evidence on this point is somewhat ambiguous.<sup>1442</sup>

634. Germain Katanga stated that in or around September or October 2002, the 500 combatants in Aveba<sup>1443</sup> included an APC platoon of some 36 men stationed at the BCA camp.<sup>1444</sup> When later questioned again on this point, he stated that Blaise Koka, who had arrived in February 2003, had been joined by 150 men but that a large part of this group went directly to Kagaba.<sup>1445</sup> The Chamber notes that only the Accused reported the presence of these 150 soldiers. Lastly, Witness D02-146 stated that he had lived in Aveba “[TRANSLATION] under the authority of the APC soldiers”, that is, “[TRANSLATION] Congolese army” troops, and that the militia members lived in the area around Aveba.<sup>1446</sup> The Chamber finds that it can accord only relative probative value to this part of the testimony of D02-146, who lived in Aveba for three months in 2003 as a refugee who, as he said, worked in the fields and never saw a military camp.<sup>1447</sup>

635. In the light of these various pieces of evidence, the Chamber finds that there was a very large number of combatants – in the thousands – in Walendu-Bindi *collectivité*. It further notes from the various testimonies taken on this point that shortly before the battle of Bogoro, there was only a small number of APC soldiers in the *collectivité*, some 30 or so men, regarding whom, furthermore,

<sup>1439</sup> D02-228, T. 249, pp. 66.

<sup>1440</sup> D02-228, T. 249, pp. 67-68; T. 250, pp. 6-7.

<sup>1441</sup> D02-350, T. 253, p. 45.

<sup>1442</sup> D02-350, T. 253, p. 45, lines 18-19.

<sup>1443</sup> D02-300, T. 315, p. 58.

<sup>1444</sup> D02-300, T. 315, pp. 56-57.

<sup>1445</sup> D02-300, T. 317, p. 48.

<sup>1446</sup> D02-146, T. 265, pp. 9-10.

<sup>1447</sup> D02-146, T. 265, pp. 10, 20 and 24.

several witnesses made a distinction by referring to them as “*militaires*” [soldiers], as opposed to the local “*combattants*” [combatants].<sup>1448</sup>

### 3. Combatant training

636. The Prosecution submitted that the Ngiti combatants underwent military training at the camps, that discipline was enforced and that they were prepared for combat.<sup>1449</sup> Military parades in the Ngiti camps were a means of ensuring near-automatic compliance with orders. During these parades, the commanders instructed the combatants, taught them teamwork and reminded them of the obligation to obey orders.<sup>1450</sup>

637. The Defence argued that only certain combatants received military training. It maintained that those who had received more advanced training owed that to the RCD-ML, which trained many Lendu combatants in 2001 and 2002 at an APC camp in Nyaleke. It further contended that the Prosecution had not demonstrated how the military parades ensured any compliance with orders and that it had, in any case, not been proven that such parades had taken place, as only witnesses who, in its view, were not credible gave evidence on the subject. Lastly, it argued that virtually no training of combatants had taken place in Aveba.<sup>1451</sup>

638. In support of this allegation, the Prosecution relied on the testimonies of P-28, P-219, P-250 and D02-01. In the light of its findings on the credibility of P-219 and P-250, the Chamber can on this point refer only to the testimony of D02-01 and, partially, to that of P-28. When questioned twice on the topic,<sup>1452</sup> D02-01 stated that in late 2002 he had gone to Nyabiri to join a group of militia members

<sup>1448</sup> See, in particular, P-287, T. 130, pp. 63 and 64; D02-148, T. 279, p. 32; D03-88, T. 304, p. 14; P-30, T. 179, pp. 20-21. See also P-28, T. 217, pp. 33 and 34; T. 218, p. 8.

<sup>1449</sup> [Prosecution Closing Brief](#), paras. 163-166.

<sup>1450</sup> [Prosecution Closing Brief](#), paras. 164 and 231. See also [Closing Brief of the common legal representative of the main group of victims](#), paras. 216-217.

<sup>1451</sup> [Defence Closing Brief](#), paras. 1173 and 1303; [Defence Closing Statements, T. 340](#), pp. 12-13.

<sup>1452</sup> D02-01, T. 276, pp. 12-14; T. 277, p. 10.

and remained there for around four months.<sup>1453</sup> There he underwent training in which he was drilled and learnt to handle and fire a weapon.<sup>1454</sup> The witness further stated that he had to count the number of troops in the company for Commander Move and that this specifically involved drawing up a list for the daily morning “[TRANSLATION] roll-call of the combatants” present at the camp.<sup>1455</sup> Witness P-267, meanwhile, stated that the Ngiti “[TRANSLATION] had no specific training camp for children”.<sup>1456</sup>

639. Witness D02-161, who arrived in Aveba in September 2002 and lived there until February 2003, stated that the soldiers underwent training and that she often saw them out running in Aveba in the mornings.<sup>1457</sup> P-28, for his part, stated that muster was called and parades were held in Aveba<sup>1458</sup> and that members of the APC posted there had taught the local combatants how “[TRANSLATION] soldiers should behave towards their commander”.<sup>1459</sup> Germain Katanga confirmed that the discipline adhered to by the local combatants was based on the APC disciplinary regime.<sup>1460</sup> Witness P-132 related how during the time she was held captive at a Ngiti combatants’ camp where she had been taken after the 24 February 2003 attack, the combatants had participated in military parades.<sup>1461</sup> Moreover, it bears noting that the letter entitled “Cobra’s Complaint” dated 2 February 2003 bears the letterhead “*Mouvement de Libération lendu – Comité de sécurité Olongba – Centre de formation Muzituni*” [Lendu Liberation Movement – Olongba Security Committee – Muzituni Training Centre].<sup>1462</sup> Finally, according to the MONUC report on the events in Ituri relating events during 2002 and 2003,

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<sup>1453</sup> D02-01, T. 276, p. 12; T. 277, p. 10.

<sup>1454</sup> D02-01, T. 276, p. 14; T. 277, p. 10.

<sup>1455</sup> D02-01, T. 277, p. 46.

<sup>1456</sup> P-267, T. 173, p. 53.

<sup>1457</sup> D02-161, T. 269, pp. 22-23.

<sup>1458</sup> P-28, T. 217, p. 42.

<sup>1459</sup> P-28, T. 218, p. 5.

<sup>1460</sup> D02-300, T. 317, p. 26

<sup>1461</sup> P-132, T. 140, pp. 47-49 ; T. 141, p. 34.

<sup>1462</sup> EVD-D02-00243: Cobra Matata’s Complaint.

the Ngiti and Lendu militias seemed to have “been offered a summary training either in their home villages or nearby”.<sup>1463</sup> Hence, the Chamber attaches no credibility to D02-228’s claims that the FRPI did not have training centres teaching weapons handling.<sup>1464</sup>

640. From these various pieces of evidence it is possible to establish that training of a military nature was dispensed at some of the camps in Walendu-Bindi *collectivité* in early 2003. The Chamber also notes that military parades were held at the same camps. In its view, the training and parades prove the existence of a degree of discipline at the camps.

#### 4. Supply of weapons and ammunition for the battle of Bogoro

641. The Prosecution alleged that in the immediate run-up to the attack on Bogoro, the Ngiti camps were better armed because, following the official founding of the FRPI and Germain Katanga’s trip to Beni in November 2002, the ties forged with the RCD-ML and the APC had made it possible to supply them with weapons and ammunition.<sup>1465</sup> It further alleged that the weaponry delivered was to be used during the attack on Bogoro,<sup>1466</sup> an allegation moreover not contested by the Defence.<sup>1467</sup>

642. The Defence recalled that prior to December 2002, the Ngiti combatants had only bows, arrows and spears, and that they would sometimes pick up weapons abandoned *in situ* in the aftermath of battle or buy them from APC soldiers.<sup>1468</sup> The Defence described the local combatants at the time of the attack on Bogoro as a “ragtail force”<sup>1469</sup> which possessed very few automatic weapons. It submitted

<sup>1463</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-0129-0375, para. 147).

<sup>1464</sup> D02-228, T. 250, p. 24.

<sup>1465</sup> [Prosecution Closing Brief](#), paras. 140 and 162. See also [Closing Brief of the common legal representative of the main group of victims](#), paras. 87-91.

<sup>1466</sup> [Prosecution Closing Brief](#), para. 523.

<sup>1467</sup> [Defence Closing Brief](#), para. 654.

<sup>1468</sup> [Defence Closing Brief](#), para. 654.

<sup>1469</sup> [Defence Closing Statements, T. 338](#), pp. 10-11.

that after they had forged ties with the authorities in Beni, weapons, ammunition and other provisions were delivered to them from Beni “in plenty”.<sup>1470</sup> In its closing statements, the Defence further submitted that two or three tonnes of weapons had been delivered to Aveba.<sup>1471</sup> Moreover, it affirmed that the majority of the local combatants were untrained in the use of heavy weapons, such as heavy mortars, and that some of them had received special training by the APC soldiers in order to be able to use light weapons in Bogoro.<sup>1472</sup>

643. The Chamber notes firstly that a series of deliveries to the local combatants of Walendu-Bindi was unquestionably organised by the Beni authorities from December 2002. Germain Katanga explained that between his return to Aveba and the attack on Bogoro, there had been at least six return flights and that he himself had taken the opportunity to make round trips to Beni lasting three or four days.<sup>1473</sup> The first landing was allegedly facilitated by Commander Yuda, who had gone to Aveba to that end.<sup>1474</sup>

644. The Chamber further notes that the deliveries included weapons and ammunition which were found in Aveba by the local commanders from Walendu-Bindi for use in the attack on Bogoro. The Accused stated that the aeroplanes carried first and foremost “[TRANSLATION] mostly” ammunition, as well as food, fuel, medicine and military clothing.<sup>1475</sup> They also transported mortars, rocket launchers, MAGs, SMGs and AK-47s.<sup>1476</sup> According to Germain Katanga, all this equipment was delivered to the APC troops,<sup>1477</sup> but the Aveba combatants also received it as important allies of the APC, since the APC was not

<sup>1470</sup> [Defence Closing Brief](#), para. 654.

<sup>1471</sup> [Defence Closing Statements, T. 338](#), p. 16.

<sup>1472</sup> [Defence Closing Statements, T. 340](#), pp. 12-13 and 15.

<sup>1473</sup> D02-300, T. 317, pp. 42 and 43.

<sup>1474</sup> D02-300, T. 317, pp. 31-32.

<sup>1475</sup> D02-300, T. 317, pp. 43-44.

<sup>1476</sup> D02-300, T. 317, pp. 41 and 44.

<sup>1477</sup> D02-300, T. 317, pp. 44-45.

in a position to go “[TRANSLATION] to the front alone”.<sup>1478</sup> He nevertheless explained that the mortars, rocket launchers and grenade launchers were not distributed to the combatants, who did not know how to use them, and that prudence was exercised in distributing the ammunition to the combatants lest they “[TRANSLATION] turn the guns on” the APC.<sup>1479</sup>

645. D02-228 stated that he had left Beni in late January or early February 2003 in order to participate in a mission to Aveba.<sup>1480</sup> He stated that on that occasion the aeroplane in which he was travelling was carrying weapons and ammunition specifically destined for Aveba.<sup>1481</sup> According to the witness, from Beni, the weapons, coming originally from Kinshasa, were delivered to the main localities in the region, in particular those with landing strips, including Aveba, Mongbwalu and Kpandroma.<sup>1482</sup>

646. He mentioned that the weapons thus sent to Aveba were not only for the combatants there but were also distributed amongst the commanders who controlled the various zones in the region – for example, Olongba, Kagaba and Zumbe.<sup>1483</sup> D02-228 further added that the supply mission in which he had participated, like those that followed, was intended to reorganise the region’s fighting forces. He asserted that those who came from Beni had two missions, one relating to control of Komanda, a strategic position, and the other to the attack on Bogoro”.<sup>1484</sup> Lastly, Witness P-28 stated that a letter had been written to the heads of the various camps inviting them to come and collect the ammunition transported to Aveba by aeroplane for the battle of Bogoro.<sup>1485</sup>

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<sup>1478</sup> D02-300, T. 317, p. 45.

<sup>1479</sup> D02-300, T. 317, p. 45.

<sup>1480</sup> D02-228, T. 249, p. 66.

<sup>1481</sup> D02-228, T. 249, pp. 65-68.

<sup>1482</sup> D02-228, T. 249, pp. 64-65. See also T. 252, p. 52.

<sup>1483</sup> D02-228, T. 249, p. 65.

<sup>1484</sup> D02-228, T. 249, pp. 67-68; T. 250, p. 4.

<sup>1485</sup> P-28, T. 217, pp. 18 and 35.

647. D02-350 stated that when he was in Beni, Mbusa Nyamwisi promised to send 200 weapons “[TRANSLATION] into the field” and that this was how he learnt that an attack was being planned against Bogoro with a view to reaching Bunia.<sup>1486</sup> D03-88 stated that Germain Katanga used the money he had received in Beni to charter an aeroplane and obtain weapons and ammunition in prospect of the attack.<sup>1487</sup> At first, Germain Katanga made a general statement that weapons were distributed only when an operation was planned and troops would be going to the front.<sup>1488</sup> When subsequently answering a more specific question under examination-in-chief, he stated that the weapons delivered to Aveba from Beni were intended only for the war and that the imminent operation in question involved attacking Bogoro and then Bunia.<sup>1489</sup>
648. The Chamber also accepts, as hearsay, the evidence of P-28, who stated that in normal circumstances the combatants had no supply source for weapons and ammunition, which were taken from enemy forces in the aftermath of battle.<sup>1490</sup> He stated that they received such supplies, from Beni, only later as part of the preparations to neutralise the Bogoro-based UPC forces.<sup>1491</sup> He stated that the preparations for the attack were made in Beni.<sup>1492</sup>
649. The Chamber further notes that it is undisputed that the Kagaba camp, located on the front line, was the main base from which the Walendu-Bindi combatants launched the attack on Bogoro<sup>1493</sup> and that weapons were maintained there prior to the launch of the attack. In this connection, Germain Katanga stated that he was kept informed when weapons and ammunition from Beni were delivered to

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<sup>1486</sup> D02-350, T. 253, pp. 44-46.

<sup>1487</sup> D03-88, T. 306, p. 33.

<sup>1488</sup> D02-300, T. 317, p. 45.

<sup>1489</sup> D02-300, T. 317, p. 49.

<sup>1490</sup> P-28, T. 217, p. 24.

<sup>1491</sup> P-28, T. 217, p. 24; T. 223, pp. 29-30.

<sup>1492</sup> P-28, T. 217, p. 24.

<sup>1493</sup> [Defence Closing Brief](#), paras. 453, 626, 628 and 706.

Singo, Songolo and Kagaba.<sup>1494</sup> He also stated that on or around 20 February 2003, he ordered the combatants to go to Kagaba for, among other reasons, the due maintenance of all the weapons which were to be used in Bogoro.<sup>1495</sup>

650. Finally, the Chamber notes that the combatants' victory on 24 February 2003 was due to a significant supply of weapons, which provided exceptional and very considerable firepower.<sup>1496</sup> In this connection, the Chamber notes that before the battle of Bogoro, the local combatants had little in the way of weapons and ammunition, except for what they had previously found on the battlefield. Witness D02-176, a UPC soldier who was in Bogoro on 24 February 2003,<sup>1497</sup> affirmed that on that date the attackers used weapons which they had never used previously, that they were better organised, that they had a large amount of ammunition and that their weapons were much superior to those of the UPC, which to his mind was the reason why the battle was lost.<sup>1498</sup> Germain Katanga explained that "[TRANSLATION] having weapons, enough ammunition, enough support weapons, is what sapped the enemy's strength, sapped in the sense that they went at it with their ammunition, they went at it with their weapons until they felt exhausted".<sup>1499</sup> Finally, P-28 stated that the ammunition received from Beni was to be used in the attack and, further, that the success of the battle on 24 February 2003 was due to the relations forged between the combatants and the APC and to those supplies.<sup>1500</sup>

651. From the foregoing, it is clear that in the months before the 24 February 2003 attack, deliveries of weapons and ammunition from Beni began for the purpose of launching an imminent attack on Bogoro. The Chamber further points out that whilst the quantity of weapons cannot be ascertained precisely, it must be noted

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<sup>1494</sup> D02-300, T. 318, p. 17.

<sup>1495</sup> D02-300, T. 318, pp. 4 and 5.

<sup>1496</sup> See also "Section VIII(A)(3) How of the attack proceeded".

<sup>1497</sup> D02-176, T. 255, p. 23.

<sup>1498</sup> D02-176, T. 256, pp. 48 and 49.

<sup>1499</sup> D02-300, T. 324, p. 25.

<sup>1500</sup> P-28, T. 217, pp. 24 and 34-35.

that it was quite considerable given the situation in Walendu-Bindi *collectivité* at the time and particularly given the fact that the combatants were armed mostly with traditional weapons.<sup>1501</sup> In any event, the battle of Bogoro was waged and won by local combatants thanks to the significant supply of weapons and ammunition. Ultimately, the Chamber must conclude that in Bogoro on 24 February 2003 the local combatants of Walendu-Bindi *collectivité* used the weapons and ammunition from Beni, which were allotted to them after being received in Aveba.

## 5. Means of communication

652. According to the Prosecution, in the immediate run-up to the battle of Bogoro, the Ngiti combatants had various means of communication, which facilitated communication between the different camps.<sup>1502</sup> The Defence, meanwhile, noted that the means of communication then available to Walendu-Bindi *collectivité* were relatively limited.<sup>1503</sup>

653. Witness D02-01, Commander Move's secretary at Nyabiri camp,<sup>1504</sup> explained that written requests, authenticated by a signature or stamp, could be made to other camps, to which combatants might bring messages.<sup>1505</sup> P-28 stated that a letter had been sent to the heads of the various camps inviting them to collect the ammunition delivered by air to Aveba for the battle of Bogoro.<sup>1506</sup> He also explained that a certain Manono, who was the secretary at Germain Katanga's

<sup>1501</sup> See "Section VII(A)(1) Creation of the self-defence groups".

<sup>1502</sup> [Prosecution Closing Brief](#), para. 167. See also [Closing Brief of the common legal representative of the main group of victims](#), para. 214; [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 47.

<sup>1503</sup> [Defence Closing Brief](#), paras. 640-645.

<sup>1504</sup> D02-01, T. 277, p. 9.

<sup>1505</sup> D02-01, T. 277, pp. 47-50.

<sup>1506</sup> P-28, T. 217, pp. 18 and 35.

camp, was tasked with preparing written documents, which in the case of mission orders, bore a stamp depicting a lion.<sup>1507</sup>

654. Moreover, D03-88 stated that he had been able to contact young people in Kagaba from Aveba using walkie-talkies called “Cobras”, which had been “[TRANSLATION] found” in Nyakunde;<sup>1508</sup> this was corroborated by P-28, who stated that the camp commanders also used “[TRANSLATION] mobile telephones” called “Cobras”.<sup>1509</sup> Germain Katanga also stated that he had brought six walkie-talkies with, according to him, a range of 5 km back from Beni in December 2002.<sup>1510</sup>

655. The Prosecution submitted that radio equipment, referred to as a “*phonie blanche*”, also facilitated communication between the camps.<sup>1511</sup> According to P-28, devices of this type were found in the health centres of the *collectivité*, and the commanders communicated with each other using this kind of *phonie*.<sup>1512</sup> According to D02-01, even if a camp did not have a *phonie* device, it was possible to request the operator of the *phonie* at the hospital to transmit a message to the other camps.<sup>1513</sup>

656. The Defence drew on Germain Katanga’s testimony to argue that the *phonie blanche* at the Aveba health centre had a range of about 10 km, that it was used solely by the missionaries “[TRANSLATION] stationed” there<sup>1514</sup> and that it enabled the missionaries at the different health centres to communicate with each other.<sup>1515</sup> It disputed that it could have been used by the combatants, recalling the

<sup>1507</sup> P-28, T. 216, pp. 65-66.

<sup>1508</sup> D03-88, T. 304, p. 64; T. 305, pp. 26, 29 and 63.

<sup>1509</sup> P-28, T. 217, pp. 15.

<sup>1510</sup> D02-300, T. 317, pp. 33-34.

<sup>1511</sup> [Prosecution Closing Brief](#), p. 170.

<sup>1512</sup> P-28, T. 217, p. 15.

<sup>1513</sup> D02-01, T. 277, p. 48.

<sup>1514</sup> D02-300, T. 317, p. 38.

<sup>1515</sup> D02-300, T. 317, pp. 38 and 43; T. 318, p. 17.

Accused's explanation that there was no regular mobile telephone network in Aveba or elsewhere in the region.<sup>1516</sup>

657. The *phonies blanches* were in all likelihood placed in the health centres of the *collectivité* and intended for communication concerning healthcare. The above-mentioned witnesses nonetheless stated that the devices could be used to send messages to the various camps. Accordingly, the Chamber cannot accept the very limitative argument advanced by the Defence.

658. The Prosecution further noted that at the time of the attack on Bogoro, the *collectivité* also had two multi-frequency radio devices – one in Aveba and the other in Kagaba – making long-distance communication possible.<sup>1517</sup>

659. P-28 also mentioned that there was a multi-frequency *phonie* in Aveba able to reach Beni and used solely to communicate with the APC troops.<sup>1518</sup> According to him, it was initially placed in the health centre, later being moved to the BCA camp.<sup>1519</sup> He stated that Mike 4 was the operator, with Oudo Jackson standing in for him.<sup>1520</sup> This claim was corroborated by Witnesses D02-129, D02-160 and D02-161, who also stated that Oudo Jackson was the operator of the *phonie*.<sup>1521</sup>

660. Germain Katanga confirmed that in Walendu-Bindi *collectivité* only two localities had multi-frequency *phonies*: one, brought by the combatants from Avenyuma in January 2003, was in Kagaba, and the other, brought by Mike 4, also that January, was in Aveba.<sup>1522</sup> These devices enabled communication with Kinshasa, Beni, Kisangani and even Equateur province.<sup>1523</sup>

661. Therefore, it would appear to the Chamber that at the material time a multi-frequency *phonie* and a *phonie blanche* were available for use at the Aveba health

<sup>1516</sup> [Defence Closing Brief](#), para. 641.

<sup>1517</sup> [Prosecution Closing Brief](#), para. 171.

<sup>1518</sup> P-28, T. 217, p. 16; T. 221, p. 54.

<sup>1519</sup> P-28, T. 217, p. 16; T. 221, pp. 53-54.

<sup>1520</sup> P-28, T. 217, p. 16.

<sup>1521</sup> D02-129, T. 271, pp. 41-42; D02-160, T. 272, p. 69; D02-161, T. 269, p. 24.

<sup>1522</sup> D02-300, T. 317, pp. 37 and 39; T. 318, p. 17.

<sup>1523</sup> D02-300, T. 317, p. 38.

centre. Witness D02-129 stated that on 24 February 2003, the *phonie blanche* at the health centre was used to communicate with the *phonies blanches* in the other villages for updates on the battle.<sup>1524</sup> Confirming the witness's evidence, Germain Katanga also stated that on the day of the attack on Bogoro, Mike 4, together with a certain Aldo in Kagaba camp, had set up an "[TRANSLATION] ongoing communications system", which made it possible to follow developments "[TRANSLATION] on the battlefield" using the multi-frequency *phonie*.<sup>1525</sup>

662. The Chamber notes that the village of Aveba thus had various means of communication connecting it with the other camps in Walendu-Bindi *collectivité*. Moreover, it should be recalled that in addition to his walkie-talkie Germain Katanga had his own satellite telephone, which had been given to him in Beni so that he could remain in contact with Mbusa Nyamwisi and which allowed him to communicate absent a network.<sup>1526</sup>

663. Broadly speaking, it appears, therefore, that the commanders in Walendu-Bindi *collectivité* communicated both in writing, since combatants could move between camps, and by radio devices within a single network.

## 6. Civil and administrative authority in Walendu-Bindi

664. The Prosecution submitted that at the time, the combatants had replaced the regular authorities within Walendu-Bindi *collectivité* and wielded civil and administrative authority.<sup>1527</sup>

665. The Defence argued, however, that whilst the community's official administrative structure had effectively collapsed, since the customary chief was unable to exercise his authority, the fetish-priests had become more powerful

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<sup>1524</sup> D02-129, T. 272, p. 13.

<sup>1525</sup> D02-300, T. 318, pp. 17-19.

<sup>1526</sup> D02-300, T. 317, pp. 33-34.

<sup>1527</sup> [Prosecution Closing Brief](#), paras. 133 and 208-209.

than the civil administration.<sup>1528</sup> Germain Katanga confirmed that in late 2002 and early 2003 the *collectivité's* administration collapsed, as the RCD-ML had withdrawn and the *groupement* and *localité* chiefs were left to their own devices. He claimed that the elders and the fetish-priests had therefore taken on this role.<sup>1529</sup>

666. In this respect, the Chamber first notes P-267's statement that in the Ngiti community from 2002 the "[TRANSLATION] the spiritual authorities had become obsolete, as everything was decided by the militia leaders. The authorities, including the religious authorities, submitted to the whim and might of the militia leaders".<sup>1530</sup> P-28 also testified to that effect.<sup>1531</sup> The Chamber further notes that P-28 spoke of operations during which indebted persons belonging to Walendu-Bindi *collectivité* were sought and arrested in order to be brought to Aveba camp, where they were issued with a summons by the secretary of Germain Katanga's commander and, if required, their property was confiscated. He also stated that those accused of witchcraft were executed.<sup>1532</sup>

667. A series of documents tendered into evidence corroborates this testimonial evidence: the 5 June 2002 Memorandum of Understanding underlines the diminished powers of the *localité* chiefs (chiefs of *collectivités*, *groupements*, etc.);<sup>1533</sup> the MONUC report on the events in Ituri states that the leaders of the armed groups had taken over the roles traditionally held by administrators, business leaders, traditional chiefs and law enforcement officers;<sup>1534</sup> the Grievance Letter, dated 15 November 2002, refers to the "[TRANSLATION] total paralysis and inertia of administrative activities throughout Walendu-Bindi";<sup>1535</sup> and the

<sup>1528</sup> [Defence Closing Brief](#), paras. 671-672.

<sup>1529</sup> D02-300, T. 316, p. 25; T. 322, pp. 15-16.

<sup>1530</sup> P-267, T. 170, p. 28.

<sup>1531</sup> P-28, T. 218, p. 46.

<sup>1532</sup> P-28, T. 216, p. 67, 69-70; T. 218, p. 46.

<sup>1533</sup> EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic Conflict.

<sup>1534</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-0129-0335, para. 7).

<sup>1535</sup> EVD-D03-00098: Grievance Letter.

“Evangelization” letter, written in January 2003, and “Gold tax levy” letter, dated March 2003, demonstrate that the combatants were in charge of the civil administration of the *collectivité*.<sup>1536</sup> These two letters will be addressed in greater detail at a later point.

668. In the Chamber’s view, it has been established that at the material time, civil and administrative authority within Walendu-Bindi *collectivité* was exercised by the commanders of Walendu-Bindi *collectivité*. The relationship between the commanders and the fetish-priests will be discussed later.<sup>1537</sup>

## 7. Structure of the group

669. The Prosecution submitted that at the time of the attack on Bogoro the local combatants in Bedu-Ezekere *collectivité* formed a structured military group, there was a centralised military command and control and its headquarters were in Aveba.<sup>1538</sup> It further submitted that the Ngiti militia was structured so as to ensure that it could operate and could coordinate its administration.<sup>1539</sup>

670. According to the Defence, the combatants of Walendu-Bindi *collectivité*, as has been noted above, in no wise constituted an army and were nothing but a rag-tag collection amongst whom “rivalries and competition prevailed”.<sup>1540</sup> In its view, at no time during that period did the combatants have a monolithic<sup>1541</sup> or unified<sup>1542</sup> structure, “there was no hierarchy; each commander had his own stronghold and his followers obeyed his orders”;<sup>1543</sup> at a local level, they consisted of a variety of groups, and “the combatants acted in an autonomous fashion and did not easily

<sup>1536</sup> EVD-OTP-00238: “Evangelization” letter; EVD-OTP-00239: “Gold tax levy” letter.

<sup>1537</sup> See “Section X(A)(3) Relations between the fetish-priests, Germain Katanga and the combatants of Walendu-Bindi *collectivité*”.

<sup>1538</sup> [Prosecution Closing Brief](#), para. 152. See also [Closing Brief of the common legal representative of the main group of victims](#), paras. 211, 213 and 222.

<sup>1539</sup> [Prosecution Closing Brief](#), para. 158.

<sup>1540</sup> [Defence Closing Brief](#), paras. 574-575 and 663; [First Defence observations on article 25\(3\)\(d\)](#), para. 99.

<sup>1541</sup> [Defence Closing Brief](#), para. 572.

<sup>1542</sup> [Defence Closing Statements, T. 338](#), p. 35.

<sup>1543</sup> [Defence Closing Brief](#), para. 668; [First Defence observations on article 25\(3\)\(d\)](#), para. 80.

lend themselves to obeying orders”.<sup>1544</sup> According to the Defence, only after the attack on Bogoro was there a structured organisation, with its headquarters in Aveba.<sup>1545</sup>

**a) Existence of an organised group**

671. In this section the Chamber will set out the main evidence in determining whether, in February 2003, the group of commanders and Ngiti commanders of Walendu-Bindi *collectivité* was of an organised nature.

672. Firstly, with respect to the administration of the camps, the Chamber adverts to the testimony of Witness D02-01, who stated that he had been appointed Commander Move’s “S1”, that is, his secretary,<sup>1546</sup> some months after his arrival in Nyabiri.<sup>1547</sup> D02-01 stated that as “S1” he was in charge of administration and that his work consisted of providing a breakdown of troop numbers at Nyabiri camp for the roll-call of combatants in the camp.<sup>1548</sup> He noted that the other units also had “S1” staff responsible for administrative matters, “S2” staff responsible for intelligence, “S3” staff responsible for operational matters and “S4” staff in charge of logistics.<sup>1549</sup> This division of duties was also described by the Accused himself,<sup>1550</sup> who stated that the sixty or so men loyal to him were grouped “[TRANSLATION] into sections” and that his second-in-command was his chief bodyguard.<sup>1551</sup> In the Chamber’s view, this description of precise, regulated structure in the camps is an initial clear indication of the organised nature of the group.

<sup>1544</sup> [Defence Closing Brief](#), paras. 1264; [First Defence observations on article 25\(3\)\(d\)](#), para. 99.

<sup>1545</sup> [Defence Closing Brief](#), para. 1289.

<sup>1546</sup> D02-01, T. 277, p. 46.

<sup>1547</sup> D02-01, T. 277, p. 47.

<sup>1548</sup> D02-01, T. 277, pp. 9 and 46.

<sup>1549</sup> D02-01, T. 277, pp. 46-47.

<sup>1550</sup> D02-300, T. 320, pp. 46-47.

<sup>1551</sup> D02-300, T. 324, p. 72.

673. The Defence submitted that the use of titles to designate the various roles does not, however, demonstrate the existence of a structure, and that there was no hierarchy amongst the commanders and combatants. It noted that the Accused had stated that they all assumed titles such as “commander of operations”, “S4”, or “battalion commander”, even where the commander in question had only about ten men under his command.<sup>1552</sup>

674. The Chamber accepts that, as stated by Germain Katanga,<sup>1553</sup> some commanders may, at some time or other, have assumed titles or ranks which did not strictly correspond to the number of men they in fact had under their command. However, it is of the opinion that the information given by D02-01 on the structure of Move’s camp in Nyabiri must be considered probative as his position as secretary to the camp commander made him one of the best qualified to provide such information. Finally, it bears recalling that when questioned on this point, Germain Katanga provided general confirmation of the division of duties described above<sup>1554</sup> and that it appears to have endured after the attack on Bogoro, as a video recorded in late March 2003 demonstrates.<sup>1555</sup> The Chamber further notes that most of the camps adopted a military structure headed by at least one commander, who may have been able to communicate directly with EMOI<sup>1556</sup> and provided military training.<sup>1557</sup>

675. Secondly, with respect to Aveba’s importance in the *collectivité*, the Chamber notes that it was there that the weapons and ammunition supplies were centralised<sup>1558</sup> and that it was also there, as will be discussed below, that the commanders of Walendu-Bindi regularly travelled for this purpose. However,

<sup>1552</sup> [Defence Closing Brief](#), para. 574.

<sup>1553</sup> D02-300, T. 317, p. 24.

<sup>1554</sup> D02-300, T. 320, pp. 45-46.

<sup>1555</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport (DRC-OTP-0080-0011 and DRC-OTP-1030-0032 to DRC-OTP-1030-0033).

<sup>1556</sup> D02-228, T. 249, p. 62; D02-148, T. 280, p. 12; D02-01, T. 277, p. 14.

<sup>1557</sup> See “Section VII(C)(3) Combatant training”.

<sup>1558</sup> D03-88, T. 304, p. 62; P-28, T. 217, p. 35; D02-300, T. 318, p. 17.

absent any evidence to this effect, the Chamber cannot find that Aveba was the headquarters, in the strictly military sense of the term, of all of the local combatants of Walendu-Bindi *collectivité*.

676. Thirdly, upon examination of various pieces of documentary evidence, the Chamber notes that a number of commanders and other prominent persons referred to a “[TRANSLATION] movement” known to all, although, for the reasons explained above, use of the name “FRPI” was only gradual. It notes that references to the movement appeared sometimes in the letterhead stating the sender’s name,<sup>1559</sup> in the form of a stamp<sup>1560</sup> or in the title of the main recipient or copy recipients,<sup>1561</sup> or at times all three would appear in a single document.<sup>1562</sup>

677. The Chamber notes that several commanders and fetish-priests are frequently referred to in these letters either by name or by title. Such is the case with Cobra Matata and Oudo, who are each referred to five times;<sup>1563</sup> Germain Katanga, who is referred to four times;<sup>1564</sup> and Move,<sup>1565</sup> Kakado,<sup>1566</sup> Androzo and Kasaki,<sup>1567</sup> who are each referred to twice. The Chamber further notes that some camp commanders received copies of these letters, which demonstrates the existence of commonly accepted formal correspondence allowing them to be kept informed of the various civilian, administrative and military activities taking place in the *collectivité*.

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<sup>1559</sup> EVD-D02-00231: Report of the Immediate Office; EVD-OTP-00239: “Gold tax levy” letter; EVD-OTP-00243: Report on the general situation in the DRC.

<sup>1560</sup> EVD-OTP-00025: Soap letter; EVD-D02-00231: Report of the Immediate Office; EVD-OTP-00239: “Gold tax levy” letter.

<sup>1561</sup> EVD-D02-00231: Report of the Immediate Office; EVD-OTP-00239: “Gold tax levy” letter; EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>1562</sup> EVD-OTP-00239: “Gold tax levy” letter.

<sup>1563</sup> EVD-OTP-00025: Soap letter; EVD-D02-00231: Report of the Immediate Office; EVD-OTP-00239: “Gold tax levy” letter; EVD-D02-00243: Cobra Matata’s Complaint; EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>1564</sup> EVD-OTP-00238: “Evangelization” letter; EVD-OTP-00278: “Prohibition on bearing arms” letter; EVD-OTP-00239: “Gold tax levy” letter; EVD-D02-00243: Cobra Matata’s Complaint.

<sup>1565</sup> EVD-OTP-00239: “Gold tax levy” letter; EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>1566</sup> EVD-OTP-0023: Report of the Immediate Office; EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>1567</sup> EVD-OTP-00238: “Evangelization” letter; EVD-OTP-00278: “Prohibition on bearing arms” letter.

678. The letters also demonstrate that ultimately certain spiritual, civilian and military authorities of the *collectivité* turned to a common authority – whose name varied but who was always located in Aveba – between 29 January and 6 March 2003, when, for example, they had information to impart or were seeking to secure proper execution of an order issued.<sup>1568</sup> There was thus a focal point for the various commanders, sometimes referred to as “*supériorité si grande*” [great eminence], with whom, according to the letters’ authors, oversight of the *collectivité* rested and to whom they would turn when weight needed to be given to a decision considered important.

679. From the foregoing, the Chamber finds that in the immediate run-up to the battle of Bogoro the commanders and the local combatants constituted an organised armed militia.<sup>1569</sup> They were in fact capable of communicating amongst themselves and did so effectively through a well-established network. It also appears that they united in pursuit of a common struggle as part of a movement or under the newly formed force called the FRPI. In the view of the Chamber, the commanders and combatants were thus part of a single entity able to come together and organise itself to achieve its objectives.

680. In this regard, the Chamber cannot subscribe to the Defence argument that a plethora of autonomous groups engaged in military activities in the *collectivité* at the time. It must note that none of the witnesses from Beni or Walendu-Bindi *collectivité* who testified in this case reported the presence of groups of combatants living separately, entirely independently, and forming numerous distinct groups of local combatants. On the contrary; it notes that these witnesses observed that if necessary the combatants were perfectly able to join forces and formed part of a

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<sup>1568</sup> EVD-D02-00231: Report of the Immediate Office; EVD-OTP-00238: “Evangelization” Letter; EVD-OTP-00278: “Prohibition on bearing arms” letter; EVD-OTP-00239: “Gold tax levy” Letter; EVD-D02-00243: Cobra Matata’s Complaint; EVD-OTP-00025: Soap letter.

<sup>1569</sup> The Chamber notes that the Defence also used the term “militia”. See, for example, [Defence Closing Brief](#), paras. 14, 200, 259, 523, 554, 628, 654, 747, 788, 900, 1047, 1081 and 1227; [Defence Closing Statements, T. 338](#), pp. 11, 15 and 35; [T. 340](#), p. 6.

single movement identified as the “[TRANSLATION] Lendu combatants”, Lendu being understood in the broad sense, or Ngiti “[TRANSLATION] combatants”. Moreover, the appropriation of the name FRPI, which Witness D02-228 also described as a “[TRANSLATION] movement”,<sup>1570</sup> a term used by various witnesses and appearing in the documentary evidence, encouraged the local Ngiti combatants<sup>1571</sup> to rally around a single struggle against the UPC/Hema invader, as noted above. The need to pursue this common struggle, as notably described in the Grievance Letter, bonded and mobilised the group members.

681. Though they were stationed at different camps under different commanders, received logistical assistance from the APC and formed a somewhat rag-tag collection,<sup>1572</sup> all of these combatants, who communicated and could move between camps, nonetheless worked together, as part of a single armed militia, in pursuit of a common objective: to attack the enemy located in Bogoro. They knew how to organise themselves with sufficient effectiveness so as to be in a position to launch the planned attack on the village, with Aveba as their supply centre for weapons and ammunition.

#### **b) Chain of command**

682. In the Prosecution’s submission, there was a supreme leader of the group of combatants in Walendu-Bindi *collectivité*, and the group constituted a structured military group with a centralised, hierarchical chain of command.<sup>1573</sup> In its view, the military leader was able to exert effective control over his subordinates before, during and after the attack on Bogoro.<sup>1574</sup> The Prosecution alleged that this commander-in-chief of the organisation was informed of the group’s situation,

<sup>1570</sup> D02-228, T. 249, p. 46; T. 250, p. 52. See also EVD-D02-00045: Handwritten document “FRPI History”.

<sup>1571</sup> D02-129, T. 271, p. 55.

<sup>1572</sup> See, for example, D02-350, T. 253, p. 46.

<sup>1573</sup> [Prosecution Closing Brief](#), para. 152.

<sup>1574</sup> [Prosecution Closing Brief](#), paras. 217-226 and 230.

that all of the commanders followed his orders and that all of the combatants knew that they were under the obligation to follow them. It further submitted that the combatants, including the commanders, were punished for breaches of the rules.<sup>1575</sup>

683. As aforementioned, the Defence maintained that at the time of the *sub judice* events there was no such hierarchy.<sup>1576</sup> It argued that it was the military authorities in Beni, in particular EMOI, who exerted effective control over the commanders and the combatants of Walendu-Bindi *collectivité*.<sup>1577</sup>

684. On this point, the Chamber refers to its findings on Germain Katanga's role and powers within the Ngiti militia of Walendu-Bindi.<sup>1578</sup>

#### **D. PREPARATIONS FOR THE ATTACK ON BOGORO IN WALENDU-BINDI COLLECTIVITÉ**

685. The Prosecution alleged that meetings and musters preceded the attack on Bogoro, in Walendu-Bindi *collectivité* and in Bedu-Ezekere *groupement*. It further argued that the battle of Bogoro was waged according to a well-organised plan devised jointly by the Ngiti and Lendu.<sup>1579</sup> In addition to the aforementioned meetings,<sup>1580</sup> it argued that the main Ngiti commanders went to Germain Katanga's home to prepare the attack. In its view, they also mustered their troops in Kagaba and Medhu in prospect of the attack.<sup>1581</sup>

<sup>1575</sup> [Prosecution Closing Brief](#), paras. 152-157, 216 and 229-230; [Prosecution Closing Statements, T. 337](#), pp. 20-21.

<sup>1576</sup> See, in particular, [Defence Closing Brief](#), paras. 668 and 1288; [First Defence observations on article 25\(3\)\(d\)](#), para. 80.

<sup>1577</sup> [Defence Closing Statements, T-338](#), p. 15.

<sup>1578</sup> See "Section X(A)(7)(b) Military powers wielded within Walendu-Bindi *collectivité* in February 2003"; "Section X(A)(8) Role and powers of Germain Katanga: Conclusion".

<sup>1579</sup> [Prosecution Closing Statements, T. 336](#), p. 46.

<sup>1580</sup> See "Section VII(B)(1) Delegation of prominent figures from Bedu-Ezekere *groupement* to Aveba in November 2002"; "Section VII(B)(3) Relations established between Ngiti combatants and representatives of Bedu-Ezekere *groupement* in late 2002 for the purpose of attacking Bogoro".

<sup>1581</sup> [Prosecution Closing Brief](#), paras. 536-540 and 541-543. See also paras. 552-556.

686. The Defence maintained that the Prosecution had failed to prove that whilst the Bedu-Ezekere delegation, of which Witness D03-88 formed part, was in Aveba, a plan to attack Bogoro was devised.<sup>1582</sup> It argued that the combatants from Bedu-Ezekere *groupement* opportunely decided to join in the fighting, but later, after hearing detonations.<sup>1583</sup> It noted that, as stated by the Accused, the plan to attack Bogoro prepared by EMOI in Beni was delivered “on paper”.<sup>1584</sup> Finally, it did not dispute that the attack was launched from camps at Kagaba and Medhu and that troops were assembled there.<sup>1585</sup>

687. The Chamber notes that in addition to the testimonies of Witnesses P-219, P-250, P-279 and P-280, the Prosecution referred on these issues to the evidence of P-28, who stated that a meeting was held at Germain Katanga’s home in Aveba, to discuss the attack on Bogoro.<sup>1586</sup> In addition to the Accused, it was attended by Commanders Yuda, Dark, Cobra Matata, Oudo, Anguluma and Alpha Beby, the Gety company commander and a number of other commanders, in particular an APC commander called Blaise Koka.<sup>1587</sup> Thereafter, the witness claimed to have learnt that Bogoro was to be attacked from two positions – one in Medhu and the other in Kagaba.<sup>1588</sup> Subsequently, a communiqué, which did not state the date of the attack, was allegedly sent to those in charge of the market to obtain food provisions in preparation for the attack.<sup>1589</sup>

688. As the Chamber has previously stated, P-28, as a resident of Aveba in February 2003, may well have observed the arrival of several of the commanders and witnessed meetings held at Germain Katanga’s home. However, it bears recalling that the Chamber held that his testimony requires corroboration, in

<sup>1582</sup> [Defence Closing Brief](#), paras. 1147-1148.

<sup>1583</sup> [Defence Closing Brief](#), paras. 709, 1131(4) and (7), 1149-1155 and 1163.

<sup>1584</sup> [Defence Closing Brief](#), para. 687.

<sup>1585</sup> [Defence Closing Brief](#), paras. 706 and 709.

<sup>1586</sup> P-28, T. 218, pp. 9-10.

<sup>1587</sup> P-28, T. 218, pp. 9-10.

<sup>1588</sup> P-28, T. 218, p. 12; T. 219, p. 19.

<sup>1589</sup> P-28, T. 217, p. 35.

particular as regards aspects critical to the Accused's responsibility. Therefore, in the Chamber's view, his statements alone do not suffice to determine whether such a meeting was held and how it proceeded.<sup>1590</sup> Furthermore, absent the text of the communiqué or further testimony referring to it, the Chamber cannot rely on that part of P-28's testimony on this point.

689. Moreover, the testimonies of the Accused and Witness D02-148, who was a combatant based in Kagaba, are laid before the Chamber. Germain Katanga stated that according to the plan of attack devised by EMOI, the operation could be prepared in Kagaba.<sup>1591</sup> Blaise Koka's troops went to Kagaba on 20 February 2003, and those commanded by Garimbaya followed suit the day after, in order, amongst other things, to carry out maintenance on the weapons and to prepare the ceremonies led by Kasaki.<sup>1592</sup> Germain Katanga also stated that a contingent from Gety took part in the fighting and, to that end, had gone to Kagaba to join the "*Garrison*" troops.<sup>1593</sup> D02-148 stated that the entire group spent the night in Kagaba, whence they set off for Bogoro.<sup>1594</sup> Further, when questioned specifically about the preparations for and the organisation of the attack, he stated several times that Yuda, as Commander at Kagaba, and his second-in-command, Dark, had "[TRANSLATION] asked for preparations to be made" and that they had prompted the objective of attacking Bogoro.<sup>1595</sup> Lastly, he referred to combatants mustering in Medhu before the attack was launched.<sup>1596</sup>

690. Accordingly, regarding the muster called in Kagaba, the Chamber considers it established that in the immediate run-up to the attack, if not before, Ngiti troops from Walendu-Bindi *collectivité* assembled in Kagaba, whence they headed to Bogoro on 24 February 2003. In the Chamber's estimation, D02-148's *viva voce*

<sup>1590</sup> See "Section V(A)(1) Credibility of P-28".

<sup>1591</sup> D02-300, T. 318, p. 3.

<sup>1592</sup> D02-300, T. 318, pp. 4-5 and 15. See also T. 324, p. 5.

<sup>1593</sup> D02-300, T. 318, p. 22.

<sup>1594</sup> D02-148, T. 281, p. 18. See also T. 279, p. 16.

<sup>1595</sup> D02-148, T. 279, pp. 16 and 32.

<sup>1596</sup> D02-148, T. 279, pp. 16 and 33.

evidence makes clear that the Kagaba camp was paramount as a muster point and place of preparation for the attack on Bogoro.

691. As regards the assembling of troops at Medhu, no testimony specifically referring to such an occurrence there was put before the Chamber. However, it is established, in the light of D02-148's testimony, that the Ngiti combatants approached Bogoro from two points: Kagaba and Medhu.<sup>1597</sup>

692. As to radio messages between Aveba and Zumbe which, the Prosecution alleged, preceded the attack on Bogoro and which warned of an imminent attack,<sup>1598</sup> the Defence noted that "it is not in dispute that there was a plan to attack Bogoro. It is then not impossible that messages from one Ngiti camp to another close-by Bogoro were transmitted. [...] This, however, does not at all go to proof of a common plan between the Ngiti and Lendu."<sup>1599</sup>

693. On this point, the Chamber avails itself of the testimonies of Witnesses D02-176 and P-233 who mentioned the interception before 24 February 2003 of radio messages in Kingiti by UPC soldiers in Bogoro.<sup>1600</sup> In addition, several testimonies explicitly mentioned conversations between Lendu and Ngiti. Witnesses P-161, P-323 and P-166 gave mutually corroborative statements that the Ngiti communicated with the Lendu. P-323 and P-161 stated that the expressions "[TRANSLATION] till the field" or "[TRANSLATION] tend our field" were used during these conversations. One witness understood the expressions as referring to extermination of the population, whereas for the other two witnesses they clearly signified that Bogoro was to be attacked.<sup>1601</sup>

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<sup>1597</sup> According to Witness D02-176, the Ngiti attacked Bogoro via the Medhu and Gety roads (D02-176, T. 256, pp. 21-22).

<sup>1598</sup> [Prosecution Closing Brief](#), para. 551.

<sup>1599</sup> [Defence Closing Brief](#), para. 1141.

<sup>1600</sup> D02-176, T. 255, p. 26 ; T. 256, p. 44; P-233, T. 88, pp. 20-21.

<sup>1601</sup> P-161, T-111, p. 21; P-166, T. 227, p. 37.

694. The three testimonies are mutually corroborative. The Chamber has discussed P-161's statements in analysing his credibility.<sup>1602</sup> P-323 stated that he did not understand the language of the Lendu and Ngiti and that Hema from Bogoro who understood the Ngiti language<sup>1603</sup> had intercepted them. P-166 stated that he had "[TRANSLATION] received information" from two young people with Hema and Ngiti parents, who had claimed that messages indicating that an attack was imminent had been intercepted by UPC personnel proficient in Ngiti.<sup>1604</sup> Hence, in the Chamber's estimation, it appears that communications between the Lendu and the Ngiti prior to the attack may, in all likelihood, have been intercepted.

695. In any event, all of these testimonies go to proof that an attack on Bogoro was being actively mounted, at least by Walendu-Bindi *collectivité*, and that Kagaba camp served as the Ngiti militia's place of muster and preparation for the attack. The Chamber will now describe the mindset in which the Walendu-Bindi combatants attacked Bogoro on 24 February 2003.

## E. ETHNIC MOTIVATIONS OF THE NGITI COMMANDERS AND COMBATANTS

696. The Prosecution, akin to the legal representatives,<sup>1605</sup> attached great importance to the interethnic nature of the conflict, of which, in their view, the attack on Bogoro formed a part. Indeed, in many respects the Prosecution drew on the notion of "interethnic conflict" – to which, moreover, much reference is made in its Closing Brief<sup>1606</sup> – as the thread which allegedly connects the chief allegations of its case. It maintained that the Lendu and the Ngiti saw all Hema as

<sup>1602</sup> See "Section V(B)(3) Credibility of P-161", para. 228.

<sup>1603</sup> P-323, T. 117, pp. 23-24.

<sup>1604</sup> P-166, T. 227, p. 38.

<sup>1605</sup> [Closing Statements of the legal representatives](#), T. 337, pp. 54 and 74-75; [Closing Brief of the common legal representative of the main group of victims](#), paras. 55 and 58-61.

<sup>1606</sup> [Prosecution Closing Brief](#), paras. 37, 134, 479, 512, 516, 658 and 668.

enemies<sup>1607</sup> and that they were generally driven by a desire for vengeance fuelled by ethnic hatred.<sup>1608</sup> In this regard, it submitted that the hatred of the Hema had developed within the Lendu and Ngiti communities, spread among the combatants<sup>1609</sup> and taken the form of acts of vengeance.<sup>1610</sup>

697. The Defence did not dispute that an ethnic element was at play, but also cautioned against exaggerating the extent of the problem pitting Hema against Ngiti in and around Walendu-Bindi *collectivité*.<sup>1611</sup> The Defence further held that it was incorrect to maintain that every Ngiti combatant harboured hatred of the Hema.<sup>1612</sup> It underlined that, in its view, none of the evidence on record proved the existence of a conflict between the Hema and the Ngiti prior to August 2002.<sup>1613</sup> It submitted that a conflict did exist between the Bira and the Ngiti<sup>1614</sup> and, more generally, that the conflict which is of interest to the Chamber must ultimately be viewed as a “political and military manipulation of a peasantry”,<sup>1615</sup> in an apparent reference to the land disputes between the communities in question.

698. Broadly, the Chamber first notes that phrases such as “[TRANSLATION] ethnic conflict”, “[TRANSLATION] ethnic war”, “[TRANSLATION] tribal war” and “[TRANSLATION] inter-communal conflict” were frequently used by the protagonists of the situation, at the sites and time of the *sub judice* events.<sup>1616</sup> Indeed, some witnesses freely used such expressions to describe the

<sup>1607</sup> [Prosecution Closing Brief](#), para. 527. See also [Closing Statements of the legal representatives](#), T. 337, p. 74.

<sup>1608</sup> Prosecution Opening Statements, T. 43, p. 59; [Prosecution Closing Brief](#), para. 512.

<sup>1609</sup> [Prosecution Closing Statements](#), T. 337, pp. 11 and 14.

<sup>1610</sup> [Prosecution Closing Statements](#), T. 336, pp. 38-39.

<sup>1611</sup> [Defence Closing Brief](#), para. 55; [Defence Closing Statements](#), T. 340, p. 5.

<sup>1612</sup> [Defence Closing Statements](#), T. 340, p. 6; [First Defence observations on article 25\(3\)\(d\)](#), para. 100; [Second Defence observations on article 25\(3\)\(d\)](#), para. 35. See also [Defence Closing Brief](#), para. 1313.

<sup>1613</sup> [Defence Closing Statements](#), T. 340, pp. 4-5.

<sup>1614</sup> [Defence Closing Statements](#), T. 340, p. 6.

<sup>1615</sup> [Defence Closing Statements](#), T. 340, p. 7.

<sup>1616</sup> See, for example, EVD-OTP-00240: PUSIC political declaration (DRC-OTP-0041-0104 to DRC-OTP-0041-0106).

circumstances in which they were living,<sup>1617</sup> and they appear in documents admitted into the record.<sup>1618</sup> Hence, it cannot be disputed that the conflict, in the eyes of most of those who experienced, participated in or sought to pacify it, had a markedly interethnic significance.

699. The Chamber notes further that none of the witnesses or documents on record mention an ancestral hatred inherent to the ethnic groups living in Ituri, in particular, and in the wider DRC. On this point, it is mindful of the Defence's submissions that it would be incorrect to speak of an atavistic precursor, "race hate" or traditional Hema-Lendu interethnic conflict.<sup>1619</sup> On the contrary, the evidence on record allows the "ethnicities" or "ethnic groups"<sup>1620</sup> present in Ituri to be defined as localised social groups with identity-related, economic and land interests<sup>1621</sup> that could diverge and succumb to conflicts of interests. It is certain, therefore, that the general context in which the attack on Bogoro took place was unrelated to an ancestral ethnic conflict. Nor did the Prosecution describe it as a "[TRADITIONAL] traditional" conflict, but instead underscored the living conditions caused by the war.

700. The parties and participants do not dispute that in 2002 inter-communal violence escalated in Ituri and degenerated into a cycle of reprisals and acts of vengeance among the various ethnic groups, including the Lendu of Djugu and Irumu.<sup>1622</sup> It was all sparked by a highly localised land dispute in one of the district's five territories, Djugu territory.<sup>1623</sup> This land dispute spread to the Irumu area where the Hema and southern Lendu lived. The ensuing cycle of reprisals is

<sup>1617</sup> See, for example, P-12, T. 197, pp. 65-66; T. 198, p. 8; P-160, T. 211, p. 38; D03-44, T. 292, p. 22; D03-707, T. 328, pp. 58-60; D03-66, T. 297, p. 20.

<sup>1618</sup> EVD-D03-00099: Report on the Hema attacks on Bedu-Ezekere *groupement* (DRC-OTP-001-0086); EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic conflict.

<sup>1619</sup> [Defence Closing Statements](#), T. 340, p. 6.

<sup>1620</sup> This expression is generally used by the parties and participants in the instant case.

<sup>1621</sup> See, for example, D03-88, T. 299, p. 40.

<sup>1622</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0341, para. 23).

<sup>1623</sup> D03-307, T. 327, pp. 44 and 48.

moreover described in the Grievance Letter dated 15 November 2002,<sup>1624</sup> which, according to the Defence, presents “legitimate complaints of attacks in the region”.<sup>1625</sup>

701. In the Chamber’s view, three essential features marked the conflict in 2002 that it will now briefly describe.

702. First of all, the record of the case shows that the Hema on the one hand, and the Lendu on the other – the latter term being understood in a broad sense to encompass the Ngiti (southern Lendu) and the northern Lendu – were the two principal parties in the conflict and that the other ethnic groups were allied to one side or the other as the case may be. As the MONUC report states, the other ethnic communities, such as the Bira, Alur, Nyali, Lugbara, Kakwa, Ndo Okebo and Lese, who were not involved directly in the conflict, were drawn into it and/or were attacked by both parties, who accused them of harbouring the enemy.<sup>1626</sup> Accordingly, the Chamber notes that in 2002 the conflict was clearly polarised around these two ethnic groups – an aspect pivotal to the conflict, in its view.

703. Witnesses also spoke unprompted of such polarisation. Witness D03-44, for example, underscored the cycle of intercommunal reprisals that marked the “[TRANSLATION] tribal conflict” which, in his view, then existed between the northern Hema/southern Hema community and the Lendu/Ngiti community.<sup>1627</sup> He confirmed that the Hema attacked Bedu-Ezekere *groupements*, to which the Lendu responded with reprisals against the Hema “[TRANSLATION] in their community”.<sup>1628</sup> Witness D02-228 stated that, to his mind, the interethnic conflict

<sup>1624</sup> EVD-D03-00098: Grievance Letter.

<sup>1625</sup> Defence Closing Statements, T. 338, p. 57. See also p. 65.

<sup>1626</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0351, para. 26). See also EVD-OTP-00222: Human Rights Watch report, “*Le fléau de l’or*” (DRC-OTP-0163-0406 to DRC-OTP-0163-0407, pp. 40-41).

<sup>1627</sup> D03-44, T. 292, p. 22.

<sup>1628</sup> D03-44, T. 292, p. 22.

set Lendu against Hema.<sup>1629</sup> Moreover, although the Memorandum of Understanding of 5 June 2002 refers to a conflict involving the Bira as well as the Hema and the Lendu, its call for disarmament in fact mentions only “[TRANSLATION] the Hema militias” and “[TRANSLATION] the Lendu combatants”.<sup>1630</sup> The Chamber further notes that although the Grievance Letter of November 2002 mentions “[TRANSLATION] all the people of Ituri”, it distinguishes between and even contrasts “[TRANSLATION] the Hema” and “[TRANSLATION] the Lendu people” in the opening lines of its introduction.<sup>1631</sup>

704. The polarisation of the conflict between Hema and Lendu, the latter term being used in a broad sense, was furthermore mentioned by Germain Katanga with regard to the events in Nyakunde in August 2001. According to him, the Bira who at that time were attacking Lendu inhabitants had been, “[TRANSLATION] according to what we heard”, “[TRANSLATION] influenced by the Hema community”.<sup>1632</sup> He added that this “[TRANSLATION] attitude persisted” and that in fact some Bira were loyal to the Lendu and others to the Hema and that the two groups were rivals in a very real sense.<sup>1633</sup> This testimony shows that the Bira, owing to their geographic fragmentation, were often forced to take sides with the Hema or Lendu depending on the local balance of power.

705. As regards the attack on Nyakunde on 5 September 2002, the Chamber does not accept the Defence argument that only the existence of ethnic problems between the Bira and the Ngiti appears to have been established<sup>1634</sup> because the attack was primarily directed against the Bira.<sup>1635</sup>

<sup>1629</sup> D02-228, T. 252, p. 28. See also P-2, T. 191, p. 4.

<sup>1630</sup> EVD-OTP-00275: Memorandum of Understanding on the Resolution of Inter-ethnic Conflict (DRC-OTP-0136-0206-R01).

<sup>1631</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0349).

<sup>1632</sup> D02-300, T. 315, pp. 17-19.

<sup>1633</sup> D02-300, T. 315, p. 19.

<sup>1634</sup> [Defence Closing Statements](#), T. 340, p. 6.

<sup>1635</sup> [Defence Closing Statements](#), T. 338, pp. 10 and 49.

706. On this point, the Chamber recalls that the attack on Nyakunde was in reprisal for the UPC attack on Songolo on 31 August 2002 and that it is absolutely clear that the Bira were then considered UPC allies and, in consequence, allies of the Hema, as will be explained below. The Grievance Letter proves the connection thus made and shows that the attack on Songolo was led by the UPC/RP its allies, and that the Bira were drawn “[TRANSLATION] into their movement”.<sup>1636</sup> The MONUC report on the events in Ituri explains that during the attack on Songolo on 5 September 2002 both Bira and Hema were systematically attacked.<sup>1637</sup> In the context of the polarisation of the conflict described above, it appears to the Chamber that by reason of its status of UPC/Hema ally the civilian population, mostly Bira from Nyakunde, was attacked on 5 September 2002.

707. In addition to the foregoing polarisation, the Chamber notes that, after the rout of the APC in August 2002, which inflamed the ethnic divisions in the conflict, armed groups were often identified by their ethnic composition. Evidence on record shows that the terms “Hema” and “UPC” were frequently associated with each other or conflated by the witnesses,<sup>1638</sup> although some witnesses did emphasise the importance of not confusing the Hema military and Hema civilians.<sup>1639</sup> Germain Katanga stated that the Hema militia members had rallied to the UPC in April 2002.<sup>1640</sup> The UPC was portrayed as an enemy Hema

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<sup>1636</sup> EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0350).

<sup>1637</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-00129-0351, para. 56).

<sup>1638</sup> See, for example, P-2, T. 186, p. 66; P-12, T. 194, pp. 39-40; T. 197, pp. 27, 32-33, 42, 58 and 65; T. 202, p. 29; P-30, T. 179, p. 15; P-249, T. 137, pp. 49, 60 and 61; D02-300, T. 325, p. 9; D03-66, T. 295, pp. 61-62; D03-88, T. 299, pp. 39 and 48. See also EVD-D03-00099: Report on the Hema attacks on Bedu-Ezekere *groupement*; EVD-OTP-00173 Video excerpt – 30 March 2003 televised debate on the Ituri Pacification Commission.

<sup>1639</sup> D03-88, T. 302, p. 34.

<sup>1640</sup> D02-300, T. 321, p. 49.

party<sup>1641</sup> or the political and military group of the Hema<sup>1642</sup> – aggressors on whom revenge had to be taken<sup>1643</sup> and potential invaders.

708. The Chamber notes that several witnesses mentioned clearly that the Hema were known to be the enemies of the Lendu (this term again being used in a broad sense here to include, in particular, the Ngiti).<sup>1644</sup> Such was the case, for example, of P-28, who lived in Aveba and testified unambiguously to that effect.<sup>1645</sup> Germain Katanga admitted that within his community, “[TRANSLATION] people [...] [had] bad memories of the Hema”<sup>1646</sup> and that “[TRANSLATION] [e]ven in Aveba too there were combatants, even APC officers, who also threatened the Hema who [were] [...] in [his] territory.”<sup>1647</sup> P-160 also explained this phenomenon in the following terms: “[TRANSLATION] when the Lendu killed, they didn’t kill everyone, they didn’t kill just anyone; they killed their enemies, who were the [...] Hema”.<sup>1648</sup>

709. Witness P-12 stated that the group which was Germain Katanga’s “[TRANSLATION] enemy” was the “[TRANSLATION] Hema” group.<sup>1649</sup> He added, specifying that he was talking in general terms, that the military operations conducted by the Lendu targeted the Hema and that “[TRANSLATION] on many occasions, it wasn’t a conflict between two groups but between two ethnic groups”.<sup>1650</sup> According to P-12, the Lendu always pursued a precise objective when they launched attacks (such as taking weapons or cattle) and that to this end they specifically attacked Hema villages.<sup>1651</sup> As regards the UPC, he stated

<sup>1641</sup> D02-300, T. 324, p. 46.

<sup>1642</sup> D03-55, T. 293, p. 36.

<sup>1643</sup> P-12, T. 212, p. 37; D02-300, T. 324, p. 46. See also in this regard, EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0340, para. 21).

<sup>1644</sup> See, in particular, D03-44, T. 292, p. 22, D03-88, T. 299, p. 39.

<sup>1645</sup> P-28, T. 218, p. 48; T. 219, pp. 6 and 8.

<sup>1646</sup> D02-300, T. 319, p. 24.

<sup>1647</sup> D02-300, T. 325, p. 15.

<sup>1648</sup> P-160, T. 212, p. 45.

<sup>1649</sup> P-12, T. 197, p. 17. See also p. 26.

<sup>1650</sup> P-12, T. 197, p. 66.

<sup>1651</sup> P-12, T. 197, p. 66; T. 198, p. 8.

that this armed group had been created to combat the Lendu, not the central government.<sup>1652</sup>

710. Finally, the Chamber notes that ethnic and patriotic considerations often merged. It is significant that documents, such as the Resistance Manifesto of January 2003 or the Grievance Letter, written with the “patriotic” objective of preventing the secession of Ituri and restoring the central government’s authority, ascribe to the enemy plans to commit “[TRANSLATION] ethnic cleansing”, “[TRANSLATION] extermination” and “[TRANSLATION] genocide”.

711. In this respect the Grievance Letter is particularly illustrative, given its title and the stamp it bears.<sup>1653</sup> In the view of the Defence, the exhibit does not contain a shred of ethnic hatred. After “[TRANSLATION] closely” studying its content, the Defence maintained that the letter referred only to the UPC, Uganda and Rwanda.<sup>1654</sup> The Chamber observes, however, that although this letter is couched in defensive terms, the UPC is identified most explicitly as a Hema party and that it is on the ethnicity of its members, the potential exterminators, that this document lays emphasis. It also notes that in its introduction, the Grievance Letter does not mention only the UPC but also calls this organisation “[TRANSLATION] the Hema militia” whose “[TRANSLATION] Ugandan and Rwandan allies” attacked Governor Lompondo.

712. In the Resistance Manifesto the Lendu people is portrayed as “[TRANSLATION] a genuine Congolese people whose patriotism is exemplary” and, the UPC, a “[TRANSLATION] covert Congolese metamorphosis of two armies of aggression and occupation”, is described as the tool of foreign powers, working tirelessly to implement vast “[TRANSLATION] hidden agendas”, and as a “[TRANSLATION] Hema

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<sup>1652</sup> P-12, T. 202, pp. 59-60.

<sup>1653</sup> The stamp is that of the FREC, the “*Force de résistance contre l’extermination des congolais*” [Congolese Extermination Resistance Front]. See in this regard D03-88, T. 302, p. 53; T. 304, p. 44; T. 307, p. 8.

<sup>1654</sup> [Defence Closing Statements](#), T. 338, p. 57.

ethno-tribal militia with a pseudo political party.”<sup>1655</sup> Therefore, far from, being, on the face of it, distinct, the ethnic and patriotic dimensions of the conflict merged and reinforced each other. Germain Katanga himself explained that the UPC was “[TRANSLATION] identified as the Hema-Tutsi force” which “[TRANSLATION] would invade [his community] and take [their] land”<sup>1656</sup> and that the Lendu risked being “[TRANSLATION] driven from [their] territory so that the Hema could extend their sphere of influence from Rwanda all the way to Ituri.”<sup>1657</sup> The sense of a threat to the integrity of national territory therefore combined with the fear of the Lendu people – who, according to the Accused, see themselves as farmers by tradition<sup>1658</sup> – that they would one day find themselves under the authority of the Hema, who were mainly graziers and looking to secure new “[TRANSLATION] pastures”<sup>1659</sup> and new territories. According to Germain Katanga:

[TRANSLATION] [...] the Tutsi [or] the Hema [...] are graziers. They are herders. So, as regards them, according to the ideology that we were “taught”, it was said that we would be driven from our land for it to become pasture for the animals. So, that was it. The Hema had to ... the Tutsi had to dominate that territory as they pleased, to be masters of that land. That’s how I understand it.<sup>1660</sup>

713. Of note is that the myth of the “Hima-Tutsi” empire was a reasonable explanation, more relevant than ever in 2003, for the sense among the Lendu that the Hema represented a threat. P-267 volunteered as follows:

[TRANSLATION] it was no secret to anyone that there was talk of a Hema empire, it was well-known, which made... Ituri was to form part of that empire. So, that would mean breaking up the east of the DRC, with Ituri going to Uganda and North Kivu to Rwanda; that was no secret to anyone, generally. That was the national opinion.<sup>1661</sup>

714. When questioned by the Chamber as to whether the APC commanders had tried to rally Lendu combatants to their side by exploiting the conflict between

<sup>1655</sup> EVD-D02-00063: Resistance Manifesto (DRC-00126-414).

<sup>1656</sup> D02-300, T. 316, p. 64. See also P-267, T. 171, p. 41 and 44. See also with regard to the “[TRANSLATION] Hema invader” EVD-D02-00045: Handwritten document “FRPI History”.

<sup>1657</sup> D02-300, T. 321, p. 65.

<sup>1658</sup> D02-300, T. 318, pp. 25-26.

<sup>1659</sup> D03-88, T. 299, pp. 48-49.

<sup>1660</sup> D02-300, T. 325, p. 10. See also D03-707, T. 329, pp. 37-38.

<sup>1661</sup> P-267, T. 171, p. 44.

the Hema and Lendu communities, Germain Katanga addressed the fear of a Hima-Tutsi empire:

[TRANSLATION] I... I'm not sure that I would express it quite that way, Your Honour. There was also a conflict between the RCD/K-ML and the UPC, so when they were bad-mouthing the UPC and saying it was a Hema party, they were... they were associating the UPC rebellion with that of the rwandophones from North Kivu, by inferring that the rwandophones who came from Goma, by attacking the north would... their goal was to link up with the UPC who were also pro-Rwandan. And they explained that after the conquest, after the Nande and the Lendu had been driven out, they would establish what they called the Hima-Tutsi empire.<sup>1662</sup>

715. Finally, to the question as to whether the ideology of a Hima-Tutsi empire was in the thoughts of the commanders and combatants of Aweba, Germain Katanga replied as follows:

[TRANSLATION] A. With the commanders in Aweba, yes, Your Honour, people did talk about it. People talked about it when, for example, there was an attack, people said: look, they want to come and occupy our land. Those people want to establish their empire. That was said, that was said verbally. But as to understanding in depth what was..., well, I must say it's a bit difficult for me to confirm.

Q: In order for everything to be as clear as possible in our minds, could you repeat who in Ituri, which community or communities wanted to set up this empire?

A. Your Honour, I would say that this initiative, this... this policy could only come from the Hema because they were pro-Tutsi.<sup>1663</sup>

716. From the body of evidence aforesaid, the Chamber considers the ethnic dimension of the conflict pitting the commanders and combatants of Walendu-Bindi *collectivité* against the Hema-affiliated UPC to be indisputable. In the case at bar, this conflict was presented as being polarised between two main ethnic groups, the Hema and the Lendu, the ethnic dimension being interwoven with geopolitical considerations. The conflict cannot, therefore, be reduced to an ordinary village dispute or a dispute among neighbours. In the Chamber's view, the emphasis laid on the national and patriotic reach of the struggle waged by combatants and resistance fighters does not necessarily take away all ethnic significance. Quite the contrary, it appears to the Chamber that, as previously stated, the two dimensions combined to reinforce each other.

<sup>1662</sup> D02-300, T. 325, p. 9.

<sup>1663</sup> D02-300, T. 325, pp. 11-12. See also pp. 9-10.

717. The Chamber also observes that the fear of Ituri's incorporation into a future Hima-Tutsi empire that would see the "[TRANSLATION] territory of the Lendu people" transformed into a "[TRANSLATION] collective pasture" caused the various conceptions, dimensions and manifestations of the conflict to meld into a single fear. For the Chamber, although there is no doubt that this fear formed an ideology that was still alive at the material time, it must also be noted that it was based on the actual experience of the Lendu and Ngiti of relentless and violent attacks by the predominantly Hema UPC, whose President, Thomas Lubanga, made no secret of his wish to secede along with the rest of Ituri.<sup>1664</sup>

718. With specific regard to the commanders and combatants of Walendu-Bindi *collectivité*, whereas the Chamber cannot conclude that the Ngiti harboured an atavistic hatred of the Hema, it does find that in 2002, over and above the UPC, the Ngiti combatants viewed the Hema and their allies as their enemy, as an ethnic group that repeatedly attacked and threatened their territory. The statements of witnesses who lived in or near Walendu-Bindi *collectivité* make clear that the UPC was equated with the Hema, that the local combatants were engaged in resistance against that enemy, regarded as an invader – resistance which also involved counter-offensives, such as the one against Nyakunde. It was against that backdrop that the Ngiti combatants from Walendu-Bindi attacked Bogoro.

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<sup>1664</sup> In this regard, see P-12, T. 203, pp. 12-13 and 48-49. See also Thomas Lubanga at Bunia stadium on 11 January 2003, EVD-D03-00042: Video excerpt of a UPC rally (DRC-D03-0001-0398 taken from DRC-OTP-0227-0063). The flag which can be seen at 06:46 is that of the UPC. The witness confirmed that the video shows only UPC and not DRC flags. (P-30, T-182, p. 79; T.183, pp. 5-6).

## VIII. CRIMES COMMITTED DURING THE ATTACK ON BOGORO ON 24 FEBRUARY 2003

719. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that in the early morning of 24 February 2003, FRPI and FNI combatants armed with heavy weapons and bladed weapons encircled the village of Bogoro from all the roads leading to it.<sup>1665</sup> Civilians in Bogoro awoke that day to gunfire as Lendu and Ngiti combatants began the attack, which was directed not only against the UPC military camp, but also against the civilian population.<sup>1666</sup> According to the above-mentioned decision, approximately 200 civilians were killed during and in the aftermath of the attack on the village,<sup>1667</sup> and the combatants destroyed a great many houses, shops, schools and/or public or private property belonging to the civilian population.<sup>1668</sup> They also pillaged civilian property<sup>1669</sup> and raped and sexually enslaved civilian women and girls.<sup>1670</sup> Lastly, children under the age of fifteen were used to participate actively in the hostilities.<sup>1671</sup> Germain Katanga was present in the vicinity of Bogoro shortly before or during the attack<sup>1672</sup> and took part in the victory celebrations after the battle had ended.<sup>1673</sup>

720. In this section, the Chamber will describe the battle of Bogoro before considering whether, as alleged by the Prosecution, the crimes of murder, rape and sexual slavery as war crimes and crimes against humanity, attack against civilians, destroying the enemy's property, pillaging and using children under the age of fifteen to participate in the hostilities were committed during the battle.

<sup>1665</sup> [Decision on the confirmation of charges](#), see, in particular, para. 403.

<sup>1666</sup> [Decision on the confirmation of charges](#), see, in particular, para. 403.

<sup>1667</sup> [Decision on the confirmation of charges](#), para. 425.

<sup>1668</sup> [Decision on the confirmation of charges](#), paras. 319-326.

<sup>1669</sup> [Decision on the confirmation of charges](#), paras. 334-338.

<sup>1670</sup> [Decision on the confirmation of charges](#), paras. 347-354, 434-436 and 442-444.

<sup>1671</sup> [Decision on the confirmation of charges](#), paras. 253-263.

<sup>1672</sup> [Decision on the confirmation of charges](#), para. 557(i).

<sup>1673</sup> [Decision on the confirmation of charges](#), para. 558(i).

721. With respect to war crimes, the Chamber, in accordance with regulation 55 of the Regulations of the Court, determines *infra* that, at the time of the 24 February 2003 attack on Bogoro, the armed conflict raging in Ituri was not of an international character.<sup>1674</sup> Accordingly, it will rule on the crimes proscribed by articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi), 8(2)(e)(vii) and 8(2)(e)(xii) of the Statute.

## A. THE ATTACK ON BOGORO

### 1. Terminology

722. Firstly, the Chamber notes that the term “Lendu” denotes two ethnic sub-groups present in Ituri: the Northern Lendu, who live north of Bunia, principally in Djugu territory, and the Southern Lendu, who live primarily south of Bunia and who are known as the “Ngiti”. The Northern Lendu and the Northern Hema speak the same language, while the Ngiti speak a different language.<sup>1675</sup> Ituri is home to a number of other ethnic groups, such as the Nande, the Alur and the Bira. Swahili is the lingua franca.<sup>1676</sup> The Chamber notes further that the term “Lendu” refers either to the Lendu group as a whole – for example, when used to mark a contrast with the “Hema” ethnic group – or specifically to the Lendu of Djugu territory, as opposed to, for example, the term “Ngiti”.<sup>1677</sup> According to established local usage, the witnesses used the term “Lendu” to refer to Lendu groups living in Djugu territory and the term “Ngiti” to designate Lendu from Walendu-Bindi *collectivité*.<sup>1678</sup>

<sup>1674</sup> See “Section IX(B)(3)(a) Existence and nature of the armed conflict”.

<sup>1675</sup> See, in particular, P-268, T. 108, p. 68; V-2, T. 231, pp. 32-33 and 41; CHM-2, T. 159, p. 22. The Ngiti refer to their own language as “Ndruna”, whereas the other groups refer to it as “Ngiti” (CHM-2, T. 159, p. 13).

<sup>1676</sup> CHM-2, T. 159, pp. 14-15 and 17.

<sup>1677</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0336, paras. 12-13).

<sup>1678</sup> See, in particular, P-166, T. 226, p. 61; P-233, T. 83, p. 19.

723. The Chamber wishes to emphasise that whilst it uses the term “Lendu from Bedu-Ezekere” to denote combatants from that *groupement*, this geographical appellation does not correspond to the actual territorial borders of an ethnic subgroup.<sup>1679</sup> It also notes that it has been careful to reproduce the witnesses’ words as spoken in court. In this connection, it notes that witnesses used the term “Northern Lendu” in reference to the Lendu from Djugu *collectivité* and “Southern Lendu” in reference to those from Walendu-Bindi *collectivité*.<sup>1680</sup>

## 2. Bogoro village

724. A census taken before conflict broke out in Ituri<sup>1681</sup> recorded a population of 6,320 in Babiase *groupement*, where the village of Bogoro is located.<sup>1682</sup> Although prior to the conflicts the majority of the population of Bogoro was Hema, more than ten ethnic groups were present, notably the Lendu and the Bira.<sup>1683</sup> The keeping of grazing animals was a significant part of the Bogoro economy, especially amongst the Hema, who are herders by tradition.<sup>1684</sup> The inhabitants of Bogoro also farmed the land.<sup>1685</sup>

725. When tension between the Hema and Lendu escalated in 2001, the Lendu population, the term being understood in the broad sense, left the village.<sup>1686</sup> The school known as the “Bogoro Institute” was turned into a military camp by UPDF soldiers who occupied Bogoro at the time.<sup>1687</sup> Having protected Bogoro for over a year and a half, the UPDF troops left, leaving the UPC combatants, their new

<sup>1679</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0336, para. 13).

<sup>1680</sup> See, in particular, P-166, T. 226, pp. 11 and 50; T. 227, pp. 20-22.

<sup>1681</sup> See “Section VI(B) Main political events and developments”.

<sup>1682</sup> EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0005-R04, para. 15); P-166, T. 225, p. 53.

<sup>1683</sup> EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0005-R04, para. 14); P-166, T. 225, pp. 14-15; T. 226, pp. 49-50; P-233, T. 83, p. 20; T. 88, p. 79.

<sup>1684</sup> P-166, T. 225, pp. 56-58.

<sup>1685</sup> P-166, T. 225, pp. 58-59; V-2, T. 231, pp. 48-49.

<sup>1686</sup> P-323, T. 118, pp. 20-21; P-166, T. 226, pp. 49-50.

<sup>1687</sup> EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0007-R04 to DRC-OTP-1007-0010, paras. 30 and 47); P-323, T. 117, p. 9; P-233, T. 83, p. 48.

allies after the APC troops had been ousted from Bunia in August 2002, to defend the village.<sup>1688</sup>

726. In 2003, the Bogoro camp was therefore under UPC control. It comprised straw houses, known locally as *manyata*,<sup>1689</sup> which were scattered around the open area where the Bogoro Institute stands.<sup>1690</sup> The sketch drawn by Witness P-323 shows that the camp was also surrounded by trenches, themselves embedded in a concentric network of military positions.<sup>1691</sup> The Chamber notes that on the day of the attack, the UPC troops had a significant military arsenal of firearms.<sup>1692</sup> It notes that Witness P-268 stated that the UPC then mustered between 300 and 400 in Bogoro,<sup>1693</sup> whereas Witness P-233 put their number at between 100 and 200.<sup>1694</sup> This discrepancy in the estimates precludes the Chamber from establishing the exact number of UPC soldiers in Bogoro on 24 February 2003. Nevertheless, it can be said that at that time there was a camp in Bogoro defended by at least one hundred well-armed soldiers.

727. Several witnesses also stated that village “youths” having formed a self-defence group patrolled the *groupement* armed with bladed weapons, in order to gather information on possible Lendu incursions.<sup>1695</sup>

728. UPC soldiers, however, were identifiable by their camouflage uniform (referred to as “*tâche-tâche*”), although they did not all have a full uniform<sup>1696</sup> and,

<sup>1688</sup> EVD-OTP-00016: Witness’s diary P-233; P-233, T. 87, p. 60; T. 88, p. 9; P-268, T. 108, pp. 21 and 51; P-166, T. 226, p. 54; T. 227, p. 7. See also “Section VI(B) Main political events and incidents”.

<sup>1689</sup> P-323, T. 117, p. 9; P-233, T. 83, pp. 48 and 52; P-161, T. 116, pp. 15-16.

<sup>1690</sup> EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0010-R04 and DRC-OTP-1007-0017-R04, paras. 47 and 90).

<sup>1691</sup> EVD-OTP-00050: Photograph of Bogoro on which P-323 marked the position of the trenches. See also P-323, T. 117, p. 28; P-233, T. 83, pp. 48-49; [Prosecution Closing Brief](#), para. 40.

<sup>1692</sup> P-233, T. 83, pp. 49-50; P-323, T. 117, pp. 3-5. See also P-268, T. 108, pp. 16-17.

<sup>1693</sup> P-268, T. 108, p. 17. See also P-323, T. 117, pp. 67-69. See also [Defence Closing Brief](#), para. 650; [Defence Closing Statements, T. 338](#), pp. 8-9.

<sup>1694</sup> P-233, T. 83, pp. 48-49; T. 88, pp. 19-20. See also D02-176, T. 255, p. 26; T. 256, p. 45.

<sup>1695</sup> P-166, T. 227, pp. 41-42; P-233, T. 88, pp. 17-19 and 25-26 and 68-69. See also D02-148, T. 279, p. 19.

<sup>1696</sup> P-323, T. 117, p. 3; P-268, T. 108, p. 17.

on the day of the attack, not all of those who had one were wearing it.<sup>1697</sup> The Chamber also notes that, according to Witness D02-176, once the UPC arrived in Bogoro, the task of defending the village was entrusted exclusively to the military.<sup>1698</sup>

729. Thus, whilst the Chamber cannot rule out that on 24 February 2003, some inhabitants who were members of the self-defence group participated directly in the hostilities, or that some soldiers were dressed in civilian clothing, it considers that most of the inhabitants were readily identifiable as civilians who were not taking direct part in combat. When adjudging the commission of the crimes, the Chamber will satisfy itself that each victim's status is duly established and that the victim did not participate in the hostilities.

730. The Chamber is unable to establish the precise number of civilians present in Bogoro on the day of the battle. From the Defence's estimate based on the testimony of D02-176, it considers that it is established that at least 800 civilians were living in the village,<sup>1699</sup> that they were mostly Hema<sup>1700</sup> and, in any event, that they were much more numerous than the soldiers. The Chamber further notes that although Bogoro was a strategic military position, those who lived there also led civilian lives. The village had a livestock market<sup>1701</sup> and several churches attended by the population.<sup>1702</sup>

### 3. How the attack proceeded

731. The witnesses who were in Bogoro on 24 February 2003 stated that the attack began at dawn, at around 4 or 5 a.m., and that they awoke to the crackle of

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<sup>1697</sup> D02-176, T. 255, p. 34.

<sup>1698</sup> D02-176, T. 256, pp. 43-46.

<sup>1699</sup> D02-176, T. 256, p. 46. See also P-233, T. 83, p. 20; P-323, T. 117, p. 59; [Defence Closing Brief](#), para. 882.

<sup>1700</sup> For the ethnic make-up of Bogoro, see, in particular, P-233, T. 88, p. 79; EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0007, para. 14); P-166, T. 226, pp. 49-50.

<sup>1701</sup> P-166, T. 226, p. 64; T. 227, pp. 29-31 and 34-35; EVD-D03-00072, EVD-D03-00075: Sketch of Bogoro. See also P. 233, T. 88, p. 49. [Site Visit Report](#), pp. 13-14.

<sup>1702</sup> P-233, T. 83, pp. 50-51. See also P-166, T. 227, p. 25.

gunfire.<sup>1703</sup> The witnesses, be they residents of Bogoro or soldiers from the UPC camp, or even a Ngiti combatant from Walendu-Bindi who took part in the attack,<sup>1704</sup> all stated that there were a great many attackers,<sup>1705</sup> that they were armed with firearms, arrows, spears and machetes,<sup>1706</sup> that the gunfire was particularly heavy,<sup>1707</sup> to the point that it was heard in neighbouring villages,<sup>1708</sup> and that it came from all directions.<sup>1709</sup>

732. Some attackers wore military uniforms of various kinds, whereas others were in civilian dress.<sup>1710</sup> Several testimonies confirm that the combatants were accompanied by women who also took part in the attack.<sup>1711</sup> Lastly, witnesses reported that those leading the offensive shouted, sang, played drums, rang bells and blew whistles.<sup>1712</sup> Some witnesses also reported the presence of children, armed and fighting alongside the adults.<sup>1713</sup>

733. Regarding the attackers' advance, the Chamber wishes to focus on the evidence of P-323, a UPC soldier,<sup>1714</sup> who, from his position inside the camp, saw them – Ngiti combatants coming primarily along the roads from Kagaba<sup>1715</sup> but

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<sup>1703</sup> P-132, T. 138, pp. 78 and 81; P-161, T. 109, p. 32; T. 112, pp. 34-35; P-233, T. 83, pp. 66-67; P-268, T. 107, pp. 14-15; T. 108, p. 86; P-287, T. 129, p. 21; V-2, T. 231, pp. 28-30; V-4, T. 233, pp. 68-69; P-323, T. 117, pp. 23 and 27-28; P-353, T. 213, pp. 11-12; D02-148, T. 279, p. 18; D02-176, T. 256, pp. 34 and 51.

<sup>1704</sup> D02-148, T. 279, pp. 15-16; T. 280, p. 54.

<sup>1705</sup> P-268, T. 107, p. 26; P-323, T. 117, pp. 28-30; D02-148, T. 279, pp. 15-16.

<sup>1706</sup> P-161, T. 111, p. 50; P-233, T. 83, p. 73 (The Chamber notes that P-233 stated that at that time, the attackers were Bira); P-268, T. 107, pp. 62-63; P-287, T. 129, pp. 24, 37, 40 and 53; P-323, T. 117, p. 31; V-4, T. 234, pp. 11 and 47; T. 235, pp. 18-19. See also EVD-OTP-00285: MONUC report on events in Ituri (DRC-OTP-0129-0353, para. 65).

<sup>1707</sup> P-161, T. 112, p. 44; P-268, T. 107, p. 19; T. 108, p. 85; V-2, T. 231, p. 29; T. 232, p. 15; P-323, T. 117, pp. 27-28 and 31; T. 118, p. 24; P-353, T. 213, p. 28.

<sup>1708</sup> D03-44, T. 291, p. 42; D03-55, T. 294, p. 48; D03-88, T. 306, p. 25; D02-300, T. 318, p. 17; D03-707, T. 330, pp. 22-23.

<sup>1709</sup> P-268, T. 108, p. 85; V-4, T. 233, p. 69; T. 234, p. 9; P-323, T. 117, pp. 27-29 and 36; V-2, T. 231, p. 41.

<sup>1710</sup> P-268, T. 107, pp. 36-37; T. 108, p. 14; P-233, T. 83, p. 68; P-323, T. 117, p. 30; T. 118, pp. 23-24; EVD-OTP-00285: MONUC report on events in Ituri (DRC-OTP-0129-0353, para. 65).

<sup>1711</sup> P-323, T. 117, p. 61; P-268, T. 107, pp. 26-27 and 62; T. 108, pp. 26-27.

<sup>1712</sup> P-268, T. 107, pp. 14, 32-33; V-4, T. 233, pp. 69-70; P-323, T. 117, pp. 28-29 and 40.

<sup>1713</sup> P-268, T. 107, pp. 38 and 61; P-267, T. 166, p. 30; T. 170, pp. 8-12.

<sup>1714</sup> P-323, T. 117, p. 23.

<sup>1715</sup> D02-148, T. 279, p. 18; D02-228, T. 250, pp. 6-7 and 9-10; D02-300, T. 318, p. 22. See also D02-01, T. 277, pp. 13 and 14; D02-129, T. 271, p. 26; The Defence for Germain Katanga submits that the combatants gathered in Kagaba before the attack ([Defence Closing Brief](#), para. 706).

also from Medhu<sup>1716</sup> – enter Bogoro from various roads leading to the village and advance to the camp and enter it.<sup>1717</sup> According to P-323, as the reinforcements requested from Bunia had not arrived, and since they lacked sufficient ammunition to continue to defend the village, the UPC troops were forced to abandon Bogoro at approximately 11 a.m.<sup>1718</sup>

734. Similarly, D02-176, a UPC combatant who was also on duty at the camp, stated that when the *manyata* where the soldiers stayed caught fire and the attackers were able to penetrate the camp, the Commander of the UPC forces announced that the battle was lost and ordered the combatants to flee.<sup>1719</sup> The combatants therefore left the camp before midday and forced open a corridor towards Bunia, via Waka Mountain, to the west of Bogoro. This breach enabled some of the villagers to flee with them.<sup>1720</sup> From the evidence before it, the Chamber considers that the camp fell to the attacking forces before midday.<sup>1721</sup>

735. Some witnesses identified the ethnic origin of the attackers based on the direction whence they came. Several of them stated that on 24 February 2003, the attackers had entered Bogoro from various directions, in particular from Waka mountain and the Gety road,<sup>1722</sup> *viz.*, from the direction of Walendu-Bindi *collectivité*,<sup>1723</sup> as well as from the Zumbe, Katonie and Kasenyi roads,<sup>1724</sup> *viz.*, from the direction of Bedu-Ezekere *groupement*.<sup>1725</sup> Others identified the attackers as

<sup>1716</sup> D02-176, T. 256, pp. 8, 21 and 22; D02-148, T. 279, p. 33.

<sup>1717</sup> P-323, T. 117, pp. 27-29, 36 and 73. See also D02-176, T. 255, pp. 35-36.

<sup>1718</sup> P-323, T. 117, pp. 27, 29, 59 and 73.

<sup>1719</sup> D02-176, T. 255, p. 36; T. 256, pp. 33-34 and 50-51.

<sup>1720</sup> P-323, T. 117, pp. 27, 36 and 73-74. See also P-287, T. 129, pp. 23 and 24.

<sup>1721</sup> See, in particular, D02-129, T. 271, p. 26; P-323, T. 117, p. 59; D02-176, T. 255, p. 36.

<sup>1722</sup> P-268, T. 108, p. 43; P-323, T. 117, pp. 28-29, 36 and 73. See also V-4, T. 233, pp. 68-69.

<sup>1723</sup> EVD-D02-00217: Map on which Germain Katanga outlined Walendu-Bindi *collectivité*; D02-300, T. 314, p. 45. See also Annex D.

<sup>1724</sup> P-323, T. 117, pp. 28-29, 36 and 73; P-317, T. 228, pp. 32 and 36; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0353, para. 65); P-268, T. 107, p. 26; EVD-D03-00010: Map on which P-268 marked the position of Zumbe and Katonie; P-268, T. 108, pp. 59-62; EVD-OTP-00273: Sketch outlining Bedu-Ezekere *groupement* drawn by D03-88. See also V-4, T. 233, pp. 68-69.

<sup>1725</sup> D03-44, T. 292, pp. 9-11; EVD-OTP-00273: Sketch outlining Bedu-Ezekere *groupement* drawn by D03-88; D03-88, T. 303, p. 37. See Annex D.

being Ngiti and Lendu on the basis, in particular, of the language they were speaking: Kilendu or Kingiti.<sup>1726</sup>

736. As regards the presence of commanders from Walendu-Bindi *collectivité*, the Chamber notes that several witnesses stated that Commanders Yuda<sup>1727</sup> and Dark<sup>1728</sup> from Kagaba camp, Commander Oudo Mbafele from Medhu camp,<sup>1729</sup> Commander Lobo Tchamangere from Lapka camp,<sup>1730</sup> and Commanders Alpha Bebi from Bukiringi camp and Anguluma from Mandre camp<sup>1731</sup> were present during the battle of Bogoro.<sup>1732</sup> According to Germain Katanga, Commander Garimbaya from Aéro camp in Aveba<sup>1733</sup> and Commander Joël Androso from Gety also took part in the offensive.<sup>1734</sup>

737. Besides Lendu and Ngiti combatants, various evidence suggests that other attackers were present during the attack. The Chamber notes that Witness P-233 identified attackers in civilian clothing, armed with machetes, spears and sub-machine guns,<sup>1735</sup> as Bira specifically from the direction whence they came.<sup>1736</sup> Survivors also allegedly told that witness that they had seen attackers who were Bira.<sup>1737</sup> The Chamber notes that most *viva voce* evidence in this connection is based on hearsay<sup>1738</sup> and that only P-233 witnessed the presence of Bira at first

<sup>1726</sup>V-4, T. 233, pp. 69-70; V-2, T. 231, p. 32; P-268, T. 107, pp. 26-27, 39-40 and 61; T. 108, pp. 68-69 and 78.

<sup>1727</sup> D02-01, T-277, pp. 13-14; D02-129, T-271, p. 27; D02-148, T. 279, pp. 16 and 32-33; T. 280, pp. 21-22; T. 281, pp. 17-19; D02-228, T. 250, pp. 9-10; D02-161, T. 268, pp. 25-26; D02-300, T. 318, p. 32; T. 325, p. 22; D02-350, T. 253, p. 46.

<sup>1728</sup> D02-148, T. 279, pp. 16 and 32-33; T. 281, p. 17; D02-228, T. 250, pp. 9-10; D02-300, T. 318, p. 32; T. 325, p. 22.

<sup>1729</sup> D02-148, T. 279, p. 33; T. 280, pp. 19-20. According to the witness, Oudo's second in command was Adibale (D02-148, T. 279, p. 33). See also D02-129, T. 271, p. 72.

<sup>1730</sup> D02-01, T. 277, p. 14; D02-148, T. 280, p. 19. See also D02-129, T. 271, p. 72.

<sup>1731</sup> D02-148, T. 280, pp. 18 and 19.

<sup>1732</sup> The Defence for Germain Katanga acknowledged that the commanders were present in Bogoro ([Defence Closing Brief](#), para. 706).

<sup>1733</sup> D02-300, T. 318, pp. 4 and 20.

<sup>1734</sup> D02-300, T. 325, pp. 22 and 28.

<sup>1735</sup> According to P-323, they were small calibre weapons (P-323, T. 117, p. 4).

<sup>1736</sup> P-233, T. 83, pp. 72-73; T. 88, pp. 27-28 and 33. See also P-287, T. 129, pp. 51-52.

<sup>1737</sup> P-233, T. 88, pp. 28 and 34.

<sup>1738</sup> P-166, T. 226, p. 30; P-161, T. 111, pp. 6 and 13; T. 116, p. 14.

hand. Having regard to such evidence, the Chamber finds that Bira elements were present in Bogoro on 24 February 2003.

738. As to the participation of Ugandan troops (UPDF), the Prosecution took the view, contrary to the findings of the Pre-Trial Chamber,<sup>1739</sup> that there is no persuasive evidence to substantiate their involvement.<sup>1740</sup> The Defence concurred with the Prosecution's view on the matter and, although Germain Katanga stated that the possible participation of Ugandan troops in the attack on Bogoro could not be ruled out, he nevertheless considered it highly unlikely.<sup>1741</sup> Accordingly, despite certain isolated statements of witnesses who had merely inferred or heard that Ugandan soldiers were present,<sup>1742</sup> the Chamber is not in a position to find that UPDF soldiers were present during the battle.

739. Lastly, the Prosecution acknowledged that it was possible that APC soldiers were present at the battle of Bogoro, on the basis, in particular, of the testimony of P-28. It argued, however, that they mustered only 20 or 25.<sup>1743</sup> In the Prosecution view, the APC only provided the combatants with logistical assistance and supplied them with weapons and ammunition. In any event, according to the Prosecution, the APC forces played only a secondary role.<sup>1744</sup>

740. The Defence, for its part, submitted that APC troops, together with Ngiti combatants, launched the attack on Bogoro,<sup>1745</sup> and that the exact troop numbers are of little importance. In its view, the APC presence at the front, which the

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<sup>1739</sup> The Pre-Trial Chamber held: “[t]here is also sufficient evidence to establish substantial grounds to believe that Uganda directly intervened in this armed conflict through the *Ugandan People Armed Forces* (“the UPDF”). The evidence presented establishes direct participation of significant numbers of UPDF troops in several military operations on behalf of different armed groups including the UPC takeover in Bunia in early August 2002, the FNI/FRPI takeover in Bogoro in February 2003 and of Bunia in early March 2003.” (*Decision on the confirmation of charges*, para. 240).

<sup>1740</sup> [Prosecution Closing Brief](#), paras. 483-485.

<sup>1741</sup> [Defence Closing Brief](#), para. 708.

<sup>1742</sup> P-268, T. 107, pp. 36-37; T. 108, p. 78; P-323, T. 116, p. 72; T. 117, p. 27. See also P-166, T. 225, p. 60; P-161, T. 111, p. 16; T. 114, pp. 24 and 27.

<sup>1743</sup> [Prosecution Closing Brief](#), paras. 586, 588 and 592-593; [Prosecution Closing Statements, T. 336](#), pp. 47-49; [T. 337](#), pp. 23 and 27-28.

<sup>1744</sup> [Prosecution Closing Brief](#), paras. 585-589 and 599.

<sup>1745</sup> [Defence Closing Brief](#), para. 766.

RCD-ML President Mbusa Nyamwisi intended to be inconspicuous, was in any event significant and essential.<sup>1746</sup> It submitted, lastly, that during the attack, heavy weapons were used only by the APC troops or former APC elements and that the local combatants owed their victory to the prowess and expertise of the APC, a trained army.<sup>1747</sup>

741. The Chamber notes, with regard to the number of APC soldiers who allegedly took part in the offensive, that Germain Katanga alone claimed that they were present in large numbers. According to the Accused's account, in prospect of the attack on Bogoro, troops under the command of APC Captains Blaise Koka and Matumbo, that is, more than 150 men,<sup>1748</sup> left Aveba on 20 February 2003 for Kagaba, where they were joined by Captain Mutombo's second-in-command and troops from Gety.<sup>1749</sup>

742. No other witness present on the battle-field reported such high APC troop numbers during the attack. D02-148 alone said that a small number had taken part.<sup>1750</sup> P-323 and P-287, for their part, simply reported the presence of combatants in APC uniform.<sup>1751</sup> Furthermore, the Chamber recalls that it concluded that approximately thirty APC soldiers were present in Aveba before the attack<sup>1752</sup> and that many close operational ties had been established, in particular between the Walendu-Bindi combatants and the APC, as of November 2002 as part of a plan to retake Ituri and, specifically, to prepare the attack on Bogoro.<sup>1753</sup>

<sup>1746</sup> [Defence Closing Brief](#), paras. 1184 and 1190; [Defence Closing Statements, T. 338](#), p. 61.

<sup>1747</sup> [Defence Closing Brief](#), para. 1179; [Defence Closing Statements, T. 340](#), pp. 12-15.

<sup>1748</sup> D02-300, T. 317, p. 48.

<sup>1749</sup> D02-300, T. 318, p. 22; T. 325, p. 22.

<sup>1750</sup> D02-148, T. 279, p. 32.

<sup>1751</sup> P-287, T. 130, p. 63; P-323, T. 116, p. 72; T. 118, pp. 23-24.

<sup>1752</sup> See "Section VII(C)(2) Troop numbers in Walendu-Bindi *collectivité* in February 2003".

<sup>1753</sup> See "Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003: conclusion".

743. Thus, whilst it is reasonable to believe that APC soldiers took part in combat alongside Ngiti combatants, there are strong indications that they did so in very limited numbers.

744. Turning to the Defence's submission that there was no doubt that APC troops took part in the attack because they alone were capable of handling the heavy weaponry,<sup>1754</sup> the Chamber notes that Witness D02-148, a Ngiti combatant, stated that APC soldiers, present in small numbers, had come to lend assistance to the Ngiti combatants in the use of heavy weaponry, in particular a *60 mm mortar*,<sup>1755</sup> and that "[TRANSLATION] there were other types, such as MAGs and RPG shells, that the combatants used".<sup>1756</sup> It notes, however, that of all the other witnesses present in Bogoro, only P-161 said that he had seen a ball of fire in the direction of the UPC camp that was "[TRANSLATION] like a bomb".<sup>1757</sup> No other witness mentioned anything to that effect. Indeed, as the Chamber will examine *infra*, the account of the criminal events, as described by the witnesses, does not establish that the victims were harmed and that the damage was caused by the impact of bombs or fire from a 60 mm mortar.<sup>1758</sup> It is, however, apparent from all the evidence that on the day of the attack, the attackers used a large number of firearms, in particular, automatic weapons.<sup>1759</sup>

745. The Chamber notes lastly that the attackers came from all directions<sup>1760</sup> and that escape was very difficult. Most of the witnesses were forced to hide in the

<sup>1754</sup> [Defence Closing Brief](#), para. 1179; [Defence Closing Statements, T. 340](#), pp. 12-15.

<sup>1755</sup> D02-148, T. 279, p. 32.

<sup>1756</sup> D02-148, T. 279, p. 32. See also D02-228, T. 249, pp. 66-68; T. 250, pp. 6-7; D02-350, T. 253, pp. 44-45.

<sup>1757</sup> P-161, T. 114, p. 62.

<sup>1758</sup> See "Section VIII(B) Murder as a crime against humanity (article 7(1)(a) of the Statute) and as a war crime (article 8(2)(c)(i) of the Statute) and crime of attack against the civilian population as a war crime (article 8(2)(e)(i) of the Statute)" and "Section VIII(C) Destruction of enemy property (article 8(2)(e)(xii) of the Statute) and of pillaging (article 8(2)(e)(v) of the Statute) as war crimes".

<sup>1759</sup> P-323, T. 117, pp. 30-31; P-268, T. 107, pp. 61-62; P-161, T. 111, p. 62. Whereas P-317 used the expression "[TRANSLATION] heavy weapons", she did so to contrast with weapons such as machetes, spears and arrows (P-317, T. 228, p. 32). The same comment applies to EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0353, para. 65).

<sup>1760</sup> See "Section VIII(A)(3) How the attack proceeded".

bush and move carefully to evade them.<sup>1761</sup> Furthermore, once the camp fell to the attackers, the UPC combatants forced their way out, allowing part of the population to follow in their wake.<sup>1762</sup>

746. It is the case that, D02-148, who was among the Ngiti combatants to take part in the attack, stated that not all roads were blocked and that Bogoro was not surrounded and that there were breaches because attackers always need to plan a way out.<sup>1763</sup> It is the Chamber's view, however, that the fact that the attackers had foreseen exit routes is in no way inconsistent with encirclement of the village.

747. Sufficient evidence is therefore put before the Chamber for it to find that the attackers came to Bogoro by various routes from Bedu-Ezekere *groupement* and Walendu-Bindi *collectivité* and positioned themselves so as to surround the village.

748. Ultimately, the attack on Bogoro was carried out by the Ngiti combatants from Walendu-Bindi *collectivité* and the Lendu combatants from Bedu-Ezekere *groupement*, with APC reinforcements, who essentially provided support early on, when the attack was conceived and planned.<sup>1764</sup>

#### **4. Presence of Germain Katanga during the attack and claim of responsibility for victory**

749. The Prosecution asserted that, akin to the other combatants, Germain Katanga fought at Bogoro and belonged to the same group as Yuda. The Defence, however, argued that it was Yuda who led the attack and that Germain Katanga took no part therein.<sup>1765</sup> It notes that the Ngiti combatants, including Germain

<sup>1761</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began" and "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush".

<sup>1762</sup> P-323, T. 117, pp. 27, 36 and 73-74. See also P-287, T. 129, pp. 23 and 24.

<sup>1763</sup> D02-148, T. 280, pp. 20-21.

<sup>1764</sup> See "Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003: conclusion".

<sup>1765</sup> [Defence Closing Brief](#), paras. 1206, 1211; [Defence Closing Statements, T. 338](#), p. 20; First Defence observations on article 25(3)(d), para. 72.

Katanga, who had launched an unsuccessful attack on Bogoro on 10 February 2003<sup>1766</sup> were prohibited by the fetish-priest Kazaki from taking part in combat for such time as would be required to “[TRANSLATION] recover [the] souls [of victims of the 10 February attack] through traditional ceremonies”. According to the Defence, the Accused had also to remain in Aveba with his 60 men to protect the population, his own family included, from a possible attack by Commander Kisoro from the Ngiti Bulandjabo camp.<sup>1767</sup> Lastly, the Defence disputed that Germain Katanga claimed victory.<sup>1768</sup>

750. Several testimonies concerning these various matters lie before the Chamber. Firstly, it recalls that it considered that it need not rely on the evidence of P-161 concerning Germain Katanga’s presence at the *locus in quo*.<sup>1769</sup> Witness P-12 made most plain that the Accused had himself said at a meal that he had been present in Bogoro that day.<sup>1770</sup> The Chamber is of the view, however, that as concerns such a key aspect of the case, circumspection is required, since P-12’s evidence is wholly uncorroborated save by that of P-160.<sup>1771</sup>

751. By contrast, D02-129 stated that on the day of the 24 February 2003 attack, Germain Katanga, dressed in civilian clothing, went by motorbike to the Aveba health centre for information. He rushed there specifically to enquire after Yuda, who had been wounded in combat.<sup>1772</sup> Whilst stating that he had not been present in person during the attack, D02-228 also stated that he had learnt that Germain Katanga had not taken part in the battle, notably for security and personal

<sup>1766</sup> [Defence Closing Brief](#), para. 649.

<sup>1767</sup> [Defence Closing Brief](#), paras. 679-680 and 682-689; [Defence Closing Statements, T. 338](#), p. 20; [First Defence observations on article 25\(3\)\(d\)](#), para. 58. See also D02-300, T. 318, pp. 13-14; D02-228, T. 250, pp. 10-11.

<sup>1768</sup> [Defence Closing Brief](#), paras. 296 and 309-321. See also paras. 329-334.

<sup>1769</sup> See “Section V(B)(3) Credibility of P-161”. See also on this point, 4 March 2010 oral ruling, T. 112, pp. 1-5.

<sup>1770</sup> P-12, T. 197, pp. 27-28; T. 201, p. 31.

<sup>1771</sup> See “Section V(B)(1) Credibility of P-12” including the Chamber’s conclusions as to the credibility of Witness P-160.

<sup>1772</sup> D02-129, T. 271, p. 27.

reasons.<sup>1773</sup> D02-148 who, however, had been *in situ*, stated that he had not seen the Accused on 24 February 2003.<sup>1774</sup>

752. In the light of the body of the evidence laid before it, the Chamber is unable to establish beyond reasonable doubt that Germain Katanga was present in Bogoro on 24 February 2003.

753. Likewise, the Chamber is not in a position to find that the Accused took part in celebrations following the battle, as alleged by the Prosecution, insofar as the Prosecution relies on the evidence of the five witnesses it considered to be its “[TRANSLATION] key witnesses”<sup>1775</sup> and whom the Chamber did not consider credible as regards that part of their testimony.

754. Lastly, the Chamber is unable to conclude, either, that Germain Katanga claimed victory once fighting had ceased. Indeed, P-12 and P-160<sup>1776</sup> were alone to so claim and the Chamber recalls that it considered that that testimony could only be afforded probative value if corroborated.<sup>1777</sup> Accordingly, the Chamber is unable to establish that Germain Katanga claimed victory.

## 5. Conclusion

755. In the light of the foregoing, the Chamber is in a position to find that the attack on Bogoro began at around 5 a.m. on 24 February 2003. The attackers, who included women and children, came from several different directions, via roads and tracks leading from areas mostly inhabited by Ngiti and Lendu. Accordingly, it can be stated on the basis of various testimonies that on that day, Ngiti combatants from Walendu-Bindi *collectivité* and Lendu combatants from Bedu-Ezekere *groupement* surrounded the village of Bogoro in order to attack it. Lastly, the Chamber is unable to state that Germain Katanga was present in Bogoro on 24

<sup>1773</sup> D02-228, T. 250, pp. 10-11; T. 251, pp. 75-77.

<sup>1774</sup> D02-148, T. 279, p. 16.

<sup>1775</sup> Witnesses P-28, P-219, P-250, P-278 and P-280.

<sup>1776</sup> P-12, T. 197, pp. 26-28, 30-32 and 36; T. 201, pp. 23-24. D02-236, T. 243, pp. 25-27.

<sup>1777</sup> See “Section V(B)(1) Credibility of P-12”.

February 2003 and that he took part in the fighting. Nor has it been able to establish whether he took part in the victory celebrations and whether he claimed responsibility for that victory.

**B. MURDER AS A CRIME AGAINST HUMANITY (ARTICLE 7(1)(A) OF THE STATUTE) AND AS A WAR CRIME (ARTICLE 8(2)(C)(I)) AND CRIME OF ATTACK AGAINST CIVILIANS AS A WAR CRIME (ARTICLE 8(2)(E)(I))**

756. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that on 24 February 2003 FNI/FRPI members committed the crime against humanity of murder<sup>1778</sup> and the war crime of wilful killing<sup>1779</sup> during and in the aftermath of the attack on Bogoro, killing approximately 200 civilians.

757. The Pre-Trial Chamber further found that there was sufficient evidence to establish substantial grounds to believe that FNI and FRPI combatants intentionally directed an attack against the civilian population of the village of Bogoro.<sup>1780</sup> It stated that even if the attack launched on 24 February 2003 had been intended to target a military objective – the UPC military camp – it had also been intended to target the civilian population or individual civilians not taking part in the hostilities, so as to secure control of the village in reprisal against the resident Hema population.<sup>1781</sup> In the view of the Pre-Trial Chamber, the attack was intended, first and foremost, to target the civilian population and individual civilians not taking direct part in the hostilities. It added that the object of the attack was the entire village<sup>1782</sup> and the purpose was to “wipe [it] out”.<sup>1783</sup> The Pre-Trial Chamber found that there were substantial grounds to believe that during

<sup>1778</sup> [Decision on the confirmation of charges](#), paras. 424-427.

<sup>1779</sup> [Decision on the confirmation of charges](#), paras. 298-307.

<sup>1780</sup> [Decision on the confirmation of charges](#), paras. 275-284.

<sup>1781</sup> [Decision on the confirmation of charges](#), paras. 275 and 281.

<sup>1782</sup> [Decision on the confirmation of charges](#), para. 281.

<sup>1783</sup> [Decision on the confirmation of charges](#), para. 283.

and in the aftermath of the 24 February 2003 attack on the village of Bogoro, around 200 civilians were killed.<sup>1784</sup>

758. It is the Prosecution's submission that Lendu and Ngiti combatants surrounded Bogoro, killing the civilian population and UPC combatants indiscriminately as they converged on the centre,<sup>1785</sup> thereby committing the crimes of murder, wilful killing and attack against civilians.<sup>1786</sup> The villagers were killed in their homes, in flight, at the Institute and in the bush,<sup>1787</sup> even after the attackers had overrun the village.<sup>1788</sup> The village was littered with the corpses of people of all ages, including infants.<sup>1789</sup> The Prosecution estimated that 150 people, mostly civilians, were killed during the 24 February 2003 attack on Bogoro.<sup>1790</sup>

759. The Defence considered it established that there was a UPC military camp in Bogoro on 24 February 2003 and that the soldiers were numerous and heavily armed.<sup>1791</sup> It asserted that the Bogoro Institute was a UPC base which, due to its nature, location and purpose, made an effective contribution to UPC military action. Its destruction, capture or neutralisation offered a definite military advantage.<sup>1792</sup> As regards the presence of civilians, the Defence submits that witnesses testified that most of the population had already fled as a result of previous attacks, which could have been foreseen by the planners of the attack.<sup>1793</sup>

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<sup>1784</sup> [Decision on the confirmation of charges](#), paras. 298-307 and 424-427.

<sup>1785</sup> [Prosecution Closing Brief](#), para. 47; [Office of the Prosecutor, Prosecution observations on article 25\(3\)\(d\)](#), 8 April 2013, ICC-01/04-01/07-3367, ([First Prosecution observations on article 25\(3\)\(d\)](#)), para. 22.

<sup>1786</sup> [Prosecution Closing Brief](#), para. 65.

<sup>1787</sup> [Prosecution Closing Brief](#), paras. 48-50 and 53-55.

<sup>1788</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 66.

<sup>1789</sup> [Prosecution Closing Brief](#), para. 60.

<sup>1790</sup> [Prosecution Closing Brief](#), para. 64.

<sup>1791</sup> [Defence Closing Brief](#), para. 853.

<sup>1792</sup> [Defence Closing Brief](#), para. 854.

<sup>1793</sup> [Defence Closing Brief](#), para. 853.

It argued that it has been established that most, if not all, of the population of Bogoro took refuge in the UPC camp.<sup>1794</sup>

760. The Defence maintained that the lists of victims on which the Prosecution relies lack credibility.<sup>1795</sup> It noted, for example, that one witness claimed that not all persons listed had necessarily been killed. It raised the possibility that some names may have been invented and added that the list included civilian victims of collateral damage<sup>1796</sup> or persons who had participated in the hostilities.<sup>1797</sup> It pointed out in this connection that not all UPC soldiers were in uniform<sup>1798</sup> and that, in its view, given the context and various testimonies, it was plausible that child soldiers and women had participated in the defence of Bogoro.<sup>1799</sup>

761. The common legal representative of the main group of victims contended that the testimony of witnesses present at the material time or “[TRANSLATION] directly thereafter” establishes that during and after the 24 February 2003 attack, Lendu and Ngiti attackers intentionally attacked the civilian population and killed many civilians whilst they slept in their homes or pursued them as they were attempting to flee once the fighting had ended.<sup>1800</sup> He also stated that when the attackers succeeded in penetrating the UPC camp, they attacked the civilians who had taken refuge in the classrooms, including many families, women, young children and elderly people.<sup>1801</sup> The common legal representative submitted that reliable, conservative estimates made by various sources shortly after the attack establish that a total of 200 people were killed during the attack or have since disappeared and that remains were also found in 2005.<sup>1802</sup>

<sup>1794</sup> [Defence Closing Brief](#), paras. 857 and 858.

<sup>1795</sup> [Defence Closing Brief](#), paras. 870-878.

<sup>1796</sup> [Defence Closing Statements, T. 338](#), p. 72.

<sup>1797</sup> [Defence Closing Brief](#), para. 871.

<sup>1798</sup> [Defence Closing Statements, T. 338](#), p. 72.

<sup>1799</sup> [Defence Closing Brief](#), paras. 871, 886 and 887.

<sup>1800</sup> [Closing Brief of the common legal representative of the main group of victims](#), paras. 245 and 246.

<sup>1801</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 246.

<sup>1802</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 249.

762. The legal representative further considered it established that numerous civilians were in Bogoro on 24 February 2003. He explained that their financial needs outweighed the volatility of the security situation and that they were accustomed to the attacks, which they were confident that the UPC presence in the village would repel.<sup>1803</sup> Furthermore, he submitted that there was no evidence to establish that the civilians who were killed had participated actively in the hostilities on that day.<sup>1804</sup> He stated that the witnesses said that as soon as they realised that they were under attack, they fled without trying to defend themselves.<sup>1805</sup> He also asserted that the attackers killed sleeping civilians, as well as women and children whom they pursued at close range, since they used machetes, and whom they could not therefore have mistaken for UPC combatants who were in uniform.<sup>1806</sup> The common legal representative of the main group of witnesses argued that even if the objective of the attack included the elimination of the UPC presence, it is apparent from the number of civilian deaths and the method used to attack the village – namely, its encirclement, the pursuit of civilians and their systematic murder – that the objective was not solely military but that the attack was also aimed at eliminating the civilian population.<sup>1807</sup>

763. Lastly, in the view of the Legal Representative of the child-soldier victims, the attack on Bogoro ensued from implementation of a plan aimed at eradicating any UPC military presence and Hema civilians.<sup>1808</sup> When the attack was mounted, it was considered that no civilians remained in Bogoro and hence that anyone there should be treated as a combatant or an enemy.<sup>1809</sup> The combatants' aim was to retake the village of Bogoro so as to take control of it and restore its original

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<sup>1803</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 247.

<sup>1804</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 248.

<sup>1805</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 248.

<sup>1806</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 248.

<sup>1807</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 248.

<sup>1808</sup> [Closing Brief of the legal representative of the child-soldier victims](#), para. 145.

<sup>1809</sup> [Closing Brief of the legal representative of the child-soldier victims](#), para. 154.

Lendu character.<sup>1810</sup> During the attack, all strategic entrances to the village were blocked, making escape impossible for the civilian population.<sup>1811</sup>

764. Here, the Chamber must now rule as to the commission of the crimes of murder as a crime against humanity (article 7(1)(a)) and as a war crime (article 8(2)(c)(i)) and attack against civilians as a war crime (article 8(2)(e)(i)). Having noted that the evidence establishing these three crimes is identical in part, it will deal with them together.

## **1. Applicable law**

### **a) Murder as a crime against humanity**

765. Article 7(1)(a) provides:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder.

766. According to the Elements of Crimes, in addition to the requirement that it be established that the conduct was committed as part of a widespread or systematic attack directed against a civilian population and that the perpetrator knew that the conduct formed part of such an attack, the constituent element of the crime of murder is as follows: the perpetrator killed one or more persons.<sup>1812</sup>

#### **i. Objective elements**

767. The Chamber considers that in order to determine whether the crime of murder is established, it must be proven that an individual, by act or omission, caused the death or one or more persons. The victim’s death must be the result of

<sup>1810</sup> [Closing Brief of the legal representative of the child-soldier victims](#), para. 155.

<sup>1811</sup> [Closing Brief of the legal representative of the child-soldier victims](#), paras. 172-173.

<sup>1812</sup> [Elements of Crimes](#), article 7(1)(a)(1), footnote 7 (“The term ‘killed’ is interchangeable with the term ‘caused death’.”).

the conduct of the accused in such a way that a causal link is established between the conduct and the result.<sup>1813</sup>

768. To prove the victim's death, the Prosecution need not show that the corpse of the deceased was found. It may tender circumstantial evidence of the death provided that the victim's death is the only reasonable conclusion that can be drawn.<sup>1814</sup>

769. Furthermore, it must be demonstrated that that conduct was part of a widespread or systematic attack directed against a civilian population.<sup>1815</sup>

## ii. Subjective elements

### a. Applicable law under article 30

770. Article 30 of the Statute defines the requisite state of mind to establish the criminal responsibility of an accused person. It constitutes the *lex generalis* which is applicable by default, "unless otherwise provided". Article 30 provides that it must be established that the material elements of the crime were committed "with intent and knowledge", unless the Statute or the Elements of Crimes provide otherwise.

771. It must be noted at the outset that the proper application of article 30 of the Statute presupposes that the Chamber draw a distinction between the *conduct*, *consequences* and *circumstances* specific to each offence. Indeed, the General introduction to the Elements of Crimes stipulates that "[t]he elements of crimes are generally structured in accordance with the following principles: [...] the

<sup>1813</sup> [Decision on the confirmation of charges in Bemba](#), para. 132. See also [ICTY, Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgement, 16 November 1998 \("Delalić Trial Judgement"\)](#), para. 424; [Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Judgement, 26 February 2001 \(Kordić and Čerkez Trial Judgement\)](#), para. 233.

<sup>1814</sup> [Decision on the confirmation of charges in Bemba](#), paras. 132 and 133; [ICTY, Prosecutor v. Popović et al., Case No. IT-05-88-T, Trial Judgement, 10 June 2010 \("Popović and others Trial Judgement"\)](#), para. 789.

<sup>1815</sup> Rome Statute, article 7(1); Elements of Crimes, article 7(1)(a)(2). See also "Section IX(A)(1)(b)(iii) Nexus and knowledge".

*conduct, consequences and circumstances* associated with each crime, [being] generally listed in that order”.<sup>1816</sup>

772. That introduction also provides that “[w]hen required, a particular mental element is listed after the affected *conduct, consequence or circumstance*”. Thus, specific intent is required for the realisation of certain crimes, and in that case, the perpetrator must satisfy not only the subjective elements of the crimes associated, as the case may be, with one or other of the material elements, but also an additional mental element (*dolus specialis*).<sup>1817</sup>

773. The Chamber turns now to the interpretation of the requirements of intent and knowledge defined in paragraphs 2 and 3 of article 30.

774. Article 30(2) of the Statute links intent firstly to the conduct in which the person in question means to engage and then to the consequences of the act committed. As regards *conduct*, the Chamber considers that it must be ascertained whether the suspect deliberately acted or failed to act, without regard to the expected result of the action taken. As regards the *consequence* of the act committed, the Statute foresees two forms of intent. The first appears in article 30(2)(b), which lays down that a person has intent where that person means to cause a consequence (*dolus directus* of the first degree). That definition refers to the conventional definition of intent: volition to commit the act and to achieve the desired result. The second form of intent provided for by the Statute in relation to the consequence of the act committed is awareness that the consequence “will occur in the ordinary course of events”, a concept which the Statute leaves undefined and which it rests with the Chamber to determine.

775. It cannot be inferred from the use of the future tense and words or expressions such as “will occur” or “in the ordinary course of events” that the drafters of the Statute intended to include *dolus eventualis*, that is, awareness of the existence of a

<sup>1816</sup> Elements of Crimes, Introduction, para. 7.

<sup>1817</sup> For example, for the war crimes of torture or pillaging.

mere *likelihood* or *possibility*. However, neither need the volition to cause the consequence in question be established – since article 30(2)(b) is intended to furnish an alternative to *dolus directus* of the first degree – or even the absolute certainty that that consequence will occur in future, which by definition is impossible to prove.

776. The words “will occur”, read together with the phrase “in the ordinary course of events”, make clear that the required standard of occurrence of the consequence in question is near but not absolute certainty. The standard is therefore “virtual certainty”, otherwise known as “oblique intention”. The Chamber considers that the words used in article 30 are sufficiently clear for it to be able to rule in this connection. It therefore adopts the findings of Pre-Trial Chamber II in *Bemba*.<sup>1818</sup>

777. Thus, this form of criminal intent presupposes that the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur.

778. As regards knowledge, article 30(3) lays down that in respect of a *circumstance*, knowledge entails the accused’s awareness that the circumstance exists and, in respect of a *consequence*, it requires the accused’s awareness that the consequence will occur in the ordinary course of events.

779. Circumspection is required of the bench when applying the three concepts, which correspond to different criteria for establishing the mental element. In particular, the Chamber must refer to the “ordinary course of events” in establishing intent and knowledge only where an unintended *consequence* is at issue.

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<sup>1818</sup> [Decision on the confirmation of charges in Bemba](#), paras. 352-369.

## b. Subjective elements of the crime of murder

780. To establish the subjective element of a crime, the Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>1819</sup>

781. Consequently, the Chamber considers that in the instant case, the perpetrator must have intentionally killed one or more persons. Such intent will be proven where the perpetrator acted deliberately or failed to act (1) in order to cause the death of one or more persons or (2) whereas he or she was aware that death would occur in the ordinary course of events.

782. Furthermore, the Chamber must be satisfied that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>1820</sup>

### b) Murder as a war crime

783. Article 8(2)(c)(i) reads:

1. For the purpose of this Statute, “war crimes” means: [...]

(c) In the case of an armed conflict not of an international character, serious violations of article 3, common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

784. In accordance with the Elements of Crimes, in addition to the fact that it must be established that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator

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<sup>1819</sup> Elements of Crimes, General introduction, para. 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>1820</sup> Elements of Crimes, article 7(1)(a)(3). See also “Section IX(A)(1)(b)(iii) Nexus and knowledge”.

was aware of the factual circumstances that established the existence of an armed conflict, the constituent elements of that crime are as follows: (1) the perpetrator killed one or more persons; (2) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities; and (3) the perpetrator was aware of the factual circumstances that established this status.

**i. Objective elements**

785. It flows from the “chapeau” of article 8(2)(c) that the crimes proscribed by that article are founded on article 3 common to the four Geneva Conventions of 12 August 1949, which provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no *active* part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [...].<sup>1821</sup>

786. Pursuant to articles 8(2)(c)(i)-1 and 8(2)(c)(i)-2 of the Elements of Crimes, it must therefore be proven that an individual, by act or omission, caused the death of one or more persons “*hors de combat*”, civilians, medical personnel or religious personnel taking no active part in the hostilities.<sup>1822</sup>

787. It is expedient to dwell further on civilians for the purposes of article 8(2)(c) of the Statute, given that the commission of the murder of combatants does not lie before the Chamber for determination.<sup>1823</sup>

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<sup>1821</sup> Emphasis added.

<sup>1822</sup> Elements of Crimes, articles 8(2)(c)(i)-1 and 8(2)(c)(i)-2.

<sup>1823</sup> [Decision on the confirmation of charges](#), paras. 298-307.

788. In the view of the Chamber, the aforementioned article 3 common to the four Geneva Conventions when read in conjunction with articles 1 and 13 of Additional Protocol II defines civilians as persons who are not members of either State or non-state armed forces. According to the Elements of Crimes, only civilians taking no active part in hostilities are protected.<sup>1824</sup>

789. The Chamber notes that the [French version] of the “chapeau” of article 8(2)(c) refers to *direct* participation in hostilities whereas the [French version] of the Elements of Crimes refers to *active* participation in hostilities. In the Chamber’s view, and for the purposes of this article alone, the criterion of direct participation in hostilities must be used. The Chamber will give precedence to the “chapeau” of the article, which is consistent with article 3 common, which constitutes the basis of article 8(2)(c). Furthermore, the preparatory work shows that the drafters of the Statute intended that there should be no difference between wilful killing under article 8(2)(a) and murder under article 8(2)(c)(i).<sup>1825</sup> The Chamber notes, moreover, that the ad hoc tribunals give those two terms a similar meaning.<sup>1826</sup>

790. Consequently, persons protected by virtue of article 8(2)(c) lose that protection only through direct – and not active – participation in hostilities and for the duration of that participation.<sup>1827</sup> The Statute, treaty law and customary law do not define direct participation in hostilities. The Chamber observes, however, that the Commentary on article 13(3) of Protocol II defines it as “acts of war that by

<sup>1824</sup> Elements of Crimes, article 8(2)(c)(i)-1(2).

<sup>1825</sup> See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 394.

<sup>1826</sup> [ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998](#) (“Akayesu Trial Judgement”), para. 629. See also [ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgement, 7 May 1997](#) (“Tadić Trial judgement”), para. 616.

<sup>1827</sup> [Additional Protocol II, article 13\(3\); International Committee of the Red Cross, \(Yves Sandoz et al.\) \[Eds.\], Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949](#) (1986), p. 1453; [ICTY, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004](#) (“Kordić and Čerkez Trial Judgement”), para. 50; International Committee of the Red Cross (Nils Melzer), *Interpretive guidance on the notion of direct participation in hostilities under humanitarian law* (2009), pp. 53-60 (“Interpretive guidance on the notion of direct participation in hostilities under international law”).

their nature or purpose str[ike] at the personnel and ‘*matériel*’ of enemy armed forces”.<sup>1828</sup>

791. Lastly, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>1829</sup>

## ii. Subjective elements

792. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>1830</sup>

793. Hence, in the instant case, the Chamber considers that the perpetrator must have intentionally killed one or more persons. Such intent will be proven where the perpetrator acted deliberately or failed to act (1) in order to cause the death of one or more persons or (2) whereas he or she was aware that death would occur in the ordinary course of events. Moreover, pursuant to article 8(2)(c)(i)-1(3) of the Elements of Crimes, the perpetrator must also have been aware of the factual circumstances that established the status of the victims.<sup>1831</sup>

794. In addition to the criteria of intent and knowledge laid down by article 30 of the Statute, the Chamber must satisfy itself that the perpetrator was “aware of the factual circumstances that established the existence of an armed conflict”<sup>1832</sup> of which his conduct formed part and with which it was associated.<sup>1833</sup>

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<sup>1828</sup> [International Committee of the Red Cross \(Yves Sandoz et al.\) \[Eds.\] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949](#) (1986), p. 1453. See also [ICTY, Galić Trial Judgement](#), para. 48.

<sup>1829</sup> Elements of Crimes, article 8(2)(e)(i)(4). See also “Section IX(B)(1) Applicable law”, para. 1176.

<sup>1830</sup> Elements of Crimes, General introduction, para. 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>1831</sup> [Decision on the confirmation of charges](#), para. 297. The Chamber notes that it is not necessary for the perpetrator to have assessed the situation and concluded that the victim was *hors de combat*, a civilian, a member of medical personnel or religious personnel taking no active part in the hostilities.

<sup>1832</sup> Elements of Crimes, article 8(2)(c)(i)-1(5).

<sup>1833</sup> See also “Section IX(B)(1) Applicable law”, para. 1176.

### c) Attack against civilians

795. Article 8(2)(e)(i) reads:

1. For the purpose of this Statute, 'war crimes' means: [...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts: [...]

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

796. In accordance with the Elements of Crimes, in addition to the fact that it must be established that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict, the constituent elements of this crime are as follows: (1) the perpetrator directed an attack;<sup>1834</sup> (2) the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;<sup>1835</sup> and (3) the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

#### i. Objective elements

##### a. The perpetrator directed an attack

797. The Chamber notes that there is no definition of the term "attack" in the Statute or in the Elements of Crimes. Considering the reference in article 8(2)(e) of the Statute to "serious violations of the laws and customs applicable in armed conflicts not of an international character" and to the "established framework of

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<sup>1834</sup> The Chamber notes that whilst there is a difference [in the French version] between elements 8(2)(b)(i)(1) and 8(2)(e)(i)(1) of the Elements of Crimes, it considers it to be inconsequential to their due interpretation. The Chamber observes, further, that this difference does not appear in the English version of the Elements of Crimes.

<sup>1835</sup> The Chamber notes that whilst there is a difference [in the French version] between elements 8(2)(b)(i)(1) and 8(2)(e)(i)(1) of the Elements of Crimes, it considers it to be inconsequential to their due interpretation. The Chamber observes, further, that this difference does not appear in the English version of the Elements of Crimes.

international law” the Chamber is of the view that it must have regard to Additional Protocol II, specifically to article 13 on which article 8(2)(e)(i) draws.<sup>1836</sup>

798. In the Chamber’s view, the term “attack” must be understood within the meaning of article 13(2) of Additional Protocol II, that is, as “acts of violence against the adversary, whether in offence or defence”.<sup>1837</sup>

799. It further considers that the crime of attack against civilians proscribes a certain conduct and that the material element is established where the attack is launched and its object is a civilian population as such or individual civilians not taking direct part in hostilities; no result need ensue from the attack. Indeed, the Chamber considers that the absence of a result requirement in the Elements of Crimes is not accidental, insofar as, where such a requirement exists, the Elements of Crimes refer to it and specify the consequence thereof.<sup>1838</sup>

**b. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities**

800. Article 8(2)(e)(i) of the Statute enshrines the prohibition on the direct targeting of civilians.<sup>1839</sup> The Chamber recalls that this prohibition can in no circumstances be counterbalanced by military necessity.<sup>1840</sup> The prohibition on directly attacking

<sup>1836</sup> [Decision on the confirmation of charges in Abu Garda](#), para. 64.

<sup>1837</sup> [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 47; [ICTY, Prosecutor v. Strugar, Case No. IT-01-41-T, Trial Judgement, 31 January 2005 \(“Strugar Trial Judgement”\)](#), para. 282.

<sup>1838</sup> See for example, Statute, article 8(2)(b)(vii). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 130; Daniel Franck, *Article 8(2)(b)(ii) – Attacking Civilians*, in R. S. Lee (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence* (2001), pp. 141 and 142.

<sup>1839</sup> Additional Protocol II, article 13(2); ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Decision, 8 March 1996, para. 11; [ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 100](#). See also J-M. Henckaerts, L. Doswald-Beck (Eds.), *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, Bruylant (2006), pp. 3-10.

<sup>1840</sup> This derives from the unambiguous wording of the prohibition (Additional Protocol II, article 13(2)). See also [ICTY, Prosecutor v. Galić, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006 \(“ICTY, Galić Appeal Judgement”\)](#), para. 130; [ICTY, Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 \(“Blaškić Appeal Judgement”\)](#), para. 109; [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 54.

civilians is therefore absolute and applies both to international and non-international armed conflict.

801. Consonant with its approach to murder as a war crime, the Chamber understands “civilian” to mean any person who is not a member of either State or non-State armed forces.<sup>1841</sup> The term “civilian population” denotes “civilians as a group”.<sup>1842</sup> In this connection, the Chamber will take account of factors such as the number and the conduct of the combatants present.<sup>1843</sup>

802. The Chamber considers that the crime may be established even if the military operation also targeted a legitimate military objective.<sup>1844</sup> It is important, however, to establish that the primary object of the attack was the civilian population or individual civilians. Thus, situations in which the attack is directed against a military objective and civilians are *incidentally* affected fall outwith article 8(2)(e)(i). It must be noted that indiscriminate attacks – proscribed by a rule of custom<sup>1845</sup> – may qualify as intentional attacks against the civilian population or individual civilians, especially where the damage caused to civilians is so great that it appears to the Chamber that the perpetrator meant to target civilian objectives.<sup>1846</sup> Use of weaponry that has indiscriminate effects may, *inter alia*, show that the attack was directed at the civilian population or individual civilians.<sup>1847</sup> The Chamber notes in this regard that an indiscriminate attack does not,

<sup>1841</sup> See “Section VIII(B)(1)(b) Murder as a war crime”.

<sup>1842</sup> International Committee of the Red Cross (Yves Sandoz *et al.* [Eds.]), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (1986), p. 1449.

<sup>1843</sup> [ICTY, Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, para. 512 \(Blaškić Trial Judgement\)](#)), para. 552; [ICTY, Blaškić Trial Judgement](#), para. 115; [ICTY, Prosecutor v. Kupreškic, Case No. IT-95-16-T, Trial Judgement, 14 January 2000 \(“Kupreškic et al. Trial Judgement”\)](#), paras. 522 and 523.

<sup>1844</sup> [Decision on the confirmation of charges](#), paras. 273-274 ; [ICTY, Galić Appeal Judgement](#), para. 132. The Chamber notes that this point is not disputed by the Defence for Germain Katanga ([Defence Closing Brief](#), para. 851).

<sup>1845</sup> See, in particular, [ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995](#), para. 127.

<sup>1846</sup> Additional Protocol II, article 51(4); [ICTY, Galić Trial Judgement](#), para. 57; [ICTY, Galić Appeal Judgement](#), para. 132; [ICTY, Prosecutor v. Martić, Case No. IT-95-11-T, Trial Judgement, 12 June 2007, para. 69 \(“Martić Trial Judgement”\)](#).

<sup>1847</sup> [ICTY, Blaškić Trial Judgement](#), para. 512.

however, automatically constitute an attack against the civilian population under article 8(2)(e)(i), as the subjective element is decisive in respect of the second case.

803. Lastly, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>1848</sup>

## ii. Subjective elements

804. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>1849</sup>

805. Accordingly, it must be established that the criminal conduct, namely, directing an attack, was committed with intent within the meaning of article 30(2)(a).

806. The Chamber observes, however, that article 8(2)(e)(i)(3) of the Elements of Crimes prescribes a specific subjective element as follows: “The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”.<sup>1850</sup> In the Chamber’s view, that specific element is, in fact, a repetition of article 30(2)(a).<sup>1851</sup> Indeed, the Chamber

<sup>1848</sup> Elements of Crimes, article 8(2)(e)(i)(4). See also “Section IX(B)(1) Applicable Law”, para. 1176.

<sup>1849</sup> Elements of Crimes, General introduction, para. 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>1850</sup> Here again, since the English version of this element in the Statute is identical in every respect to element 8(2)(b)(i)(3) of the Statute, the Chamber considers the slightly different [French] wording inconsequential.

<sup>1851</sup> The Chamber considers that the inclusion of the third element of the crime, which specifies that “[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”, does not constitute a particular intent requirement but is justified in particular by the presence of the word “intentionally” in the text of the article (See, in particular, by analogy, Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), pp. 130 and 131) and by the need to make a clear distinction between this crime, which proscribes violations of the principle of distinction, and acts violating the principles of proportionality and/or precaution. See also on this point, Daniel Franck, *Article 8(2)(b)(i) – Attacking Civilians* in R. S. Lee. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence* (2001), pp. 142-143).

considers that the second element of the Elements of Crimes, to which it applies, namely, “[t]he object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities”, must be regarded as conduct.

807. In the Chamber’s view, that specific mental element may be inferred from various factors establishing that civilians not taking part in the hostilities were the object of the attack, such as the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack or, as the case may be, the nature of the act constituting the attack.<sup>1852</sup>

808. For the mental element of the crime to be established, the perpetrator must have (1) intentionally directed an attack; (2) intended the civilian population or individual civilians to be the object of the attack; (3) been aware of the civilian character of the population or of civilians not taking part in hostilities; and (4) been aware of the factual circumstances that established the existence of an armed conflict.<sup>1853</sup>

## 2. Findings of fact

809. In this section, the Chamber will determine the criminal events which occurred during the battle waged on 24 February 2003 against the population of Bogoro. Accordingly, it will first address the pursuit of its inhabitants who fled their homes when the attack began, before turning to the fate of those who took refuge in the military camp. The Chamber will then examine the pursuit of the inhabitants who hid in their homes, those who fled when the camp was overrun and those who hid in the bush and were discovered after the camp had fallen to the attackers. Lastly, the Chamber will consider the evidence pertaining to other deaths and showing the toll of the attack, and will identify the perpetrators of those acts, before concluding as to the attackers’ objectives.

<sup>1852</sup> Elements of Crimes, General introduction, para. 3; [ICTY, Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-A, Appeal Judgement, 12 June 2002 \(“Kunarac et al. Appeal Judgement”\)](#), para. 91; [ICTY, Galić Appeal Judgement](#), para. 132; [ICTY, Blaškić Trial Judgement](#), para. 512.

<sup>1853</sup> Elements of Crimes, article 8(2)(e)(i)(5). See also “Section IX(B)(1) Applicable law”, para. 1176.

**a) Pursuit of inhabitants who took flight as the attack began**

810. The evidence shows that the village of Bogoro was attacked very early in the morning, whilst it was still dark, and that the villagers were at home, asleep.<sup>1854</sup> The UPC combatants were, meanwhile, in the military camp located in the centre of the village.<sup>1855</sup> The witnesses present in Bogoro, ordinary inhabitants of Bogoro, UPC soldiers on duty there and a Ngiti combatant from Walendu-Bindi *collectivité* who participated in the attack,<sup>1856</sup> all stated that there were a great many attackers,<sup>1857</sup> armed with guns and machetes,<sup>1858</sup> that they came from all directions,<sup>1859</sup> thus surrounding the village,<sup>1860</sup> and that the attack was particularly intense,<sup>1861</sup> with considerable gunfire.<sup>1862</sup>

811. As fighting broke out and the combatants entered Bogoro, many of its inhabitants – men, women, children and elderly persons – fled their homes to hide in the bush or at the Bogoro Institute,<sup>1863</sup> where the UPC was encamped<sup>1864</sup> and where refuge was usually sought in the event of an attack.<sup>1865</sup> The attackers, armed with guns and machetes, then set about pursuing those who had fled.<sup>1866</sup>

812. Witness P-287<sup>1867</sup> stated that he saw that villagers had sustained gunshot wounds in the vicinity of the Institute before they had even been able to reach

<sup>1854</sup> See “Section VIII(A)(3) How the attack proceeded”.

<sup>1855</sup> P-323, T. 117, p. 27; D02-176, T. 255, pp. 28-29; 31 and 34-35.

<sup>1856</sup> D02-148, T. 279, pp. 15-16; T. 280, p. 54.

<sup>1857</sup> P-268, T. 107, p. 26; P-323, T. 117, pp. 28-30.

<sup>1858</sup> P-161, T. 111, p. 50; P-233, T. 83, p. 73 (The Chamber notes that P-233 stated that at that time, the attackers were Bira); P-287, T. 129, pp. 24, 37, 40 and 53; V-4, T. 234, pp. 11 and 47; T. 235, pp. 18-19.

<sup>1859</sup> V-2, T. 231, p. 41; V-4, T. 233, p. 69; T. 234, p. 9; P-323, T. 117, pp. 27-29 and 36.

<sup>1860</sup> See “Section VIII(A)(3) How the attack proceeded”.

<sup>1861</sup> P-323, T. 117, p. 27; P-323, T. 118, p. 24.

<sup>1862</sup> P-268, T. 107, p. 19; T. 108, p. 85; V-2, T. 231, p. 29; P-323, T. 117, pp. 27-28.

<sup>1863</sup> P-323, T. 117, pp. 29-30; T. 118, p. 30; D02-176, T. 256, pp. 31-32; V-4, T. 234, pp. 3-5; T. 235, p. 18.

<sup>1864</sup> P-233, T. 83, pp. 48 and 52; P-323, T. 117, p. 9; D02-176, T. 255, pp. 28-29.

<sup>1865</sup> P-233, T. 83, p. 50; P-268, T. 108, p. 62; P-287, T. 129, p. 38; T. 130, pp. 62-63; D02-176, T. 256, pp. 31-32; V-4, T. 234, p. 3; T. 235, p. 18.

<sup>1866</sup> P-161, T. 109, pp. 42-43; T. 111, pp. 6 and 10; P-233, T. 83, pp. 67-69, 74 and 75; T. 88, pp. 27 and 28, 33 and 34. (The Chamber notes that P-233 stated that at that time, the attackers were Bira); V-4, T. 234, pp. 4-6; T. 235, pp. 18-19.

<sup>1867</sup> P-287, T. 129, p. 18.

it.<sup>1868</sup> The Chamber, however, does not know whether those persons wounded close to the Institute were directly targeted by the attackers with firearms or whether they were caught in crossfire between the combatants, including fire from the UPC, which still occupied the military camp.<sup>1869</sup>

813. The increasing intensity of the fire exchanged and the difficulty, perhaps impossibility, of reaching the Institute forced some villagers to give up their attempt to do so and to flee towards those areas of bush surrounding the village centre or Waka mountain.<sup>1870</sup>

814. Several witnesses testified that the attackers fired at them as they fled and that some were shot.<sup>1871</sup> The *viva voce* evidence also attests to the fact that not only did the attackers fire on the fleeing villagers but they also struck them with machetes.<sup>1872</sup> Attackers, shouting that the Hema had to be captured, caught up with Witness V-2 who was running away from her home with her family.<sup>1873</sup> Close at her heels, they killed the baby she was carrying by machete.<sup>1874</sup> Similarly, whilst taking flight, Witness P-268 saw, in front of his uncle's house close to a school,<sup>1875</sup> the corpse of a two-year old child lying on the ground who had been shot and hacked to pieces by machete.<sup>1876</sup>

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<sup>1868</sup> P-287, T. 129, pp. 38-39.

<sup>1869</sup> See "Section VIII(A)(3) "How the attack proceeded".

<sup>1870</sup> P-132, T. 138, pp. 78-79; P-249, T. 135, pp. 40-41; P-268, T. 107, pp. 20-25 and 29-30; T. 108, pp. 63-64; V-2, T. 231, pp. 30-31; P-233, T. 83, pp. 67-70, 73 and 75; T. 88, pp. 24-25 (The Chamber notes that P-233 stated that at that time, the attackers were Bira).

<sup>1871</sup> P-132, T. 138, pp. 79 and 82-83; T. 139, p. 8; T. 140, pp. 49-51 and 55. The Chamber considers that the witness's account on this point is detailed and credible; EVD-OTP-00055: Forensics report (DRC-OTP-1033-0034 to DRC-OTP-1033-0036, paras. 55-59); EVD-OTP-00113; EVD-OTP-00114, EVD-OTP-00115, EVD-OTP-00116: Photographs of the witness's scar; P-249, T. 135, pp. 40-41; EVD-OTP-00107, EVD-OTP-00108: Photographs of the witness's wound; EVD-OTP-00056: Forensics report; P-249, T. 135, p. 47.

<sup>1872</sup> V-2, T. 231, p. 36; P-268, T. 107, p. 20.

<sup>1873</sup> V-2, T. 231, pp. 32-33.

<sup>1874</sup> V-2, T. 231, p. 36.

<sup>1875</sup> EVD-OTP-00043: Map annotated by P-268.

<sup>1876</sup> P-268, T. 107, p. 20.

815. In the early stages of the attack, whilst fleeing from her family's house, situated to the south of Bogoro, towards Waka mountain,<sup>1877</sup> Witness P-132 saw the corpses of four women wearing dresses and wrappers whom she described as "[TRANSLATION] civilians", the corpse of a fifth woman and her baby, and lastly the corpse of an elderly man – all had been hacked to pieces by machete.<sup>1878</sup> According to the witnesses, most of the people whose throats had been slit and who had been hacked to pieces by machete or shot dead were "[TRANSLATION] civilians" who had had no part in combat.<sup>1879</sup>

816. Lastly, Witness P-161 stated that he learnt from one of his wives that one of his sons, who was not – according to him – a UPC combatant,<sup>1880</sup> had been killed by a Lendu – rather than a Ngiti – attacker whilst fleeing from the Bogoro Institute.<sup>1881</sup> The Chamber notes that these facts are corroborated by Witness D02-176 who, however, stated that P-161's son was a UPC soldier but that he had not fought on the day of the battle.<sup>1882</sup> Given this inconsistency, the Chamber is not in a position to determine whether or not that person was a UPC combatant but considers that he was indeed killed whilst fleeing. The same witness also said that he heard that the attackers had killed one of his sons, aged four years,<sup>1883</sup> and one of his daughters<sup>1884</sup> and one of his nephews, both aged six years,<sup>1885</sup> by machete whilst they were fleeing. He further stated that his older sister's three young children were killed by machete alongside their mother, who was shot dead, and a woman

<sup>1877</sup> P-132, T. 138, pp. 42 and 76-77; T. 139, pp. 8-9; T. 142, pp. 23 and 26 T. 143, p. 69.

<sup>1878</sup> P-132, T. 138, pp. 79 and 82; T. 140, pp. 55-56.

<sup>1879</sup> P-132, T. 138, p. 82; P-249, T. 135, pp. 46-47.

<sup>1880</sup> P-161, T. 116, pp. 43-45.

<sup>1881</sup> P-161, T. 109, pp. 39-40; P-161, T. 110, pp. 64-67; T. 113, pp. 42 and 46-49; T. 116, pp. 40-42. See also EVD-OTP-00047: List of family members of P-161 who died during the attack. See Annex E.

<sup>1882</sup> See Annex E.

<sup>1883</sup> P-161, T. 110, pp. 68-69; T. 113, pp. 42-44 and 50-51; EVD-OTP-00047: List of family members of P-161 who died during the attack. See Annex E.

<sup>1884</sup> P-161, T. 110, pp. 67-68; EVD-OTP-00047: List of family members of P-161 who died during the attack.

<sup>1885</sup> P-161, T. 111, p. 7; EVD-OTP-00047: List of family members of P-161 who died during the attack.

who was with them.<sup>1886</sup> In his view, at that point in time, the attackers were Lendu, Ngiti and Bira.<sup>1887</sup>

817. In the light of the foregoing, the Chamber finds that from the outset of the attack on Bogoro, the combatants pursued and killed the inhabitants of the village – men, women and children – with machetes and firearms, even though they had no part in the fighting and were fleeing towards the Institute, into the bush or towards Waka mountain.

**b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured**

818. Witness P-323, a UPC combatant based in Bogoro,<sup>1888</sup> stated that, at the height of battle around the UPC camp on the morning of 24 February 2003, the UPC troops had to abandon Bogoro at or around 11 a.m., for they had not secured the reinforcements requested in Bunia and had run out of ammunition with which to continue defending the village.<sup>1889</sup> Similarly, Witness D02-176, a UPC combatant also stationed in the camp, stated that when the *manyata* in which the soldiers were quartered caught fire and the attackers were able to penetrate the camp, the UPC commanders announced that the battle was lost and ordered the combatants to flee.<sup>1890</sup> The combatants therefore left the camp before noon by forcing open a corridor towards Bunia, via Waka mountain, west of Bogoro. This breach enabled part of the village's population to escape with them.<sup>1891</sup> D02-176 added that, amongst those who had taken refuge in the Institute and thus tried to flee upon

<sup>1886</sup> P-161, T. 110, p. 69; T. 111, pp. 5-6 and 8-9; T. 113, pp. 39-40; EVD-OTP-00047: List of family members of P-161 who died during the attack. See Annex E.

<sup>1887</sup> P-161, T. 111, p. 6.

<sup>1888</sup> P-323, T. 117, p. 23.

<sup>1889</sup> P-323, T. 117, pp. 27, 29, 59 and 73.

<sup>1890</sup> D02-176, T. 255, p. 36; T. 256, pp. 33-34 and 50-51.

<sup>1891</sup> P-323, T. 117, pp. 27, 36 and 73-74. See also P-287, T. 129, pp. 23-24.

realising that the attackers had surrounded the camp, very few ultimately managed to escape.<sup>1892</sup>

819. The evidence shows that when the attackers took the camp, many people, including babies, children, women and elderly persons who had found refuge there,<sup>1893</sup> in particular at the Institute, and who had been unable to flee with the UPC soldiers, were wounded or killed<sup>1894</sup> by machete or gunfire.<sup>1895</sup> The Chamber considers that regard must also be had to the testimony of D02-148, a Ngiti soldier who was present in the military camp at the material time and according to whom “[TRANSLATION] civilians” were killed during the attack – some of those in vicinity of the Bogoro Institute were killed by machete, whilst others were shot dead.<sup>1896</sup> Other witnesses, close to the Institute during the events, testified to having heard the screams and pleas of persons being killed in the Institute.<sup>1897</sup> In this respect, several witnesses stated that they had lost relatives who were killed on the Institute’s premises. For example, D02-176’s mother<sup>1898</sup> and P-323’s wife and daughter<sup>1899</sup> perished in the classrooms where they had taken refuge or in attempting to leave the classrooms. Furthermore, P-268 stated that when he was locked up with other people in a classroom of the Bogoro Institute on the night of 24 February 2003,<sup>1900</sup> he saw many corpses in the buildings and at least six corpses

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<sup>1892</sup> D02-176, T. 256, p. 33.

<sup>1893</sup> D02-176, T. 256, p. 32; V-4, T. 234, p. 5. See also P-268, T. 107, p. 47.

<sup>1894</sup> D02-176, T. 256, pp. 33-34; D02-148, T. 279, pp. 18-19; T. 280, pp. 25-27; P-161, T. 109, p. 36; T. 111, pp. 17-19; P-287, T. 129, pp. 45-46.

<sup>1895</sup> P-268, T. 107, pp. 15, 31-32 and 46; D02-148, T. 280, pp. 22-28 (The Chamber observes that D02-148 was reluctant to confirm that civilians had died outside the school but did, however, concede that they may have been hit by stray bullets. The Chamber notes that the witness stressed that he had not personally seen civilians being killed, but had seen only corpses of civilians); EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0288, para. 7). See also P-317, T. 228, p. 32; D02-176, T. 256, p. 34; V-4, T. 234, pp. 11, 12 and 47 (The Chamber notes that V-4 did not specify whether the corpses were of soldiers or civilians).

<sup>1896</sup> D02-148, T. 279, pp. 49 and 50; T. 280, pp. 22-28.

<sup>1897</sup> P-268, T. 107, p. 15; P-287, T. 129, pp. 45-46.

<sup>1898</sup> D02-176, T. 256, p. 12, 13 and 28; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0032, number 192).

<sup>1899</sup> P-323, T. 117, pp. 34-39.

<sup>1900</sup> P-268, T. 107, pp. 41-42.

outside. Amongst them, he recognised a woman by the name of “Henriette”, who worked in a local restaurant.<sup>1901</sup>

820. According to P-287 and P-323, those persons who had been unable to leave with the UPC troops were killed in the Institute or in their flight.<sup>1902</sup> The Chamber notes however that D02-148, the aforementioned Ngiti combatant, testified that most of the persons present in Bogoro on the day of the attack were armed.<sup>1903</sup> It also notes that Witness P-166, who was not present, stated that some young people from Bogoro lent support to the UPC soldiers in the Institute by transporting, for example, the ammunition.<sup>1904</sup> Thus, although it can be reasonably argued that soldiers or civilians who directly participated in the hostilities may have been present in or around the Institute when the attackers entered it, the Chamber considers it established that the villagers killed at the Institute on the day of the attack had not put up any resistance, and it notes that the vast majority of them were defenceless and only seeking refuge in the classrooms. In the Chamber’s view, the scale of the massacres in this building, together with how they occurred – those who had taken refuge there pleaded with the attackers and some were executed by machete – establish that such persons were at the mercy of the attackers and were not in a position to resist. It thus appears that the villagers were killed by gunfire and machete, even though the attackers had taken control of the camp and the UPC had fled.

821. The Chamber further notes that P-287 testified to having been attacked by attackers in a house located in the military camp, where she had taken refuge with her two children.<sup>1905</sup> As it recalled in its findings on the credibility of this

<sup>1901</sup> P-268, T. 107, pp. 45 and 58.

<sup>1902</sup> P-287, T. 130, p. 27; P-323, T. 117, p. 47. See also P-317, T. 228, p. 32.

<sup>1903</sup> D02-148, T. 279, p. 19. See also [Prosecution Closing Statements, T. 337](#), pp. 82 and 83.

<sup>1904</sup> P-166, T. 226, p. 47. See also P-323, T. 117, pp. 59-60; [Prosecution Closing Statements, T. 337](#), pp. 82-83.

<sup>1905</sup> P-287, T-129, pp. 28-37.

witness, the Chamber considers that at the material time, P-287 was with only one of her infant children.<sup>1906</sup>

822. Indeed, P-287 stated that after the attackers entered the house, they wounded her child with a spear and shot at her.<sup>1907</sup> P-287 then begged them not to kill them.<sup>1908</sup> They asked her if she was married to a soldier, to which she replied that she was “[TRANSLATION] a civilian”. They forced her to part from her child by striking her on the back with a machete<sup>1909</sup> and told her that they were going to kill them.<sup>1910</sup> Shortly thereafter, she heard a gunshot. Even though she did not see anything, she is convinced that her child, whom she has never seen since, was killed at that time.<sup>1911</sup> The Chamber further notes that this event is corroborated by the testimony of D02-176<sup>1912</sup> and thus considers that the child did perish during the attack. Also according to P-287, the attackers asked her to show them the weapons depot. Not knowing where it was, she took them to the “[TRANSLATION] general store”.<sup>1913</sup>

823. The Chamber also notes that the attackers, using their firearms and machetes,<sup>1914</sup> pursued the UPC troops who, once their camp was in the grip of Lendu and Ngiti combatants, retreated and fled through a corridor to Waka mountain which had been opened up, with part of the population of the village who had taken refuge in the camp.<sup>1915</sup> Witness P-323 stated that the attackers

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<sup>1906</sup> See “Section V(D)(2) Credibility of D02-176”, including the Chamber’s conclusions on the credibility of Witness P-287.

<sup>1907</sup> P-287, T. 129, p. 29.

<sup>1908</sup> P-287, T. 129, pp. 29 and 37.

<sup>1909</sup> P-287, T. 129, pp. 32-33.

<sup>1910</sup> P-287, T. 129, pp. 32-33.

<sup>1911</sup> P-287, T. 129, pp. 32-34.

<sup>1912</sup> See Annex E.

<sup>1913</sup> P-287, T. 129, pp. 34 and 43. According to the witness, the store sold clothing and drinks, amongst other items.

<sup>1914</sup> P-323, T. 117, pp. 36-38; D02-176, T. 255, p. 37; T. 256, pp. 50-51; V-4, T. 234, pp. 8 and 11-12 (The Chamber notes that V-4 fled just before the camp was captured, having been forewarned by UPC soldiers that the enemies were approaching). See also P-233, T. 84, p. 13; T. 86, p. 10; P-161, T. 112, pp. 63-64; P-233, T. 86, p. 10.

<sup>1915</sup> P-323, T. 117, pp. 27, 36 and 73-74.

made no “[TRANSLATION] distinction” between ordinary villagers and combatants, in that they killed all those in their path by firearm or machete, including children and elderly persons.<sup>1916</sup> D02-176, a UPC soldier, stated, amongst other things, that he saw Matia Babona, the church’s leader, running unarmed right ahead of him,<sup>1917</sup> being targeted and shot dead.<sup>1918</sup>

824. In the light of the foregoing, the Chamber finds that, when the military camp in Bogoro was captured, the attackers wounded, shot dead and killed by machete those who had taken refuge in the camp, particularly those who were in the rooms of the Institute, namely men, women, children and elderly persons. The Chamber also finds that the attackers pursued those who were fleeing the camp, villagers and combatants alike, killing many of them, including, again, women, children and elderly persons, and shooting or striking them with machetes.

**c) Pursuit of the population in the houses during the fighting and after the village was overrun**

825. In the light of the evidence before it, the Chamber notes that throughout the attack on Bogoro, whether during the fighting or after the village was captured,<sup>1919</sup> the attackers entered houses to seek out and kill villagers hiding inside.<sup>1920</sup> It also notes in this regard the evidence of D02-176, a UPC combatant,<sup>1921</sup> who claimed that the attackers also shot or slashed with machetes “[TRANSLATION] civilians” attempting to leave their home.<sup>1922</sup> The Chamber further notes the testimony of P-161, who stated that one of his family members had told him that he had seen two of his infant children being killed by machete

<sup>1916</sup> P-323, T. 117, pp. 36-38.

<sup>1917</sup> D02-176, T. 256, p. 13.

<sup>1918</sup> D02-176, T. 256, p. 13. See also P-233, T. 84, pp. 13-14; V-4 T. 233, p. 65; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0032, number 191).

<sup>1919</sup> P-268, T. 107, p. 32; P-287, T. 129, pp. 24, 43, 46 and 51.

<sup>1920</sup> P-353, T. 213, pp. 19-21; D02-176, T. 256, p. 34.

<sup>1921</sup> D02-176, T. 255, p. 23.

<sup>1922</sup> D02-176, T. 256, p. 34.

in their house.<sup>1923</sup> The Chamber also notes that P-132 stated that he learnt from one of his sisters that his mother and sister had been shot dead and that his mother had subsequently been chopped to pieces by machete as they were both trying to leave their house in order to escape.<sup>1924</sup>

826. The Chamber also relies on the testimony of P-353, who, hiding with several families from his neighbourhood<sup>1925</sup> in a room in his home in Bogoro,<sup>1926</sup> saw and heard the attackers enter the rooms of the house,<sup>1927</sup> making death threats against them.<sup>1928</sup> According to the witness, the attackers then opened fire on those present<sup>1929</sup> and struck them with machetes.<sup>1930</sup> The victims screamed and begged as the attackers, after mutilating them, shot and killed them.<sup>1931</sup> P-353 added that the victims included two four-year-old children who had been cut to pieces by machete<sup>1932</sup> and that there were corpses and blood in several rooms in the house.<sup>1933</sup> Upon entering another room, the attackers then asked those who were not Hema to leave<sup>1934</sup>. The attackers told the Hema women that they were vain women who despised them but that they were going to marry them that day without even paying a dowry.<sup>1935</sup> P-353 and the other three girls who were present were only spared because they claimed not to be Hema.<sup>1936</sup>

827. P-353 also testified that after being apprehended and whilst en route with the attackers, she saw many corpses on the ground in front of the houses. However,

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<sup>1923</sup> P-161, T. 111, pp. 7-9; EVD-OTP-00047: List of family members of P-161 who died during the attack. See Annex E.

<sup>1924</sup> P-132, T. 140, pp. 41-42; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0031, numbers 113 and 115).

<sup>1925</sup> P-353, T. 213, p. 15.

<sup>1926</sup> See Annex E.

<sup>1927</sup> P-353, T. 213, p. 19.

<sup>1928</sup> P-353, T. 213, p. 19.

<sup>1929</sup> P-353, T. 213, p. 19.

<sup>1930</sup> P-353, T. 213, p. 21.

<sup>1931</sup> P-353, T. 213, pp. 19-21.

<sup>1932</sup> P-353, T. 213, p. 20.

<sup>1933</sup> P-353, T. 213, p. 25.

<sup>1934</sup> P-353, T. 213, pp. 21 and 27.

<sup>1935</sup> P-353, T. 215, p. 26.

<sup>1936</sup> P-353, T. 213, p. 21.

she was unable to identify them or say whether they had been shot dead or killed by machete.<sup>1937</sup> She also heard people screaming and weeping in other homes along the road. She was convinced at the time that those persons were being killed, like those in the house she had just left.<sup>1938</sup>

828. In the light of the foregoing, the Chamber finds that after the fighting and after the village was taken over, the attackers sought out the villagers, including women and children, in their homes in order to shoot them dead and/or kill them by machete.

#### **d) Pursuit of inhabitants hiding in the bush**

829. Several witnesses testified that, when hiding in the bush around the centre of the village once the camp in Bogoro was in the grip of the attackers and the UPC soldiers were fleeing,<sup>1939</sup> they heard and some even saw the attackers threatening to shoot people if they did not leave their hiding place<sup>1940</sup> or passing themselves off as Hema by speaking to them in Kihema.<sup>1941</sup> The people in hiding subsequently came out or were spotted.<sup>1942</sup> Some were captured on the spot,<sup>1943</sup> which was the case of P-132, who was brought to a Ngiti camp that same day by a

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<sup>1937</sup> P-353, T. 213, p. 27.

<sup>1938</sup> P-353, T. 215, p. 26.

<sup>1939</sup> P-132, T. 143, pp. 69-71; P-268, T. 107, p. 18; T. 117, pp. 59-60; P-287, T. 129, pp. 51-52.

<sup>1940</sup> P-287, T. 129, p. 51.

<sup>1941</sup> P-233, T. 83, p. 79.

<sup>1942</sup> P-233, T. 83, p. 75; P-287, T. 129, pp. 51-52; P-132, T. 143, pp. 69-71. The Chamber recalls that it has doubts as to P-132's hiding-place during the attack. However, in the light of the other evidence corroborating her account, it will accept her testimony on the matter. (See "Section V(B)(2) Credibility of P-132"). The Chamber notes that the witness expressly stated that the events took place the day after the attack. In the light of the details provided by the witness (P-132, T. 139, pp. 8-9; T. 143, p. 71) and the commonalities between her testimony and that of Witness P-249 (P-249, T. 135, pp. 41 and 49) and D02-148 (D02-148, T. 279, p. 21; T. 280, p. 40), the Chamber considers it established that the events described did take place on 24 February 2003 and not on 25 February 2003. (See "Section VIII(D)(2)(a) Rape: Witness P-132", para. 963). See also P-323, T. 117, pp. 59 and 60 (From his hiding-place Witness P-323 simply saw people being attacked in the bush).

<sup>1943</sup> P-233, T. 84, pp. 32-33; P-268, T. 107, pp. 15, 16 and 40; T. 108, p. 73.

Ngiti militia combatant,<sup>1944</sup> and P-249, who was brought to a camp controlled by Ngiti combatants.<sup>1945</sup> Both women stated that they denied being Hema for fear of being killed and claimed to be from another ethnic group.<sup>1946</sup> In this regard, the Chamber also notes the testimony of P-233, who testified to having learnt that some civilians had their attackers believe that they were Bira or Nande.<sup>1947</sup>

830. Others were shot dead or killed by machete on the spot by the Lendu and Ngiti attackers.<sup>1948</sup> P-287 and P-233 testified to having heard an elderly man<sup>1949</sup> and a “[TRANSLATION] civilian” named Mateso, who was unarmed at the time of his death,<sup>1950</sup> coming out of their hiding-place and being killed. P-232 also learnt from his sister that his grandmother had been discovered in the bush and killed by the attackers,<sup>1951</sup> although by which weapon the Chamber does not know. P-161 stated that he saw the wife of a man called Laurent<sup>1952</sup> being shot dead and cut to pieces by Ngiti and Lendu after being spotted in the bush by the “*lopi*”, who, from on high, informed the other combatants where the inhabitants were hiding<sup>1953</sup> (an expression used by Germain Katanga to denote the “look out position”).<sup>1954</sup> Laurent was also allegedly killed, but the witness did not provide any details in that regard.<sup>1955</sup> Despite some inconsistencies in the account of the death of Laurent’s wife, the Chamber considers that she was killed, but absent any other evidence as to the circumstances of his death, cannot conclude that

<sup>1944</sup> D02-148, T. 279, p. 21; T. 280, pp. 40-42 and 60-62; T. 181, p. 10; P-132, T. 139, pp. 12-13; T. 140, p. 58; T. 143, p. 24.

<sup>1945</sup> P-249, T. 135, p. 64; T. 136, p. 80; T. 137, pp. 60-61.

<sup>1946</sup> P-132, T. 139, pp. 11-12; P-249, T. 135, pp. 58-59.

<sup>1947</sup> P-233, T. 84, p. 12.

<sup>1948</sup> P-233, T. 84, pp. 32-33; P-268, T. 107, pp. 18, 67 and 74; P-287, T. 129, pp. 30 and 51.

<sup>1949</sup> P-287, T. 129, p. 51.

<sup>1950</sup> P-233, T. 83, pp. 63 and 78-80; T. 84, pp. 7 and 32-33. The Chamber notes that P-233 identified the persons with whom he had hidden, including an armed UPC combatant who was not, however, the person who was killed.

<sup>1951</sup> P-233, T. 84, p. 6; T. 86, pp. 10-11; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0030, number 77).

<sup>1952</sup> P-161, T. 110, pp. 51-53.

<sup>1953</sup> P-161, T. 110, pp. 51-53; T. 113, pp. 44-46 and 52-53; T. 116, pp. 37-43.

<sup>1954</sup> D02-300, T. 322, p. 51.

<sup>1955</sup> P-161, T. 116, p. 39.

Laurent was also killed. Furthermore, the Chamber has no reason to doubt that a “*lopi*” was present during the attack. Indeed, in the Chamber’s view, the witness’s knowledge of such a technical term, whose use was confirmed by Germain Katanga, cannot be coincidental.

831. Moreover, P-249, P-233 and P-268 told the Chamber that they saw corpses in the bush,<sup>1956</sup> including those of two children approximately 10 years old, near Nyakeru, about 15 kilometres from the village,<sup>1957</sup> and that of a woman in the Bogoro bush.<sup>1958</sup>

832. The Chamber further notes, and will subsequently make a determination on this point below, that P-249 and P-132<sup>1959</sup> were also flushed out of their hiding-place in the bush and sexually assaulted by the combatants.<sup>1960</sup>

833. In view of the foregoing, the Chamber concludes that, on 24 February 2003, once the camp had fallen and fighting had ceased, the attackers continued to pursue the inhabitants hiding in the bush, sexually assaulted women, captured people whom they found hiding and killed others. None of these people had any part in the fighting.

#### e) Other deaths

834. In addition to the above-mentioned events, various witnesses – P-132,<sup>1961</sup> P-233,<sup>1962</sup> P-161<sup>1963</sup> and D02-176<sup>1964</sup> – testified to having learnt that several of their

<sup>1956</sup> P-249, T. 135, p. 42.

<sup>1957</sup> P-233, T. 86, pp. 9-10.

<sup>1958</sup> P-268, T. 107, p. 18.

<sup>1959</sup> P-132, T. 139, pp. 13-14 and 19-21; T. 141, pp. 37-38; P-249, T. 135, pp. 41-42 and 54-55; T. 136, pp. 77-78.

<sup>1960</sup> See “Section VIII(D)(2)(a)(i) Rape: Witness P-132” and “Section VIII(D)(2)(a)(ii) Rape: Witness P-249.

<sup>1961</sup> P-132, T. 140, p. 42; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0031, numbers 116-119). See Annex E.

<sup>1962</sup> P-233, T. 86, pp. 16-17 (In addition to his grandmother, the circumstances of whose death are detailed above [See “Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush”, para. 830], Witness P-233 stated that he learned of the death of two of her children from a female family member).

<sup>1963</sup> P-161, T. 109, pp. 20-24. See Annex E.

relatives had perished during the battle, including women and children, some of them infants, but were unable to specify the circumstances of their death. Lastly, Witness V-4 heard that two shepherds who were tending his cows were killed when the attackers seized the cows.<sup>1965</sup> However, given the contrary evidence of D02-176, who told the Chamber that V-4's cows were not in Bogoro on the day of the attack, the Chamber is not in a position to determine the circumstances of death of the two shepherds mentioned by V-4.

#### f) Toll of the attack

835. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there were substantial grounds to believe that approximately 200 civilians had died during the battle of Bogoro.<sup>1966</sup> On the basis of a list of the dead compiled after the attack by the survivors,<sup>1967</sup> the Prosecution maintained that 150 persons, mostly civilians, were killed on 24 February 2003.<sup>1968</sup> For its part, the Defence arrived at a figure of 142 on the basis of the same list,<sup>1969</sup> emphasising, however, that that figure included UPC fatalities and persons killed by civilians or who had participated in the hostilities but that the figure did not specify the number of deaths resulting from collateral damage.<sup>1970</sup> The legal representative of the main group of victims submitted that the list establishes that approximately 150 people died.<sup>1971</sup>

836. In the view of the Chamber, the evidence shows that the battle of Bogoro claimed many victims. The village was littered with corpses, including those of women, children and elderly persons. Some had been cut to pieces by machete,

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<sup>1964</sup> D02-176, T. 256, pp. 12, 13 and 28; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0032, numbers 28, 194-195 and 200). See Annex E.

<sup>1965</sup> V-4, T. 234, p. 23.

<sup>1966</sup> [Decision on the confirmation of charges](#), paras. 304 and 427.

<sup>1967</sup> EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003.

<sup>1968</sup> [Prosecution Closing Brief](#), para. 64.

<sup>1969</sup> [Defence Closing Brief](#), para. 876.

<sup>1970</sup> [Defence Closing Brief](#), para. 877; [Defence Closing Statements, T. 338](#), pp. 71-73.

<sup>1971</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 160.

whilst others had been shot dead.<sup>1972</sup> Several witnesses also stated that they saw people being wounded<sup>1973</sup> or that they themselves were wounded.<sup>1974</sup> Lastly, Witness P-233 stated that when he returned to Bogoro in 2005, the inhabitants had discovered many skeletal remains,<sup>1975</sup> but only those of two persons, one of whom was Pastor Babona, could be identified.<sup>1976</sup>

837. As to the breakdown of the death toll of the attack, two lists lie before the Chamber, compiled one by Witness P-317 and the other by an inhabitant of Bogoro. The first records 330 dead and missing, including 173 children under the age of 18, during the battle of 24 February 2003, whereas the second records approximately 150 dead. According to P-317 and P-166, the lists contain mistakes and may include names of living persons, fabricated names<sup>1977</sup> or names of UPC soldiers.<sup>1978</sup> The Chamber further notes that these two lists do not specify the circumstances of death nor, as concerns P-317's list, identity (name, age and date of death) or military or civilian status. Moreover, the Chamber notes that Witness CHM-1, an investigations team leader in the Office of the Prosecutor, stated that "the numbers are very vague" and are based on witness statements and information provided by organisations present at the scene shortly after the events.<sup>1979</sup> Accordingly, the Chamber will use these lists only for corroborating

<sup>1972</sup> P-132, T. 138, pp. 79 and 82; T. 140, pp. 55-56; P-233, T. 86, p. 10; P-249, T. 135, p. 42; P-268, T. 107, pp. 45, 46, 57-61 and 64; P-287, T. 129, pp. 45-46; P-353, T. 213, pp. 25, 27 and 44; D02-148, T. 280, pp. 27-28; D02-176, T. 256, p. 34; V-4, T. 234, pp. 11-12, T. 140, pp. 55-56.

<sup>1973</sup> P-132, T. 138, pp. 79 and 82; T. 139, p. 8; T. 140, pp. 49-51 and 55; The Chamber considers that the witness's account on this point is detailed and credible; P-249, T. 135, p. 47; P-268, T. 107, pp. 69-72.

<sup>1974</sup> P-132, T. 138, p. 83; T. 139, p. 8; T. 140, pp. 49-51; EVD-OTP-00055: Forensics report (DRC-OTP-1033-0034-DRC-OTP-1033-0036, paras. 55-59). EVD-OTP-00113, EVD-OTP-00114, EVD-OTP-00115, EVD-OTP-00116: Photographs of the witness's scar; P-249, T. 135, pp. 40-41; EVD-OTP-00107, EVD-OTP-00108: Photographs of the witness's wound; EVD-OTP-00056: Forensics report; P-287, T. 129, p. 29; EVD-OTP-00097 to EVD-OTP-00101: Photographs.

<sup>1975</sup> P-233, T. 87, pp. 24-25; P-161, T. 111, pp. 32-33; V-4, T. 234, p. 17. See also P-166, T. 225, pp. 62-64 (P-166 stated that not all the bodies of the persons killed during the attack were buried, making the subsequent identification of the victims more difficult).

<sup>1976</sup> See Annex E.

<sup>1977</sup> See Annex E. See also P-317, T. 229, p. 72; T. 230, p. 21.

<sup>1978</sup> P-166, T. 226, p. 56; P-317, T. 228, p. 40; T. 229, pp. 31-32.

<sup>1979</sup> CHM-1, T. 81, pp. 27 and 89-90.

testimonies and it is not in a position to establish that 150 people, mostly civilians, did die during the attack, as the Prosecution alleged.<sup>1980</sup>

838. On the basis of the above observations, the Chamber is in a position to establish that at least 60 people were killed on the day of the attack, including at least 25 children.<sup>1981</sup> However, of these 60, only 14 appear on the list, mentioned in the above paragraph, which an inhabitant of Bogoro provided.<sup>1982</sup>

839. The Chamber considers, however, that the attack claimed considerably more lives, but imprecision of the evidence tendered prevents it from arriving at a definite breakdown. To this end, it refers to the various testimonies which, although imprecise, speak of many villagers killed on 24 February 2003.<sup>1983</sup> Such is the case, for example, of the testimony of P-353, who stated that the people who had taken refuge in her house were murdered, but was unable to say who or how many, save for two children aged four.<sup>1984</sup> This also holds true for the testimony of D02-176, who lost several family members, but the Chamber is not in a position to determine exactly how many.<sup>1985</sup> The Chamber also recalls that various witnesses stated that the village was littered with corpses, but, again, it is impossible for the Chamber to arrive at a total breakdown.<sup>1986</sup>

840. It should further be underlined that many UPC soldiers died on 24 February 2003. P-323, a UPC combatant who participated in the battle, stated that approximately 120 UPC soldiers died on the day of the attack,<sup>1987</sup> whereas D02-176, a soldier who also participated in the defence of the village, estimated that

<sup>1980</sup> [Prosecution Closing Brief](#), para. 64.

<sup>1981</sup> See Annex F.

<sup>1982</sup> EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0029-DRC-OTP-1007-0033, numbers 28, 77, 113, 115-119, 191-192, 194-195 and 199-200).

<sup>1983</sup> D02-176, T. 255, p. 40.

<sup>1984</sup> P-353, T. 213, pp. 19-20.

<sup>1985</sup> D02-176, T. 256, p. 28.

<sup>1986</sup> P-132, T. 138, pp. 79-82; T. 140, pp. 55-56; P-233, T. 86, p. 10; P-249, T. 135, p. 42; P-268, T. 107, pp. 15, 18, 31-32, 45-46, 57-61 and 64; P-287, T. 129, pp. 45-46; P-353, T. 213, pp. 25, 27 and 44; D02-148, T. 280, pp. 27-28; D02-176, T. 256, p. 34; V-4, T. 234, pp. 11-12, T. 140, pp. 55-56.

<sup>1987</sup> P-323, T. 117, p. 30.

approximately 70 men had been killed.<sup>1988</sup> On the basis of this evidence, the Chamber cannot determine the exact number of UPC soldiers who perished in combat.

841. Ultimately, in the Chamber's view, the attack on Bogoro claimed the lives of many of its inhabitants – the death toll of 60 constituting a minimum – including a significant number of women, children and elderly persons.

#### **g) Perpetrators of the acts**

842. In the light of some oral evidence, the Chamber notes that, overall during the attack<sup>1989</sup> or in the specific context of acts constituting the crimes of murder and attack against civilians,<sup>1990</sup> Bira elements were at the *locus in quo*. Similarly, although other testimonies briefly mention the participation of APC combatants or, at the very least, persons in APC uniform,<sup>1991</sup> the Chamber notes that most of the witnesses clearly identified the people who together committed these acts as being Lendu and Ngiti combatants,<sup>1992</sup> alongside whom women and children also acted, some of them armed.<sup>1993</sup> In this connection, pursuant to its 15 May 2013 Decision,<sup>1994</sup> the Chamber will rely only on evidence which may establish that acts committed during the attack on Bogoro were committed by Ngiti combatants from Walendu-Bindi *collectivité*. Therefore, the Chamber has not relied on evidence pertaining to acts which were allegedly committed only by Lendu

<sup>1988</sup> D02-176, T. 255, p. 40. See also [Defence Closing Brief](#), para. 877.

<sup>1989</sup> See, in particular, P-161, T. 111, pp. 12-13; P-166, T. 226, pp. 29-30; P-233, T. 83, pp. 72-73; P-287, T. 129, pp. 51-52; T. 130, p. 63; [First Defence observations on further investigations](#), para. 12.

<sup>1990</sup> See, *inter alia*, P-161, T. 111, p. 6; P-233, T. 83, pp. 63 and 68. See also [First Defence observations on further investigations](#), para. 12.

<sup>1991</sup> See, in particular, P-287, T. 130, p. 63; P-323, T. 116, p. 72; T. 118, pp. 23-24; D02-148, T. 279, p. 32. See also "Section VIII(A)(3) How the attack proceeded".

<sup>1992</sup> See, in particular, P-268, T. 107, pp. 26-27; P-249, T. 135, p. 47; D02-176, T. 256, p. 8; V-4, T. 233, p. 68-70; V-2, T. 231, p. 41; T. 232, pp. 38-39; P-161, T. 109, pp. 35-36 and 41-42; T. 110, pp. 49 and 52-53; T. 111, p. 6; P-132, T. 138, pp. 80-81; P-353, T. 213, p. 13 and 41-42.

<sup>1993</sup> P-132, T. 140, pp. 46-47; P-268, T. 107, pp. 37-39; P-287, T. 129, pp. 44-50; T. 130, pp. 20 and 30; P-323, T. 117, pp. 56-57.

<sup>1994</sup> [Decision transmitting additional legal and factual material \(regulation 55\(2\) and 55\(3\) of the Regulations of the Court\), 15 May 2013, ICC-01/04-01/07-3371-tENG](#) ("15 May 2003 Decision"), para. 19.

combatants from Bedu-Ezekere *groupement* or evidence which does not refer to the involvement of Ngiti combatants.

843. To ascertain whether Ngiti combatants committed murder or attacks against civilians in Bogoro on 24 February 2003, the Chamber considered with circumspection the various exhibits on record, specifically, those testimonies which adverted to specific acts committed by Ngiti combatants. In some cases, where witnesses did not specify the attackers' ethnic group in their description of certain criminal acts, the Chamber was nonetheless able to establish it by relying on the time and *locus in quo* and by considering the testimony as a whole. Failing that, it did not hold the Accused responsible for such acts. Where the witnesses mentioned joint Ngiti and Lendu participation, the Chamber considered that the attackers had acted together.

844. In this regard, the Chamber considers that the attackers who killed Witness V-2's child were Lendu, as the witness recognised the language they were speaking.<sup>1995</sup> The Chamber also considers that the killing of a two-year-old child and the pursuit of persons fleeing, two occurrences seen by Witness P-268 as he took to his heels, were committed by Lendu. Indeed, the witness stated that at that time, the shooting came from Katonie<sup>1996</sup>, a Lendu place.<sup>1997</sup> In the Chamber's view, P-161's son was killed by a Lendu combatant, as this was clearly stated by this witness.<sup>1998</sup> Lastly, although P-233 stated that Matso, the unarmed "[TRANSLATION] civilian", was probably killed by Ngiti, the Chamber cannot reach such a conclusion. Indeed, the Chamber notes that the witness merely "[TRANSLATION] thought" that the attackers were Ngiti, adding that at that time, the attackers were Bira and came from "[TRANSLATION] the Bira road".<sup>1999</sup>

<sup>1995</sup> V-2, T. 231, pp. 32-33 and 40-41.

<sup>1996</sup> P-268, T. 107, p. 20.

<sup>1997</sup> See Annex D.

<sup>1998</sup> P-161, T. 110, pp. 64-68; T. 111, p. 7; T. 113, p. 42; T. 116, p. 42. See also "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 816.

<sup>1999</sup> P-233, T. 83, pp. 63, 75 and 79-80; T. 84, p. 7.

845. However, the Chamber is of the opinion that other testimonies allow the commission of crimes to be connected to the Ngiti combatants. Thus, as to the events which took place when, at the start of the attack, the inhabitants were fleeing towards the Institute and the bush, the participation of Ngiti combatants is established. Indeed, on the basis, amongst others, of the language they were speaking or their appearance, Witnesses V-2, P-249 and P-132 were able to identify some Ngiti.<sup>2000</sup>

846. As to persons attacked, shot dead or killed by machete in the houses, from the testimonies laid before it, the Chamber finds that Ngiti were involved alongside Lendu.<sup>2001</sup> Indeed, D02-176 and P-249 clearly identified the attackers as Ngiti. Also, the combatants who attacked those who had taken refuge in P-353's house were Lendu and Ngiti. The witness did admittedly state that at the start of the attack, upon hearing the attackers arrive, she thought that they were Lendu, because they were the "[TRANSLATION] the enemies of the population of Bogoro"<sup>2002</sup> and they wore grass leaves around their hips and all over their bodies, as well as a red headband.<sup>2003</sup> However, the witness also added subsequently that two of the attackers belonging to the group who made her leave her house argued over taking her as their wife,<sup>2004</sup> before bringing her to a camp located in Gety, a Ngiti village.<sup>2005</sup>

847. In like manner, the witnesses who testified before the Chamber to the events which occurred during the capture of the military camp stated that the attackers were Lendu and Ngiti.<sup>2006</sup> In the Chamber's view, this was so for the attackers

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<sup>2000</sup> P-132, T. 138, pp. 80-81; (The Chamber notes that the witness added that Lendu and Ngiti were present on the day of the attack); V-2, T. 232, p. 38; P-249, T. 135, p. 47 (The Chamber notes that P-249 specifically referred to "Ngiti" when she talks about persons firing at the civilians).

<sup>2001</sup> P-268, T. 107, pp. 26 and 32; D02-176, T. 255, p. 36; T. 256, pp. 33-34 and 50-51.

<sup>2002</sup> P-353, T. 213, p. 12.

<sup>2003</sup> P-353, T. 213, p. 13.

<sup>2004</sup> P-353, T. 213, pp. 41-42.

<sup>2005</sup> P-353, T. 213, pp. 46-47; T. 215, pp. 29, 45 and 47-48.

<sup>2006</sup> P-287, T. 129, pp. 30-31; T. 130, pp. 63 and 66-67. See also D02-148, T. 280, pp. 22-27; P-161, T. 109, pp. 36, 39 and 45-46; P-268, T. 107, pp. 15-16 and 40-41; T. 108, p. 73.

who assaulted the occupants of the *manyata* where P-287 was, since she stated that she inferred that the attackers were Lendu and Ngiti from the languages they were speaking then.<sup>2007</sup> According to other witnesses, those people who fled immediately after the fall of the camp were also targeted by Lendu and Ngiti attackers.<sup>2008</sup> Hence, contrary to the Defence submission,<sup>2009</sup> the evidence shows clearly that Ngiti combatants participated in the crimes committed during the capture of the camp.

848. Lastly, in respect of the persons pursued in the bush, it is, in the Chamber's view, established that the attackers were Lendu and Ngiti acting together, as stated by P-233, P-268 and P-287.<sup>2010</sup> As will be addressed later, the Chamber also considers that Witnesses P-249 and P-132 were sexually assaulted by Ngiti combatants whilst hiding in the bush.<sup>2011</sup> However, as regards Mateso, the unarmed "[TRANSLATION] civilian" whom P-233 saw being killed, the Chamber is not in a position to find that he was killed by Ngiti. Indeed, although the witness did think that he had been a victim of the Ngiti, he did not specify the foundation of such assertion, whereas he did, on the contrary, state that at that moment the attackers were coming from the "[TRANSLATION] Bira road".<sup>2012</sup>

849. In the light of the body of evidence on record, the Chamber thus finds that the predominantly Hema population of Bogoro was pursued, mistreated, wounded or killed during the 24 February 2003 attack and that such acts were committed by, amongst others, Ngiti combatants of Walendu-Bindi *collectivité*.

<sup>2007</sup> P-287, T. 129, pp. 29-31; T. 130, pp. 66-67.

<sup>2008</sup> D02-176, T. 256, p. 8; P-323, T. 117, p. 27.

<sup>2009</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 77.

<sup>2010</sup> P-233, T. 83, p. 79; P-268, T. 108, pp. 72-74; P-287, T. 129, pp. 30-31.

<sup>2011</sup> See "Section VIII(D)(2)(a)(i) Rape: Witness P-132" and "Section VIII(D)(2)(a)(ii) Rape: Witness P-249".

<sup>2012</sup> P-233, T. 83, pp. 63, 75 and 79-80; T. 84, p. 7.

## h) Objectives of the attackers

850. The Chamber recalls that, at the time of the Bogoro operation, the Ngiti combatants regarded the Hema, as an ethnic group, as their enemy.<sup>2013</sup>

851. It notes that, according to P-12, who was involved in the activities of PUSIC<sup>2014</sup> at the material time, it was often the case that battles were waged not between two groups but between two ethnic groups, and the attack on Bogoro in this regard was of an ethnic character.<sup>2015</sup>

852. The Chamber also notes that P-28 stated that “[TRANSLATION] even now, a Hema is an enemy to me. A Hema is an enemy to me. That’s my truth”,<sup>2016</sup> adding that, generally, “[TRANSLATION] when it came to the UPC, we targeted men and women alike; for example, a Hema man and his wife. So, as far as the UPC was concerned, our enemies were not only the men”.<sup>2017</sup>

853. The Chamber also recalls that several witnesses testified to having heard the attackers’ threats and the pleas of their victims,<sup>2018</sup> who wept and begged for mercy.<sup>2019</sup> Various witnesses stated that the attackers asked their victims their ethnic origin,<sup>2020</sup> and several inhabitants passed themselves off as non-Hema in order to save their lives.<sup>2021</sup> In this regard, the Chamber will rely on the testimony of V-2, which it considers particularly instructive in that the witness reported that the attackers shouted, “[TRANSLATION] Catch these Hema” as they chased the people who were fleeing.<sup>2022</sup>

<sup>2013</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>2014</sup> P-12, T. 194, p. 32.

<sup>2015</sup> P-12, T. 197, p. 66.

<sup>2016</sup> P-28, T. 219, pp. 5-6.

<sup>2017</sup> P-28, T. 217, p. 19.

<sup>2018</sup> P-233, T. 84, pp. 32-33; P-268, T. 107, pp. 15 and 31-32; P-287, T. 129, pp. 29, 37, 45-46; P-353, T. 213, pp. 19-20.

<sup>2019</sup> P-233, T. 84, pp. 32-33.

<sup>2020</sup> P-132, T. 139, pp. 11-12; P-249, T. 135, pp. 58-59; P-268, T. 107, pp. 40-41; P-353, T. 231, p. 20.

<sup>2021</sup> P-132, T. 139, pp. 11-12; D02-148, T. 280, pp. 41-42; P-233, T. 83, pp. 16-17; T. 84, p. 12; P-249, T. 135, pp. 58-59; P-353, T. 213, pp. 20-21 and 27; T. 215, p. 26.

<sup>2022</sup> V-2, T. 231, pp. 32-33 and 36.

854. Lastly, the Chamber notes that, according to the MONUC report on the events in Ituri, the Bogoro operation did not pursue only military objectives, but “also appeared to be a reprisal operation against the Hema civilian population”.<sup>2023</sup> It also notes that, during their visit of 26 March 2003, the MONUC investigators found that the village was inhabited only by “Lendu armed groups”.<sup>2024</sup> In this respect, the Chamber notes that Witness P-317, a MONUC investigator, understood the term “Lendu” in its generic sense, that is, as encompassing both Lendu and Ngiti.<sup>2025</sup> The Chamber further observes that it was with Commander Dark, a Ngiti, whom the MONUC delegation had to negotiate access to the village, which was refused.<sup>2026</sup> Moreover, V-2 testified that when she passed through Bogoro en route to Uganda with a Ugandan military convoy approximately two months after the attack, the village was inhabited by Lendu and Ngiti,<sup>2027</sup> which is corroborated by P-233, who returned to Bogoro in 2005.<sup>2028</sup>

855. The Chamber therefore finds that the Bogoro operation took place in the context of an ethnic conflict between, on the one hand, the Lendu and Ngiti and, on the other hand, the Hema, and not only between armed groups. It also notes that, after the battle, the village of Bogoro was cleared of its Hema population, as the inhabitants had been forced to flee or had perished there.

### **3. Conclusions of law**

#### **a) Conclusions on murder as a crime against humanity and as a war crime**

856. By way of a preliminary comment, the Chamber recalls that it concluded that UPC soldiers died in combat. However, it recalls that no allegations of soldiers killed *hors de combat* lie before the Chamber for determination, and it will

<sup>2023</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0353, para. 64).

<sup>2024</sup> EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0288).

<sup>2025</sup> P-317, T. 228, p. 34.

<sup>2026</sup> EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0288); P-317, T. 228, p. 34.

<sup>2027</sup> V-2, T. 231, pp. 43-44.

<sup>2028</sup> P-233, T. 83, pp. 52-53.

therefore not rule on the possibility of their having been murdered. The Chamber must therefore establish the civilian status of the deceased, find that they were taking no active part in the hostilities at the time of their death and assess the physical perpetrators' intent to kill them.

857. The Chamber found that people were killed in Bogoro on the day of the 24 February 2003 attack, in particular by Ngiti combatants,<sup>2029</sup> in their flight as the attack started, in their houses, in the military camp, whilst they were fleeing the military camp and whilst hiding in the bush.

**i. Persons killed in flight or at the start of the attack**

858. As to the people killed whilst they were fleeing once the combatants had entered the village, the Chamber notes the death of seven members of P-161's family – women and children only<sup>2030</sup> – and that of the woman accompanying his sister.<sup>2031</sup> Given the age of these six children, who were accompanied by two women, one of whom was the mother of three of the children, and the circumstances in which they were killed, that is, they were fleeing, the Chamber considers that these eight people were civilians not taking direct part in hostilities. Moreover, the Chamber notes that the children were killed with machetes and that the nature of this weapon and the necessary proximity it entails with the victim unequivocally show the intentional character of the act. Admittedly, both P-161's sister and his wife who was accompanying her were shot dead. However, the Chamber considers that, although the murders occurred at the start of the attack, that is, at a time when the UPC soldiers were not yet fleeing and were fighting, the fact that the women were accompanying children who were directly killed by machete suffices, in its view, to establish that this group of civilians was targeted intentionally.

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<sup>2029</sup> See "Section VIII(B)(2)(g) Perpetrators of the acts".

<sup>2030</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 816.

<sup>2031</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 816.

859. The Chamber further notes that P-132 stated that, whilst attempting to flee towards Waka mountain at the start of the attack, she saw four corpses of women wearing wrappers and the corpses of an elderly man, a woman and her baby, all chopped to pieces by machete.<sup>2032</sup> It considers that given the age of some of the victims and the fact that the other victims were women in civilian clothing, the bodies which P-132 saw in her flight were those of civilians not taking direct part in hostilities and who, moreover, were intentionally killed by machete.

**ii. People killed in the houses**

860. The Chamber recalls that it identified amongst the victims of the attack the two children whom P-353 saw being killed in his house<sup>2033</sup> located outside the camp.<sup>2034</sup> In the Chamber's view, there is no doubt that these two children, and all the other people who had taken refuge in this home, were civilians not taking direct part in hostilities, given that they had taken refuge in a house with children and were mutilated and killed by bladed weapon. Nor is there any doubt, in the opinion of the Chamber, that these people were targeted intentionally, since the attackers threatened and mutilated their victims with bladed weapons before killing them and the victims were shot dead or dispatched by machete.<sup>2035</sup> Moreover, the people shot dead in this house could not have been struck by stray bullets, since the attackers entered the house to kill its occupants and not to fight any soldiers who might have been there.

861. The Chamber also recalls the death of Witness P-161's two nephews, killed by machete in their house.<sup>2036</sup> In the Chamber's view, these children were civilians

<sup>2032</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 815.

<sup>2033</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", para. 826.

<sup>2034</sup> See Annex E.

<sup>2035</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", para. 826.

<sup>2036</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", para. 825.

not taking direct part in the fighting when they died and were targeted intentionally.

862. Lastly, the Chamber notes the P-132's mother and sister perished in the attack –, they were killed by shooting and by machete as they were leaving their house in an attempt to flee.<sup>2037</sup> In the Chamber's view, these women were civilians and, given the circumstances in which they were killed, they could not be considered as taking direct part in the fighting. It considers that the conditions in which they died, in the vicinity of their house and whilst trying to flee, also establish that they were targeted intentionally.

**iii. Persons killed in the military camp, including at the Institute and in flight from the camp**

863. The Chamber recalls that the mother of D02-176<sup>2038</sup> died during the capture of the camp, as did one of P-287's children, killed in a house located in the military camp,<sup>2039</sup> and that P-323's wife and daughter died after taking refuge at the Institute.<sup>2040</sup>

864. In the Chamber's view, there is no doubt that these people, as well as the majority of those who had found refuge at the Institute, including women, children and elderly persons,<sup>2041</sup> were civilians not taking direct part in the hostilities and that they were killed intentionally by the attackers. Indeed, the Chamber recalls that it found that these persons were ordinary inhabitants of

<sup>2037</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", para. 825.

<sup>2038</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 819; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0033, numbers 113 and 115).

<sup>2039</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 822; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0033, number 199).

<sup>2040</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 819.

<sup>2041</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 819.

Bogoro who had sought refuge inside the camp and who, at the time of their death, were defenceless, that the attackers heard them plead and that they were killed primarily by machete.<sup>2042</sup>

865. The Chamber further considers that the civilians who fled the Institute were killed intentionally,<sup>2043</sup> including when they were shot dead.<sup>2044</sup> Indeed, despite the fact that the civilians and soldiers were fleeing together and that it cannot be denied that UPC soldiers at that moment may have constituted a military target for the attackers, the Chamber 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 already fleeing. In addition, no evidence suggests that some of the people killed in this context were so killed during an exchange of fire between the two armed forces. The Chamber thus considers that the people who were fleeing at the time, including Matia Babona,<sup>2045</sup> killed as he was fleeing towards Waka mountain at the same time as UPC combatants, could not have died in the cross-fire. It takes the view that by shooting indiscriminately at fleeing persons, the Lendu and Ngiti showed scant regard for the fate of the civilians among the UPC soldiers in the mêlée and knew that their death would occur in the ordinary course of events. The Chamber finds that they thus intended to cause their death.

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<sup>2042</sup> See “Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured”, para. 819. See also EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0288, para. 7); P-317, T. 228, p. 32.

<sup>2043</sup> See “Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured”, para. 823. See also P-268, T. 107, pp. 15, 20, 31-32, 58-61 and 64; P-323, T. 117, pp. 36-38; D02-176, T. 255, p. 37; T. 256, p. 13; V-4, T. 234, p. 8 and 11-12; P-317, T. 228, p. 32.

<sup>2044</sup> See “Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured”, para. 823. See also D02-176, T. 256, p. 13; P-287, T. 129, pp. 38-39; D02-148, T. 280, p. 27; P-323, T. 117, pp. 36-38.

<sup>2045</sup> See “Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured”, para. 823; EVD-OTP-00203: List of victims of the attacks on Bogoro between 2001 and 2003 (DRC-OTP-1007-0032, number 191).

**iv. Persons killed whilst hiding in the bush**

866. The Chamber found that P-233's grandmother,<sup>2046</sup> the elderly man whom Witness P-287<sup>2047</sup> heard being killed when he was coming out of the bush where he had been hiding, the women whom P-268 also discovered in the Bogoro bush the day after the attack<sup>2048</sup> and the wife of the person known as Laurent<sup>2049</sup> all died. In the Chamber's view, it is established that, given their age,<sup>2050</sup> their gender<sup>2051</sup> and the circumstances in which they were killed, these people were civilians not taking direct part in hostilities. The Chamber also considers it established that they were killed intentionally, since they were shot dead just after surrendering or being discovered by attackers who misled them about their intentions.

**v. Persons killed by other attackers or in circumstances unknown to the Chamber**

867. The Chamber established that many other persons died but is not in a position to find that they were murdered by Ngiti. The Chamber has thus found that V-2's baby, killed by machete,<sup>2052</sup> and the two-year-old child seen by P-268, shot dead and chopped to pieces by machete,<sup>2053</sup> were killed by Lendu.<sup>2054</sup> In addition, as regards Mateso, the unarmed "[TRANSLATION] civilian" killed as he was coming out of the bush, the Chamber cannot rule out that his attackers were Bira.<sup>2055</sup> The Chamber thus considers that whilst these three persons were civilians not taking

<sup>2046</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 830; EVD-OTP-00203, number 77 (DRC-OTP-1007-0030).

<sup>2047</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 830.

<sup>2048</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 831.

<sup>2049</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 831.

<sup>2050</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 830.

<sup>2051</sup> See *supra*, "Findings of fact", paras. 830-831.

<sup>2052</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 814.

<sup>2053</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 814.

<sup>2054</sup> See "Section VIII(B)(2)(g) Perpetrators of the acts", para. 844.

<sup>2055</sup> See Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 830; "Section VIII(B)(2)(g) Perpetrators of the acts", para. 844.

part in hostilities and that they were killed intentionally, it does not intend to hold the Accused responsible for these crimes, as it has not been demonstrated that they were committed by Ngiti.

868. The Chamber further found that P-161's son<sup>2056</sup> was killed by Lendu, but it was unable to establish whether he was a combatant *hors de combat* or a civilian.

869. Indeed, absent sufficient detail, the Chamber considers that, save for his mother and sister, the members of P-132's family who were killed during the attack cannot be considered civilian victims of murder.<sup>2057</sup> The same holds true for the two children of P-233's family;<sup>2058</sup> the skeletal female remains discovered in 2005;<sup>2059</sup> D02-176's aunt, sister and brothers;<sup>2060</sup> the two shepherds mentioned by V-4;<sup>2061</sup> the six corpses including that of Henriette, the restaurant owner whom P-268 said she saw in front of the Bogoro Institute;<sup>2062</sup> the two corpses of ten-year-old children seen by P-233 in the bush around Nyakeru, 15 kilometres from Bogoro;<sup>2063</sup> and P-161's sister.<sup>2064</sup> Indeed, the Chamber does not know the circumstances of their death, and it cannot therefore rule out that these persons were, for example, struck by stray bullets. It is thus established that many people perished during the attack on Bogoro on 24 February 2003, since the Chamber was able to identify 60 of them, of whom at least 33 were civilians not taking direct part in hostilities. The Chamber considers that 30 of these civilians, including 13 children, were murdered by Ngiti acting alone or by Lendu and Ngiti acting together.<sup>2065</sup> The Chamber is further satisfied beyond reasonable

<sup>2056</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 816; "Section VIII(B)(2)(g) Perpetrators of the acts", para. 844.

<sup>2057</sup> See "Section VIII(B)(2)(e) Other deaths", para. 834.

<sup>2058</sup> See "Section VIII(B)(2)(e) Other deaths", para. 834.

<sup>2059</sup> See "Section VIII(B)(2)(f) Toll of the attack", para. 836.

<sup>2060</sup> See "Section VIII(B)(2)(e) Other deaths", para. 834.

<sup>2061</sup> See "Section VIII(B)(2)(e) Other deaths", para. 834.

<sup>2062</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 819.

<sup>2063</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 831.

<sup>2064</sup> See "Section VIII(B)(2)(e) Other deaths", para. 834 and footnote 1963.

<sup>2065</sup> See Annex F.

doubt that the number of persons murdered by Ngiti exceeds 30, in the light, *inter alia*, of the detailed testimony of Witness P-353.<sup>2066</sup>

870. Having regard to this analysis and the conclusions drawn from its assessment of the contextual elements of the crimes against humanity and war crimes,<sup>2067</sup> the Chamber thus finds beyond reasonable doubt that, during the attack on Bogoro, Ngiti combatants committed against civilians the crimes of murder as a crime against humanity and murder as a war crime under articles 7(1)(a) and 8(2)(c)(i) of the Statute.

#### **b) Conclusions on the crime of attack against civilians**

871. By way of a preliminary comment, the Chamber recalls that, as regards its constituent elements, the crime of attack against civilians does not require results, such as the determination of a certain number of persons killed.<sup>2068</sup> Nonetheless, in the case at bar, the existence of such results is also taken into account to demonstrate the commission of the crime. In this regard, the Chamber recalls its earlier finding that at least 30 civilians were victims of murder committed by Ngiti.<sup>2069</sup>

872. The Chamber further recalls, as it found above, that, on 24 February 2003, the village of Bogoro was inhabited by many civilians, who were predominantly Hema.<sup>2070</sup> It also notes that the village was attacked very early in the morning,

<sup>2066</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", paras. 826-827.

<sup>2067</sup> See Section IX(A)(2)(c) Nexus between the crimes committed and the attack"; "Section IX-B-3-b Nexus between the crimes and the non-international armed conflict".

<sup>2068</sup> See "Section VIII(B)(1)(c)(i)(a) The perpetrator directed an attack", para. 799.

<sup>2069</sup> See "Section VIII(B)(3)(a) Conclusions of law on the crime of murder as a crime against humanity and a war crime", para. 869.

<sup>2070</sup> See "Section VIII(A)(2) Bogoro village".

when it was still dark and the villagers were still at home asleep, and that the attackers arrived from all directions,<sup>2071</sup> making escape very difficult.

873. The Chamber further recalls that throughout the Bogoro operation, the combatants pursued, wounded or killed the villagers who were not taking direct part in hostilities whilst they were fleeing towards the Institute or the bush and Waka mountain,<sup>2072</sup> as well as when they were in their houses.<sup>2073</sup>

874. As to the people, including women and children, who were attacked during the capture of the camp and, in particular, those who had taken refuge at the Bogoro Institute, the Chamber refers to its findings establishing that the attackers executed the civilians who had taken refuge in the camp.<sup>2074</sup>

875. As to the people attacked as they were leaving the camp for the slopes of Waka mountain, the Chamber found that this group of people included both civilians and UPC troops, who were also fleeing.<sup>2075</sup> The Chamber further notes that the evidence admitted into the record does not allow it to assess the exact proportion of civilians and soldiers within this group.<sup>2076</sup> It is therefore difficult for the Chamber to find that one of the objectives, at that specific moment, was to attack the civilian population and that the civilian population was targeted as such. Therefore, the Chamber is unable to establish that these acts fall within article 8(2)(e)(i) of the Statute, as this provision requires the Chamber to establish that the perpetrator meant the civilian population, as such, to be the object of the attack within the meaning of article 30(2)(a).

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<sup>2071</sup> See Section VIII(A)(3) How the attack proceeded"; "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", para. 810.

<sup>2072</sup> See "Section VIII(B)(2)(a) Pursuit of inhabitants who took flight as the attack began", paras. 810-817.

<sup>2073</sup> See "Section VIII(B)(2)(c) Pursuit of the population in the houses during the fighting and after the village was overrun", paras. 825-828.

<sup>2074</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", paras. 818-824.

<sup>2075</sup> See, in this respect, the circumstances of their flight, para. 823.

<sup>2076</sup> See "Section VIII(B)(2)(b) Attack on inhabitants who took refuge in the military camp, including in the Institute, and as they took flight after the camp was captured", para. 823.

876. Lastly, although the UPC combatants had retreated, the Lendu and Ngiti combatants continued to pursue the population of Bogoro who were still hiding in the bush, killed some of them and sexually assaulted two women.<sup>2077</sup>

877. The Chamber further recalls the threats made against the Hema civilians by the attackers, the fact that these same attackers asked their victims to reveal their ethnic group, and the victims' pleas;<sup>2078</sup> all such facts make it possible to establish that on 24 February 2003 the attackers intended to attack the predominantly Hema civilians.

878. Thus, from the timing of the attack and the means and method used – encirclement of the village whilst its inhabitants were still asleep; use of machetes to strike them directly and at close range; shooting indiscriminately or directly at the villagers, whether during or after the fighting, in their homes, as they fled or when they had taken shelter in the Institute or in the bush; the civilian death toll, including 13 children, many women and elderly people – the Chamber finds beyond reasonable doubt that Ngiti combatants directly targeted the predominantly Hema civilian population of Bogoro on 24 February 2003.

879. In the light of the above and its findings on the contextual elements of war crimes,<sup>2079</sup> the Chamber is therefore satisfied beyond reasonable doubt that the civilian population and civilians not taking direct part in hostilities were attacked intentionally in Bogoro on 24 February 2003 and that the crime defined in article 8(2)(e)(i) was committed by Ngiti combatants.

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<sup>2077</sup> See "Section VIII(B)(2)(d) Pursuit of inhabitants hiding in the bush", para. 829. See also "Section VIII(D)(2)(a)(i) Rape: Witness P-132" and "Section VIII(D)(2)(a)(ii) Rape: Witness P-249".

<sup>2078</sup> See "Section VIII(B)(2)(h) Objectives of the attackers", para. 853.

<sup>2079</sup> See "Section IX(B)(3)(b) Nexus between the crimes and the non-international armed conflict".

**C. WAR CRIMES OF DESTRUCTION OF ENEMY PROPERTY (ARTICLE 8(2)(E)(XII) OF THE STATUTE) AND PILLAGING (ARTICLE 8(2)(E)(V) OF THE STATUTE)**

880. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that it had sufficient evidence to establish substantial grounds to believe that the FNI and FRPI combatants had committed the war crime of destroying the enemy's property, as defined in article 8(2)(b)(xiii) of the Statute, during and in the aftermath of the 24 February 2003 attack on the village of Bogoro.<sup>2080</sup> Specifically, it found that there were substantial grounds to believe that the combatants had intentionally destroyed a large number of "enemy" houses, setting ablaze many of them, as well as shops and schools belonging to the civilian population of Bogoro.<sup>2081</sup> Such property did not constitute military objectives and such destruction was not justified by military necessity.<sup>2082</sup>

881. The Pre-Trial Chamber also found that it had sufficient evidence to establish substantial grounds to believe that the war crime of pillaging, as defined in article 8(2)(b)(xvi) of the Statute, was committed by FNI and FRPI combatants in the aftermath of the 24 February 2003 attack on the village of Bogoro.<sup>2083</sup> Indeed, the Pre-Trial Chamber found that there were substantial grounds to believe that the combatants had intentionally pillaged property belonging mainly to the Hema civilian population in the aftermath of the attack, that is from the time the village came under their control.<sup>2084</sup>

882. The Prosecution submitted that during the attack and in the days that followed,<sup>2085</sup> the Lendu and Ngiti combatants destroyed the property belonging to the civilian population of Bogoro on a large scale.<sup>2086</sup> Such property included

<sup>2080</sup> [Decision on the confirmation of charges](#), para. 326.

<sup>2081</sup> [Decision on the confirmation of charges](#), paras. 320-323.

<sup>2082</sup> [Decision on the confirmation of charges](#), para. 324.

<sup>2083</sup> [Decision on the confirmation of charges](#), para. 338.

<sup>2084</sup> [Decision on the confirmation of charges](#), paras. 334-338.

<sup>2085</sup> [Prosecution Closing Brief](#), paras. 91-95.

<sup>2086</sup> [Prosecution Closing Brief](#), para. 94.

houses, schools and churches in the village,<sup>2087</sup> which were destroyed or set on fire.<sup>2088</sup>

883. Also according to the Prosecution, the Lendu and Ngiti attackers pillaged Bogoro after taking control of the village and in the days following the attack.<sup>2089</sup> They seized mattresses, tables, chairs and kitchen utensils,<sup>2090</sup> took possession of cows, goats and chickens<sup>2091</sup> and pillaged a school, churches, the health centre and a shop.<sup>2092</sup> Civilians from neighbouring villages,<sup>2093</sup> including children,<sup>2094</sup> participated in the pillaging alongside the combatants. The goods were transported to Zumbe, Katonie, Lagura, Aveba and Gety, as well as to other Ngiti and Lendu camps.<sup>2095</sup>

884. The Defence did not dispute that property was destroyed during the battle of Bogoro, but submitted that it did not always belong to the “adverse party” to the conflict. Indeed, in Bogoro, many houses had been abandoned by Ngiti who lived in them before fleeing the village at the start of the conflict and who therefore remained their rightful owners. Consequently, the test requiring that the destruction affect enemy property is not met.<sup>2096</sup>

885. The Defence did not deny either that pillaging was committed during the battle. It added, however, that some of the perpetrators of this crime were Bira, including women and children, who appropriated property out of mere opportunism.<sup>2097</sup> The Defence submitted that the crime of pillaging requires a high

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<sup>2087</sup> [Prosecution Closing Brief](#), para. 94.

<sup>2088</sup> [Prosecution Closing Brief](#), para. 91.

<sup>2089</sup> [Prosecution Closing Brief](#), paras. 96-105.

<sup>2090</sup> [Prosecution Closing Brief](#), para. 97.

<sup>2091</sup> [Prosecution Closing Brief](#), para. 99.

<sup>2092</sup> [Prosecution Closing Brief](#), para. 98.

<sup>2093</sup> [Prosecution Closing Brief](#), para. 100.

<sup>2094</sup> [Prosecution Closing Brief](#), para. 96.

<sup>2095</sup> [Prosecution Closing Brief](#), para. 102.

<sup>2096</sup> [Defence Closing Brief](#), para. 928.

<sup>2097</sup> [Defence Closing Brief](#), paras. 901-902.

gravity threshold, which was not met during the attack of 24 February 2003.<sup>2098</sup> Indeed, although some of these acts were of an opportunistic nature, others were linked to military necessity<sup>2099</sup> or were “indispensable for survival” and thus cannot be defined as pillaging.<sup>2100</sup> As in the case of the acts of destruction, the Defence submitted that some of those who appropriated property were in fact the rightful owners of such property, of which they had been dispossessed when, in 1999 and 2000, they fled the war in Ituri.<sup>2101</sup>

886. The common legal representative of the main group of victims submitted that the straw houses, the houses with roofing sheets, the schools, the churches<sup>2102</sup> and the farm animals, including livestock,<sup>2103</sup> were pillaged during the attack. Women and children allegedly participated in the pillaging,<sup>2104</sup> and hostages were used to transport the property.<sup>2105</sup> He added that, during and after the attack, the Lendu and Ngiti attackers destroyed and pillaged houses and other buildings in Bogoro.<sup>2106</sup> Lastly, upon travelling through Bogoro in the months following the attack, several witnesses could see that most of the buildings had been destroyed.<sup>2107</sup>

## 1. Applicable law

### a) Destruction of enemy property

887. Article 8(2)(e)(xii) of the Statute reads:

1. For the purposes of the Statute, “war crimes” means: [...]

<sup>2098</sup> [Defence Closing Brief](#), para. 907.

<sup>2099</sup> [Defence Closing Brief](#), paras. 908 and 910-911.

<sup>2100</sup> [Defence Closing Brief](#), paras. 919-923.

<sup>2101</sup> [Defence Closing Brief](#), paras. 912-914.

<sup>2102</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 174.

<sup>2103</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 186.

<sup>2104</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 182.

<sup>2105</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 185.

<sup>2106</sup> [Closing Brief of the common legal representative of the main group of victims](#), paras. 252-257.

<sup>2107</sup> [Closing Brief of the common legal representative of the main group of victims](#), paras. 189-193.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts : [...]

(xii) Destroying [...] the property of an adversary unless such destruction [...] be imperatively demanded by the necessities of the conflict. [...]

888. According to the Elements of Crimes, the establishment of this war crime requires, in addition to proof of a nexus between the crime and the existence of an armed conflict not of an international character and the perpetrator's awareness of the factual circumstances establishing the existence of such a conflict, that the following five elements be met: (1) "the perpetrator destroyed [...] certain property; (2) "such property was property of an adversary"; (3) "such property was protected from that destruction [...] under the international law of armed conflict"; (4) "the perpetrator was aware of the factual circumstances that established the status of the property"; and (5) "the destruction [...] was not required<sup>2108</sup> by military necessity".<sup>2109</sup>

#### **i. Objective elements**

889. By way of a preliminary comment, the Chamber notes that there is nothing to suggest that the constituent elements of the crime defined under article 8(2)(e)(xii) differ from those of the crime of destruction of enemy property committed in an international armed conflict, under article 8(2)(b)(xiii).<sup>2110</sup>

890. The destruction of property constitutes a war crime proscribed by article 8(2)(e)(xii) of the Statute where the perpetrator destroyed property belonging to the adversary and protected under the international law of armed conflict and where such destruction was not imperatively demanded by the necessities of war.

<sup>2108</sup> In the Chamber's view, the slight difference between, on the one hand, the wording of the crime under article 8(2)(b)(xiii) and the corresponding Elements of Crimes and, on the other hand, the wording of the crime under 8(2)(e)(xii) and the corresponding Elements of Crimes is inconsequential.

<sup>2109</sup> [Elements of Crimes](#), article 8(2)(e)(xii).

<sup>2110</sup> [Decision on the confirmation of charges in Mbarushimana](#), footnote 397. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), pp. 485-486.

891. Destruction entails acts such as setting ablaze, demolishing, or otherwise damaging property.<sup>2111</sup> In this regard, the Chamber considers that badly damaged property may be akin to partial destruction and thus fall under the definition of destruction. This, however, will require a case-by-case assessment in respect of the facts of the case.

892. The property concerned must belong to an “adversary” in the conflict. In the view of the Chamber, this means that the property in question – whether moveable or immovable, private or public – must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator,<sup>2112</sup> which can be established in the light of the ethnicity or place of residence of such individuals or entities.

893. To fall within the ambit of article 8(2)(e)(xii) of the Statute, partially or totally destroyed property must be protected by the international law of armed conflict, that is, it must not constitute “military objectives”. Military objectives are those “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>2113</sup> It is therefore important to assess the “military advantage” from the attacker’s perspective for each targeted object, and such an advantage must be definite and cannot in any way be indeterminate or potential.<sup>2114</sup> The Chamber recalls in this regard that it is for the Prosecution to establish that the destruction

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<sup>2111</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 174.

<sup>2112</sup> [Decision on the confirmation of charges](#), para. 310; [Decision on the confirmation of charges in Mbarushimana](#), para. 171.

<sup>2113</sup> Additional Protocol I, article 52(2).

<sup>2114</sup> [International Committee of the Red Cross \(Yves Sandoz et al. \(Eds\), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1986](#), paras. 2024 and 2028. See also [ICTY, Galić Trial Judgement](#), para. 51: “Whether a military advantage can be achieved must be decided [...] from the perspective of the ‘person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action’”, quoted *inter alia* in [ICTY, Strugar Trial Judgement](#), para. 295.

is not justified by military necessity. In such a case, civilian objects lose their protection only for such time as they are military objectives.<sup>2115</sup>

894. The destruction of property therefore does not constitute a crime under article 8(2)(e)(xii) of the Statute where such destruction is justified by military necessity.<sup>2116</sup> As did the Appeals Chamber of the ICTY in *Kordić and Čerkez*,<sup>2117</sup> the Chamber will adopt the definition of “military necessity” in article 14 of the Lieber Code of 24 April 1863, which lays down: “Military necessity [...] consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.<sup>2118</sup> With respect to this exception, article 8(2)(e)(xii) refers explicitly to cases where the destruction “[is] imperatively demanded by the necessities of the conflict”.<sup>2119</sup> The Chamber observes that only “imperative” reasons of military necessity, where the perpetrator has no other option in this regard, could justify acts of destruction which would otherwise be proscribed by this provision.<sup>2120</sup> To determine whether the destruction of property fell within military necessity, the Chamber will conduct a case-by-case assessment by considering, for example, whether the destroyed property was defended or whether specific property was destroyed.<sup>2121</sup>

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<sup>2115</sup> [Henckaerts, J-M. and L. Doswald-Beck \(Eds\), Customary International Humanitarian Law, Volume 1: Rules, Bruylant, 2006](#), p. 46, rule 10.

<sup>2116</sup> The Chamber notes that whilst there is a difference between the expression “imperatively demanded by the necessities of the conflict” at article 8(2)(e)(xii) of the Statute and “required by military necessity” at Element 8(2)(e)(xii)(5) of the Elements of Crimes, it considers it to be inconsequential to the due interpretation of that element.

<sup>2117</sup> [ICTY, \*Kordić and Čerkez Appeal Judgment\*](#), para. 686.

<sup>2118</sup> [Instructions for the Government of Armies of the United States in the Field \(1863\)](#), (“Lieber Code”), article 14.

<sup>2119</sup> Article 8(2)(e)(xii). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, 2003, pp. 485-486.

<sup>2120</sup> Zimmermann, Andreas, “Article 8(2)(b)(xiii)” in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, page 400. Whilst the analysis concerns the crime of destroying the enemy’s property in an international armed conflict (article 8(2)(b)(xiii)), in this specific regard, it is also applicable to article 8(2)(e)(xii).

<sup>2121</sup> See, in particular, [ICTY, \*Kordić and Čerkez Appeals Judgment\*](#), paras. 534 and 586.

895. Additionally, under customary law, attacks directed at military objectives may cause “collateral civilian damage” which is not unlawful per se, provided that the rules of custom prescribing proportionality in the conduct of hostilities were respected.<sup>2122</sup> The principle of proportionality defined in article 51(5)(b) of Additional Protocol I proscribes “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

896. Lastly, the Chamber notes that to the examination of the objective elements of this crime the Pre-Trial Chamber added the test of “extensive” destruction of property.<sup>2123</sup> In this regard, the Chamber notes that the addition of the “extensive” test derives from the chapeau of article 8(1), which reads:

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

It notes in this regard that the use of the term “in particular” in article 8(1) means specifically that these circumstances must not be considered as prerequisites to the exercise of the Court’s jurisdiction over such crimes.<sup>2124</sup> The Chamber further observes that neither the Statute nor the Elements of Crimes explicitly make provision for the “extensive” test in defining the crime of destruction of enemy property under article 8(2)(e)(xii). Indeed, they require, according to the exact terms of the element of the crimes of 8(2)(e)(xii)(1), only the destruction of

<sup>2122</sup> [Decision on the confirmation of charges](#), para. 313. See also [ICTY, Kordić and Čerkez Appeals Judgment](#), para. 52; [J-M. Henckaerts, and L. Doswald-Beck \(Eds\), Customary International Humanitarian Law, Volume 1: Rules, Bruylant, 2006](#), pp. 62-68, rule 14.

<sup>2123</sup> [Decision on the confirmation of charges](#), para. 314 referring to the [Geneva Convention \(IV\)](#), article 147 and the jurisprudence of the ICTY ([Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 September 2004](#), paras. 584-585). See also [Prosecution Closing Brief](#), para. 94.

<sup>2124</sup> [Decision on the confirmation of charges in Bemba](#), para. 211. See also *inter alia*, Michael Cottier, “I. Paragraph 1: ‘jurisdiction in respect of war crimes’” in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, page 300. See also as regards the crime of pillaging, [Decision on the confirmation of charges in Mbarushimana](#), para. 94.

“certain” property.<sup>2125</sup> The Chamber considers, therefore, that it need not take this test into account in its analysis of the crime of destruction of property under article 8(2)(e)(xii).

897. Lastly, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>2126</sup>

## ii. Subjective elements

898. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>2127</sup>

899. Under article 30 of the Statute, it is necessary to prove that the perpetrator acted deliberately or failed to act (1) in order to destroy intentionally the property or (2) whereas he or she was aware that its destruction would occur in the ordinary course of events.

900. The perpetrator must also have been aware that the property was property of the adversary.<sup>2128</sup> Furthermore, under article 8(2)(e)(xii)(4) of the Elements of Crimes, it is also required that the perpetrator was aware of the factual circumstances that established the “status of the property”, without it being necessary therefore to establish that the perpetrator had concluded, following assessment of the situation, that the property was effectively protected from destruction under international humanitarian law.<sup>2129</sup> Lastly, the perpetrator must

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<sup>2125</sup> See also Andreas Zimmermann, “Article 8(2)(b)(xiii)” in Triffterer O (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, p. 399. As stated in footnote 2120, the Chamber notes that whilst the analysis concerns the crime of destroying the enemy’s property in an international armed conflict (article 8(2)(b)(xiii)), it is also, in this specific regard, applicable to article 8(2)(e)(xii).

<sup>2126</sup> Elements of Crimes, article 8(2)(e)(xii)(6). See also “Section IX(B)(1) Applicable law”, para. 1176.

<sup>2127</sup> Elements of Crimes, General introduction, para. 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>2128</sup> Elements of Crimes, article 8(2)(e)(xii)(2).

<sup>2129</sup> Elements of Crimes, article 8(2)(e)(xii)(4). See also [Decision on the confirmation of charges](#), para. 316.

have been aware of the fact that the destruction was not justified by military necessity.<sup>2130</sup>

901. Furthermore, the Chamber must satisfy itself that the perpetrator was “aware of factual circumstances that established the existence of an armed conflict.”<sup>2131</sup>

## **b) Pillaging**

902. Article 8(2)(e)(v) reads as follows:

1. For the purpose of this Statute, “war crimes” mean: [ ... ]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]

(v) Pillaging a town or place, even when taken by assault.

903. According to the Elements of Crimes, the establishment of this war crime requires, in addition to proof of a nexus between the crime and the existence of an armed conflict not of an international character and the perpetrator’s awareness of the factual circumstances of the existence of an armed conflict, that the following three elements be met: (1) the perpetrator appropriated certain property; (2) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; and (3) the appropriation was without the consent of the owner.<sup>2132</sup>

### **i. Objective elements**

904. The pillaging of a town or place constitutes a war crime under article 8(2)(e)(v) of the Statute where it is committed by a person who appropriated certain property, either public or private, and the appropriation was without the consent of the owner.

<sup>2130</sup> Elements of Crimes, article 8(2)(e)(xii)(5).

<sup>2131</sup> Elements of Crimes, article 8(2)(e)(xii)(7). See also “Section IX(B)(1) Applicable law”, para. 1176.

<sup>2132</sup> Elements of Crimes, article 8(2)(e)(v).

905. In the opinion of the Chamber, the pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by combatants in their own interest.<sup>2133</sup>
906. According to footnote 62 of the Elements of Crimes, appropriations justified by military necessity cannot constitute the crime of pillaging.
907. With respect to the owner of the property, although the Defence contended<sup>2134</sup> that international humanitarian law requires that the property not belong to combatants or persons having directly participated in hostilities, the Chamber notes that this requirement appears neither in the Statute nor in the Elements of Crimes. Therefore, in the view of the Chamber, appropriation of private property belonging to combatants but not justified by military necessity constitutes the crime of pillaging.
908. The Defence further argued that pillaging must cross a specific threshold of gravity to constitute a war crime.<sup>2135</sup> The Chamber refers in this regard to its findings on the crime of destruction of property.<sup>2136</sup>
909. The Chamber notes, however, that the chapeau of article 8(2)(e), which enfolds article 8(2)(e)(v), clearly states that it encompasses other “serious” violations of the laws and customs applicable in conflicts not of an international character.<sup>2137</sup> The Chamber considers in this respect that the gravity of the violation must be determined on a case-by-case basis, with due regard for the particular

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<sup>2133</sup> [ICTY, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Trial Judgement, 31 March 2003 \(“Naletilić and Martinović Trial Judgement”\), para. 612; ICTY, Prosecutor v. Simić et al., Case No. IT-95-9-T, Trial Judgement, 17 October 2003, para. 99; International Committee of the Red Cross \(Jean Pictet \[Eds.\]\), Commentary of the Geneva Convention \(IV\) \(1956\), page 244.](#)

<sup>2134</sup> [Defence Closing Brief](#), para. 911. The Defence relied in that regard on article 33(2) of the Geneva Convention prohibiting pillage, which falls within Part III, “Status and Treatment of Protected Persons”, and on article 4(2)(g) of the Additional Protocol II prohibiting pillage and concerning persons who do not take a direct part or who have ceased to take part in hostilities.

<sup>2135</sup> [Defence Closing Brief](#), paras. 905-909.

<sup>2136</sup> See “Section VIII(C)(1)(a)(i) Destruction of enemy property: Objective elements”.

<sup>2137</sup> Statute, article 8(2)(e).

circumstances of the case.<sup>2138</sup> The Chamber will therefore determine the violation to be serious, where, for example, pillaging had significant consequences for the victims,<sup>2139</sup> even where such consequences are not of the same gravity for all the victims, or where a large number of persons were deprived of their property.<sup>2140</sup>

910. Lastly, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>2141</sup>

## ii. Subjective elements

911. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>2142</sup>

912. The criteria of intent and knowledge prescribed by article 30 of the Statute are applicable to pillaging as a war crime under article 8(2)(b)(v).<sup>2143</sup> In the instant case, it must be proven that the perpetrator acted deliberately or failed to act (1) in order to appropriate certain property or (2) whereas he or she was aware that the deprivation would occur in the ordinary course of events.

913. According to article 8(2)(e)(v)(2) of the Elements of Crimes, pillaging requires a particular mental element or *dolus specialis*. The latter consists in the fact that the perpetrator intended to “deprive the owner” of his or her property and to “appropriate [...] for private or personal use”. In the opinion of the Chamber, the

<sup>2138</sup> [ICTY, Kordić and Čerkez Appeal Judgement](#), paras. 80-82; [ICTY, Naletilić and Martinović Trial Judgement](#), para. 614.

<sup>2139</sup> [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 82; [ICTY, Naletilić and Martinović Trial Judgement](#), para. 613 and footnote 1509.

<sup>2140</sup> [ICTY, Naletilić and Martinović Trial Judgement](#), para. 614; [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 82.

<sup>2141</sup> Elements of Crimes, article (8)(2)(e)(v)(4). See also “Section IX(B)(1) Applicable Law”, para. 1176.

<sup>2142</sup> Elements of Crimes, General introduction para 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>2143</sup> Elements of Crimes, General introduction, para 2.

volitional element can be inferred from the specific conduct of the perpetrator of the deprivation.

914. Further, under article 30(3) of the Statute the perpetrator must also have known that the appropriation was without the consent of the owner.<sup>2144</sup> Lastly, the Chamber must satisfy itself that the perpetrator was aware of “factual circumstances that established the existence of an armed conflict”.<sup>2145</sup>

## **2. Findings of fact**

915. In this section, the Chamber will determine the criminal events during which acts were perpetrated against the property of the inhabitants of Bogoro on 24 February 2003. It will first address the acts of destruction of enemy property, before describing the acts of pillaging.

### **a) Destruction of enemy property**

916. By way of a preliminary comment, the Chamber notes that only the acts committed during the events of 24 February 2003 in Bogoro<sup>2146</sup> lie before it for determination and it will therefore not entertain acts of destruction that allegedly took place in the days following the attack.<sup>2147</sup>

917. The evidence shows that from the onset of the attack on Bogoro early in the morning of 24 February 2003, and once the fighting had ended, at around midday, the attackers, essentially Lendu and Ngiti from Walendu-Bindi *collectivité*,<sup>2148</sup> together demolished or set ablaze houses, especially thatched

<sup>2144</sup> Elements of Crimes, article (8)(2)(e)(v)(3).

<sup>2145</sup> Elements of Crimes, article (8)(2)(e)(v)(5). See also “Section IX(B)(1) Applicable Law”, para. 1176.

<sup>2146</sup> See Section “(I)(C) The charges”, para. 11. See also [Decision on the confirmation of charges](#), paras. 334 and 338, in particular.

<sup>2147</sup> See, for example, P-233, T. 83, p. 64; T. 84, pp. 34-35; T. 88, pp. 78-79; P-132, T. 139, p. 9; T. 143, p. 71.

<sup>2148</sup> P-323, T. 117, p. 60; P-268, T. 107, pp. 5 and 27; P-233, T. 83, pp. 78-79; P-161, T. 111, pp. 13 and 14; V-4, T. 234, p. 25. See also “Section VIII(A)(3) How the attack proceeded”.

houses<sup>2149</sup> and those with roofing sheets<sup>2150</sup> in which the predominantly Hema inhabitants of Bogoro lived.<sup>2151</sup>

918. Witnesses told the Court that at the time of the events, whilst in hiding in the bush near the centre of the village to escape the fighting,<sup>2152</sup> they could see and/or hear the attackers demolishing houses.<sup>2153</sup> Several of them, including P-268, who lived in Bogoro and was present during the attack on 24 February 2003, specified that the attackers moved between the houses, setting thatched houses on fire, smashing or demolishing those with roofing sheets<sup>2154</sup> and breaking down or dismantling doors and roofs.<sup>2155</sup>

919. Furthermore, the Chamber notes that according to several witnesses, the attackers assaulted Kavali school and removed its roof.<sup>2156</sup>

920. The Chamber notes that at the material time all schools in Bogoro had already been closed down for years, and Kavali School had become a military position for the UPC, which used it as an observation post.<sup>2157</sup> Located north of Bogoro, it was

<sup>2149</sup> See, in particular, P-132, T. 138, p. 83; T. 140, p. 56; P-161, T. 111, pp. 14-16; T. 114, p. 50; P-249, T. 135, pp. 40-41; P-268, T. 107, pp. 26 and 31-32; T. 108, pp. 10 and 72; P-287, T. 129, p. 53; T. 130, pp. 26 and 30; P-323, T. 117, pp. 59-61. See also P-166, T. 225, p. 61; D02-161, T. 268, pp. 24-25; D02-129, T. 272, p. 32.

<sup>2150</sup> See also P-161, T. 111, pp. 13 and 15; P-233, T. 83, pp. 74-75; P-268, T. 107, pp. 26-27 and 31; T. 108, p. 72; P-287, T. 129, p. 52; P-323, T. 117, pp. 59-61; V-4, T. 234, p. 24.

<sup>2151</sup> See, in particular, P-132, T. 138, p. 83; T. 140, p. 56; P-161, T. 111, pp. 14-16; T. 114, p. 50; P-233, T. 88, p. 79; P-249, T. 135, pp. 40-41; P-268, T. 107, pp. 14-15; T. 108, pp. 10 and 72; P-287, T. 129, p. 53; T. 130, p. 26; P-323, T. 117, pp. 59-61. See also P-166, p. 61; D02-161, T. 268, pp. 24-25; D02-129, T. 272, p. 32; P-161, T. 111, p. 13; P-233, T. 83, pp. 74-75; P-287, T. 129, p. 52; T. 130, p. 26; P-323, T. 117, pp. 59-61; V-4, T. 234, p. 24. See also "Section VIII(A)(2) "Bogoro village".

<sup>2152</sup> EVD-OTP-00044: Map of Bogoro annotated by P-268; P-268, T. 107, pp. 24-26; EVD-OTP-00010: Sketch on which Witness P-233 marked her first hiding-place with a red cross; P-323, T. 117, pp. 59-60.

<sup>2153</sup> P-323, T. 117, pp. 59-61.

<sup>2154</sup> P-268, T. 107, pp. 14-15, 26 and 31; T. 108, pp. 9 and 10; EVD-OTP-00043: Map of Bogoro; P-353, T. 215, pp. 25-26; P-287, T. 129, pp. 39 and 43; P-233, T. 83, pp. 74-75; T. 88, p. 34; P-323, T. 117, pp. 59-60; T. 118, p. 6. See also D02-01, T. 278, p. 30; V-4, T. 234, p. 24.

<sup>2155</sup> See, in particular, P-268, T. 107, pp. 14-15 and 31; P-353, T. 215, pp. 25-26.

<sup>2156</sup> P-268, T. 107, pp. 20 and 25; T. 108, pp. 9, 47-48; V-2, T. 232, pp. 39-40 (V-2 also noticed that the roof of Kavali School had been removed when he was there two months later). See also D03-707, T. 333, p. 44 (Mathieu Ngudjolo, who was in Bogoro on 28 March 2003, stated that he saw that Kavali Primary School, among other buildings, still had roofing sheets, but that its doors had been broken down); EVD-OTP-00285: MONUC Special report on the events in Ituri (DRC-OTP-0129-0353, para 66).

<sup>2157</sup> P-268, T. 107, pp. 19 and 25; T. 108, pp. 47-48.

geographically separate from the UPC camp<sup>2158</sup> at the centre of the village.<sup>2159</sup> The Chamber is, however, not in a position to determine whether the destruction of Kavali School took place on 24 February 2003, since Witnesses V-2 and D03-707 (that is, Mathieu Ngudjolo) found out about it several weeks after the attack and P-268 simply stated that he had “[TRANSLATION] heard”<sup>2160</sup> that the roofing sheets had been removed. Regarding the other schools in Bogoro, the Chamber is also unable to determine whether the acts of destruction were perpetrated there during the attack, as the only testimony on the topic provided no detail about damage caused or the circumstances of its commission.<sup>2161</sup>

921. Witnesses also mentioned the *manyata*, small houses occupied by UPC soldiers, some with their wives,<sup>2162</sup> which were within the military camp. D02-176, who at the time of the attack was with the UPC soldiers in the camp at the Institute, told the Court that the commanders of the UPC forces told the combatants to flee only after the *manyata* had been set ablaze, since the enemy, coming from Gety then Zumbe and the Bunia road, had succeeded in penetrating the camp and the battle seemed lost.<sup>2163</sup> The Chamber notes that the *manyata* were therefore set ablaze during the attack on the UPC camp even before the defenders of the camp were able to flee. The Chamber considers that the acts of destruction could have had a military justification from the view point of the attackers.

922. As to the local churches, the Chamber refers to the testimony of P-161 who said that from where he was hiding, he saw the attackers dismantle the roof of the CECA 20 church in Diguna Mission.<sup>2164</sup> Other witnesses, including P-233 and V-2, spoke of significant damage, noted after the events of 24 February 2003, to the

<sup>2158</sup> See, in particular, EVD-OTP-00043: Map of Bogoro on which Witness P-268 marked the site of his uncle’s house; P-268, T. 107, p. 10. EVD-OTP-00044: Map of Bogoro annotated by Witness P-268; P-268, T. 107, pp. 22-23; T. 108, p. 69; EVD-D02-00099: Sketch by P-166.

<sup>2159</sup> P-268, T. 107, pp. 22-23; T. 108, p. 69; EVD-OTP-00044: Map of Bogoro annotated by Witness P-268.

<sup>2160</sup> P-268, T. 108, p. 9.

<sup>2161</sup> P-233, T. 83, pp. 47-48.

<sup>2162</sup> D02-176, T. 255, p. 31 and 35; P-323, T. 117, pp. 9-10.

<sup>2163</sup> D02-176, T. 255, p. 36; T. 256, pp. 50-51.

<sup>2164</sup> P-161, T. 111, pp. 12-13 and 15.

buildings of Diguna Mission, in particular the removal of the roof of the CECA 20 church situated on the main road to the village.<sup>2165</sup> On the basis of this evidence, the Chamber considers that several buildings in Diguna Mission, in particular the CECA 20 church, were damaged during the attack on Bogoro on 24 February 2003.

923. Further, based solely on V-2's statements that her restaurant was razed during the attack, although she was not an eye witness to the event,<sup>2166</sup> the Chamber is not in a position to find that the destruction of that building by the attackers actually took place on 24 February 2003 as part of the attack by the Lendu and Ngiti combatants.

924. In the light of the foregoing, the Chamber finds that on 24 February 2003 in Bogoro, the attackers demolished and/or set ablaze or removed the roofs of the houses owned and occupied by the predominantly Hema population of Bogoro, as well as the buildings of Diguna Mission, including the CECA 20 church, which the population attended. These acts of destruction took place throughout the village and throughout the day, including once it had fallen into the grip of the attackers. The Chamber further found that houses occupied by soldiers, in particular the *manyata* inside the military camp, as well as the Kavali School building, which was used as a UPC observation post at the material time, were also targeted and considerably damaged by the attackers. The Chamber accepts, however, that as regards the *manyata*, the perpetration of the acts could be justified by military necessity. As for Kavali School, the Chamber is not in a position to establish that the damage reported was committed on 24 February 2003. Lastly, the Chamber was unable to establish that other property had also been destroyed during the attack on Bogoro on 24 February 2003 .

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<sup>2165</sup> P-233, T. 83, pp. 50-51 (P-233 noticed the damage when he returned in 2005); V-2, T. 232, pp. 39-40 (V-2 noticed that the roof of the CECA church had been removed when he was there two months later); P-166, T. 226, p. 40; T. 227, p. 25. See also EVD-OTP-00285: MONUC Special report on events in Ituri (DRC-OTP-0129-0353, para. 66).

<sup>2166</sup> V-2, T. 231, pp. 46 and 48.

## b) Pillaging

925. The Chamber previously found that as the attack was unleashed and, to a large extent, once the village was overrun, the attackers, including Ngiti combatants from Walendu-Bindi *collectivité*, removed the roofs from some houses and the Diguna Mission buildings, in particular from the CECA 20 church.<sup>2167</sup> The Chamber noted that they not only damaged but also took away, as seen and heard by numerous witnesses,<sup>2168</sup> everything they found including houseware.<sup>2169</sup>

926. Witness P-323, a UPC soldier who fled after the camp was taken and who was watching from an observation point, saw from a distance<sup>2170</sup> Ngiti and Lendu combatants taking away roofing sheets.<sup>2171</sup> The Chamber notes that the witness stated that he found “[TRANSLATION] it difficult to observe everything because he was far away” and to see exactly who was perpetrating such acts.<sup>2172</sup> The Chamber however considers him credible on account of his statement that he saw the attackers appropriating property in Bogoro.

927. After the camp was taken, the attackers also took away property stolen from a store.<sup>2173</sup> Witness P-287, when apprehended by the combatants, brought her attackers there,<sup>2174</sup> claiming that it was a weapons depot. The attackers, who also entered the neighbouring houses,<sup>2175</sup> broke down the door<sup>2176</sup> and rushed in to

<sup>2167</sup> The Chamber also notes P-161’s testimony that the roofing sheets removed from Diguna Mission were reused in Songolo. See also P-161, T. 111, pp. 13 and 15.

<sup>2168</sup> See, in particular, P-161, T. 111, pp. 13-15; P-268, T. 107, pp. 15 and 31; T. 108, pp. 9 and 72; P-287, T. 129, pp. 45-46; T. 130, pp. 26 and 27; P-323, T. 117, pp. 59-61; T. 118, p. 6.

<sup>2169</sup> P-268, T. 107, p. 15; P-287, T. 129, pp. 43-46; P-353, T. 213, pp. 46-48; T. 215, pp. 29, 45 and 47-48; V-4, T. 234, p. 24.

<sup>2170</sup> P-323, T. 118, pp. 6-7; P-166, T. 226, p. 7.

<sup>2171</sup> P-323, T. 117, pp. 59-61.

<sup>2172</sup> P-323, T. 117, pp. 59-60. The witness further stated that whilst he could “[TRANSLATION] clearly see the military camp”, he found it “[TRANSLATION] difficult to make out the people” (P-323, T. 118, p. 38).

<sup>2173</sup> P-287, T. 129, p. 34.

<sup>2174</sup> P-287, T. 129, pp. 30 and 34.

<sup>2175</sup> P-287, T. 129, pp. 43-46.

<sup>2176</sup> P-287, T. 129, pp. 34 and 42-43.

take money and “[TRANSLATION] various items” including drinks, clothing and other goods.<sup>2177</sup>

928. Regarding the value of the property stolen, various witnesses underscored before the Chamber the qualitative and quantitative loss they had incurred as a result of the attack, whether roofing sheets, furniture from their homes or animals (cows, goats and fowl)<sup>2178</sup> – all considered essential to their daily life.<sup>2179</sup> Contrary to the testimonies of Witness D02-148, Germain Katanga and Mathieu Ngudjolo, who asserted that there was no livestock in Bogoro on 24 February 2003,<sup>2180</sup> several witnesses, whilst acknowledging that they could not be sure,<sup>2181</sup> maintained that livestock had indeed been stolen during the attack. Witness P-353, in particular, noticed that “over twenty” cows and goats had been herded by some boys from Bogoro at the attackers’ behest and that the livestock was then driven out of the village.<sup>2182</sup> Witness V-4 stated that the attackers had seized his herd of about 130 head of cattle,<sup>2183</sup> further stating that the number included neither the calves nor the heifers.<sup>2184</sup> The Chamber notes, however, that according to Witness D02-176, V-4’s cows as well as his, were in Kasenyi on the day of the attack on Bogoro.<sup>2185</sup> In the light of the contradictory testimonies, the Chamber is therefore unable to establish whether the livestock was actually stolen. It

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<sup>2177</sup> P-287, T. 129, p. 43.

<sup>2178</sup> P-166, T. 225, pp. 55 and 61-62; V-4, T. 234, pp. 23-25.

<sup>2179</sup> V-4, T. 234, pp. 23-24; P-161, T. 111, p. 45; P-166, T. 225, pp. 56 and 59.

<sup>2180</sup> Mathieu Ngudjolo believed, although was uncertain, that there were no cattle because of the frequent attacks (D03-707, T. 333, p. 44-46). According to Germain Katanga, the people of Bogoro had no land on which to graze their animals, and had cattle been rustled they would have necessarily passed through Aveba to be sold in North Kivu, which was not so. (D02-300, T. 318, pp. 25-27; T. 324, pp. 55-56). D02-148, however, provides no detail (D02-148, T. 280, p. 55).

<sup>2181</sup> D02-300, T. 318, p. 26; D03-707, T. 333, p. 46.

<sup>2182</sup> P-353, T. 213, pp. 44-47; T. 215, pp. 13 and 28. According to the witness, the cows belonged to the inhabitants of Bogoro, as only the Hema owned cows.

<sup>2183</sup> V-4, T. 234, p. 23.

<sup>2184</sup> V-4, T. 234, p. 36.

<sup>2185</sup> D02-176, T. 255, pp. 47-48.

acknowledges, however, that V-4's goats and chickens could have been stolen by the combatants during the attack.<sup>2186</sup>

929. Witness P-161 also testified that he lost his livestock but retracted the exact breakdown of the losses resulting specifically from the attack on 24 February 2003<sup>2187</sup> and gave varying accounts of how his animals were killed or stolen by the attackers.<sup>2188</sup> The Chamber notes that other witness confirmed that P-161 was a herder,<sup>2189</sup> and, moreover, that the loss of his livestock made him turn to farming.<sup>2190</sup> These two observations therefore suggest that the loss of his animals ensued at least in part from the attack. However, the Chamber considers the evidence insufficient to determine specifically whether it actually amounted to theft committed during the attack on Bogoro on 24 February 2003.

930. D02-148, a Ngiti combatant from Walendu-Bindi *collectivité*, took part in the attack on Bogoro under the orders of Commanders Yuda and Dark<sup>2191</sup> and confirmed that property had been taken away in spite of the prohibitions of the fetish-priests which were still in force after the fighting.<sup>2192</sup> According to this witness, the combatants from the various camps who took part in the attack each appropriated "[TRANSLATION] the spoils of war", which they took back to their camps.<sup>2193</sup> He stated that each combatant acted as he wished, appropriating his own "[TRANSLATION] spoils of war"<sup>2194</sup> to use as he pleased<sup>2195</sup> and would not

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<sup>2186</sup> V-4, T. 234, p. 24.

<sup>2187</sup> P-161, T. 111, p. 32; T. 112, p. 43.

<sup>2188</sup> P-161, T. 109, p. 52- 53; T. 111, p. 13-14, 32 and 36; T. 112, p. 42-43. See, however, P-353, T. 215, p. 28, who stated that he saw the attackers herd about 20 cows at the Institute and that they forced youths who had just been captured to drive them towards Gety. The Chamber does not know whether P-161's cows were among them.

<sup>2189</sup> D02-176, T. 255, p. 43; EVD-OTP-00202: Previous statement of Witness P-166 (DRC-OTP-1007-0012-R04, para. 58).

<sup>2190</sup> P-161, T. 109, p. 17.

<sup>2191</sup> D02-148, T. 279, pp. 14-15.

<sup>2192</sup> D02-148, T. 280, pp. 32-33.

<sup>2193</sup> D02-148, T. 280, p. 58.

<sup>2194</sup> D02-148, T. 280, pp. 57-58.

<sup>2195</sup> D02-148, T. 280, p. 58.

necessarily remit part of the spoils to his commander or camp head.<sup>2196</sup> The Accused even stated that since the combatants were not paid a salary, “[TRANSLATION] when [they] found something [they] grabbed it”.<sup>2197</sup> Mathieu Ngudjolo, who went to the scene on 28 March 2003, stated that he saw many houses whose doors had been broken down and which had been stripped bare.<sup>2198</sup>

931. According to several other witnesses, women and children, some armed, pillaged alongside the attackers and transported the property once the enemy was neutralised.<sup>2199</sup> Various witness who were inhabitants of Bogoro also stated that they had been forced to transport property for the attackers. Witness P-353 thus stated that she had had to transport to a Ngiti Militia military camp<sup>2200</sup> property belonging to her or to others.<sup>2201</sup> Similarly, the combatants asked P-287 to help them transport items which had been stolen in his presence from a shop.<sup>2202</sup> The Chamber notes, finally, that according to P-268, attackers removed and took away property, including roofing sheets and furniture stolen from Raymond Bahemuka Bamaraki’s house.<sup>2203</sup>

932. In the light of the foregoing, the Chamber finds that during the attack on Bogoro on 24 February 2003, after the village was overrun, property belonging to the predominantly Hema civilian population of Bogoro, which was essential to its daily life, including roofing sheets, furniture and various other personal effects, food, and livestock and animals, was taken away by the attackers and by women and children, some armed, who had come to assist. The combatants also forced

<sup>2196</sup> D02-148, T. 280, pp. 58-59.

<sup>2197</sup> D02-300, T. 316, pp. 39-40.

<sup>2198</sup> D03-307, T. 332, pp. 32-33; T. 333, p. 44.

<sup>2199</sup> P-132, T. 140, pp. 46-47 and 56; P-161, T. 111, pp. 12-14; P-268, T. 107, pp. 26-27 and 37-39; T. 108, pp. 26-27 (The witness saw children take part in destroying houses and argue over the spoils they wanted to take away [in this respect, see, in particular, P-268, T. 107, pp. 26-27 and 39]); P-287, T. 129, pp. 45-50; T. 130, pp. 20 and 30; P-323, T. 117, p. 55-57 and 60-61; P-353, T. 213, p. 22; T. 215, pp. 12-13.

<sup>2200</sup> See Annex D.

<sup>2201</sup> P-353, T. 213, pp. 22, 25-28; T. 215, pp. 12-13. See also P-353, T. 215, p. 28.

<sup>2202</sup> P-287, T. 129, pp. 44-46. The witness was, however, able to escape before transporting the property.

<sup>2203</sup> P-268, T. 107, p. 15; T. 108, pp. 9 and 71.

people captured in Bogoro, including women, and Witness P-353 in particular, to transport the stolen property.

**c) Perpetrators of the acts**

933. Having regard to certain testimony, the Chamber finds that some Bira, including women and children,<sup>2204</sup> were present at the *locus in quo*, either during the attack generally<sup>2205</sup> or during the specific acts of destruction<sup>2206</sup> or pillaging.<sup>2207</sup> Equally, whereas some testimonies briefly mention the participation of APC combatants, or in any event persons in APC uniform,<sup>2208</sup> the Chamber notes that most witnesses clearly identified the people who, jointly, committed the acts as being Lendu and Ngiti combatants,<sup>2209</sup> alongside whom were women and children, some armed.<sup>2210</sup> In the light of its 15 May 2013 Decision, the Chamber will rely only on evidence that may establish that the acts committed during the attack on Bogoro were perpetrated by Ngiti combatants of Walendu-Bindi *collectivité*. The Chamber therefore has not relied on the evidence pertaining to acts which were allegedly committed only by Lendu combatants from Bedu-Ezekere *groupement* or evidence which does not refer to the involvement of Ngiti combatants.

934. To establish whether Ngiti combatants committed acts of destruction and/or appropriation of property on 24 February 2003 in Bogoro, the Chamber considered with circumspection the various exhibits on record, in particular *viva*

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<sup>2204</sup> P-233, T. 88, pp. 28 and 34 (The witness stated that the Bira pillaged property which was then transported by some women and children. He further stated that before the 24 February 2003 attack, some Bira used to come to pillage in Bogoro).

<sup>2205</sup> P-161, T. 111, pp. 6 and 13; T. 116, p. 14; P-166, T. 226, pp. 29-30; P-233, T. 83, pp. 72-73.

<sup>2206</sup> P-161, T. 111, p. 14; P-233, T. 83, pp. 74-79; T. 88, pp. 28 and 34.

<sup>2207</sup> P-233, T. 88, pp. 28 and 34.

<sup>2208</sup> P-323, T. 118, pp. 23-24; D02-148, T. 279, p. 32.

<sup>2209</sup> P-323, T. 117, p. 60; P-268, T. 107, pp. 5 and 27; P-233, T. 83, p. 79; P-161, T. 111, pp. 13 and 14; V-4, T. 234, pp. 24-25.

<sup>2210</sup> P-132, T. 140, pp. 46-47 and 56; P-161, T. 111, pp. 12-14; P-268, T. 107, pp. 26-27 and 39; P-287, T. 129, pp. 46-50; T. 130, p. 20; P-323, T. 117, pp. 55-57 and 60-61. See also, in general, for the participation of Lendu women in pillaging, D03-66, T. 298, pp. 8-9.

*voce* evidence mentioning specific acts committed by Ngiti combatants. Where the witnesses' account of certain criminal acts did not state the ethnic group of the attackers, the Chamber was sometimes able to establish it on the basis of the time and place of the acts and in the light of the testimony as a whole. Where this was impossible, the Chamber did not hold the Accused responsible for the acts concerned. Where the witnesses made reference to joint Ngiti and Lendu participation, the Chamber considered that the attackers had acted together.

935. The Chamber notes firstly that all the witnesses who stated that Bogoro village had suffered significant pillaging also said that the acts were perpetrated by Ngiti, among others.<sup>2211</sup> In the particular case of Witness P-268's testimony, the Chamber considers that the destruction and pillaging of houses he mentioned, including Raymond Bahemuka Bamaraki's home, cannot be considered to be the work of Ngiti. In fact, the Witness testified that the attackers who laid waste and pillaged came from the direction of Zumbe and from Katonie,<sup>2212</sup> which are located in Lendu territory.<sup>2213</sup> Other testimonies, however, establish a nexus between the commission of such acts and Ngiti combatants. In fact, several witnesses who gave accounts of such acts explicitly stated that Ngiti combatants had participated therein, which allows the Chamber to find beyond reasonable doubt, that Ngiti combatants committed theft inside and on the houses, removing some of their roofs or setting them ablaze.<sup>2214</sup>

936. As to the destruction of the Diguna Mission, and the CECA 20 church in particular, by removal of roofs and pillaging, the Chamber is not in a position to establish whether the Ngiti combatants took part. The Chamber considers that whilst P-161 was able to see the event, he could not see which attackers engaged

<sup>2211</sup> P-323, T. 117, pp. 59-60; P-132, T. 138, p. 83; P-161, T. 111, pp. 13-14; D02-148, T. 280, p. 32.

<sup>2212</sup> P-268, T. 107, p. 15; T. 108, pp. 9 and 71.

<sup>2213</sup> P-268, T. 107, p. 26. For Zumbe, see D03-44, T. 292, pp. 9-11; EVD-OTP-00273: Sketch delimiting Bedu-Ezekere *groupement* made by D03-88; D03-88, T. 303, pp. 37-38. For Katonie, see EVD-OTP-00274: Sketch delimiting Bedu-Ezekere *groupement*, annotated by D03-88; D03-88, T. 303, p. 46.

<sup>2214</sup> P-323, T. 117, pp. 59-61; P-353, T. 215, pp. 25-26; P-287, T. 129, pp. 53-54; P-132, T. 138, pp. 82-83; V-4, T. 234, p. 34; D02-148, T. 280, p. 32. See also P-233, T. 83, pp. 74-79.

in such acts, as he was too far away.<sup>2215</sup> Whereas other evidence corroborates these facts,<sup>2216</sup> none can be relied on to determine the perpetrator, which precludes the Chamber's establishment of the participation of Ngiti militia in such acts.

937. The Chamber also considers that the pillaging of the store described by P-287 was the work of the Lendu of Bedu-Ezekere. Whereas the combatants who forced her out of her house and killed her child were Lendu and Ngiti,<sup>2217</sup> P-287 subsequently made plain that the attackers who pillaged the store wanted to take home the property they were stealing, that is, towards the hill where Zumbe,<sup>2218</sup> a Lendu village, is located.<sup>2219</sup>

938. Regarding the theft of livestock, goats and chickens reported by P-353, V-2 and V-4, the Chamber first notes that V-2 stated that the Lendu had taken her animals,<sup>2220</sup> leading the Chamber to exclude Ngiti involvement in the theft. It notes, however, that V-4 stated that the attackers who had appropriated her animals were Lendu and Ngiti.<sup>2221</sup> Further, P-353 and other captives were forced by the attackers to carry suitcases of stolen property towards a Ngiti camp.<sup>2222</sup> P-353 further stated that the Ngiti combatants also forced young men who had been captured to herd livestock to their camp.<sup>2223</sup> Whilst the Chamber is unable to determine the owner of the cows and goats, it finds that Ngiti combatants stole cows and goats belonging to inhabitants of Bogoro and they forced them to herd them to a Ngiti camp.

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<sup>2215</sup> See "Section V(B)(3) Credibility of P-161", paras. 224 and 227; "Section VIII(C)(2)(a) Destruction of enemy property", para. 922 and "Section VIII(C)(2)(b) Pillaging", para. 925.

<sup>2216</sup> P-166, T. 226, p. 40; T. 227, p. 25; P-233, T. 83, pp. 50-51; V-2, T. 232, pp. 39-40; EVD-OTP-00285: MONUC special report on the events in Ituri (DRC-OTP-0129-0353, para. 66).

<sup>2217</sup> P-287, T. 129, pp. 29-31; T. 130, pp. 66 and 67. See also "Section VIII(B)(2)(g) Perpetrators of the acts", para. 847.

<sup>2218</sup> P-287, T. 129, pp. 44-45.

<sup>2219</sup> See Annex D.

<sup>2220</sup> V-2, T. 231, p. 46.

<sup>2221</sup> V-4, T. 234, pp. 24-25.

<sup>2222</sup> P-353, T. 213, pp. 46-48; T. 215, pp. 29, 45 and 47-48. See also P-353, T. 111, pp. 12-13 and 15.

<sup>2223</sup> P-353, T. 213, pp. 46-48.

939. Lastly, on the basis of the testimonies of P-353 and V-4,<sup>2224</sup> the Chamber found that houseware was taken away. In fact, P-353 stated that she had been forced, as indicated above, to carry suitcases filled with houseware to a Ngiti camp<sup>2225</sup> and V-4 clearly stated that the plunderers were Lendu and Ngiti.<sup>2226</sup> The Chamber however will not take into account the theft of houseware reported by P-268<sup>2227</sup> and P-287,<sup>2228</sup> since, as noted above, these acts were perpetrated by the Lendu.<sup>2229</sup>

940. Finally, the Chamber notes that the commission of destruction and pillaging by Ngiti combatants during the 24 February 2003 attack on Bogoro was confirmed by witnesses who were themselves Ngiti. Hence, as stated earlier, D02-148, a Ngiti combatant who took part in the attack, explained to the Chamber that some combatants disregarded the fetish-priests' prohibition on theft because the temptation was too strong, and they pillaged the few possessions of the inhabitants of Bogoro.<sup>2230</sup> Furthermore, although his statement is based on hearsay, as he did not participate in the attack himself, D02-01, who is Ngiti and the secretary of one of the Ngiti commanders,<sup>2231</sup> confirmed that houses in Bogoro had been unroofed by Ngiti combatants.<sup>2232</sup> The Chamber will take this witness's testimony into account, precisely because of his proximity to the Ngiti combatants and because it corroborates other witness testimony concerning theft of property by the combatants.

941. In the light of the body of evidence on record, and although Lendu combatants, APC soldiers, Bira and individuals not belonging to any armed force took part in the acts of destruction and pillaging charged, the Chamber finds it established that houses belonging to Bogoro inhabitants were set on fire and

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<sup>2224</sup> V-4, T. 234, pp. 24-25.

<sup>2225</sup> P-353, T. 213, pp. 46-48; T. 215, pp. 29, 45 and 47-48. See also P-161, T.111, pp. 12-13 and 15.

<sup>2226</sup> V-4, T. 234, pp. 24-25.

<sup>2227</sup> P-268, T. 107, p. 15.

<sup>2228</sup> P-287, T. 129, pp. 43-46.

<sup>2229</sup> See "Section VIII(C)(2)(c) Perpetrators of the acts", paras. 935 and 937.

<sup>2230</sup> D02-148, T. 280, pp. 32-33.

<sup>2231</sup> D02-01, T. 277, pp. 9-11.

<sup>2232</sup> D02-01, T. 278, p. 30.

destroyed and the property of the inhabitants was stolen and taken away during the attack of 24 February 2003, including by Ngiti combatants of Walendu-Bindi *collectivité*.

### 3. Conclusions of law

#### a) Conclusions on the war crime of destruction of enemy property

942. The Chamber found that houses and other buildings for civilian use were destroyed in Bogoro on 24 February 2003. Save for UPC troops' quarters, the properties destroyed were houses used by the predominantly Hema population of that village and public buildings including the CECA 20 church located in Diguna Mission.

943. The Chamber notes that the predominantly Hema population of Bogoro were considered "adversaries" by the attackers because of their allegiance to the UPC.<sup>2233</sup>

944. It notes the Defence argument that the Ngiti owned some of the property, as they had initially lived in Bogoro.<sup>2234</sup> The Chamber observes that Germain Katanga also stated that the Ngiti civilians<sup>2235</sup> who previously lived in Bogoro and had abandoned everything to take refuge in the surrounding areas had returned to retrieve the property they had left behind.<sup>2236</sup> According to Witness D02-176, the Lendu (the term being used in its general sense) were the first to leave Bogoro in or around 1999, and the houses which they had left vacant were occupied by "[TRANSLATION] refugees and persons displaced by war."<sup>2237</sup> However, the Chamber cannot rely on such general testimony to find that the Ngiti were the

<sup>2233</sup> See "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants"; "Section VIII(A)(2) Bogoro Village."

<sup>2234</sup> [Defence Closing Brief](#), para. 928.

<sup>2235</sup> D02-300, T. 324, p. 49.

<sup>2236</sup> D02-300, T. 318, pp. 21 and 25.

<sup>2237</sup> D02-176, T. 256, pp. 42-43. See also P-233, T. 88, p. 79 (Most ethnic groups apart from the Hema had left the village before the attack on 24 February 2003).

rightful owners of the houses which were destroyed or set on fire and considers them to have been the property of the predominantly Hema inhabitants of Bogoro, who were occupying them at the time of the attack on 24 February 2003. Further, the Chamber cannot reasonably find that the rightful owners of the property had come back to destroy them. It hence finds that the buildings destroyed were, for the most part, *de facto* and *de jure* the property of the Hema civilian population of Bogoro. Save for the houses where the UPC troops were quartered, there is no evidence to establish that by their nature, location and use, they constituted or could even be mistaken for military objectives.

945. Further, the Chamber found that public buildings, that is, the Diguna Mission, and in particular the CECA 20 church, were destroyed by non-Ngiti attackers, namely Lendu combatants, women and children. Although located in Bogoro village, the houses targeted and the CECA 20 church in the mission were clearly distinct from the UPC camp, which was located at the Bogoro Institute and geographically circumscribed.<sup>2238</sup>

946. Conversely, the Chamber considers that the burning and destruction of the *manyata* could reasonably constitute a military objective. In fact, the acts were committed during the attack on the UPC camp; the *manyatas* were inside the camp and were soldiers' quarters. The Chamber will therefore not consider these acts as constituting the crime of destruction.

947. In view of the fact that the perpetrators of the crimes were combatants and of the time when and the manner in which the destruction took place, the Chamber considers that the acts of destruction charged were perpetrated intentionally. In the view of the Chamber, the perpetrators were aware of the factual circumstances establishing that the property which they were destroying and setting on fire was enemy property and that its destruction was not justified by

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<sup>2238</sup> See Section "VIII(A)(2) Bogoro Village". See also EVD-D03-00072, EVD-D03-00075: Sketch of Bogoro.

military necessity. On the basis of these same considerations, the Chamber finds that the combatants were aware of the factual circumstances establishing the “status of the property”.

948. In the light of such evidence and its findings ensuing from its examination of the contextual elements of the war crimes,<sup>2239</sup> the Chamber therefore finds beyond reasonable doubt that Ngiti combatants committed the crime of destruction of enemy property under article 8(2)(e)(xii) of the Statute during the 24 February 2003 attack on Bogoro .

### **b) Conclusions on the crime of pillaging**

949. The Defence submitted that, should the Chamber find that acts of pillaging were committed, the circumstances in which the property in question was appropriated – survival was in fact at stake – must be taken into account, so as to exclude the perpetrator’s criminal responsibility.<sup>2240</sup>

950. The Chamber considers that Bogoro was extensively pillaged during the 24 February 2003 attack.<sup>2241</sup> It found that roofing sheets were removed from houses and taken away by Ngiti combatants,<sup>2242</sup> along with houseware<sup>2243</sup> and livestock<sup>2244</sup> owned by the civilian population of Bogoro. The Chamber also found that roofs from the Diguna Mission, in particular the CECA 20 church, were removed by Lendu attackers,<sup>2245</sup> constituting, in the view of the Chamber, the crime of pillaging within the meaning of article 8(2)(e)(v) of the Statute, for which, nonetheless, it will not hold the Accused responsible, insofar as it cannot attribute such acts to Ngiti combatants.

<sup>2239</sup> See “Section IX(B)(3)(b) Nexus between the crimes and the non-international armed conflict”.

<sup>2240</sup> [Defence Closing Brief](#), paras. 919-923.

<sup>2241</sup> P-132, T. 138, p. 83; P-161, T. 111, pp. 13-14; P-323, T. 117, pp. 59-60; D02-148, T. 280, p. 32.

<sup>2242</sup> See “Section VIII(C)(2)(c) Perpetrators of the acts”, para. 935.

<sup>2243</sup> See “Section VIII(C)(2)(c) Perpetrators of the acts”, para. 939.

<sup>2244</sup> See “Section VIII(C)(2)(c) Perpetrators of the acts”, para. 938.

<sup>2245</sup> See “Section VIII(C)(2)(c) Perpetrators of the acts”, para. 936.

951. The property was stolen for essentially personal reasons<sup>2246</sup> by combatants as well as by women and children, some armed, who took part in the pillaging alongside the attackers and who transported the property to Ngiti villages after the combatants had vanquished the enemy.<sup>2247</sup> The evidence shows that each of them “[TRANSLATION] acted in their own interest”<sup>2248</sup> and “[TRANSLATION] acted as they wished”,<sup>2249</sup> seizing the spoils and using them as they pleased.<sup>2250</sup> The Chamber notes in this respect that the Accused himself testified that as the combatants had no salary, pillaging was a form of remuneration.<sup>2251</sup>

952. Having regard to the evidence put before it, the Chamber also finds that the acts of appropriation of property in which the Ngiti combatants engaged were intentional and that they acted out of private or personal gain. In the view of the Chamber, even where food alone was involved,<sup>2252</sup> the pillaging was therefore not perpetrated out of military necessity,<sup>2253</sup> as the Defence alleged,<sup>2254</sup> but out of personal gain.

953. Whereas there is a great disparity in the value of the pillaged property – kitchen-ware and furniture but also livestock, goats and chickens, as the case may be – the property represented the bulk of the owners’ possessions. To the extent that the civilians were deprived of their personal houseware and even their livestock, property essential to their daily life, the Chamber is of the view that the property was in fact of great value to them. In the view of the Chamber, its

<sup>2246</sup> P-323, T. 117, p. 60; D02-148, T. 280, p. 58. See also D02-300, T. 316, pp. 39-40.

<sup>2247</sup> See “Section VIII(C)(2)(b) Pillaging”, para. 931; “Section VIII(C)(2)(c) Perpetrators of the acts”, para. 933.

<sup>2248</sup> P-323, T. 117, p. 60.

<sup>2249</sup> D02-148, T. 280, p. 58.

<sup>2250</sup> D02-148, T. 280, p. 58.

<sup>2251</sup> D02-300, T. 316, pp. 39-40.

<sup>2252</sup> See ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeals Judgement, para. 351: “With respect to the plunder in Vareš, the Trial Chamber found that ‘an official and organised procedure existed to collect certain property, particularly food, which the 7<sup>th</sup> Brigade considered to be part of the war booty’, but that the property plundered did not fall within the category of property having direct military use” (footnotes omitted).

<sup>2253</sup> Elements of Crimes, article 8(2)(e)(v)(2), footnote 62.

<sup>2254</sup> [Defence Closing Brief](#), paras. 910-911.

appropriation had significant consequences for the people from whom it was taken. The recurrence and abundance of the instances of this conduct attest to the gravity of the violation, and the Chamber will entertain the acts of pillaging committed as a whole during the attack in order to assess the criterion of gravity with precision.

954. Given the circumstances – the appropriation was effected as part of the attack – and the evidence tendered, it also appears that the appropriation took place without the consent of the owner of the property, as the civilians were attempting to flee or hide. The evidence shows, for example, that houses were pillaged in the absence of their owners<sup>2255</sup> and that captives, in particular women, were forced to transport the pillaged property.<sup>2256</sup>

955. Lastly, the Defence argued that in accordance with article 31(1)(d) of the Statute, the perpetrators must be excluded from criminal responsibility, as the appropriation concerned property essential to survival.<sup>2257</sup> Such an assessment cannot however be made in the abstract, but must be undertaken on a case-by-case basis,<sup>2258</sup> taking account of the fact that “in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property”<sup>2259</sup> – a standard followed by several trial chambers of the ICTY.<sup>2260</sup>

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<sup>2255</sup> See, *inter alia*, P-268, T. 107, p. 15; T. 108, pp. 9 and 70-72.

<sup>2256</sup> See “Section VIII(C)(2)(b) Pillaging”, para. 931.

<sup>2257</sup> [Defence Closing Brief](#), paras. 919-923.

<sup>2258</sup> See also in this regard, Kai Ambos, *Treatise on International Criminal Law*, Vol. I: Foundations and General Part (2013), page. 358.

<sup>2259</sup> See ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Judgement, 15 March 2006 (“*Hadžihasanović and Kubura* Trial Judgement”), para. 53: The cumulative conditions laid down by the ICTY are as follows: “(i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate; and (iv) the situation was not voluntarily brought about by the perpetrator himself”.

<sup>2260</sup> *Hadžihasanović and Kubura*, Trial Judgement, para 53; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68, oral decision, 8 June 2005, p. 9027.

956. The Chamber notes that the property pillaged sometimes consisted of livestock, but mainly included roofing sheets, furniture or personal belongings. In specific situations, appropriation of livestock and food could, indeed, and on its own, constitute a response to a grave, ongoing or imminent threat to physical integrity. The Chamber notes that it was the case that the Lendu and Ngiti communities and combatants were enduring a very difficult situation at the time,<sup>2261</sup> forcing people to go to other villages to pillage.<sup>2262</sup> In this respect the Chamber refers to its finding that the inhabitants of Walendu-Bindi *collectivité* were encircled or hemmed in and that their suffering was undeniable.<sup>2263</sup> However, without downplaying the problems faced by that *collectivité* at the time,<sup>2264</sup> the Chamber considers that there is no indication that its inhabitants were in a situation of grave, ongoing or imminent threat to their existence comparable to a famine.

957. In the light of the body of evidence and the findings ensuing from its examination of the contextual elements of the war crimes,<sup>2265</sup> the Chamber finds beyond reasonable doubt that during the 24 February 2003 attack on Bogoro, Ngiti combatants pillaged houses, livestock and houseware, thereby committing pillaging constituting a war crime under article 8(2)(e)(v) of the Statute.

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<sup>2261</sup> See, for example, EVD-D03-00098: Grievance Letter (See, in particular, DRC-OTP-0194-0351 to DRC-OTP-0194-0352); D02-300, T. 320, p. 32.

<sup>2262</sup> P-12, T. 197, pp. 54-55. See also P-233, T. 88, pp. 7- 8 and 10-12; V-2, T. 232, p. 22.

<sup>2263</sup> See "Section VII(B) Evolution of the group of group of Ngiti commanders and combatants of Walendu-Bindi *collectivité* as of October 2002 including in preparation for the attack on Bogoro", paras. 570-571.

<sup>2264</sup> D02-300, T. 320, p. 32. According to the Accused, the Ngiti combatants came to Bogoro to pillage what they had lost (D02-300, T. 318, p. 25 ; T. 324, pp. 48-49 and 52). However, he also stated that "[TRANSLATION] we could not only pillage livestock for food" but also to sell it (D02-300, T. 318, p. 27). According to V-2, Ngiti women came to Bogoro market with their wares (V-2, T. 232, p. 24). Various testimonies make clear that the Lendu came to stock up in Walendu-Bindi, especially at Tatu market (D03-66, T. 296, pp. 20-21 and 23-24; T. 297, pp. 9-10. See also D02-300, T. 320, pp. 33-34 and 37).

<sup>2265</sup> See "Section IX(B)(3)(b): Nexus between the crimes and the non-international armed conflict".

#### D. CRIMES OF RAPE AND SEXUAL SLAVERY AS CRIMES AGAINST HUMANITY (ARTICLE 7(1)(G) OF THE STATUTE) AND WAR CRIMES (ARTICLE 8(2)(E)(VI))

958. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that during and after the attack on the village of Bogoro on 24 February 2003, members of the FNI and the FRPI committed acts of rape and sexual slavery constituting war crimes under article 8(2)(b)(xxii) of the Statute<sup>2266</sup> and crimes against humanity under article 7(1)(g) of the Statute.<sup>2267</sup> According to the Pre-Trial Chamber, combatants of those two movements raped civilians during and after the attack, and some of the women who had been subjected to these acts were also abducted, imprisoned and forced to become the wives of the combatants, to engage in acts of a sexual nature, to carry out household chores for them and, generally, to obey them.<sup>2268</sup>

959. The Prosecution submitted that evidence on record established beyond reasonable doubt that during and after the attack on Bogoro, Witnesses P-132, P-249 and P-353 and other young women were raped by Lendu and Ngiti combatants.<sup>2269</sup> According to the Prosecution, they were abducted by the combatants and taken to their camps, where they were sexually enslaved.<sup>2270</sup> There they were forcibly married to commanders and combatants and raped repeatedly,<sup>2271</sup> physically abused,<sup>2272</sup> deprived of liberty<sup>2273</sup> and forced to do

<sup>2266</sup> [Decision on the confirmation of charges](#), paras. 347 and 354.

<sup>2267</sup> [Decision on the confirmation of charges](#), paras. 442 and 444.

<sup>2268</sup> [Decision on the confirmation of charges](#), paras. 347-349, 434-435 and 442-443.

<sup>2269</sup> [Prosecution Closing Brief](#), paras. 76-78 and 88; [Prosecution Closing Statements, T. 336](#), pp. 7-8. See also [Closing Brief of the common legal representative of the main group of victims](#), paras. 6-9 and 195-200.

<sup>2270</sup> [Prosecution Closing Brief](#), paras. 76, 79 and 88. See, in general, [Prosecution Closing Statements, T. 336](#), pp. 50-54 and 58-59.

<sup>2271</sup> [Prosecution Closing Brief](#), para. 81.

<sup>2272</sup> [Prosecution Closing Brief](#), para. 84.

<sup>2273</sup> [Prosecution Closing Brief](#), para. 83.

household chores.<sup>2274</sup> The Prosecution submitted that the women were severely affected both physically and mentally by this experience<sup>2275</sup> and that they were rejected by their community.<sup>2276</sup> According to the Prosecution, they endured this fate because they had convinced their abductors that they were not Hema.<sup>2277</sup> Lastly, according to the Prosecution, these acts were not isolated incidents but common practice among the Lendu combatants during the conflict raging in Ituri at the material time.<sup>2278</sup>

960. The Defence submitted that the evidence on record does not establish that the crime of rape was committed by combatants under Germain Katanga's orders, immediately before, during and/or immediately after the 24 February 2003 attack on Bogoro<sup>2279</sup> or that the combatants subjected women abducted from Bogoro to sexual slavery.<sup>2280</sup> The Defence argued that the Prosecution has failed to prove, regarding crimes against humanity, that rape<sup>2281</sup> and sexual enslavement<sup>2282</sup> were common practice among the FRPI combatants.<sup>2283</sup> According to the Defence, the Prosecution also failed to prove that with regard to war crimes, the acts were connected to an international armed conflict.<sup>2284</sup>

## 1. Applicable law

### a) Rape

961. Article 8(2)(e)(vi) reads:

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<sup>2274</sup> [Prosecution Closing Brief](#), para. 85.

<sup>2275</sup> [Prosecution Closing Brief](#), para. 86.

<sup>2276</sup> [Prosecution Closing Brief](#), para. 87.

<sup>2277</sup> [Prosecution Closing Brief](#), para. 82.

<sup>2278</sup> [Prosecution Closing Brief](#), para. 89; [Prosecution Closing Statements, T. 336](#), pp. 55-57. See also paras. 667-868 and [Closing Brief of the common legal representative of the main group of victims](#), para. 194.

<sup>2279</sup> [Defence Closing Brief](#), paras. 934-959.

<sup>2280</sup> [Defence Closing Brief](#), paras. 969-989. See also [Defence Closing Statements, T. 338](#), p. 64-66.

<sup>2281</sup> [Defence Closing Brief](#), paras. 960-968.

<sup>2282</sup> [Defence Closing Brief](#), paras. 991-1001.

<sup>2283</sup> See, in general, [Defence Closing Statements, T. 338](#), p. 66-68.

<sup>2284</sup> [Defence Closing Brief](#), para. 1011.

1. For the purpose of this Statute, “war crimes” means: [...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]

(vi) Committing rape [...].

962. According to the Elements of Crimes, the crime of rape, whether as a war crime under article 8(2)(e)(vi) of the Statute or a crime against humanity under article 7(1)(g) of the Statute, is established when, *inter alia*, the following two common material elements are present:<sup>2285</sup>

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.<sup>2286</sup>
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

#### **i. Objective elements**

963. The Chamber considers that the first constituent element is established where the perpetrator invaded the body of a person by conduct resulting in penetration, even where the perpetrator does not engage in the act of penetration. In fact, the element is framed so as to foresee also the eventuality that the perpetrator is penetrated in addition to that of the perpetrator causing or prompting penetration. Irrespective of the situation, it must comprise penetration, however slight, of any part of the body with a sexual organ, or penetration of the anal or genital opening with any object or any other part of the body.

<sup>2285</sup> Elements of Crimes, articles 7(1)(g)-1(1), 7(1)(g)-1(2), 8(2)(e)(xxii)(1)(1) and 8(2)(e)(xxii)(1)(2) (footnotes omitted).

<sup>2286</sup> The Chamber notes that whilst there is a difference between the French versions of articles 7(1)(g)-1(1) and 8(2)(e)(vi)-1(1) of the Elements of Crimes, it considers it to be inconsequential to their due interpretation.

964. The second constituent element enumerates the circumstances and conditions of invasion of the body of the victim which give it a criminal character. Also included, lastly, is the situation where the perpetrator takes advantage of a person's incapacity to give genuine consent due to a natural, induced or age-related incapacity.<sup>2287</sup>
965. The Chamber notes that, save the very specific situation of a person whose "incapacity" was "tak[en] advantage of", the Elements of Crimes do not refer to the victim's lack of consent, and therefore this need not be proven. The Elements of Crimes clearly seek to punish any act of penetration where committed under threat of force or of coercion, such as that caused by the threat of violence, duress, detention, psychological pressure or abuse of power or, more generally, any act of penetration taking advantage of a coercive environment. The establishment of at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape within the meaning of articles 7(1)(g) and 8(2)(e)(vi) of the Statute.
966. The Chamber further notes that in terms of procedure, the Rules of Procedure and Evidence confirm this interpretation by stipulating the principles applicable to evidence in matters of sexual violence. Rule 70 of the said Rules stipulates, *inter alia*, that consent cannot be inferred by reason of any words or conduct of a victim where force or coercion was used or advantage was taken of a coercive environment.<sup>2288</sup>
967. To establish rape constituting a crime against humanity within the meaning of article 7(1)(g) of the Statute, it must be demonstrated that the conduct was part of a widespread or systematic attack directed against a civilian population.<sup>2289</sup>

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<sup>2287</sup> Elements of Crimes, footnotes 16 and 64.

<sup>2288</sup> [Rules of Procedure and Evidence](#), rule 70.

<sup>2289</sup> Statute, article 7(1); Elements of Crimes, article 7(1)(g)-1(3). See also "Section IX(A)(1)(b)(iii) Nexus and knowledge".

968. To establish rape constituting a war crime within the meaning of article 8(2)(e)(vi) of the Statute, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>2290</sup>

**ii. Subjective elements**

969. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>2291</sup>

970. Accordingly, the Chamber is of the view that, as regards articles 7(1)(g)-1(1) and 8(2)(e)(vi)-1(1) of the Elements of Crimes, the physical perpetrator must have intentionally invaded the body of the victim.<sup>2292</sup> Intent will be established where it is proven that the perpetrator acted deliberately or failed to act (1) such that penetration took place or (2) whereas he or she was aware that such a consequence would arise in the ordinary course of events.<sup>2293</sup> Further, in accordance with article 30(3) of the Statute, the perpetrator must have been aware that the invasion was committed by force, threat of force, coercion or by taking advantage of a coercive environment, or “the invasion was committed against a person incapable of giving genuine consent.”

971. In addition to the requirements of intent and knowledge under article 30 of the Statute, in respect of the crime against humanity defined in article 7(1)(g), the Chamber must also satisfy itself that the physical perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>2294</sup>

<sup>2290</sup> Elements of Crimes, article 8(2)(e)(vi)-1(3). See also “Section IX(B)(1) Applicable law”, para. 1176.

<sup>2291</sup> Elements of Crimes, General Introduction, para. 2. See also “Section VIII(B)(1)(a)(ii)(a) Applicable law applicable under article 30”.

<sup>2292</sup> Statute, article 30(2).

<sup>2293</sup> Statute, article 30(2)(b).

<sup>2294</sup> Elements of Crimes, article 7(1)(g)-1(4).

972. Regarding the crime of rape punishable under article 8(2)(e)(xxii), in addition to the requirements of intent and knowledge which article 30 aforesaid prescribes, the Elements of Crimes mandate awareness of the perpetrator of the rape of factual circumstances that established the existence of an armed conflict.<sup>2295</sup>

### **b) Sexual slavery**

973. Article 8(2)(e)(vi) reads:

1. For the purposes of this Statute, “war crimes” means: [...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]

(vi) Committing rape [...].

974. According to the Elements of Crimes, the crime of sexual slavery, as a crime against humanity under article 7(1)(g) or a war crime under article 8(2)(e)(vi) of the Statute, is established where, *inter alia*, the following two common material elements are present:<sup>2296</sup>

1. The perpetrator exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>2297</sup>

### **i. Objective elements**

975. Turning to the first element, the Chamber considers that the various examples which the Elements of Crimes enumerate are not exhaustive, inasmuch as the

<sup>2295</sup> Elements of Crimes, article 8(2)(e)(vi)-1(4). See also “Section (IX)(B)(1) Applicable Law”, para. 1176.

<sup>2296</sup> Elements of Crimes, articles 7(1)(g)-2(1), 7(1)(g)-2(2), 8(2)(e)(vi)-2(1) and 8(2)(e)(vi)-2(2) (footnotes omitted).

<sup>2297</sup> The Chamber notes that whilst there are differences between the French translations of articles 7(1)(g)-2(1) and 8(2)(e)(vi)-2(1) and of articles 7(1)(g)-2(2) and 8(2)(e)(vi)-2(2) of the Elements of Crimes, it considers them to be inconsequential to their due interpretation.

“right of ownership” and the powers attaching to it may take many forms.<sup>2298</sup> Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.

976. To prove the exertion of powers which may be associated with the right of ownership or which may ensue therefrom, the Chamber will undertake a case-by-case analysis, taking account of various factors. Such factors may include detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim’s vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account.<sup>2299</sup> In the view of the Chamber, articles 7(1)(g)-2(1) and 8(2)(e)(vi)-2(1) of the Elements of Crimes are framed such that the exercise of the right of ownership over someone need not entail a commercial transaction.<sup>2300</sup> In fact, the Chamber considers that the notion of servitude relates first and foremost to the impossibility of the victim’s changing his or her condition.

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<sup>2298</sup> The Elements of Crimes refer to definitions contained in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. See in this regard Elements of Crimes, article 7(1)(g)-2, footnote 18 and article 8(2)(e)(vi)-2, footnote 66.

<sup>2299</sup> See, in particular, [ICTY, Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001 \(“Kunarac et al. Trial Judgement”\)](#), paras. 542 and 543; [ICTY, Kunarac et al. Appeal Judgement](#), paras. 119 and 121; [SCSL, Prosecutor against Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Trial Judgement, 2 March 2009 \(“Sesay, Kallon and Gbao Trial Judgement”\)](#), para. 160; [SCSL, Prosecutor Against Taylor, Case No. SCSL-03-01-T, Trial Judgement, 18 May 2012 \(“Taylor Trial Judgement”\)](#), para. 420.

<sup>2300</sup> See also [SCSL, Prosecutor against Brima, Kamara and Kanu, Case No. SCSL-04-16-T, Trial Judgement, 20 June 2007 \(“Brima, Kamara and Kanu Trial Judgement”\)](#), para. 709; [SCSL, Taylor Trial Judgement, para. 420](#). See also [UN Economic and Social Council, Systematic rape, sexual slavery and slavery-like practices during armed conflict – Update to the final report, E/CN.4/Sub.2/2000/21, 6 June 2000](#), para. 50.

977. Imposition of deprivation of liberty may take various forms and the Chamber will also consider, in its analysis of the first constituent element of the crime of sexual slavery, the subjective nature of such deprivation, that is, the person's perception of his or her situation as well as his or her reasonable fear.<sup>2301</sup>
978. In the view of the Chamber, the second element concerns the victim's ability to decide the conditions in which he or she engages in sexual activity.<sup>2302</sup> In that respect it considers that the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature.<sup>2303</sup>
979. To establish the crime of sexual slavery as a crime against humanity within the meaning of article 7(1)(g), it must be proven that the conduct was part of a widespread or systematic attack directed against a civilian population.<sup>2304</sup>
980. Lastly, as concerns the crime of sexual slavery as a war crime, it should be recalled that article 8(2)(e)(vi)-2(3) of the Elements of Crimes requires that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>2305</sup>

## ii. Subjective elements

981. The Chamber considers that the perpetrator must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and forced such person to engage in one or more acts of a sexual nature. Therefore the perpetrator must have been aware that he or she

<sup>2301</sup> [SCSL, \("Taylor Trial Judgement"\)](#), para. 420.

<sup>2302</sup> [Decision on the confirmation of charges](#), para. 432 and footnote 583.

<sup>2303</sup> [Decision on the confirmation of charges](#), para. 431 and footnote 581; UN Economic and Social Council, final report [on systematic rape, sexual slavery and slavery-like practices during armed conflict, E/CN.4/Sub.2/1998/13, 22 June 1998](#), para. 30; UN Economic and Social Council, Update to the final report on [systematic rape, sexual slavery and slavery-like practices during armed conflict, E/CN.4/Sub.2/2000/21, 6 June 2000](#), para. 30. See also [SCSL, Brima, Kamara and Kanu Trial Judgement](#), paras. 1105, 1126 and 1183.

<sup>2304</sup> Statute, article 7(1); Elements of Crimes, article 7(1)(g)-1(3).

<sup>2305</sup> Elements of Crimes, article 8(2)(b)(e)(vi)-3. See also "Section IX(B)(1) Applicable Law", para. 1176.

was exerting such powers<sup>2306</sup> and have meant to engage in the conduct<sup>2307</sup> in order to force the person concerned to engage in acts of a sexual nature or have been aware that such a consequence would occur in the ordinary course of events.<sup>2308</sup>

982. The Chamber notes that footnotes 17 and 65 to the Elements of Crimes state that considering the complex nature of this crime, “it is recognized that its commission could involve more than one perpetrator as part of a common criminal purpose.”<sup>2309</sup> However, the Chamber considers that article 30 of the Statute must apply to each perpetrator in order to establish his or her individual criminal responsibility for the commission of the crime of sexual slavery. Accordingly, whilst respecting the statutory requirement of intent and knowledge vis-à-vis each perpetrator, the Chamber will evaluate whether the first two constituent elements of the crime are established in respect of collective action.<sup>2310</sup>

983. To establish the crime against humanity of sexual slavery, it must be proven that the perpetrator knew that the conduct in question was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>2311</sup>

984. Lastly, regarding sexual slavery punishable as a war crime, article 8(2)(e)(vi)-2(4) of the Elements of Crimes mandates that the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>2312</sup>

## **2. Findings of fact and legal characterisation**

985. By way of a preliminary comment, the Chamber recalls that its jurisdiction extends only to the events which occurred during the 24 February 2003 attack on Bogoro. In that respect, it notes that the Pre-Trial Chamber found that there was

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<sup>2306</sup> Statute, article 30(3).

<sup>2307</sup> Statute, article 30(2)(a).

<sup>2308</sup> Statute, article 30(2)(b).

<sup>2309</sup> Elements of Crimes, article 7(1)(g)-2, footnote 17; article 8(2)(e)(vi)-2, footnote 65.

<sup>2310</sup> See also “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

<sup>2311</sup> Elements of Crimes, article 7(1)(g)-2(4).

<sup>2312</sup> See also “Section IX(B)(1) Applicable Law”, para. 1176.

sufficient evidence to establish substantial grounds to believe that “during and after the [24 February 2003] attack on Bogoro, women were raped by FNI/FRPI combatants in or around the village of Bogoro”.<sup>2313</sup> It also found that such evidence established substantial grounds to believe that after the attack, civilians were abducted from the village of Bogoro by FNI and/or FRPI combatants and taken to camps where they were imprisoned, forced to become the “wives” of combatants of those groups and forced to engage in acts of a sexual nature.<sup>2314</sup> The acts of rape committed in Bogoro on 24 February 2003 by “FNI/FRPI members” during the battle and thereafter and acts of sexual enslavement of women who were captured after the battle and taken to various military camps therefore lie before the Chamber for determination.

986. Insofar as they testified as direct victims of rape and sexual enslavement, the Chamber will rely chiefly on the *viva voce* evidence of Witnesses P-132, P-249 and P-353 in determining whether the crimes were committed during and after the 24 February 2003 attack and specifically by Ngiti combatants from Walendu-Bindi *collectivité*. The evidence of other witnesses may also be relevant, especially in confirming or corroborating the abduction of certain women during the attack, their captivity and their allocation to Ngiti combatants. The Chamber must, however, underscore that under rule 63(4) of the Rules of Procedure and Evidence there is no legal requirement that corroboration is required to prove crimes of sexual violence.

987. Having regard to the specific nature of evidence peculiar to the crimes of rape and sexual slavery, the Chamber will apply a specific *modus operandi* to the analysis of their commission. First, it will undertake a factual scrutiny and provide a legal characterisation of the three *sub judice* testimonies. It will then present its conclusions of law on the commission of the two types of crimes as a

<sup>2313</sup> [Decision on the confirmation of charges](#), paras. 347, 350, 354 and 442. See also para. 444.

<sup>2314</sup> [Decision on the confirmation of charges](#), paras. 347-350, 354 and 434-436.

crime against humanity (article 7(1)(g) of the Statute) and a war crime (article 8(2)(e)(vi) of the Statute).

**a) Rape**

**i. Witness P-132**

988. The Chamber considers that it can rely on those parts of Witness P-132's testimony concerning the sexual violence which she claimed to have suffered in Bogoro, despite apparent contradictions identified in her previous statements and discrepancies discerned between her statements and certain aspects of P-353's account.<sup>2315</sup> The Chamber will not hold against the witness her somewhat unclear in-court testimony, which may be explained by her difficulty in describing such intimate scenes to the Chamber. However, the Chamber will highlight the detailed nature of the information provided by P-132 about what she allegedly saw and heard from her hiding-place in the Waka plain<sup>2316</sup> and note that several details she provided were corroborated by testimonies of various other witnesses.<sup>2317</sup>

989. After hiding in the bush for part of the day of the attack,<sup>2318</sup> P-132 stated that she was flushed out by a group of six combatants armed with knives, guns and spears, to whom she swore that, contrary to what they were claiming, she was from an ethnic group other than Hema.<sup>2319</sup> The Chamber notes that as the witness had heard that other persons who had taken flight were being killed<sup>2320</sup> and was convinced that death was looming,<sup>2321</sup> she was in a state of complete submission at that moment. On the basis of the witness's testimony, the Chamber is satisfied

<sup>2315</sup> See "Section V(B)(2) Credibility of P-132".

<sup>2316</sup> See, in particular, P-132, T. 139, pp. 9-10; T. 143, pp. 70-71.

<sup>2317</sup> P-323, T. 117, pp. 59-60; P-287, T. 129, pp. 30 and 51; P-268, T. 107, p. 18; T. 108, p. 74; P-233, T. 83, pp. 75 and 79; T. 87, pp. 32-33.

<sup>2318</sup> P-132, T. 139, p. 9; T. 141, pp. 37-38; T. 142, p. 27; T. 143, p. 71.

<sup>2319</sup> P-132, T. 139, pp. 9 and 11-13. See also T. 141, p. 37.

<sup>2320</sup> P-132, T. 139, p. 10.

<sup>2321</sup> P-132, T. 139, pp. 11-12.

that three of her attackers then in turn sexually abused her by vaginal penetration.<sup>2322</sup> Whereas P-132 found it very difficult to describe the exact circumstances of her ordeal,<sup>2323</sup> it appears established that as she was aware of the risks which non-compliance entailed, she had no choice but to suffer in silence.<sup>2324</sup> The treatment inflicted caused her considerable pain and was the source of much trauma.<sup>2325</sup>

990. The Chamber is satisfied that such penetrations could only have taken place with violence and coercion, since in any event the perpetrators told the witness that she had become “[TRANSLATION] their wife”.<sup>2326</sup> In the view of the Chamber, such acts of a sexual nature committed by attackers during an armed offensive against civilians are necessarily coercive. In that instance, the coercion was all the more significant in that the crimes were committed collectively against a single victim.

991. The Chamber notes that P-132’s in-court testimony concerning the sexual violence to which she was subjected may raise doubt as to the exact date of its occurrence.<sup>2327</sup> In this respect, D02-148 stated that “[TRANSLATION] after the fighting”, “[TRANSLATION] after the battle” a woman, corresponding to P-132, was stopped in Bogoro by combatants who took her to one of their commanders. D02-148 further stated that the commander then asked him to escort the combatants and the young woman to command headquarters.<sup>2328</sup> Given that D02-148 claimed to have left Bogoro on the same day of the operation for that camp, returning only three days later to Bogoro,<sup>2329</sup> it is clear to the Chamber that P-132 was assaulted on 24 February 2003. The Chamber further notes several commonalities between

<sup>2322</sup> P-132, T. 139, pp. 13-14 and 18-21; T. 141, pp. 37-38.

<sup>2323</sup> See, in particular, P-132, T. 139, p. 19.

<sup>2324</sup> P-132, T. 139, p. 20; T. 141, p. 37.

<sup>2325</sup> See, in particular, P-132, T. 139, pp. 13 and 19-21.

<sup>2326</sup> P-132, T. 139, pp. 19-20.

<sup>2327</sup> P-132, T. 139, pp. 8-9; T. 141, pp. 37-38; T. 142, pp. 26-27; T. 143, pp. 70-71.

<sup>2328</sup> See Annex E.

<sup>2329</sup> See Annex E.

P-132's account and that of Witness P-249 regarding what she could see and hear on that same day of the battle.<sup>2330</sup> Accordingly, the Chamber finds that combatants forced P-132 to have sexual intercourse with them during the 24 February 2003 attack on Bogoro.

992. The Chamber thus considers that although P-132's testimony about the events is at times inconsistent due to, and this must be repeated, her difficulty in reviving such painful memories, it can be relied on to establish that the three persons who attacked her in Bogoro intentionally committed the crime of rape. In fact, it can be inferred from the circumstances of the events that the aforementioned subjective elements are established, as the men had the intention of engaging in sexual intercourse with the woman and were fully aware of the coercive environment in which she found herself.

#### ii. Witness P-249

993. The Chamber notes that during the attack on Bogoro village, having been spotted, pursued and dragged through the bush by six combatants, P-249 was forced to have sexual intercourse with them.<sup>2331</sup> The six armed men<sup>2332</sup> undressed her, assaulted her, threatened her with death and then twice forcibly penetrated her vagina as she begged them to leave her alone.<sup>2333</sup> These acts were repeated when the same group of combatants forced her into a place where she was held against her will and where she was further hit and raped,<sup>2334</sup> even though she asked them to kill her rather than treat her in that manner.<sup>2335</sup> The Chamber

<sup>2330</sup> See P-249, T. 135, pp. 41-42.

<sup>2331</sup> P-249, T. 135, pp. 40-42 and 50; T. 136, pp. 78-79.

<sup>2332</sup> P-249, T. 135, p. 51. For use of the term "[TRANSLATION] ordinary weapons", see also T. 135, p. 49.

<sup>2333</sup> P-249, T. 135, pp. 41-42, 50, 54-55 and 73. See also T. 136, pp. 78-79.

<sup>2334</sup> P-249, T. 135, pp. 43-44 and 57-58. See also T. 135, p. 62.

<sup>2335</sup> P-249, T. 135, p. 43.

accordingly notes the extreme vulnerability of P-249, who had good reason to fear for her life.<sup>2336</sup>

994. The Defence identified certain discrepancies between P-249's statement to the Office of the Prosecutor and her testimony in court.<sup>2337</sup> The Chamber however notes that the Witness met with the investigators twice and that although her second account does differ from the first, it is to a great extent identical to her in-court testimony.<sup>2338</sup> The Chamber is of the view, furthermore, particularly in the light of the witness's own explanations, that the contradictions were due to her initial reluctance to reveal personal information and the place where she lived, to recount her ordeal and to provide details about the number, names and conduct of her attackers.<sup>2339</sup> In the view of the Chamber, these inconsistencies – essentially arising from the witness's sense of shame at having to reveal what she had endured and her security concerns<sup>2340</sup> – do not therefore undermine her credibility. Furthermore, although the witness stated that the events had taken place the “[TRANSLATION] day after” the attack, the Chamber has no doubt that the assault did take place on 24 February 2003. In fact, P-249's testimony shows that she considered the attack to have begun on the night of 23 to 24 February 2003 and that what she calls the “[TRANSLATION] day after” actually denotes the day of the 24th.<sup>2341</sup>

995. The Chamber therefore finds that combatants forced P-249 to engage in sexual intercourse during the attack on Bogoro on 24 February 2003. In its view, the body of evidence suffices to establish the first two objective elements of rape.

996. The Chamber considers that the mental elements required by article 30 of the Statute are also established, since P-249's attackers themselves, physically and

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<sup>2336</sup> P-249, T. 135, p. 43.

<sup>2337</sup> [Defence Closing Brief](#), paras. 950-959.

<sup>2338</sup> P-249, T. 137, pp. 37-57.

<sup>2339</sup> P-249, T. 135, p. 55; T. 137, pp. 17 and 73-74.

<sup>2340</sup> P-249, T. 135, p. 55; T. 137, pp. 73-74.

<sup>2341</sup> P-249, T. 135, pp. 39-41; T. 136, pp. 74 and 77-79; T. 137, p. 27.

psychologically, committed acts of violence against her and humiliated her. In addition, they could not have been unaware of her verbal objections.<sup>2342</sup> Accordingly, the Chamber considers that in Bogoro on 24 February 2003, six combatants intentionally invaded P-249's body in the knowledge of the force, threats and duress they were exerting on their victim as well of the prevailing coercive environment.

### iii. Witness P-353

997. After witnessing the very violent murders in Bogoro of those with whom she had been hiding,<sup>2343</sup> P-353 was forced to go with the perpetrators and transport for them property they had just stolen.<sup>2344</sup> The combatants then declared that she was thenceforth "[TRANSLATION] their wife".<sup>2345</sup> Abused physically<sup>2346</sup> and spared for the sole reason that she was not Hema,<sup>2347</sup> the witness subsequently found herself alone, deprived of liberty in the combatants' camp, several hours' walk from her village.<sup>2348</sup> Two of them, who were part of the group that she had had to go along with to the camp, in turn engaged in sexual intercourse with her on the evening of her arrival. In the light of her in-court testimony, the Chamber considers that both men forced her to engage in sexual intercourse.<sup>2349</sup> P-353 did state, it should be recalled, that the first of them declared that she had become "[TRANSLATION] his wife",<sup>2350</sup> further stating that after threatening and undressing her,<sup>2351</sup> he forcibly penetrated her vagina.<sup>2352</sup> At this stage, it is clear to the Chamber that P-

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<sup>2342</sup> P-249, T. 135, pp. 41-43.

<sup>2343</sup> P-353, T. 213, pp. 18-23.

<sup>2344</sup> P-353, T. 213, pp. 22, 25-27, 43 and 50-52.

<sup>2345</sup> P-353, T. 213, pp. 43-44; T. 215, p. 26.

<sup>2346</sup> P-353, T. 215, p. 29.

<sup>2347</sup> P-353, T. 213, pp. 21-23.

<sup>2348</sup> P-353, T. 213, pp. 46-50 and 53; T. 215, p. 48.

<sup>2349</sup> P-353, T. 213, pp. 50-52.

<sup>2350</sup> P-353, T. 213, p. 50.

<sup>2351</sup> P-353, T. 213, p. 50.

<sup>2352</sup> P-353, T. 213, pp. 50 and 52. See also T. 215, p. 27.

353 feared for her life<sup>2353</sup> and that she had no other choice than to obey. It is the view of the Chamber that this young woman, whom the combatants assaulted physically and verbally both during the attack and on arrival at the camp, was forced to engage in sexual intercourse with them by dint of threat and coercion. The Chamber therefore finds that P-353, who was under 18 years of age at the material time,<sup>2354</sup> was forced by two combatants in the camp in Walendu-Bindi *collectivité* to engage in sexual intercourse with them from 24 February 2003.

998. Accordingly, the Chamber finds that two combatants, who were members of that Walendu-Bindi militia camp, intentionally raped P-353 on 24 February 2003: they were aware of the circumstances in which she found herself but nevertheless deliberately engaged in sexual intercourse with her.

999. In the light of the foregoing and the Chamber's findings following its assessment of the contextual elements of crimes against humanity and war crimes,<sup>2355</sup> the Chamber therefore finds that the evidence establishes beyond reasonable doubt that during the attack on Bogoro on 24 February 2003, combatants from the military camps of the Ngiti militia of Walendu-Bindi intentionally committed against P-132, P-249 and P-353, crimes of rape constituting crimes against humanity and war crimes under articles 8(2)(e)(vi) and 7(1)(g) of the Statute.

#### **b) Sexual slavery**

1000. Firstly and in general, the Chamber notes that the term "wife", as used by the attackers of the raped witnesses to make their fate clear to them, obviously had, given the circumstances, a very specific meaning. The Chamber notes in this respect that three persons who testified before the Court as victims of sexual

<sup>2353</sup> See, in particular, P-353, T. 213, pp. 49-50.

<sup>2354</sup> P-353, T. 213, p. 60.

<sup>2355</sup> See "Section IX(A)(2)(c) Nexus between the crimes committed and the attack"; "Section IX(B)(3)(b) Nexus between the crimes and the non-international armed conflict".

violence used the term, which is of particular importance to its analysis of the crime of sexual slavery. The Chamber is of the view that in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was “taken as a wife” by a combatant or that she was to “become his wife” is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature. P-132 made her plight most clear: “[TRANSLATION] You know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse.”<sup>2356</sup> She stated that when the combatants raped her for the first time in the bush, she immediately thought: “[TRANSLATION] So, I have become their wife.”<sup>2357</sup>

1001. In the view of the Chamber, in the case at bar, the fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were “their wives” does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them.<sup>2358</sup>

**i. Witness P-132**

1002. The Chamber recalls P-132’s testimony that after she had fled her home and hidden in the bush,<sup>2359</sup> armed men captured her in the immediate aftermath of the attack.<sup>2360</sup> After brutally raping her,<sup>2361</sup> they took her to a military camp.<sup>2362</sup> The witness was held there, in a hole dug in the ground,<sup>2363</sup> for several days<sup>2364</sup> and questioned as to her ethnic group. She did not reveal that she was Hema for fear

<sup>2356</sup> P-132, T. 140, p. 21.

<sup>2357</sup> P-132, T. 139, p. 20.

<sup>2358</sup> [SCSL, Sesay, Kallon and Gbao Trial Judgement](#), para. 1466; [SCSL, Brima, Kamara and Kanu Trial Judgement](#), in particular, paras. 1126 and 1130, 1159 and 1183.

<sup>2359</sup> See, *inter alia*, P-132, T. 138, pp. 78-79; T. 139, pp. 8-9; T. 141, pp. 37-38; T. 142, pp. 26-27; T. 143, pp. 68-71.

<sup>2360</sup> P-132, T. 139, pp. 9 and 11-13. See also T. 141, p. 37.

<sup>2361</sup> P-132, T. 139, pp. 13-14 and 18-21; T. 141, pp. 37-38.

<sup>2362</sup> P-132, T. 139, pp. 19 and 21-22.

<sup>2363</sup> P-132, T. 139, pp. 22, 27-30 and 39.

<sup>2364</sup> P-132, T. 139, p. 51; T. 140, pp. 15-16 and 31-32.

of being killed.<sup>2365</sup> At the behest of the camp commander, to whom it fell to decide her fate,<sup>2366</sup> P-132 was forced to live behind his house.<sup>2367</sup> During and after her incarceration in the camp prison, where the living conditions were particularly harsh, she was forced to carry out household chores, including assisting the combatants' wives in their daily activities.<sup>2368</sup> The Chamber recalls that P-132 considered herself a hostage<sup>2369</sup> and wanted to escape the camp<sup>2370</sup> but was afraid to disobey her commander's orders.<sup>2371</sup>

1003. In this connection, the Chamber also draws on the testimony of D02-148, an eyewitness who corroborated that P-132 was captured in Bogoro in the aftermath of battle, was then taken by combatants to the very camp where he stated she was imprisoned and questioned about her ethnic group.<sup>2372</sup> P-28, too, provided corroboration, through hearsay evidence, of P-132's abduction and stated that he had learnt that combatants had taken women hostage during the 24 February attack and taken them to that camp, where they were incarcerated.<sup>2373</sup>

1004. P-132 further stated that, on the orders of the "[TRANSLATION] superior",<sup>2374</sup> she was compelled to marry a militia member living at the camp, live with him<sup>2375</sup> and follow him when he was reassigned to other Ngiti camps.<sup>2376</sup> The witness claimed that she feared him<sup>2377</sup> and that she had thought about how she might escape but was unable to do so.<sup>2378</sup> In corroborating that account, P-233 stated that he knew three women from Bogoro who were captured by attackers, taken to Ngiti areas

<sup>2365</sup> P-132, T. 139, pp. 22-23, 37-38 and 61; T. 142, pp. 28-29 and 32.

<sup>2366</sup> P-132, T. 139, pp. 39-40 and 63-64; T. 140, pp. 15-16.

<sup>2367</sup> P-132, T. 139, pp. 45, 51, 59 and 63-64; T. 140, p. 18; T. 141, p. 43; T. 142, p. 35.

<sup>2368</sup> P-132, T. 139, p. 63; T. 140, p. 18. See also T. 139, p. 59.

<sup>2369</sup> P-132, T. 139, p. 43; T. 143, p. 36.

<sup>2370</sup> P-132, T. 139, p. 63; T. 140, pp. 13 and 18.

<sup>2371</sup> P-132, T. 139, pp. 63-64.

<sup>2372</sup> See Annex E.

<sup>2373</sup> See Annex E.

<sup>2374</sup> P-132, T. 140, pp. 20-21.

<sup>2375</sup> P-132, T. 140, pp. 18-20.

<sup>2376</sup> P-132, T. 140, pp. 21-22; T. 142, pp. 45-46.

<sup>2377</sup> P-132, T. 140, pp. 20-21.

<sup>2378</sup> P-132, T. 139, p. 63; T. 140, pp. 13 and 18.

and married to combatants, or who had suffered a similar fate.<sup>2379</sup> In the Chamber's view, one of these women must have been P-132.<sup>2380</sup>

1005. Concerning this marriage, the Defence submitted that P-132 developed a consensual relationship with a man in the camp whom she subsequently married;<sup>2381</sup> this is supported by D02-148's testimony.<sup>2382</sup> Despite several attempts to make her accept this account,<sup>2383</sup> P-132 maintained that she had never consented to the union and that it could not be considered marriage in such circumstances.<sup>2384</sup> The Chamber notes that she was quite affected by the questions casting doubt on the consensual nature of the union and upset<sup>2385</sup> upon viewing a photograph of the man which, the Defence stated, was of her husband.<sup>2386</sup> It does not rule out the possibility that he was the man to whom she may have been married and that her emotional response to the photograph could be explained by the trauma she suffered, since it can indeed be disturbing or painful to have to recall such experiences.<sup>2387</sup> Combatants at the camp where she was held captive wielded powers over her resulting from a veritable right of ownership, and the circumstances in which the union took place did not leave her the necessary discretion to enter into such an arrangement,<sup>2388</sup> even though D02-148, who was at the camp, thought that he discerned emotional ties between her and the man. Finally, the Chamber must recall that when she felt that the circumstances had become favourable and the conditions were right, Witness P-132 escaped from the military camp where she was living with the man and fled to another region.<sup>2389</sup>

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<sup>2379</sup> See Annex E.

<sup>2380</sup> See Annex E.

<sup>2381</sup> [Defence Closing Brief](#), para. 980.

<sup>2382</sup> See Annex E.

<sup>2383</sup> P-132, T. 143, pp. 34-35 and 53-59.

<sup>2384</sup> P-132, T. 143, pp. 34-37, 53-59 and 60-63.

<sup>2385</sup> P-132, T. 143, pp. 53-55.

<sup>2386</sup> EVD-D02-00030: Photograph.

<sup>2387</sup> See, *inter alia*, P-132, T. 141, pp. 39-40; T. 143, pp. 56-57; P-353, T. 215, p. 51.

<sup>2388</sup> See, *inter alia*, P-132, T. 141, pp. 42-43.

<sup>2389</sup> P-132, T. 140, pp. 21-24.

1006. Concerning the second material element, the Chamber notes that P-132 was raped several times by combatants during the attack on Bogoro, at the military camp and, more generally, in captivity.<sup>2390</sup> It further notes that she was repeatedly assaulted, at times by several combatants in turn whilst she was incarcerated,<sup>2391</sup> causing her serious mental and physical harm.<sup>2392</sup> The Chamber notes, too, that whilst she was captive she would sometimes be taken under threat into the bush by men in order to abuse her.<sup>2393</sup> The witness was subsequently regularly raped by the man who had taken her as his wife<sup>2394</sup> and, on occasion, by another combatant.<sup>2395</sup> Finally, the Chamber notes that after her escape, the witness gave birth to a child who can only have been conceived whilst she was in captivity.<sup>2396</sup>

1007. In the Chamber's view, the foregoing establishes that combatants from the camp where P-132 was kept wielded powers over her attaching to the right of ownership: the witness, who was held at the camp, was extremely vulnerable. She did not have freedom of movement, nor was she able to decide where she lived, and she in fact belonged to the camp combatants. The Chamber further considers that it has sufficient material to satisfy it that the man who became her "husband" was given P-132 and exercised powers over her attaching to the right of ownership. It can thus be established from the available evidence that this state of enslavement lasted over a year and a half.<sup>2397</sup> Furthermore, in the light of the evidence placed before it, the Chamber is satisfied that P-132 was constantly compelled to performed sexual acts whilst in captivity.

1008. Finally, in the view of the Chamber, the body of evidence, considered as a whole, establishes that the combatants who raped P-132 deliberately forced her to

<sup>2390</sup> See, *inter alia*, P-132, T. 139, pp. 13-14 and 18-21; T. 141, pp. 37-38 and 43.

<sup>2391</sup> See, *inter alia*, P-132, T. 139, pp. 46-52; T. 141, pp. 39-40 and 43.

<sup>2392</sup> P-132, T. 139, p. 39; T. 141, p. 40.

<sup>2393</sup> P-132, T. 139, pp. 52-53; T. 141, p. 43.

<sup>2394</sup> P-132, T. 140, pp. 18 and 20-21.

<sup>2395</sup> P-132, T. 140, p. 23.

<sup>2396</sup> P-132, T. 142, pp. 41-42.

<sup>2397</sup> See, *inter alia*, P-132, T. 142, pp. 41-42.

have sexual intercourse with them. Moreover, they were aware that the witness, who had lived in captivity in their camp for a long period, had no freedom of movement. This held true, in particular, for the men who raped her during her incarceration and for the man who made her his wife. He could not have been unaware that he wielded power over her such that she was in reality entirely under his control. Thus, for instance, when P-132 resisted his advances, he told her that he would make her his wife regardless, as the camp commander, it is alleged, so ordered subsequently.<sup>2398</sup> It would therefore appear proven that these combatants intentionally committed the crime of sexual slavery and that the requirements of article 30 of the Statute have been met.

**ii. Witness P-249**

1009. The Chamber notes that after being physically assaulted and raped by six Ngitu combatants during the 24 February 2003 attack,<sup>2399</sup> Witness P-249 was captured and immediately taken to a military camp, where her attackers raped her again.<sup>2400</sup> She was then held there by force for about a month.<sup>2401</sup> Upon her arrival, the commander ordered her to be taken aside and asked her ethnicity. P-249 denied that she was Hema for fear of being killed.<sup>2402</sup> After she had been taken aside, the commander told her that because of her refusal to tell him where the Hema were, she would be killed or become their wife – in other words, that she would have to do as they wished.<sup>2403</sup> He consequently “[TRANSLATION] consigned” her to one of his bodyguards.<sup>2404</sup> Whilst in captivity, she was compelled to live with the combatants from this group, serve them and, more specifically, remain

<sup>2398</sup> P-132, T. 140, pp. 18 and 21.

<sup>2399</sup> See “Section VIII(D)(2)(a)(ii) Rape: Witness P-249”. See also P-249, T. 135, pp. 40-42 and 50; T. 136, pp. 78-79.

<sup>2400</sup> P-249, T. 135, pp. 56-58; T. 137, pp. 30-31.

<sup>2401</sup> P-249, T. 136, p. 65; T. 137, pp. 61 and 65; EVD-OTP-00109: Excerpt from medical records; EVD-OTP-00056: Forensics report (DRC-OTP-1033-0066).

<sup>2402</sup> P-249, T. 135, pp. 58-60.

<sup>2403</sup> P-249, T. 135, pp. 41-43 and 59-62.

<sup>2404</sup> P-249, T. 135, pp. 60-62.

available to the man referred to immediately above.<sup>2405</sup> Threatened with death,<sup>2406</sup> P-249 thus found herself under the control of the group's combatants, who deprived her of all freedom of movement by keeping her under constant surveillance.<sup>2407</sup> They also compelled her to perform various household chores for them, which, despite sustaining a leg wound, she did out of fear of retaliation.<sup>2408</sup> She stated that it was only a lapse in the combatants' vigilance that allowed her to escape.<sup>2409</sup>

1010. The Chamber notes that P-249 stated that the commander, whom she met on the day of the attack, was named Yuda, although she was unable to identify him in a photograph presented in court by the Defence,<sup>2410</sup> despite stating that she had lived alongside him.<sup>2411</sup> Thus, the Chamber is not satisfied that the commander to whom she adverted and whom she described in some detail<sup>2412</sup> to the court was indeed that Yuda. Indeed, the Chamber considers it established that following the 24 February 2003 attack, Yuda immediately went to Aveba to have a wound examined and for medical treatment.<sup>2413</sup> The Chamber further notes that the witness identified Commander Yuda by deduction.<sup>2414</sup> This notwithstanding, the fact, in the Chamber's view, that the witness believed him to be Yuda does not cast doubt on her reliability or the credibility of her testimony concerning the events which she described and claimed to have experienced.

1011. The Chamber also notes that the witness was raped by several Ngiti combatants and on numerous occasions – first, on 24 February 2003, as already

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<sup>2405</sup> P-249, T. 135, pp. 64-65 and 70-71.

<sup>2406</sup> See, *inter alia*, P-249, T. 135, pp. 41-43 and 59-61.

<sup>2407</sup> P-249, T. 135, pp. 71-73.

<sup>2408</sup> P-249, T. 135, pp. 70-73.

<sup>2409</sup> P-249, T. 136, p. 52.

<sup>2410</sup> EVD-D02-00026: Photograph; P-249, T. 137, pp. 77-78; [Defence Closing Brief](#), para. 987. See also P-132, T. 142, p. 35; T. 138, pp. 9-10.

<sup>2411</sup> P-249, T. 135, pp. 64-65.

<sup>2412</sup> P-249, T. 135, pp. 56-57.

<sup>2413</sup> D02-129, T. 271, p. 27; D02-161, T. 270, p. 46; D02-148, T. 279, pp. 21 and 33.

<sup>2414</sup> P-249, T. 135, p. 56.

established,<sup>2415</sup> and then during each of the following nights whilst she was at the camp in Bogoro, in particular by the commander's bodyguard. P-249 recounted that combatants came to her at night with the sole purpose of having sexual intercourse with her, without even speaking to her.<sup>2416</sup>

1012. In the Chamber's opinion, this evidence establishes that the commander's bodyguard as well as several other combatants collectively exerted powers over P-249 attaching to the right of ownership. It is also established that she was regarded as a woman available for the sexual gratification of those who went to her and that she was thus compelled to engage in acts of a sexual nature with numerous men, including the aforementioned bodyguard.

1013. Finally, there is no doubt that the bodyguard wanted sexual intercourse with P-249, as did the other combatants at the Bogoro camp, and they were aware that she was deprived of all freedom of movement and autonomy. The Chamber is thus satisfied that they all knew that they collectively enjoyed prerogatives attaching to the right of ownership. Accordingly, it finds that the combatants at the Bogoro camp intentionally sexually enslaved Witness P-249.

### **iii. Witness P-353**

1014. The Chamber notes that combatants allotted themselves P-353 and two other women whom they did not believe to be Hema,<sup>2417</sup> after ordering them out of the house where they were hiding and whose occupants had just been massacred.<sup>2418</sup> Two of them disagreed over who would have P-353, before deciding to share her as their wife.<sup>2419</sup> After being beaten<sup>2420</sup> and held captive in Bogoro,<sup>2421</sup> the witness was forced to follow the combatants and transport the property they had just

<sup>2415</sup> See "Section VIII(D)(2)(a)(ii) Rape: Witness P-249".

<sup>2416</sup> See, *inter alia*, P-249, T. 135, pp. 61-62, 65-66 and 71-72.

<sup>2417</sup>P-353, T. 213, pp. 21-23 and 43.

<sup>2418</sup>P-353, T. 213, pp. 18-23 and 43.

<sup>2419</sup> P-353, T. 213, p. 4. See also T. 213, pp. 43-44; T. 215, p. 26.

<sup>2420</sup> P-353, T. 315, p. 29.

<sup>2421</sup> P-353, T. 213, pp. 43-44; T. 215, p. 29.

appropriated.<sup>2422</sup> En route, P-353 became convinced that her attackers were going to kill her.<sup>2423</sup> The Chamber recalls that on the evening of her arrival at one of the camps in Walendu-Bindi *collectivité*, two combatants who were members of the group with which she was made to travel to the camp forced her to have sexual intercourse with each of them in turn.<sup>2424</sup>

1015. P-353 subsequently found herself alone at the camp<sup>2425</sup> for about three months,<sup>2426</sup> confined to a house and afraid to go out in case her real ethnic origin was discovered and she was killed.<sup>2427</sup> The men whose wife she had become ensured that she could not escape.<sup>2428</sup> One of them even controlled her daily life to such a degree that he wanted the only activity she performed to be sexual intercourse with him.<sup>2429</sup> The Chamber notes that P-353 saw no means of escape, as she was convinced that she would be recaptured and killed.<sup>2430</sup> Ultimately a woman helped her escape captivity after obtaining permission from her “[TRANSLATION] husband” to leave the camp temporarily.<sup>2431</sup>

1016. In the Chamber’s view, the status of “[TRANSLATION] wife” thus imposed upon P-353 meant that sexual favours could be obtained from her. As she herself stated, the only task assigned to her was to have sexual intercourse with her two “[TRANSLATION] husbands”.<sup>2432</sup> Although she said that the men did not threaten her, the Chamber notes that she stated that she was compelled to second-guess what they expected of her whenever they came to her,<sup>2433</sup> and it recalls that the

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<sup>2422</sup> P-353, T. 213, pp. 22, 25-27 and 43.

<sup>2423</sup> P-353, T. 213, p. 49.

<sup>2424</sup> P-353, T. 213, pp. 50-52.

<sup>2425</sup> P-353, T. 213, pp. 47-49, 53-54 and 58-59; T. 215, pp. 47-48.

<sup>2426</sup> P-353, T. 213, p. 53; T. 215, p. 61.

<sup>2427</sup> P-353, T. 213, pp. 53 and 55-56; T. 215, p. 50.

<sup>2428</sup> P-353, T. 213, p. 56.

<sup>2429</sup> P-353, T. 213, p. 58.

<sup>2430</sup> P-353, T. 213, p. 57.

<sup>2431</sup> P-353, T. 215, pp. 17-19.

<sup>2432</sup> See, *inter alia*, P-353, T. 213, p. 58.

<sup>2433</sup> P-353, T. 213, p. 53.

witness was raped under threat on 24 February 2003.<sup>2434</sup> The Chamber notes here that the young woman was repeatedly raped over a period of about three months, initially by two men and subsequently by just one of them.<sup>2435</sup>

1017. In the Chamber's view, P-353's testimony alone establishes that following her incarceration, that is, as of 24 February 2003, the two men who had made her their wife exerted over her powers attaching to the right of ownership. Accordingly, the Chamber also finds that as of 24 February and continuously thereafter, the two men, who belonged to the group with whom the witness had been forced to go from Bogoro to their camp on the day of the attack, compelled her to have sexual intercourse with them.<sup>2436</sup>

1018. The perpetrators of these repeated rapes could not have been oblivious to the fact that whilst at the camp P-353, whom they had captured in Bogoro and were incarcerating, was deprived of all freedom of movement. They deliberately forced her to perform acts of a sexual nature. In this connection, the first man who raped her at the camp explained to her that she was now his wife and, to ensure she understood clearly what he meant by "wife", told her that he wanted her body, pushed her onto the bed and raped her as she cried.<sup>2437</sup>

1019. The Chamber therefore considers the crime of the sexual enslavement of Witness P-353, committed for a period of about three months from 24 February 2003 by two combatants stationed at a Ngiti camp in Walendu-Bindi *collectivité*, to be established.

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<sup>2434</sup> See "Section VIII(D)(2)(a)(iii) Rape: Witness P-353".

<sup>2435</sup> P-353, T. 213, p. 53.

<sup>2436</sup> P-353, T. 213, pp. 22, 25-27, 43 and 50-52.

<sup>2437</sup> P-353, T. 213, p. 50.

#### iv. Other evidence

1020. Finally, the Chamber noted that other women were sexually enslaved following the attack on Bogoro, and it will here address the following testimony in this regard.

1021. P-353 claimed that during the attack two other women who were with her and had also escaped death were given as wives to combatants who had forced them out of the house where they had been hiding.<sup>2438</sup> P-132 stated that whilst she was held captive, a girl was also incarcerated and repeatedly raped by combatants.<sup>2439</sup> P-268 stated that whilst he was being held in a classroom of the Institute on the evening of 24 February 2003, he saw a Ngiti combatant force himself on a woman. He said that he had later heard that the woman had been married to and subsequently had a child by the same man.<sup>2440</sup> P-233 also stated that he knew three Bogoro women who had been captured by attackers, taken to Ngiti-occupied locations and married to combatants or subjected to a similar fate.<sup>2441</sup> The Chamber thus finds that these various testimonies confirm that other women were sexually enslaved by Ngiti combatants during the 24 February 2003 attack on Bogoro.

#### c) Perpetrators of the acts

1022. Lastly, concerning the identity of the perpetrators of the crimes of rape and sexual slavery, the Chamber considers that it can be inferred that some of the combatants who raped and sexually enslaved P-132 were Ngiti.<sup>2442</sup> This finding is made, firstly, on the basis of her assertion that her attackers were Lendu

<sup>2438</sup> P-353, T. 213, pp. 43-48, 56-57 and 63-64. See also T. 215, p. 26.

<sup>2439</sup> P-132, T. 139, pp. 50, 52 and 54.

<sup>2440</sup> P-268, T. 107, pp. 47-49.

<sup>2441</sup> P-233, T. 86, pp. 14-26.

<sup>2442</sup> [Second Prosecution observations on article 25\(3\)\(d\)](#), para. 12; [Prosecution Closing Brief](#), paras. 79 and 83.

combatants,<sup>2443</sup> meaning Lendu and Ngiti.<sup>2444</sup> It also arises from the fact that she was taken by her attackers to a Ngiti militia commander and that he then ordered D02-148, a Ngiti combatant, to escort her to another camp belonging to the combatants from Walendu-Bindi.<sup>2445</sup> In the case of P-249, the Chamber notes that she stated that she was captured and held by Ngiti<sup>2446</sup> and that when questions were put to her suggesting that she had been held at a Ngiti camp, she did not set the questioner right.<sup>2447</sup> As for P-353, the Chamber recalls that it considered that she had been compelled to go to a Ngiti combatant camp in Walendu-Bindi *collectivité* and that she had then been raped and sexually enslaved there by combatants from the camp.<sup>2448</sup> In the Chamber's opinion, therefore, it is established that the perpetrators of the crimes of rape and sexual slavery against Witnesses P-132, P-249 and P-353 were Ngiti combatants.

1023. In the light of the foregoing, the Chamber accordingly finds that the evidence establishes beyond reasonable doubt that crimes of sexual slavery as a war crime and a crime against humanity<sup>2449</sup> under articles 8(2)(e)(vi) and 7(1)(g) of the Statute were intentionally committed, in the aftermath of the battle of Bogoro on 24 February 2003, by combatants from camps belonging to the Ngiti militia of Walendu-Bindi and by others in the camps.

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<sup>2443</sup> P-132, T. 139, pp. 12-13.

<sup>2444</sup> P-132, T. 138, pp. 80-81.

<sup>2445</sup> See Annex E.

<sup>2446</sup> P-249, T. 135, p. 50; 137, pp. 60-61.

<sup>2447</sup> P-249, T. 135, p. 64; T. 136, p. 80.

<sup>2448</sup> P-353, T. 213, pp. 22, 25-27, 43, 47-54 and 58-59; T. 215, pp. 47-48.

<sup>2449</sup> See "Section IX(A)(2)(c) Nexus between the crimes committed and the attack"; "Section IX(B)(3)(b) Nexus between the crimes and the non-international armed conflict".

## E. CRIME OF USING CHILDREN UNDER THE AGE OF 15 YEARS TO PARTICIPATE ACTIVELY IN HOSTILITIES AS A WAR CRIME (ARTICLE 8(2)(E)(VII) OF THE STATUTE)

### 1. Introduction

1024. By way of a preliminary comment, the Chamber recalls that this crime was confirmed by the Pre-Trial Chamber on the basis of Germain Katanga's responsibility under article 25(3)(a) as a "direct co-perpetrator". It further recalls that the legal recharacterisation of the mode of liability effected on the basis of article 25(3)(d) does not pertain to this crime.<sup>2450</sup> Indeed, whereas the Pre-Trial Chamber found that there were substantial grounds to believe that *members of the FRPI* had intentionally committed the other crimes alleged against the Accused, it did not make the same analysis in respect of the crime of using child soldiers. In ruling on this crime, the Pre-Trial Chamber found that there were substantial grounds to believe that *Germain Katanga* had committed it within the meaning of article 25(3)(a).<sup>2451</sup> Accordingly, the present Chamber was of the view that legal recharacterisation of the mode of liability for this crime on the basis of article 25(3)(d) would inevitably lead it to exceed the facts and circumstances of the case.<sup>2452</sup>

#### a) Decision on the confirmation of charges

1025. The Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that the war crime under article 8(2)(b)(xxvi) was committed by Germain Katanga, who had "consistently" used children under the age of 15 years to participate actively in hostilities "prior to, during, and

<sup>2450</sup> [21 November 2012 Decision](#), para. 7. See also "Section X(C)(3)(a)(iv) Decision not to recharacterise the crime of using children under the age of 15 years to participate actively in the hostilities".

<sup>2451</sup> [Decision on the confirmation of charges](#), paras. 253-263.

<sup>2452</sup> See "Section X(C)(3)(a)(iv) Decision not to recharacterise the crime of using children under the age of 15 years to participate actively in the hostilities".

following” the 24 February 2003 attack on the village of Bogoro.<sup>2453</sup> It found that there was sufficient evidence to establish substantial grounds to believe that Germain Katanga had “used children for multiple purposes, including direct participation in the attack”,<sup>2454</sup> during which they committed the subsequent crimes,<sup>2455</sup> and that a large number of FRPI combatants who participated in the hostilities were, in some cases, under 15 years of age.<sup>2456</sup> It stated that children were not only fully integrated into the militias during the fighting on 24 February 2003 but were also used by Germain Katanga and other FRPI commanders as part of an escort or personal bodyguards.<sup>2457</sup> It also noted that the child soldiers could be tasked with unloading weapons<sup>2458</sup> and that some received military training at FRPI camps, in the course of which they learnt how to handle weapons and received either bladed weapons or firearms.<sup>2459</sup>

1026. Regarding the volitional element of the war crime under article 8(2)(b)(xxvi) of the Statute, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that Germain Katanga knew or should have known that the persons thus used were under the age of 15 years.<sup>2460</sup> In that Chamber’s view, the evidence shows that the Accused used children in his personal guard,<sup>2461</sup> that he “[TRANSLATION] preferred to be escorted by child soldiers aged under 15 years because they obeyed unquestioningly”<sup>2462</sup> and that, furthermore, many children at the FRPI camps were visibly under the age of 15. The Pre-Trial Chamber further found that the available evidence also showed that the children often paraded in Germain Katanga’s presence and that they had

<sup>2453</sup> [Decision on the confirmation of charges](#), paras. 253, 256 and 263.

<sup>2454</sup> [Decision on the confirmation of charges](#), para. 254.

<sup>2455</sup> [Decision on the confirmation of charges](#), para. 257.

<sup>2456</sup> [Decision on the confirmation of charges](#), paras. 259-260.

<sup>2457</sup> [Decision on the confirmation of charges](#), para. 258.

<sup>2458</sup> [Decision on the confirmation of charges](#), footnote 331.

<sup>2459</sup> [Decision on the confirmation of charges](#), paras. 255 and 547.

<sup>2460</sup> [Decision on the confirmation of charges](#), para. 261.

<sup>2461</sup> [Decision on the confirmation of charges](#), paras. 258, 262, 547, 553 and 564.

<sup>2462</sup> [Decision on the confirmation of charges](#), paras. 262 and 547.

received military training pursuant to his orders, he himself having accepted the presence of child soldiers in the camps in 2003<sup>2463</sup> and being the key decision-maker in the transfer of children between camps.<sup>2464</sup>

1027. Accordingly, the Pre-Trial Chamber found that Germain Katanga made children under the age of 15 years actively participate in hostilities within the FRPI militia during and following the attack on Bogoro.<sup>2465</sup>

**b) Ambit of the *sub judice* matter**

1028. In adjudging the charge of using children under the age of 15 years to participate actively in hostilities, the Chamber first recalls that the facts and circumstances of the case, as described in the *Decision on the confirmation of charges*, for the most part bring to the fore the direct involvement of Germain Katanga as perpetrator of the crime. Accordingly, in this section it will address the description of the facts relating to the charge of using child soldiers and examine whether they are directly connected to the acts or omissions of the Accused.

1029. The Chamber further notes that the period in which the crime at bar was allegedly committed by Germain Katanga is “before, during and in the aftermath of” the attack on the village of Bogoro on 24 February 2003. In this connection, the Defence submitted that this phrase should be construed to mean “immediately” before or after 24 February 2003.<sup>2466</sup>

1030. The Chamber considers that, in respect of this crime, circumscription of the temporal scope by reference to “[TRANSLATION] on or around” 24 February 2003 and being “[TRANSLATION] connected” to the attack on Bogoro is consonant with

<sup>2463</sup> [Decision on the confirmation of charges](#), para. 261.

<sup>2464</sup> [Decision on the confirmation of charges](#), para. 547.

<sup>2465</sup> [Decision on the confirmation of charges](#), 256.

<sup>2466</sup> [Defence Closing Brief](#), para. 1016.

the facts and circumstances as described in the *Decision on the confirmation of charges*.<sup>2467</sup>

1031. In this section, it will therefore underscore the findings of fact establishing whether or not Germain Katanga used children under the age of 15 years to participate actively in the hostilities which took place in Bogoro on 24 February 2003, whether in the attack itself, in the preparations for the attack or in any other related acts at or around that time.

### c) Submissions of the parties and participants

1032. The Prosecution submitted that during the attack on Bogoro a large number of children under the age of 15 years participated actively in the hostilities alongside Lendu and Ngiti troops.<sup>2468</sup> In this regard, it stressed that witnesses noted the presence of children who were visibly under the age of 15 years,<sup>2469</sup> were armed, fought like adults, attacked and killed civilians, and destroyed houses and pillaged the village.<sup>2470</sup>

1033. In the Prosecution's view, the recruitment and use of *kadogos* – that is, child soldiers, including those under the age of 15 years – was a widespread practice within all the armed groups operating in Ituri.<sup>2471</sup> The FRPI had many children under the age of 15 years;<sup>2472</sup> they were to be found in various camps, such as that at Aveba,<sup>2473</sup> where they received basic military training<sup>2474</sup> and paraded in front

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<sup>2467</sup> [Decision on the confirmation of charges](#), paras. 253-263. See also [Office of the Prosecutor, "Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l'Accusation et de la liste des pièces à charge", 27 May 2009, ICC-01/04-01/07-1174 and annexes \("Table" or "Table of Incriminating Evidence"\)](#), para. 7 and Annex M.

<sup>2468</sup> [Prosecution Closing Brief](#), paras. 69-70 and 75.

<sup>2469</sup> [Prosecution Closing Brief](#), para. 70.

<sup>2470</sup> [Prosecution Closing Brief](#), para. 71.

<sup>2471</sup> [Prosecution Closing Brief](#), para. 692.

<sup>2472</sup> [Prosecution Closing Brief](#), paras. 696-697.

<sup>2473</sup> [Prosecution Closing Brief](#), para. 695.

<sup>2474</sup> [Prosecution Closing Brief](#), para. 721.

of the Accused.<sup>2475</sup> The Prosecution submitted that these child soldiers also took part in the various battles in which Germain Katanga's forces engaged.<sup>2476</sup> This also held true for the children who accompanied the Accused as members of his personal escort or bodyguard.<sup>2477</sup>

1034. Lastly, the Prosecution recalled that between November 2004 and June 2005 a demobilisation site operated at Aveba<sup>2478</sup> where many children were demobilised who had mainly become militia members at the camps in Walendu-Bindi *collectivité*.<sup>2479</sup> It notes that the Accused knew that his forces included child soldiers under the age of 15 years and that he deliberately had them take part in the attack on Bogoro.<sup>2480</sup> The age and vulnerability of the children ensured their near-automatic compliance with orders issued by the military commanders, who could be confident that the children would execute any order.<sup>2481</sup>

1035. Meanwhile, the Defence submitted that, whilst some testimonies show that children were present in Bogoro, their role and line of command has not been sufficiently established.<sup>2482</sup> It further maintained that only those activities linked to combat, provided that the threshold of direct participation in hostilities as it understands it is met, are such as to satisfy the requirements of this crime.<sup>2483</sup> It also asserted that the presence of children in the camps, their participation in parades, their training and the policing missions assigned to them as bodyguards do not mean that they directly participated in hostilities.<sup>2484</sup> The Defence further noted that, aside the *viva voce* evidence outwith the timeframe of the charges,<sup>2485</sup> the witness testimonies do not establish that children actively participated in

<sup>2475</sup> [Prosecution Closing Brief](#), para. 722.

<sup>2476</sup> [Prosecution Closing Brief](#), para. 725.

<sup>2477</sup> [Prosecution Closing Brief](#), paras. 698-714, 721 and 724.

<sup>2478</sup> [Prosecution Closing Brief](#), para. 726; [Prosecution Closing Statements, T. 336](#), p. 9.

<sup>2479</sup> [Prosecution Closing Brief](#), paras. 728-731.

<sup>2480</sup> [Prosecution Closing Brief](#), paras. 690-691 and 735.

<sup>2481</sup> [Prosecution Closing Brief](#), paras. 66, 228, 691 and 694.

<sup>2482</sup> [Defence Closing Brief](#), para. 1023.

<sup>2483</sup> [Defence Closing Brief](#), paras. 1088-1103.

<sup>2484</sup> [Defence Closing Brief](#), paras. 1104-1106 and 1012.

<sup>2485</sup> [Defence Closing Brief](#), paras. 1058-1083.

hostilities<sup>2486</sup> or allow a precise determination of their age or the group to which they belonged.<sup>2487</sup>

1036. The Legal Representative of child-soldier victims submitted that the evidence on record – in particular, the Agreement to End the Hostilities signed in Bunia on 18 March 2003 and the MONUC report on the events in Ituri between August 2002 and May 2003<sup>2488</sup> – demonstrates that children under the age of 15 years were recruited by and present in the armed groups operating in Ituri.<sup>2489</sup> According to the Legal Representative, the children received training and also took part in various activities of a military nature,<sup>2490</sup> and combat in particular.<sup>2491</sup> He recalled that children under the age of 15 years were also used as bodyguards or members of the escorts of Germain Katanga and some of his officers.<sup>2492</sup> As for the demobilisation programme established in Aweya, he noted that even the witnesses who criticised the reliability of the process specifically in determining the ages of some of the children who were included in the programme agreed that children were demobilised there.<sup>2493</sup>

1037. Lastly, the Legal Representative of child-soldier victims submitted that it is established that children who were clearly under the age of 15 years had a part in the handling and transportation of weapons and ammunition, in the preparations for the attack on Bogoro and in the attack itself.<sup>2494</sup> Furthermore, he asserted that those with responsibility for the operation provided children under the age of 15 years with weapons and ammunition for the attack.<sup>2495</sup> In combat, these children, he alleged, pursued and killed civilians, engaged in acts of destruction

<sup>2486</sup> [Defence Closing Brief](#), paras. 1026-1045.

<sup>2487</sup> [Defence Closing Brief](#), paras. 1046-1057.

<sup>2488</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 59-64 and 70.

<sup>2489</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 57, 59-66, 68-74 and 77-88.

<sup>2490</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), para. 58.

<sup>2491</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 73-74.

<sup>2492</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), para. 114.

<sup>2493</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 79-88.

<sup>2494</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 196 and 197.

<sup>2495</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), para. 160.

and pillaging and transported the stolen property.<sup>2496</sup> The Legal Representative further recalled that Germain Katanga acknowledged that children had participated in the attack on Bogoro and were present in the armed groups.<sup>2497</sup> Finally, he submitted that in deciding to send his troops on 24 February 2003, Germain Katanga was fully aware that children would participate in the hostilities.<sup>2498</sup>

## 2. Applicable law

1038. Article 8(2)(e)(vii) reads:

1. For the purpose of this Statute, “war crimes” means: [...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]

(vii) [...] using [children under the age of fifteen years] to participate actively in hostilities.

1039. As stipulated in the Elements of Crimes,<sup>2499</sup> in addition to the requirement of proof that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator was aware of factual circumstances that established the existence of the armed conflict, the constituent elements of the crime of using children under the age of 15 years to participate actively in hostilities are as follows: (1) the perpetrator conscripted or enlisted one or more persons into an armed force or group or participate actively in hostilities; (2) such person or persons were under the age of 15 years; and (3) the perpetrator knew or should have known that such person or persons were under the age of 15 years.

<sup>2496</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 197-199.

<sup>2497</sup> [Closing Statements of the Legal Representative of child-soldier victims, T. 337](#), p. 56.

<sup>2498</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 198-202.

<sup>2499</sup> Elements of Crimes, article 8(2)(e)(vii).

### a) Objective elements

1040. Regarding the objective elements of the crime, the Chamber will adopt the findings of Trial Chamber I in *Lubanga*.<sup>2500</sup>

1041. To begin, it notes that the three acts foreseen by article 8(2)(e)(vii) – conscripting, enlisting and using children under the age of 15 years – constitute three discrete crimes.<sup>2501</sup> Only the crime of using children under the age of 15 years lies before the Chamber for determination, and so on that crime alone it will rule.

1042. The Chamber further notes the particular nature of this crime, whose purpose is to protect children under the age of 15 years who may be used in hostilities in various ways.

1043. It considers, contrary to the Defence submission,<sup>2502</sup> that as regards the crime proscribed by article 8(2)(e)(vii), use of the expression “actively participate in hostilities” rather than “direct participation”, which appears in certain international humanitarian law instruments,<sup>2503</sup> is not insignificant. The definition must prohibit several forms of participation in hostilities with a view to protecting children from the risks faced during armed conflict.

1044. Accordingly, in the Chamber’s view, and as argued by the Legal Representative of child-soldier victims,<sup>2504</sup> whereas “active participation” in hostilities does refer to direct participation in hostilities, *viz.* combat,<sup>2505</sup> it also encompasses active participation in activities linked to combat, including support

<sup>2500</sup> [Lubanga Judgment](#), paras. 619-631.

<sup>2501</sup> [Lubanga Judgment](#), paras. 609 and 620.

<sup>2502</sup> [Defence Closing Brief](#), paras. 1012-1014 and 1088-1103.

<sup>2503</sup> Additional Protocol II, article 4; [Convention on the Rights of the Child, 20 November 1989](#), article 38(2).

<sup>2504</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), paras. 25-43.

<sup>2505</sup> [Decision on the confirmation of charges](#), para. 250; [Decision on the confirmation of charges in Lubanga](#), para. 261.

functions within military operations.<sup>2506</sup> However, a child is not actively participating in hostilities if the activity which he or she is performing is “clearly unrelated to hostilities.”<sup>2507</sup>

1045. Consonant with the position adopted by Trial Chamber I in *Lubanga*, the Chamber considers that all activities which constitute active participation in hostilities, whether they entail direct or indirect participation, possess, by virtue of their connection to the hostilities, the essential common feature that the child is, at the very least, a potential target during the hostilities. Accordingly, “[t]he decisive factor [...] in deciding if an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a ‘potential target’”.<sup>2508</sup> In this regard, the Chamber considers that the use of children in support functions on the front line, including as porters, is encompassed by the concept of activities connected to the hostilities.<sup>2509</sup> It further considers that the guarding of military objectives or the performance of the duties of a bodyguard or member of an escort also constitute such activities, especially when they have a direct impact on the level of logistical resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.<sup>2510</sup>

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<sup>2506</sup> [SCSL, \*Brima, Kamara and Kanu\* Trial Judgement](#), para. 737; [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, A/Conf.183/2/Add.1, 14 April 1998](#), p. 21, footnote 12.

<sup>2507</sup> [Decision on the confirmation of charges in \*Lubanga\*](#), para. 262.

<sup>2508</sup> [Lubanga Judgment](#), para. 628.

<sup>2509</sup> [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, A/Conf.183/2/Add.1, 14 April 1998](#), p. 21, footnote 12.

<sup>2510</sup> [Decision on the confirmation of charges in \*Lubanga\*](#), para. 63.

1046. Finally, the Chamber must satisfy itself that the conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>2511</sup>

**b) Subjective elements**

1047. The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.<sup>2512</sup>

1048. Accordingly, the Chamber finds that in the case at bar the perpetrator must have intentionally used children under the age of 15 years to participate actively in the hostilities. Such intent will be proven where the perpetrator acted deliberately or failed to act (1) in order to use children under the age of 15 years to participate actively in hostilities or (2) whereas he or she was aware that such participation would occur in the ordinary course of events. Contrary to the assertion of the Legal Representative of the child-soldier victims, the Chamber will not therefore consider *dolus eventualis* or negligence<sup>2513</sup> in respect of the crime of using children under the age of 15 years to participate actively in hostilities.<sup>2514</sup>

1049. The Chamber notes, however, that the Elements of Crimes provide for a specific mental element in respect of the children's age. To wit: "the perpetrator knew or should have known" that the persons whom he or she was using to participate directly in hostilities were under the age of 15 years.<sup>2515</sup>

<sup>2511</sup> Elements of Crimes, article 8(2)(e)(vii). See also "Section (IX)(B)(1) Applicable Law", para. 1176.

<sup>2512</sup> Elements of Crimes, General introduction, para. 2. See also "Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30".

<sup>2513</sup> [Closing Brief of the Legal Representative of child-soldier victims](#), para. 92.

<sup>2514</sup> See also "Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30".

<sup>2515</sup> Elements of Crimes, article 8(2)(e)(vii)-3.

1050. Lastly, the Chamber must satisfy itself that the perpetrator was “aware of factual circumstances that established the existence of an armed conflict” of which his or her conduct formed part and with which it was associated.<sup>2516</sup>

### 3. Findings of fact

1051. In this section, the Chamber will analyse the presence of children under the age of 15 years within the Ngiti militia of Walendu-Bindi *collectivité* between 2002 and 2004, before establishing whether they participated in the battle of Bogoro. It will then analyse Germain Katanga’s knowledge of the integration of children under the age of 15 years into the Ngiti militia troops during the material period, before considering his connection, if any, with child militia members under the age of 15 years in the Ngiti combatant camps, particularly in Aveba and in his bodyguard, at or around the time of the 24 February 2003 attack.

#### a) Presence of children in the Ngiti militia of Walendu-Bindi *collectivité*

1052. From several exhibits, the Chamber discerns the existence during the material period of a widespread phenomenon in Ituri of using child soldiers aged from 7 to 17 years in the ranks of the various armed groups active there,<sup>2517</sup> including by Ngiti,<sup>2518</sup> who trained them and often sent them into combat after their forcible or voluntary enlistment.<sup>2519</sup> It further notes that, according to the MONUC report on events in Ituri covering 2002 and 2003, at least 40 per cent of each militia

<sup>2516</sup> Elements of Crimes, article 8(2)(e)(vii)-5. See also “Section IX(B)(1) Applicable law”, para. 1176.

<sup>2517</sup> D02-228, T. 250, p. 24; P-12, T. 197, p. 43; D02-129, T. 272, pp. 25-30; P-30, T. 178, pp. 45-46 and 50-51; P-317, T. 229, pp. 21-22; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0373, para. 141). See also paras. 6, 39, 138, 142-143 and 147.

<sup>2518</sup> P-2, T. 188, p. 74; P-267, T. 170, p. 27; P-12, T. 197, p. 48; P-160, T. 211, pp. 35-36. The Chamber recalls that the witnesses may have used the term “Lendu” to denote both the Lendu and Ngiti ethnic groups (“Section VIII(A)(1) Terminology”).

<sup>2519</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0371 to DRC-OTP-0129-0375, paras. 138-143, 146-147 and 149). See also the testimony of Witness P-373 and his photographs admitted into evidence showing armed children in the camps in Lendu territory (see, in particular, P-373, T. 127, pp. 7-14, 42-43 and 46-47; EVD-OTP-00074, EVD-OTP-00075, EVD-OTP-00078, EVD-OTP-00083, EVD-OTP-00085, EVD-OTP-00086, EVD-OTP-00088, EVD-OTP-00089, EVD-OTP-00090, EVD-OTP-00091, EVD-OTP-00094, EVD-OTP-00095: Photographs taken by Witness P-373).

consisted of children under the age of 18 years, with a significant minority below the age of 15.<sup>2520</sup>

1053. By 2001 and in early 2002, as part of the resistance against the attacks by Ugandan forces against the population of Walendu-Bindi *collectivité*, there was a general, collective, spontaneous mobilisation of the Ngiti communities.<sup>2521</sup> In this connection, the Chamber notes that Witness P-267, who was involved in the demobilisation programme in Aveba<sup>2522</sup> and worked in the *collectivité* from 2001,<sup>2523</sup> stated that overall there was a “[TRANSLATION] community mobilisation”, meaning that “[TRANSLATION] faced with the enemy [...] everybody [was called upon] to resist: children, women and adults. That was the order.”<sup>2524</sup> The witness added that he had also known certain cases of children who, “[TRANSLATION] [f]or their protection”, “[TRANSLATION] out of vengeance”, or in order to follow their brothers, had ended up in the militias.<sup>2525</sup> Witness D02-136 stated that at that time, anyone who was physically fit defended the village of Aveba, including young people and children.<sup>2526</sup> Witness D02-228, RCD-ML territorial intelligence director and a Ngiti, also stated that following the creation of the FRPI in the second half of 2002,<sup>2527</sup> young people under the age of 18 decided of their own accord to take up arms and join the group.<sup>2528</sup>

1054. The Chamber notes, moreover, that, according to P-267, all the children demobilised in Aveba between November 2004 and June 2005 came from Ngiti communities and had belonged to the FRPI camps of Commander Dodova in Tsey, Commander Cobra Matata in Bavo, Commander Alpha Bebi in Bukiringi,

<sup>2520</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0373, para. 141). See also paras. 6 and 39; D02-134, T. 259, pp. 69-70.

<sup>2521</sup> See “Section VII(A)(1) Creation of self-defence groups”.

<sup>2522</sup> P-267, T. 163, pp. 79 and 83; T. 172, pp. 23-24.

<sup>2523</sup> P-267, T. 171, pp. 15-17.

<sup>2524</sup> P-267, T. 165, pp. 25-27. See also T. 170, pp. 26-28.

<sup>2525</sup> P-267, T. 165, p. 26. See also P-12, T. 195, pp. 68-71; T. 197, pp. 46-47.

<sup>2526</sup> D02-136, T. 240, p. 18; T. 241, p. 57.

<sup>2527</sup> D02-228, T. 251, p. 31. See also “Section VI(B) Main political events and incidents”.

<sup>2528</sup> D02-228, T. 250, pp. 23-24.

Commander Oudo in Medhu, Commander Yuda in Kagaba, Commander Angulumu in Semiliki and Commander Move in Aveba,<sup>2529</sup> except for about a hundred children from the UPC.<sup>2530</sup> He explained that some of the young people who had been demobilised had spent as many as two years in the Ngiti militia.<sup>2531</sup> The internal register of children admitted to the demobilisation centre was tendered into evidence (“the Log Book”).<sup>2532</sup> It contains 952 names of children aged from 9 to 17 years, about 400 of whom were under the age of 15 years.<sup>2533</sup> According to P-267, the admission of children was not limited solely to those who had borne arms, but, in accordance with the UNICEF “Cape Town Principles”, children associated with armed forces and groups (“CAAFGs”) might, for instance, also be admitted to the centre, that is, all children in some way associated with armed forces or groups or, more generally, with the conflict in the region.<sup>2534</sup> Whilst partially corroborating P-267’s testimony on the workings of the transit centre, Germain Katanga<sup>2535</sup> and four witnesses who had had contact with demobilised children<sup>2536</sup> cast doubt on the reliability of the count carried out at the time, especially in respect of the number of children who could be considered “[TRANSLATION] genuine” demobilised child soldiers. They maintained that many young people had wrongly claimed to have been combatants whereas they were

<sup>2529</sup> P-267; T. 165, pp. 13 and 58; T. 171, p. 57; EVD-OTP-00122: Map annotated by P-267.

<sup>2530</sup> P-267, T. 165, p. 58; T. 173, pp. 27 and 46-50.

<sup>2531</sup> P-267, T. 165, p. 25.

<sup>2532</sup> EVD-OTP-00120: Admissions log book of the Aveba transit site. See also P-267, T. 165, pp. 29-33.

<sup>2533</sup> EVD-OTP-00120: Admissions log book of the Aveba transit site; EVD-OTP-00121: Summary chart of former CAAFGs.

<sup>2534</sup> P-267, T. 165, p. 48; T. 170, p. 37; T. 172, pp. 69-72; T. 173, pp. 4-5; EVD-D02-00048: Cape Town Principles. See also D02-196, T. 283, pp. 45-46. According to the Paris Principles, a child associated with an armed force or armed group (CAAFG) refers to “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.” (The Paris Principles – Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2007).

<sup>2535</sup> D02-300, T. 320, pp. 59-60.

<sup>2536</sup> In their capacity as liaison officer (D02-01), outreach officer (D02-160), support officer tasked with receiving children at the Aveba transit centre (D02-196) and porter and occasional volunteer who took the children back to their homes (D02-136).

in fact children “[TRANSLATION] traumatised” by the conflict or “[TRANSLATION] associated with armed groups” who had come to the centre or who had been attracted primarily by “[TRANSLATION] kits”<sup>2537</sup> distributed during the demobilisation process.<sup>2538</sup> However, according to P-267, some of the children demobilised at the Aveba transit centre in 2004 told him that they had taken part in the attack on Bogoro,<sup>2539</sup> and others said that they had committed theft.<sup>2540</sup>

1055. To the Chamber, this testimony shows that some of the children may well have claimed to have been militia members whereas it was not so. This was apparently the case of Witness D02-259, who falsely claimed to have belonged to Germain Katanga’s militia, even though he had neither been a militia member nor lived in a camp, and thereby succeeded in being demobilised at the Aveba transit centre.<sup>2541</sup>

1056. However, the Chamber notes that even if, according to Witnesses D02-01, D02-129, D02-136, D02-160 and D02-196, the proportion of children who “[TRANSLATION] genuinely” were “[TRANSLATION] combatants” must have been small, their accounts nevertheless corroborate P-267’s testimony that “[TRANSLATION] child soldiers”, *viz.* “[TRANSLATION] combatants” as the testimonies make clear, who in some cases were under the age of 15 years<sup>2542</sup> and came from throughout Walendu-Bindi *collectivité*,<sup>2543</sup> were actually demobilised at the Aveba transit centre between November 2004 and July 2005.<sup>2544</sup>

<sup>2537</sup> Each kit provided on admission included, as a minimum, some clothes and flip-flop sandals (D02-160, T. 273, p. 18; D02-259, T. 284, p. 33).

<sup>2538</sup> See, *inter alia*, D02-01, T. 277, p. 8; T. 278, p. 23; D02-136, T. 240, pp. 27-28 and 55-56; T. 241, pp. 24-28, 31-32, 51-53, 55 and 62-65; D02-160, T. 273, pp. 19-20, 23-24 and 28-33; EVD-D02-00141: List of children not child soldiers; D02-196, T. 282, pp. 23, 25, 50 and 54-55; T. 283, pp. 38 and 46; EVD-D02-00048: Cape Town Principles.

<sup>2539</sup> P-267 T. 170, pp. 12-13; T. 166, pp. 32-33.

<sup>2540</sup> P-267, T. 170, p. 12; T. 171, p. 4.

<sup>2541</sup> D02-259, T. 284, pp. 33-35, 38-42, 45, 48 and 51.

<sup>2542</sup> D02-136, T. 240, pp. 55-56; T. 241, pp. 24-25, 31-32, 55 and 62-65; D02-129, T. 272, p. 30.

<sup>2543</sup> D02-01, T. 278, pp. 21-22; D02-196, T. 284, p. 2; D02-160, T. 273, pp. 73-74.

<sup>2544</sup> D02-01, T. 278, pp. 29-30; D02-160, T. 273, pp. 23-25 and 29; D02-196, T. 282, pp. 23-25, 47 and 54-55; T. 283, pp. 11-13 and 38-39.

1057. From the foregoing evidence, the Chamber finds that, whilst it is not possible to determine the precise number, some children under the age of 15 years, who came from throughout Walendu-Bindi *collectivité* and were demobilised in November 2004, were “combatants” in the *collectivité*, and some of them participated in the 24 February 2003 battle of Bogoro.<sup>2545</sup>

1058. The Chamber further notes that, according to the MONUC report, the Ngiti and Lendu militias “seem[ed] to have been offered a summary training either in their home villages or nearby”.<sup>2546</sup> Lastly, it notes that Witness V-2 claimed to have heard from a group of women from Beni at Bogoro market between December 2002 and January 2003 that Germain Katanga was training young people at a training camp in Gety.<sup>2547</sup> The Chamber recalls, however, that it considered V-2’s statements to be merely rumours and therefore of limited probative value.<sup>2548</sup> Accordingly, absent any additional evidence, it cannot rely on those rumours to find that the Accused was involved in the military training received by the young combatants.

1059. Nevertheless, the Chamber is in a position to find that children under the age of 18 years, some of whom were under 15 years of age, joined the armed groups within the Ngiti community of Walendu-Bindi *collectivité* from 2002 and that some of these, also under the age of 15 years, were “combatants” within Walendu-Bindi *collectivité* at the material time.

**b) Participation of children under the age of 15 years in the attack on Bogoro on 24 February 2003**

1060. The Chamber recalls the conclusions set out in the previous sections on the crimes committed during the 24 February 2003 attack on Bogoro, wherein it

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<sup>2545</sup> See also “Section VIII(E)(3)(b) Participation of children under the age of 15 years in the attack on Bogoro on 24 February 2003”.

<sup>2546</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0375, para. 147).

<sup>2547</sup> V-2, T. 231, pp. 50-51; T. 232, pp. 24-25 and 43-44.

<sup>2548</sup> See “Section V(C)(1) Credibility of V-2”.

determined that children armed with guns, machetes, spears and arrows fought alongside Lendu and Ngiti combatants and committed subsequent crimes.<sup>2549</sup>

1061. By way of illustration, it notes that Witness P-323, a UPC soldier,<sup>2550</sup> stated that *kadogos*, a term meaning “small or young child”, participated in combat alongside the other combatants, that they committed theft and then transported the stolen property and that they sometimes slashed people with their machetes.<sup>2551</sup> Witness P-132 also stated she had seen “[TRANSLATION] small children” in Bogoro who were armed with knives, machetes and, in some cases, guns killing people and claimed to have seen them pillaging houses to which they then set fire.<sup>2552</sup>

1062. Regarding the children’s age specifically, the Chamber considers that it can rely on the observations of the various eye-witnesses. Thus, it notes that P-132 stated without hesitation, on the basis of their physical appearance – specifically, their size and facial features – that the attackers, whom she had seen and estimated to be “[TRANSLATION] small children”, were, in her view, from 10 to 13 years old, and she explained in this regard that “[TRANSLATION] you can see a child’s face, and from that you can easily tell that he or she is still a child”.<sup>2553</sup>

1063. After claiming she was unable to give their ages, Witness P-249 estimated the youngest attackers whom she saw that day as being between 10 and 15 years old.<sup>2554</sup> According to P-287, the youngest of the “soldiers” she had seen was “[TRANSLATION] 12 years old or more”.<sup>2555</sup> Witness P-268 stated that from his

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<sup>2549</sup> See “Section VIII(B)(2)(g) Perpetrators of the acts”, para. 842; “Section “VIII(C)(2)(c) Perpetrators of the acts”, para. 933. See also P-132, T. 140, pp. 46-47 and 56; P-287, T. 129, pp. 45-50; T. 130, pp. 20 and 30; P-161, T. 111, pp. 12-14; T. 114, p. 21; P-268, T. 107, pp. 26-27 and 38-39; T. 108, pp. 26-27; P-323, T. 117, pp. 33, 55-57 and 60-61; P-353, T. 213, p. 22; T. 215, pp. 12-13; P-267, T. 166, pp. 32-33; T. 170, pp. 12-13 and 43-47; T. 171, pp. 3-4.

<sup>2550</sup> P-323, T. 117, p. 23.

<sup>2551</sup> P-323, p. 117, pp. 56-57.

<sup>2552</sup> P-132, T. 140, pp. 46-47.

<sup>2553</sup> P-132, T. 140, pp. 46-47.

<sup>2554</sup> P-249, T. 135, pp. 48-49.

<sup>2555</sup> P-287, T. 129, pp. 46-49. See also T. 130, pp. 32-33.

hiding-place he had seen several children amongst the attackers and thought that the youngest must have been 8 to 10 years old.<sup>2556</sup>

1064. Moreover, the Chamber notes that specifically from the language they spoke several witnesses claimed to have clearly identified Ngiti and Lendu children armed with arrows, spears and machetes amongst the combatants, some of whom were under the age of 15 years.<sup>2557</sup> Accordingly, based on several consistent testimonies concerning the participation of many children in the battle on 24 February 2003 and the fact that that a number of them were aged between 8 and 15 years and were Ngiti, the Chamber considers that no credibility can be attached to the statements of Witness D02-148, a Ngiti combatant, who said that he had not seen any children during the battle in Bogoro on that day.<sup>2558</sup>

1065. The Chamber is therefore satisfied beyond reasonable doubt that during the 24 February 2003 attack on Bogoro, children – including some, it is established, under the age of 15 years – were among the Lendu and Ngiti combatants, that they took part in the battle, and that they committed crimes at that time.

**c) Germain Katanga’s knowledge of the presence of child soldiers under the age of 15 years in the Ngiti militia: the Agreement to End the Hostilities and the demobilisation process**

1066. The Chamber notes that on 22 March 2003, as had representatives of eight other signatory groups three days earlier, Germain Katanga signed on behalf of the FRPI a ceasefire agreement dated 18 March 2003, whereby the FRPI undertook, *inter alia*, to “[TRANSLATION] halt all recruitment and use of child soldiers within [its] armed forces”, “[TRANSLATION] recognis[ing] that such a practice is inconsistent with international law”.<sup>2559</sup> It observes that Germain

<sup>2556</sup> P-268, T. 107, pp. 37-39; T. 108, pp. 26-27, 40 and 45-46. See also P-161, T. 111, pp. 12-13; T. 114, p. 21 and “Section V(B)(3) Credibility of P-161”.

<sup>2557</sup> P-268, T. 107, pp. 26-27; P-287, T. 129, p. 30; P-323, T. 117, pp. 55-56; P 161, T. 111, pp. 12-15.

<sup>2558</sup> D02-148, T. 279, pp. 19-20.

<sup>2559</sup> EVD-D03-00044: Agreement to End the Hostilities in Ituri (DRC-OTP-0043-0203).

Katanga testified that he had essentially concentrated on signing a “[TRANSLATION] ceasefire” agreement that day and that “[TRANSLATION] all those other little definitions, child soldiers, those things, [he] [had]n’t taken them into account”.<sup>2560</sup>

1067. In the Chamber’s view, Germain Katanga’s claim not to have acquainted himself with the passages of the Agreement to End the Hostilities on “child soldiers” strains credibility.<sup>2561</sup> The Chamber further considers that, inasmuch as at the time “child soldiers” were among the ranks of the FRPI (a name encompassing the Ngiti combatants of Walendu-Bindi *collectivité*) and inasmuch as the Accused was empowered to sign agreements on the FRPI’s behalf<sup>2562</sup> and to enter undertakings whereby it would put an end to the recruitment and use of child soldiers, he could not have been unapprised of the presence of children within that group, amongst the combatants, particularly since the practice was widespread in Ituri at the material time.

1068. As a result of the agreement, a demobilisation process was established in Ituri in late 2004.<sup>2563</sup> In November 2004, through the cooperation of Germain Katanga who attended its inauguration,<sup>2564</sup> Aveba, identified as the FRPI’s headquarters, then hosted a demobilisation centre particularly for militia members from that group and incorporated a site specifically for children.<sup>2565</sup>

1069. It is also the Chamber’s view that, in the light, firstly, of the widespread nature of the child-soldier phenomenon among combatants in Ituri, including in Walendu-Bindi *collectivité* from 2002 and after the events in Bogoro in February

<sup>2560</sup> D02-300, T. 324, pp. 16-18.

<sup>2561</sup> See “Section X(A)(7)(b)(iv) Role of Germain Katanga in the Agreement to End the Hostilities”.

<sup>2562</sup> See “Section X(A)(7)(b)(iv) Role of Germain Katanga in the Agreement to End the Hostilities”.

<sup>2563</sup> P-267, T. 171, p. 23; T. 172, pp. 23-24. These pilot projects of the National Disarmament, Demobilisation and Reintegration Programme were run by the National Commission for Disarmament and Reintegration, supported by international actors. (P-267, T. 172, pp. 26-30). See also EVD-OTP-00118: Map annotated by Witness P-267.

<sup>2564</sup> P-267, T. 165, pp. 58-59 and 61; D02-196, T. 282, pp. 31 and 44; T. 283, pp. 40-41.

<sup>2565</sup> P-267, T. 163, p. 83; T. 165, pp. 13 and 18; T. 171, p. 23; T. 172, pp. 23-24, 26 and 29-30.

2003, and, secondly, given Germain Katanga's personal involvement in the signature of the 18 March 2003 Agreement to End the Hostilities and the ensuing military demobilisation process, he cannot claim that he did not know that children, some under the age of 15 years, were among the military ranks of the Ngiti militia during the period of hostilities following the attack on Bogoro.

**d) Presence of child militia members under the age of 15 years in the Ngiti militia's camps on or around 24 February 2003 and their connection, if any, to Germain Katanga**

1070. The Chamber recalls its finding that there were child soldiers, some under the age of 15 years, in Walendu-Bindi *collectivité* at the material time.<sup>2566</sup>

1071. It notes that Witness P-353 claimed to have seen children taking part in military songs and bearing weapons<sup>2567</sup> in the Ngiti camp where she was held after being stopped in Bogoro on 24 February.<sup>2568</sup> She underscored that they appeared to be younger than her, that is, under 17 years of age, although she was unable to tell exactly how many years older she was.<sup>2569</sup> In the view of the Chamber, it is therefore established that armed children under the age of 17 years gravitated around the combatants in the Ngiti militia camp, although it cannot establish whether any of them were under the age of 15 years. Further, absent any details other than that they bore weapons and took part in military songs, it is also unable to establish that they took part in any military activities in the camp related to hostilities.

1072. P-132, a Hema inhabitant of Bogoro held at another Ngiti militia camp not far from the front line for several months from 24 February 2003,<sup>2570</sup> stated that she had seen children armed with guns, specifically "[TRANSLATION] small children"

<sup>2566</sup> See "Section VIII(E)(3)(a) Presence of children in the Ngiti militia of Walendu-Bindi *collectivité*".

<sup>2567</sup> P-353, T. 213, pp. 54 and 59-60.

<sup>2568</sup> P-353, T. 215, p. 49.

<sup>2569</sup> P-353, T. 213, p. 60; T. 215, pp. 22-23.

<sup>2570</sup> P-132, T. 142, pp. 40-43.

who, she thought, “[TRANSLATION] were not yet 15 years old”, two of whom were perhaps 12 or 13 years old.<sup>2571</sup> The children were taking part in military parades and were in the trenches guarding the camp and the prison.<sup>2572</sup> According to P-132, she saw Germain Katanga on three occasions between February 2003 and around June 2004.<sup>2573</sup> In this connection, the Chamber notes that the Accused testified that he went to the camp by motorbike shortly after the attack on Bogoro.<sup>2574</sup> It notes that P-132 specified that on his first visit, Germain Katanga was on a motorbike and was received as a figure of authority at the camp.<sup>2575</sup> She added that upon his arrival, the soldiers, amongst whom were children, stood to attention and saluted.<sup>2576</sup> P-132 stated that the children who participated in this welcome ceremony included some aged 13 or 14 years.<sup>2577</sup> She claimed that Germain Katanga had also met with the camp’s military authorities in a house.<sup>2578</sup> She further stated that after he had departed, she was told that the man was “[TRANSLATION] our president” and that he lived in Bolo, that is, Aveba.<sup>2579</sup> D02-148, a militia member, also stated that “[TRANSLATION] about five child soldiers” lived there from late 2002 to early 2003. He further stated that the young people had no role in the army and were only in the camp to live with their “[TRANSLATION] big brothers”. However, he explained that the military chief posted at the camp was against the participation of these children in combat.<sup>2580</sup>

1073. In the light of this evidence, the Chamber finds that on or around 24 February 2003, the militia members at the Ngiti camp where P-132 was located included children who took part in military parades and guarded the camp and the

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<sup>2571</sup> P-132, T. 140, pp. 47-49.

<sup>2572</sup> P-132, T. 140, pp. 47-48; T. 141, p. 34.

<sup>2573</sup> P-132, T. 142, pp. 40 and 43.

<sup>2574</sup> See Annex E.

<sup>2575</sup> P-132, T. 140, pp. 5-7, 15 and 32-33.

<sup>2576</sup> P-132, T. 140, pp. 6-7; T. 141, pp. 32-34.

<sup>2577</sup> P-132, T. 140, pp. 47-49.

<sup>2578</sup> P-132, T. 140, pp. 5-6; T. 140, p. 7.

<sup>2579</sup> P-132, T. 140, pp. 5-6.

<sup>2580</sup> See Annex E.

prison.<sup>2581</sup> In its view, that the children took part in such activities confirms that they were part of the Ngiti camp's military personnel and were able to provide military support to the Ngiti militia quartered at the camp, which was not far from the front line.<sup>2582</sup> The Chamber accordingly finds that Germain Katanga saw the children in the weeks after the attack on Bogoro. However, on the basis of this eye-witness testimony alone, which, furthermore, is insufficiently detailed to substantiate the children's ages estimated by P-132, the Chamber is not in a position to find that they were under the age of 15 years. Moreover, it is also unable to establish the existence of a direct link between the Accused and the child militia members or an effective hierarchical link<sup>2583</sup> between the Accused and the camp commander in connection with the hostilities in Bogoro.

**e) Presence of children under the age of 15 years in the camps in Aveba and Germain Katanga's guard on or around 24 February 2003**

1074. The Chamber will now examine whether there were children under the age of 15 years in the Aveba camps and whether any of them were under Germain Katanga's authority or were members of his bodyguard.

1075. Of note in this regard is the claim by Witness D02-136, the Accused's half-brother, that during 2002, as part of self-defence activities, children in the village of Aveba were mobilised to defend the village during attacks and were therefore "[TRANSLATION] included [...] among the militia members".<sup>2584</sup> The Chamber further and specifically notes that four witnesses stated, without specifying numbers, that towards late 2002 and in early 2003, children, some aged under 15 years, were living at the BCA camp with their families.<sup>2585</sup> Whilst all four witnesses asserted that the children were not militia members, Witness D02-161

<sup>2581</sup> P-132, T. 140, pp. 47-48; T. 141, p. 34.

<sup>2582</sup> See Annex E.

<sup>2583</sup> See "Section X(B)(2) Responsibility within the meaning of article 25(3)(a): Conclusions of law".

<sup>2584</sup> D02-136, T. 241, pp. 56-58.

<sup>2585</sup> D02-161, T. 270, pp. 17 and 35-36; D02-176, T. 257, p. 48; D02-129, T. 272, pp. 15-16, 23-25 and 36; D02-134, T. 257, pp. 48-49.

stated that some of them wore uniforms, although he did not know whether they were combatants.<sup>2586</sup> Germain Katanga confirmed such observations and stated that they were CAAFGs – children who were merely associated with an armed force or group but uninvolved in combat.<sup>2587</sup> He stated that, in any case, in their community children were not allowed to go to the front and that, to his knowledge, no children had gone to Aveba or travelled the 45 km between the two localities in order to fight in Bogoro.<sup>2588</sup>

1076. Additionally, P-267 stated that at the inauguration of the demobilisation centre, on 2 November 2004, Germain Katanga had the first child “[TRANSLATION] leave his rank” and presented for demobilisation.<sup>2589</sup> The centre’s log book lists one Karido, aged 12 years in November 2004, as the first child.<sup>2590</sup> Witness D02-01 and Germain Katanga himself confirmed that this 12- or 13-year-old boy had indeed been demobilised, but maintained that he was an orphan who had arrived in Aveba after the fighting in Singo in October 2002.<sup>2591</sup> When he arrived in Aveba, in late 2003,<sup>2592</sup> D02-01 learnt that Karido had fought in numerous battles, although he did not specify with which group or in which battles.<sup>2593</sup> According to D02-01 and Germain Katanga, once settled in Aveba, the child had no further part in any military activity.<sup>2594</sup> Both D02-01 and the Accused explained that they had given Karido a weapon for the sole purpose of enabling him to benefit from the programme and be demobilised on 2 November 2004.<sup>2595</sup> According to P-267, children had had no need to hand in a weapon for their admission to the

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<sup>2586</sup> D02-161, T. 270, pp. 35-36.

<sup>2587</sup> D02-300, T. 319, p. 47; T. 323, p. 74; T. 324, pp. 2-4, 18-19 and 25-26.

<sup>2588</sup> D02-300, T. 319, pp. 47-48.

<sup>2589</sup> P-267, T. 165, p. 61; T. 172, pp. 59-60.

<sup>2590</sup> EVD-OTP-00120: Admissions log book of the Aveba transit site (DRC-OTP-0164-0870).

<sup>2591</sup> D02-01, T. 277, pp. 7-8; T. 278, pp. 15-17; D02-300, T. 319, pp. 59-61; T. 321, p. 4. See also D02-300, T. 325, p. 58.

<sup>2592</sup> D02-01, T. 277, p. 12.

<sup>2593</sup> D02-01, T. 277, pp. 8 and 31-35.

<sup>2594</sup> D02-01, T. 277, pp. 8 and 31-35; D02-300, T. 324, p. 5.

<sup>2595</sup> D02-01, T. 277, pp. 7-8; T. 278, pp. 15-16 and 19; D02-300, T. 319, pp. 59-60; T. 321, p. 4.

demobilisation programme,<sup>2596</sup> which leads the Chamber to doubt such an explanation.

1077. In view of the evidence on record, whilst the Chamber finds that Karido, who was under the age of 15 years, was living at the BCA camp on or around 24 February 2003, it is not, however, in a position to ascertain the activities in which he engaged.

1078. As for the presence of children under the age of 15 years in Germain Katanga's bodyguard or escort,<sup>2597</sup> the Chamber notes that the Prosecution relied primarily on the testimony of P-28,<sup>2598</sup> whose reliability the Chamber has doubted. It recalls that it was unable to find that the witness had been a combatant but nevertheless accepted the information he provided on the presence of child soldiers in the Accused's personal escort.<sup>2599</sup> Accordingly, P-28, who may have been 14 years old at the material time,<sup>2600</sup> stated that he accompanied Germain Katanga as he moved around, from camp to camp, overseeing their organisation or arresting people, for example, in the Kagaba area.<sup>2601</sup> Absent any evidence to establish the exact period when P-28 accompanied Germain Katanga, the Chamber is not in a position to rely on these facts.

1079. The Chamber further notes that, again according to P-28, the soldiers in the Accused's escort included two other young men whom he thought were of his age at the material time and who did not yet have beards.<sup>2602</sup> Germain Katanga acknowledged that one of them was indeed his youngest bodyguard in February 2003 but claimed that he was a "[TRANSLATION] mature", "[TRANSLATION] bearded" young man, whom he put at around 22 years old in

<sup>2596</sup> P-267, T. 173, p. 69. See also D02-259, T. 284, pp. 39-43.

<sup>2597</sup> See, in this regard, [Prosecution Closing Brief](#), para. 724; [Decision on the confirmation of charges](#), paras. 258, 260, 262 and 553.

<sup>2598</sup> [Prosecution Closing Brief](#), paras. 698-714 and 721-722.

<sup>2599</sup> See "Section V(A)(1) Credibility of P-28".

<sup>2600</sup> See "Section V(A)(1) Credibility of P-28".

<sup>2601</sup> P-28, T. 217, pp. 14 and 19-20.

<sup>2602</sup> P-28, T. 217, pp. 20-21; T. 218, p. 40.

2004.<sup>2603</sup> The Chamber did indeed note from a photograph of the young man, which, according to Germain Katanga was taken in 2004, that he resembled an adult. In the light of these two contradictory testimonies from, on the one hand, the Accused and, on the other, P-28, whose evidence requires corroboration on this vital point since it has a direct bearing on Germain Katanga's criminal responsibility,<sup>2604</sup> the Chamber is not in a position to ascertain whether, at the material time, one of the Accused's bodyguards was under the age of 15 years. Moreover, it cannot accept P-28's testimony alone regarding the other young man.

1080. The only additional item of incriminating evidence on the composition of Germain Katanga's escort is found in P-12's testimony that conditions at the time compelled all leaders, including Germain Katanga, to have children in their escorts.<sup>2605</sup> The witness further explained that after mid-August 2003, when he first met with the Accused, he saw Germain Katanga accompanied by bodyguards who he himself thought were under 15.<sup>2606</sup> Nevertheless, the Chamber is unable to rely on P-12's statements in this regard, in that they refer to events that post-date by several months the events alleged; hence, it cannot find that Germain Katanga's escort included children under the age of 15 years during the hostilities in Bogoro.

1081. As to whether children under the age of 15 years under the authority of the Accused took part in receiving and transporting weapons and ammunition in Aveba in the context of the hostilities related to the attack on Bogoro,<sup>2607</sup> the Chamber adverts to the testimony of P-28. The witness claimed to have had a part, in Aveba, in receiving and transporting weapons and ammunition unloaded

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<sup>2603</sup> See Annex E.

<sup>2604</sup> See "Section V(A)(1) Credibility of P-28".

<sup>2605</sup> P-12, T. 197, p. 48; T. 196, pp. 54-55.

<sup>2606</sup> P-12, T. 196, pp. 50-55.

<sup>2607</sup> See "Section VII(C)(4) Supply of weapons and ammunition for the battle of Bogoro"; "Section X(A)(5) Role of Germain Katanga role in the receipt, storage and distribution of weapons and ammunition".

from the aeroplane which brought Germain Katanga back from Beni.<sup>2608</sup> As aforementioned, the Chamber is in much doubt as to whether P-28 was in Aveba as of that first weapons delivery, in December 2002.<sup>2609</sup> Accordingly, it considers that the witness cannot have experienced these events personally.

1082. P-28 further stated that following the delivery in December 2002, “[TRANSLATION] we received ammunition in Aveba” in view of the battle of Bogoro and it was distributed to the participating camps.<sup>2610</sup> As it is unable to determine to whom exactly the personal pronoun “we” refers, the Chamber is not in a position to find that P-28, who was a child under the age of 15 years, had a part in receiving weapons in prospect of the battle of Bogoro.

1083. Accordingly, no evidence is laid before the Chamber to sustain a finding that children from Aveba under the age of 15 years belonged to the BCA camp or to Germain Katanga’s guard or escort, or that they participated actively in hostilities connected to the attack on Bogoro on 24 February 2003.

#### **f) Conclusions of fact**

1084. In the light of the foregoing, the Chamber finds that children were present in the armed forces operating in Ituri, including in the ranks of the Ngiti militia, as of 2002 and during the period of hostilities in which the 24 February 2003 battle of Bogoro took place. It was able to establish that children, who were referred to locally as *kadogos* and who, in some cases, were estimated to be under the age of 15 years, were among the Ngiti combatants at the attack on Bogoro and took part not only in the fighting but also in certain acts of violence meted out to the local population and its property. The Chamber also finds that, shortly after 24 February 2003, there were children among the militia members at the camp where P-132 was, although it was impossible to determine whether they were

<sup>2608</sup> P-28, T. 217, pp. 27-29 and 32.

<sup>2609</sup> See “Section V(A)(1) Credibility of P-28”.

<sup>2610</sup> P-28, T. 217, p. 35.

under the age of 15 years. The children took part in military parades and guarded the camp and prison, providing the Ngiti militia with logistical support in respect of the hostilities.

1085. The Chamber further concludes that it was not in a position to establish a direct nexus between Germain Katanga and the children under the age of 15 who participated in the hostilities connected to the battle of Bogoro that would demonstrate that he used them for military purposes.

#### **4. Conclusions of law**

1086. In the light of these findings of fact, the Chamber is in a position to determine that children under the age of 15 years were fully integrated into the Ngiti militia of Walendu-Bindi *collectivité* during the hostilities connected to the 24 February 2003 battle of Bogoro and that, alongside the adult combatants, they participated directly in combat and in the crimes committed.

1087. However, the Chamber was unable to infer a direct nexus to suggest that the Accused used these children to participate in the hostilities.

1088. Hence, whilst the Chamber cannot rule out the possibility that Ngiti commanders of Walendu-Bindi *collectivité* used children under the age of 15 years in the hostilities connected to the battle of Bogoro, it cannot find that Germain Katanga committed the crime of using child soldiers under article 8(2)(e)(vii) and, consequently, cannot find him responsible under article 25(3)(a) of the Statute.

## IX. CONTEXTUAL ELEMENTS

### A. CRIMES AGAINST HUMANITY

#### 1. Applicable law

##### a) Submissions of the parties and participants

1089. By way of a preliminary comment, the Chamber notes that the parties and participants made only brief observations on certain aspects of the law pertaining to the constituent elements of crimes against humanity. Their observations do not therefore extend to all of the constituent elements set out in article 7, paragraphs 1 and 2 of the Statute.

1090. Thus, the Prosecution argued that for article 7 to find application, it need not be established that the crimes charged were widespread or systematic, but only that they formed part of a widespread or systematic attack directed against the civilian population, even if a single act was committed.<sup>2611</sup> It further contended that the policy adverted to by that same article need not be formalised and may be inferred from the manner and circumstances of commission of the acts. It suffices, in the view of the Prosecution, to show that the acts “[TRANSLATION] are not isolated or uncoordinated”.<sup>2612</sup>

1091. Drawing on ICTY case law, the Legal Representative of the main group of victims recalled that article 7 of the Statute does not mandate that the attack target the entire population within a given geographical location. In application of this provision, the bench should essentially, as he put it, ascertain the target of the attack, specifically whether it was the civilian population.<sup>2613</sup> As regards the “[TRANSLATION] deliberate policy of attacking the civilian population”, the Legal

<sup>2611</sup> [Prosecution Closing Brief](#), para. 32.

<sup>2612</sup> [Prosecution Closing Brief](#), para. 33.

<sup>2613</sup> [Closing statements of the common legal representative of the main group of victims, T. 337](#), pp. 75-76.

Representative further underscored that the Elements of Crimes do not require that attacks preceding or following the attack(s) stated in the charges be committed by the same perpetrators.<sup>2614</sup>

1092. The Defence took the view that the Chamber should adopt a narrow definition of crimes against humanity.<sup>2615</sup> It pointed out that in ICTY jurisprudence crimes against humanity are less clearly defined than in the Rome Statute. Although from the Elements of Crimes, the Defence considered it clear that a single criminal act may constitute a crime against humanity, it maintained that the attack itself must not only be widespread or systematic but must also involve the multiple commission of the crimes which article 7 of the Statute lists.<sup>2616</sup>

1093. Furthermore, according to the Defence, it does not suffice for the act to be committed “within the context of” a widespread or systematic attack. Relying on the English version of article 7(1), the Defence considered that it must form “part of” it. It is more than a matter of whether the act was committed randomly. In fact, if the act is distinct from the attack directed against the civilian population, it does not form part of the attack for the purposes of the Statute.<sup>2617</sup> In addition, the Defence maintained that the attack must be directed against the civilian population, which, according to the definition given by the Statute, implies that it be launched pursuant to a State or organisational policy. Since the offending conduct must be part of the same widespread or systematic attack, it must be proved that there was a State or organisational policy actively promoting or encouraging the commission of offences against the civilian population and that those offending acts were committed in pursuance of the same plan or policy that led to the widespread or systematic attack.<sup>2618</sup>

<sup>2614</sup> [Closing statements of the common legal representative of the main group of victims, T. 337](#), p. 77.

<sup>2615</sup> [Defence Closing Statements, T. 340](#), p. 44.

<sup>2616</sup> [Defence Closing Brief](#), para. 768.

<sup>2617</sup> [Defence Closing Brief](#), para. 769.

<sup>2618</sup> [Defence Closing Brief](#), paras. 770-771.

## b) Analysis

1094. The chapeau of article 7(1) of the Statute, which sets out the contextual elements of crimes against humanity, reads: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

1095. Article 7(2)(a) defines an attack directed against a civilian population thus:

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

1096. Desirous of imparting the exact and specific meaning to the various terms and expressions used by article 7 of the Statute and which appear in the relevant parts of the Elements of Crimes, the Chamber considers it expedient to recall at the outset that application of article 7 pre-supposes three stages of reasoning. It regards a recitation of the three stages essential to a clear understanding of which element has a normative connection to a given term or expression, so as to place the meaning of each term or expression in context, such that full effect is ultimately given to each of the contextual elements of crimes against humanity, within the meaning of article 7, and no element is disregarded, misconceived or rendered ineffective.

1097. The first stage of reasoning concerns analysis of the *existence* of an attack, which, within the meaning of article 7(2)(a) of the Statute, entails: (1) establishment of the existence of an operation or course of conduct involving, notably, the multiple commission of acts referred to in article 7(1) *aforecited*; (2) that the operation or course of conduct be directed against a civilian population; and (3) that it be proved that the operation or course of conduct took place pursuant to or in furtherance of a State or organisational policy. In this

regard, it must be shown first that a policy existed and second that the policy was connected to a State or an organisation.

1098. The second stage pertains to *characterisation* of the attack, in particular ascertainment as to whether it was widespread or systematic. To so proceed is paramount to establishing the existence of a crime against humanity and in principle should be subject to the first stage being conclusive. It is generally recognised that the adjective “widespread” adverts to the large-scale nature of the attack, whereas the adjective “systematic” reflects the organised nature of the acts of violence.

1099. The third and final stage seeks to determine, firstly, the existence of the requisite *nexus* between the widespread or systematic attack and the act within the ambit of article 7 and, secondly, *knowledge* of that nexus by the perpetrator of the act.

1100. The Chamber further considers it useful to underscore that interpretation of the terms of article 7 of the Statute and, where necessary, the Elements of Crimes, requires that reference be had to the jurisprudence of the ad hoc tribunals insofar as that jurisprudence identifies a pertinent rule of custom, in accordance with article 31(3)(c) of the Vienna Convention.<sup>2619</sup> Of note in this connection is that the negotiation of the definition of a crime against humanity was premised on the need to codify existing customary law.<sup>2620</sup>

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<sup>2619</sup> See “Section III(B) Method of interpretation”.

<sup>2620</sup> [Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I \(Proceedings of the Preparatory Committee during March-April and August 1996\), General Assembly, 51<sup>st</sup> session, Supplement No. 22, A/51/22 \(1996\)](#), paras. 51-54. See also Herman von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court” in R. S. Lee (ed.), *The International Criminal Court - The Making of the Rome Statute - Issues, Negotiations, Results* (1999), p. 91.

- i. **An attack directed against the civilian population pursuant to or in furtherance of a State or organisational policy**
  - a. **Conduct involving the commission of multiple acts of violence referred to in article 7(1)**

1101. The French version of the Elements of Crimes states that “attack directed against a civilian population” denotes “*le comportement qui consiste en la commission multiple d’actes visés au paragraphe 1 de l’article 7 du Statut à l’encontre d’une population civile quelle qu’elle soit*”. In English, the same passage reads: “a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population”.<sup>2621</sup> The Chamber therefore considers that the word “*comportement*” in the French version cannot be construed as “*comportement*” [conduct] in article 30(2)(a) of the Statute, which concerns criminal intent. At issue here is the definition of an “attack” within the meaning of article 7(2)(a) of the Statute, denoting a campaign, an operation or a series of actions directed against the civilian population, *viz.* a course of conduct and not a single isolated act. The Chamber further underscores that the proof required to establish the existence of an attack cannot be confused with the proof required to demonstrate the widespread nature of the attack, lest the alternative possibilities foreseen, *viz.* that the attack may be widespread or systematic, be rendered meaningless. This first step consists of proving only that the course of conduct involved the multiple commission of acts referred to in article 7(1). In this connection, where established that it involved such multiple commission of acts, a single event may well constitute an attack within the meaning of article 7(2)(a), provided that the other elements of that article are met.

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<sup>2621</sup> [Elements of Crimes](#), article 7, Introduction, para. 3. See also the Spanish version (“[...] *una línea de conducta que implique la comisión múltiple de los actos a que se refiere el párrafo 1 del artículo 7 del Estatuto contra una población civil [...]*”). On this point, see the [Tadić Trial Judgement](#), para. 644.

It must also be emphasised that the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population.<sup>2622</sup>

### **b. Directed against any civilian population**

1102. The expression “civilian population” denotes civilians as opposed to “members of armed forces and other legitimate combatants”.<sup>2623</sup> As such, the Chamber endorses the definition of “civilian” provided by article 50(1) of Additional Protocol I and that of “civilian population” provided by article 50(2) of Protocol I, namely “[t]he civilian population comprises all persons who are civilians”.

1103. It considers, as the *Decision on the confirmation of charges* rightly recalled, that where the commission of crimes against humanity is at issue, the nationality of the members of such a population, their ethnic group or any other distinguishing feature is immaterial to the protection that attaches to “civilian” character.<sup>2624</sup>

1104. The civilian population must be the primary target and not the incidental victim of the attack.<sup>2625</sup>

In order to determine whether the attack may be said to have been so directed, [one must] consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.<sup>2626</sup>

<sup>2622</sup> [Elements of Crimes](#), article 7, Introduction, para. 3.

<sup>2623</sup> [Decision on the confirmation of charges in Bemba](#), para. 78. See also [ICTY, Kunarac et al. Trial Judgement](#), para. 425.

<sup>2624</sup> [Decision on the confirmation of charges](#), para. 399. See also [Decision on the confirmation of charges in Bemba](#), para. 76; [ICTY, Tadić Trial Judgement](#), para. 635; [ICTY, Kunarac et al. Trial Judgement](#), para. 423; Rodney Dixon, “Article 7” in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 181.

<sup>2625</sup> [Decision on the confirmation of charges in Bemba](#), paras. 76 and 97-98. See also [ICTY, Kunarac and al. Appeal Judgement](#), paras. 91-92; [ICTY, Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgement, 31 July 2003](#), para. 624; [ICTY, Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Judgement, 29 November 2002](#), para. 33.

<sup>2626</sup> [ICTY, Kunarac et al. Appeal Judgement](#), para. 91.

1105. It should be underscored that, according to the jurisprudence of the ad hoc tribunals founded on article 50 of Additional Protocol I to the Geneva Conventions of 12 August 1949, the population so targeted must be primarily composed of civilians – the presence of non-civilians in its midst has therefore no effect on its status of civilian population.<sup>2627</sup> The Prosecution must therefore prove that the attack was not directed against a limited group of randomly selected persons.<sup>2628</sup> However, to such end, it suffices for the Prosecution to establish, as the Legal Representative of the main group of victims recalled,<sup>2629</sup> that the civilians were targeted during the attack in sufficient number or in such a manner that the attack was effectively directed against the civilian population, without it being necessary for the Prosecution to prove that the *entire* population of a geographic area was targeted at the time of the attack.<sup>2630</sup>

### c. Pursuant to or in furtherance of a State or organisational policy

#### (i) *A policy*

1106. According to the Elements of Crimes, the course of conduct constituting the attack must be executed pursuant to or in furtherance of a policy to commit such attack originating from a State or an organisation. The Chamber notes that both the Statute and the Elements of Crimes leave the term “policy” undefined.

1107. Nonetheless, the Elements of Crimes specify that a policy which has a civilian population as the object of the attack would in principle be implemented by State or organisational action. The Elements of Crimes also emphasise that “[s]uch a

<sup>2627</sup> [ICTY, Prosecutor v. Jelisić, Case No. IT-95-10-T, Trial Judgement, 14 December 1999](#), para. 54. See also [ICTY, Tadić Trial Judgement](#), paras. 638-639; [ICTR, Akayesu Trial Judgement](#), para. 582; [ICTR, Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-I-T, Trial Judgement, 21 May 1999](#), para. 128; [ICTY, Kunarac and al. Trial Judgement](#), para. 425. [ICTY, Strugar Trial Judgement](#), para. 284.

<sup>2628</sup> [ICTY, Kunarac et al. Appeal Judgement](#), para. 90.

<sup>2629</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 261.

<sup>2630</sup> [ICTY, Kunarac et al. Appeal Judgement](#), para. 90; [ICTY, Kunarac et al. Trial Judgement](#), paras. 422 and 424. See also [ICTR, Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001](#), para. 80; [ICTR, Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and sentence, 15 May 2003 \(“Semanza Trial Judgement”\)](#), para. 330.

policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action".<sup>2631</sup>

1108. In the Chamber's view, in keeping with a plain meaning of the term<sup>2632</sup> placed in context,<sup>2633</sup> "policy", within the meaning of article 7(2)(a) of the Statute, refers essentially to the fact that a State or organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action. "Policy" does not preclude a design adopted by a State or organisation with regard to a certain population in a given geopolitical situation. The Chamber would emphasise, however, that the statutory framework does not require that a formal design exist, since explicitly advanced motivations are ultimately of little importance. In any event, the policy must always target a particular civilian population or a part thereof.

1109. As regards proof of the existence of such a policy, it is important to underline that it is relatively rare, although cannot be wholly excluded, that a State or organisation seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established design or plan to that effect. In most cases, the existence of such a State or organisational policy can therefore be inferred by discernment of, *inter alia*, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation.

<sup>2631</sup> [Elements of Crimes](#), article 7, Introduction, footnote no. 6.

<sup>2632</sup> The term [in French] is a feminine noun. See, in particular, [Centre national de ressources textuelles and lexicales, "Politique"](#): "*Ligne de conduite raisonnée, en particulier d'une entreprise, d'une institution*" [TRANSLATION: "Reasoned course of conduct, in particular of a firm or institution"]; *Le Grand Robert de la langue française, "Politique"*: "*Manière concertée de conduire une affaire*" [TRANSLATION: "Concerted manner of conducting a matter"].

<sup>2633</sup> The Chamber notes that the Elements of Crimes juxtapose the terms "plan" and "policy", the latter also referring to the "object" pursued by the State or the organisation that "consciously" encourages such attack (see, in particular, [Elements of Crimes](#), article 7, Introduction, para. 2 and footnote no. 6).

1110. Furthermore, it is important to note that in the majority of situations amenable to the Court, some aspects of the policy pursued against a civilian population will only crystallise and develop as actions are set in train and undertaken by the perpetrators. The State or organisational policy may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only *in retrospect*, once the acts have been committed and in the light of the overall operation or course of conduct pursued. Otherwise stated, the State or organisational policy may be part of an ongoing process whose every aspect is not always predetermined before the operation or course of conduct pursued against the targeted civilian population has commenced or even once it has started.

1111. As the Chamber has briefly recalled, the systematic nature of the attack is understood to refer to the organised nature of the acts of violence. Any attack directed against a civilian population that may be considered “systematic” will in principle presuppose the existence of a State or organisational policy. However, that does not mean that the terms “policy” and “systematic” are to be considered synonymous. Indeed it should be recalled that it is not so much the policy as it is the widespread or systematic nature of the attack – *viz.* a consideration of the scale and regular nature of the pattern followed – which first and foremost distinguishes a crime against humanity and constitutes its “hallmark”.<sup>2634</sup>

1112. Certainly, the demonstration of, first, the existence of a policy and, second, of the systematic character of the attack do ultimately form part of the same requirement: the requirement to establish that the individual act is the link in a chain and that it is connected to a system or plan. However, the various definitions provided by the Statute and the Elements of Crimes do not entail that a meaning be imparted to the term “policy” that departs from how it has previously been construed. In the Chamber’s view, to equate the term “policy”

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<sup>2634</sup> [Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, General Assembly, Forty-ninth session, Supplement No. 10, A/49/10 \(1994\)](#), p. 40.

with the concept of “regular pattern”, as the Court has at times ruled,<sup>2635</sup> would be tantamount to considering it analogous to “systematic”. Ultimately, this would mean that, were the existence of a policy demonstrated, a widespread attack would be cast as systematic, in contradiction with the Statute’s disjunctive wording.

1113. In the Chamber’s opinion, the adjective “systematic” allows the nature of the attack, understood in a broad sense, to be characterised and to bring to the fore the existence of a *pattern* of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence that establish the existence of a crime against humanity. To establish a “policy”, it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community.<sup>2636</sup> Such analysis also entails inquiry as to whether a series of repeated actions seeking to produce always the same effects on a civilian population was undertaken with consideration – identical acts or similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area.

**(ii) Pursuant to or in furtherance**

1114. The very language of the Statute and Elements of Crimes requires that a course of conduct establishing the existence of an attack be executed “pursuant to

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<sup>2635</sup> [Decision on the confirmation of charges](#), para. 396; [Decision on the confirmation of charges in Bemba](#), para. 81; [Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya 31 March 2010, ICC-01/09-19-Corr \(“Decision to open an investigation into the Situation in Kenya”\)](#), para. 84; [The Prosecutor v. Laurent Koudou Gbagbo, Pre-Trial Chamber III, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, ICC-02/11-01/11-9-Red](#), para. 37.

<sup>2636</sup> Given that, as the Chamber has already stated, the Elements of Crimes do not require the demonstration of the existence of a pre-established design, a programme, a plan or concerted action.

or in furtherance of a State or organizational policy” to attack a civilian population. The policy thus has a part in making sense of the acts committed by connecting them in such a way as to establish the existence of a course of conduct – considered as a whole – that constitutes an attack within the meaning of article 7(2)(a).

1115. If the term “policy” is placed in context, it is apparent that the Elements of Crimes link this concept, as does article 7(2)(a) of the Statute, to the actual definition of “attack” (rather than to the characterisation of the attack, which must be widespread or systematic), since “attack” denotes, as aforementioned, a course of conduct or an operation involving the multiple commission of acts. In the Chamber’s view, it is therefore not a question of demonstrating that each of the acts listed in article 7(1) of the Statute took place pursuant to or in furtherance of a State or organisational policy. Having regard to the language of the Statute, it is important, in the view of the Bench, to establish beyond reasonable doubt that the operation or course of conduct was carried out pursuant to or in furtherance of the policy. Hence at this stage of the reasoning it is not a matter of ascertaining whether the perpetrators of these acts are members of or are directly or indirectly connected to the State or organisation, although regard may be had to this aspect as evidence of the connection between the attack and the State or organisational policy. Similarly, at this stage their possible criminal intent need not be determined such that it accords in every respect with the State or organisational policy.

1116. Further, in the Chamber’s view, the requisite nexus is hence one that exists between the course of conduct or operation and the policy, and not one that may exist between the course of conduct or operation and the State or organisation in question, although the latter factor is not immaterial to establishing the first-mentioned factor. The Chamber views the Statute and the Elements of Crimes as unequivocal on this point.

**(iii) An organisation**

1117. The attack, within the meaning of article 7(2)(a) of the Statute, must be executed pursuant to or in furtherance of a State or organisational policy. The Statute and the Elements of Crimes leave undefined the term “organisation”, but two provisional conclusions may be drawn from a plain reading of the texts as they stand:

- the organisation is not the State, as the text uses the conjunction “or” to denote that the concepts are and must remain distinct;
- the Elements of Crimes state that the organisation or State must “actively promote or encourage” the attack against the civilian population.<sup>2637</sup> That they so specify presupposes that the organisation in question has sufficient means to promote or encourage a campaign involving the multiple commission of acts referred to in article 7(2) of the Statute.

1118. The Chamber notes that paragraph 3 of the Introduction to article 7 of the Elements of Crimes and article 7(2)(a) of the Statute make no reference whatsoever to any centralised and hierarchical structure of the organisation but only to an object. However, the Chamber is aware that the characteristics of the organisation, within the meaning of the Statute and the Elements of Crimes, were canvassed by a Pre-Trial Chamber of the Court.<sup>2638</sup> It considers that, here too, interpretation is expedient so as to delineate the contours of an organisation.

1119. Turning first to its plain meaning, the term “organisation” must be understood as an “[a]ssociation, *régie ou non par des institutions, qui se propose des buts déterminés*” [TRANSLATION: an association, whether or not governed by

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<sup>2637</sup> Elements of Crimes, article 7, Introduction, para. 3.

<sup>2638</sup> See [Decision on the opening of an investigation into the situation in Kenya](#), paras. 90-93 and [Dissenting opinion of Judge Hans-Peter Kaul](#), paras. 33-66.

institutions, that sets itself specific objectives].<sup>2639</sup> This very general definition does not, however, allow the contours of an organisation to be clearly circumscribed. To such end, the Chamber places the term in its context. The question then arises as to whether the normative connection of the organisation to the existence of an attack within the meaning of article 7(2)(a) may affect the definition of the characteristics of such organisation. In the Chamber's view, the connection of the term "organisation" to the very existence of the attack and not to its systematic or widespread nature presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute. It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.

1120. That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State. In the Chamber's opinion, of prime import are, it must be repeated, the capacities for action, mutual agreement and coordination, which, in its view, are essential features to defining

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<sup>2639</sup> *Le Grand Robert de la langue française*. See also [Centre national de ressources textuelles and lexicales](#), "[Organisation](#)": "ensemble structuré (de services, de personnes) formant une association ou une institution ayant des buts déterminés" [TRANSLATION: a structured body (of departments or people) forming an association or an institution with specific objectives"].

an organisation that, by very reason of the means and resources it possesses and its membership, allow an attack to be executed.

1121. Moreover, it must be noted that the “general practice accepted as law”,<sup>2640</sup> identified by the jurisprudence of the ad hoc tribunals, adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics.<sup>2641</sup> Thus, the jurisprudence of the ad hoc tribunals has drawn specific attention to the milestone in the definition of a crime against humanity – initially conceived as an instrument to shield the individual from abuses by his or her national State – by recalling that “non-State actors are also possible perpetrators of crimes against humanity”.<sup>2642</sup> The Rome Statute in this regard therefore echoes the rules of custom brought to the fore by the ad hoc tribunals.

1122. Recalling that the method of interpretation that it must follow encompasses, *inter alia*, the purpose and object of the Statute,<sup>2643</sup> the Chamber also underscores that a restrictive conception of the organisation requiring that it possess quasi-State characteristics, would not further the Statute’s goal of prosecuting the most serious crimes.<sup>2644</sup> To so conceive the organisation would in effect exclude any entities that may have undertaken a widespread or systematic operation involving the multiple commission of acts under article 7(1) of the Statute

<sup>2640</sup> [Statute of the International Court of Justice, 26 June 1945](#), article 38.

<sup>2641</sup> See, in particular, [ICTY, Tadić Trial Judgment](#), para. 654 (“The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy ‘because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nuremberg Charter]’ [...] In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.”) (footnotes omitted).

<sup>2642</sup> [ICTY, Tadić Trial Judgment](#), para. 655, referring to the work of the International Law Commission on the matter. See Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, General Assembly, Forty-sixth session, Supplement No. 10 (A/46/10), p. 290.

<sup>2643</sup> See “Section III(B) Method of interpretation”.

<sup>2644</sup> [Rome Statute](#), Preamble.

pursuant to or in furtherance of their policy, on the sole ground that they are insufficiently hierarchical to be considered, in theory, as capable of pursuing or enforcing a policy whose aim is such an attack.

**ii. A widespread or systematic attack**

1123. The attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated. An established line of authority holds that the adjective “widespread” adverts to the large-scale nature of the attack and to the number of targeted persons, whereas the adjective “systematic” reflects the organised nature of the acts of violence and the improbability of their random occurrence.<sup>2645</sup> It has also been consistently held that the “systematic” character of the attack refers to the existence of “patterns of crimes” reflected in the non-accidental repetition of similar criminal conduct on a regular basis.<sup>2646</sup>

**iii. Nexus and knowledge**

1124. The Chamber recalls that the individual act must be committed as part of a widespread or systematic attack. In determining whether an act within the ambit of article 7(1) of the Statute forms part of a widespread or systematic attack, the bench must, with due regard for the nature of the act at issue, the aims it pursues and the consequences it occasions, inquire as to whether it is part of the widespread or systematic attack, considered as a whole, and in respect of the various components of the attack (i.e. not only the policy but also, where relevant, the pattern of crimes, the type of victims, etc.).<sup>2647</sup> Isolated acts that clearly differ

<sup>2645</sup> [The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58\(7\) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr](#), para. 62.

<sup>2646</sup> [Decision on the confirmation of charges](#), para. 397. See also [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 94; [ICTY, Blaškić Appeal Judgement](#), para. 101; [ICTY, Kunarac and al. Appeal Judgement](#), para. 94; [ICTR, Akayesu Trial Judgement](#), para. 580; [ICTR, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007](#), para. 920.

<sup>2647</sup> See, in particular, [ICTY, Kunarac et al. Appeal Judgement](#), para. 99; [ICTY, Prosecutor v. Duško Tadić, Appeals Chamber, Case No. IT-94-1-A, 15 July 1999 \(“Tadić Appeal Judgement”\)](#), paras. 271-272;

in their nature, aims and consequences from other acts that form part of an attack, fall outwith article 7(1) of the Statute.

1125. Lastly, the perpetrator must know that the act in question is part of the widespread or systematic attack against the civilian population. Accordingly, the Court's founding instruments require proof that the perpetrator of the act knowingly participated in the attack directed against a civilian population; such knowledge constitutes the foundation of a crime against humanity as it elucidates the responsibility of the perpetrator of the act within the context of the attack considered as a whole. However, that stipulation should not be interpreted as a requirement of proof that the perpetrator had knowledge of all of the characteristics of the attack or the precise details of the plan or policy of the State or organisation. Nor is it required that the perpetrator of the act subscribed to the State or the organisation's criminal design, any more than it must be shown that the perpetrator deliberately intended his or her act to form part of the attack against the civilian population, even though the Elements of Crimes mention this scenario. The perpetrator's motive is hence irrelevant to such proof and for his or her act to be characterised as a crime against humanity, it suffices to establish, in view of the context, knowledge of the particular fact that his or her act formed part of the attack.<sup>2648</sup>

## 2. Findings of fact and legal characterisation

1126. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that the attack on Bogoro on 24 February 2003 was not only directed against the UPC military camp but also against the predominantly Hema civilian population of the

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[ICTR, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgement and sentence, 1 December 2003](#), para. 866; [ICTR, Semanza Trial Judgement](#), para. 326.

<sup>2648</sup> [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 99; [ICTY, Blaškić Appeal Judgement](#), para. 124; [ICTR, Semanza Trial Judgement](#), para. 332. See also [ICTY, Kunarac et al. Appeal Judgement](#), para. 103.

village.<sup>2649</sup> The attack was intended to “wipe out” or “raze” that village by killing the mainly Hema civilian population and destroying its homes.<sup>2650</sup>

1127. According to the Pre-Trial Chamber, the attack formed part of a widespread attack on Ituri’s mainly Hema civilian population.<sup>2651</sup> Indeed, it cost around 200 civilian lives;<sup>2652</sup> and numerous other civilians, mostly Hema, were killed during attacks by the FNI and the FRPI in the months before and after.<sup>2653</sup> It also formed part of a systematic attack against the civilian population of the Ituri region that took place from late 2002 to mid-2003.<sup>2654</sup> It was undertaken pursuant to a common policy and an organised common plan which were, *inter alia*, (i) part of a broader campaign of reprisals directed against Ituri’s predominantly Hema civilians; (ii) illustrative of conflict between armed forces, pitting the Hema (UPC) against the Lendu and the Ngiti (FNI/FRPI); and (iii) a means to “wipe out” the village of Bogoro so as to secure control over the road leading to Bunia.<sup>2655</sup> Moreover, the Pre-Trial Chamber established that rape and sexual slavery were committed by the FNI and FRPI frequently and consistently throughout the region of Ituri in the DRC.<sup>2656</sup>

1128. In its Closing Brief, the Prosecution maintained that the 24 February 2003 attack on Bogoro was in and of itself a widespread and systematic attack on civilians, insofar as it claimed over 200 civilian lives.<sup>2657</sup> It further alleged that the attack formed part of a widespread military campaign targeting civilians in Ituri between 2001 and 2003 and submitted that before that attack, the Lendu and Ngiti had already killed numerous civilians, especially in that area, in attacks in 2001 and 2002, in particular in Nyakunde in September 2002. The Prosecution

<sup>2649</sup> [Decision on the confirmation of charges](#), para. 403.

<sup>2650</sup> [Decision on the confirmation of charges](#), para. 406.

<sup>2651</sup> [Decision on the confirmation of charges](#), paras. 408-411.

<sup>2652</sup> [Decision on the confirmation of charges](#), para. 408.

<sup>2653</sup> [Decision on the confirmation of charges](#), paras. 408-411.

<sup>2654</sup> [Decision on the confirmation of charges](#), paras. 412-416.

<sup>2655</sup> [Decision on the confirmation of charges](#), para. 413.

<sup>2656</sup> [Decision on the confirmation of charges](#), para. 415.

<sup>2657</sup> [Prosecution Closing Brief](#), paras. 34 and 35.

maintained that scores of civilians were also killed in attacks on Mandro, Bunia, Tchomia and Kasenyi, which all took place after the battle of Bogoro in February 2003.<sup>2658</sup> It considered that the attack directed against the primarily Hema civilians of that village occurred against the backdrop of a widespread ethnic conflict pitting Hema against Lendu and Ngiti between late 2002 and mid-2003.<sup>2659</sup> The Prosecution further maintained that Lendu and Ngiti combatants were driven by ethnic hatred which fuelled their vengefulness<sup>2660</sup> and the crimes committed against civilians during the fighting in Bogoro on 24 February 2003 were not random acts of violence but formed part of a policy targeting primarily Hema civilians.<sup>2661</sup>

1129. The Defence, on the contrary, contended that the attack on Bogoro was directed not against the civilian population, but against the UPC camp in the village.<sup>2662</sup> It considered that, even if there were a widespread or systematic attack resulting from a State or organisational policy or plan – which, in any event, the Prosecution has not proved – it did not encompass the attack on Bogoro.<sup>2663</sup> As to the attack itself, the Prosecution has also not proved, in the Defence’s estimation, that the excesses against civilians during the battle were the result of an organisational policy.<sup>2664</sup> Indeed, according to the Defence, the plan to attack Bogoro was executed by EMOI and the RCD-ML, based on the military and strategic objective of recovering territory from the UPC.<sup>2665</sup> Moreover, the Defence further submitted that the prevailing “general perception” was that the civilians had left Bogoro<sup>2666</sup> and that the organisers reportedly gave specific instructions

<sup>2658</sup> [Prosecution Closing Brief](#), para. 36. See also [Prosecution Closing Statements, T. 337](#), pp. 7-9.

<sup>2659</sup> [Prosecution Closing Brief](#), para. 37.

<sup>2660</sup> [Prosecution Closing Statements, T. 337](#), pp. 11-15.

<sup>2661</sup> [Prosecution Closing Brief](#), para. 38.

<sup>2662</sup> [Defence Closing Brief](#), para. 772; [Defence Closing Statements, T. 338](#), pp. 46-47.

<sup>2663</sup> [Defence Closing Brief](#), para. 772. See also [Defence Closing Statements, T. 338](#), p. 48.

<sup>2664</sup> [Defence Closing Brief](#), para. 773.

<sup>2665</sup> [Defence Closing Brief](#), paras. 773-774. See also [Third Defence observations on article 25\(3\)\(d\)](#), para. 58.

<sup>2666</sup> [Defence Closing Brief](#), para. 774.

that they should not be targeted.<sup>2667</sup> The Defence maintained that the village was not encircled and that civilian victims were mostly victims of the inevitable collateral damage.<sup>2668</sup> These apart, the excesses that were committed were the doing of undisciplined or uncontrollable elements or elements belonging to various ethnic groups and other groups.<sup>2669</sup>

1130. Further, in the Defence's submission, the attack on Bogoro was in itself neither widespread nor systematic.<sup>2670</sup> It also noted that the attack identified in the *Decision on the confirmation of charges* was the attack directed against the civilian population of predominantly Hema ethnicity of the region of Ituri.<sup>2671</sup> It submitted that the 24 February 2003 attack, and it alone, cannot be taken into consideration as an attack must be exceptionally large in order to be characterised as "widespread", which cannot be the case of a single offensive whose military objective was one village, which lasted just one day and claimed, according to an unconfirmed estimate, 200 civilian lives.<sup>2672</sup> The Defence added in this connection that the other attacks cited by the Prosecution, such as those on Bunia, Tchomia, Kasenyi, Mandro and Nyakunde, were not part of the same plan of attack.<sup>2673</sup> Lastly, in the Defence's submission, neither can the attack on Bogoro be considered "systematic", as it is impossible to prove the existence of a course of conduct planned and executed in a detailed and repetitive manner implying a degree of continuity.<sup>2674</sup>

1131. The Legal Representative of the main group of victims submitted that the attack on Bogoro took place against the backdrop of an inter-ethnic conflict pitting Lendu and Ngiti against Hema. According to him, on 24 February 2003

<sup>2667</sup> [Defence Closing Brief](#), para. 780.

<sup>2668</sup> [Defence Closing Brief](#), para. 781. See also para. 785.

<sup>2669</sup> [Defence Closing Brief](#), paras. 784, 787-792. See also [Third Defence observations on article 25\(3\)\(d\)](#), paras. 76-77.

<sup>2670</sup> [Defence Closing Brief](#), para. 795.

<sup>2671</sup> [Defence Closing Statements, T. 338](#), p. 48.

<sup>2672</sup> [Defence Closing Brief](#), paras. 798-799. See also [Defence Closing Statements, T. 338](#), pp. 48-49.

<sup>2673</sup> [Defence Closing Brief](#), paras. 802-827; [Defence Closing Statements, T. 338](#), pp. 49-50.

<sup>2674</sup> [Defence Closing Brief](#), para. 800.

the Lendu and Ngiti attackers sought to eliminate the UPC and the Hema population associated with it.<sup>2675</sup> In the Legal Representative's view, the policy of attacking the Hema civilian population was primarily motivated by the Lendu and Ngiti combatants' avowed ethnic hatred of their Hema enemy.<sup>2676</sup> The scale of the attack, the method deployed, namely encirclement of the village, the nocturnal assault, the pillaging and the "[TRANSLATION] manhunt" demonstrate the systematic or widespread nature of that attack.<sup>2677</sup>

1132. For his part, the Legal Representative of the child-soldier victims did not specifically and directly address crimes against humanity. However, the Chamber notes that in his closing statements, the Legal Representative submitted that before the battle of Bogoro, the Lendu and Ngiti warriors joined forces with the Beni authorities who planned to re-conquer national territory, but did so in pursuit of their own motivations and objectives, *viz.* attacking the mainly Hema civilian population.<sup>2678</sup>

1133. In this section, the Chamber will analyse the evidence on record with a view to establishing whether the contextual elements of crimes against humanity are met. To this end, and in accordance with the legal elements that it has defined, the Chamber will consider whether the attack on Bogoro involved the commission of multiple acts within the meaning of article 7(1) of the Statute; whether its object was the civilian population of that village; whether the Ngiti combatants of Walendu-Bindi *collectivité* constituted an organisation within the meaning of

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<sup>2675</sup> [Closing brief of the common legal representative of the main group of victims](#), paras. 263-264; [Closing statements of the common legal representative of the main group of victims, T.337](#), pp. 74-77; [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 56-60.

<sup>2676</sup> [Closing statements of the common legal representative of the main group of victims, T. 337](#), pp. 76-77.

<sup>2677</sup> [Closing brief of the common legal representative of the main group of victims](#), paras. 263-264; [Closing statements of the common legal representative of the main group of victims, T.337](#), p. 78. See also [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 67-68.

<sup>2678</sup> [Closing statements of the legal representative of the group of child-soldier victims, T. 337](#), pp. 51-55.

article 7(2) and whether, in the instant case, the assault was carried out pursuant to or in furtherance of an organisational policy. Second, the Chamber will establish whether the attack was widespread or systematic in character before ultimately making a determination as to the nexus between the crimes committed in Bogoro and the attack against the civilian population.

**a) The assault on Bogoro involved the commission of multiple acts, targeted the civilian population and was undertaken by the Ngiti combatants of Walendu-Bindi *collectivité* in accordance with a policy**

**i. The assault on the village of Bogoro involved the commission of multiple acts and targeted its civilian population**

1134. In this regard, the Chamber makes general reference to its conclusions of fact concerning the crimes which it considers to be established.<sup>2679</sup>

1135. It concluded that the Ngiti combatants of Walendu-Bindi *collectivité* attacked Bogoro with the support of the APC and Lendu combatants of Bedu-Ezekere *groupement*.<sup>2680</sup> It further established that numerous civilians and UPC soldiers were living in Bogoro on the day of the attack.<sup>2681</sup>

1136. The Chamber noted that the UPC had set up a military camp at a central location in the village that evidently constituted a military objective for the attackers.<sup>2682</sup> It also notes the Defence's argument that the camp and not the civilian population was the prime object of the attack.<sup>2683</sup> Nevertheless, the Chamber considers that the UPC camp was not the attackers' sole and prime target. It recalls that the military camp, being at the heart of the village, was

<sup>2679</sup> See "Section VIII Crimes committed during the attack on Bogoro on 24 February 2003". See also "Section VIII(A)(3) How the attack proceeded".

<sup>2680</sup> See also "Section VIII(A)(3) How the attack proceeded".

<sup>2681</sup> See "Section VIII(A)(2) Bogoro village".

<sup>2682</sup> See "Section VIII(A)(2) Bogoro village".

<sup>2683</sup> See, in particular, [Defence Closing Statements, T. 338](#), pp. 46-47.

geographically circumscribed<sup>2684</sup> and that the Ngiti combatants did not solely take the camp to secure control of the village.<sup>2685</sup>

1137. It recalls that the attackers began the assault at 5 a.m. and that throughout that day, 24 February 2003, they made no distinction between combatants and civilians in Bogoro. Indeed, from the outset of the attack, when the military camp was captured and even once fighting had ceased, the attackers relentlessly pursued, wounded or killed by machete and firearm the villagers who were in their homes, had taken flight, or were seeking refuge at the Institute or in the bush and who had no part in combat. The Chamber refers in this connection to its conclusions on the crimes, wherein it also found that combatants had intentionally caused the death of numerous civilians – including women, elderly people and children, together with babies<sup>2686</sup> – even though the only definite breakdown of the death toll it was able to establish was 33 civilian deaths, including 13 infants.<sup>2687</sup>

1138. Thus, in view of the commission of multiple acts under article 7 of the Statute, perpetrated directly against the Hema inhabitants of Bogoro, the number and status of the victims and the fact that after the attack, Bogoro village was cleared of its Hema inhabitants and inhabited only by Lendu and Ngiti armed groups, as well as the scale of the acts perpetrated against their property,<sup>2688</sup> the Chamber considers that the civilian population was the principal target and not solely the UPC troops or a group of randomly selected individuals.

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<sup>2684</sup> See “Section VIII(A)(2) Bogoro village”.

<sup>2685</sup> See “Section VIII Crimes committed during the attack on Bogoro on 24 February 2003”.

<sup>2686</sup> See “Section VIII(B)(3)(a) Conclusions on murder as a crime against humanity and as a war crime”; “Section VIII(B)(3)(b) Conclusions on the crime of attack against civilians”.

<sup>2687</sup> See “Section (III)(B)(3)(a) Conclusions on murder as a crime against humanity and as a war crime”, para. 869.

<sup>2688</sup> The Chamber further recalls that throughout the village and throughout the day, including once the village had fallen into the grip of the attackers, they destroyed and/or set ablaze or removed roofing sheets from the houses and public buildings that were used by the population of Bogoro, and that they also pillaged the property that was essential to their daily lives (see “Section VIII(C)(3)(a) Conclusions on the war crime of destruction of enemy property”; “Section VIII(C)(3)(b) Conclusions on the crime of pillaging”).

**ii. The Ngiti combatants of Walendu-Bindi constituted an organisation within the meaning of article 7(2) of the Statute**

1139. The Chamber recalls its finding that the Ngiti combatants of Walendu-Bindi *collectivité* were organised within a single militia.<sup>2689</sup> It refers in this regard to the body of its conclusions of fact on the structure of that militia and, in particular, on the existence of an organised armed group within the meaning of humanitarian law.<sup>2690</sup> In the Chamber's view, most of the *collectivité's* camps had put in place a military-type structure, and the Ngiti militia was headed by a president.<sup>2691</sup>

1140. The Ngiti combatants of the *collectivité* demonstrated that they were capable of conceiving and executing large-scale attacks such as that on Nyakunde in September 2002<sup>2692</sup> and, even more significantly, the attack on Bogoro in February 2003. To this end, despite the discord that may have existed among some commanders, they united and joined forces in Aveba to prepare to wage the battle against their common enemy, the UPC/Hema invader.

1141. In the Chamber's view, these facts suffice to determine that the Ngiti combatants of Walendu-Bindi *collectivité* constituted an organisation within the meaning of article 7(2) of the Statute.

**iii. The Bogoro attack was carried out pursuant to a policy**

1142. Laid before the Chamber in the instant case are a number of exhibits attesting to the existence of the design, specific to the Ngiti combatants of Walendu-Bindi *collectivité*, to wipe out from Bogoro not only UPC troops but also the

<sup>2689</sup> See "Section VII(C)(7)(a) Existence of an organised group", paras. 679 and 681.

<sup>2690</sup> See "Section VII(C) Organisation of the Walendu-Bindi *collectivité* combatants in the immediate run-up to the attack on Bogoro", in particular paras. 628, 635, 640, 651, 661-663, 679 and 681; "Section IX(B)(3)(a)(ii) Presence of organised armed groups in Ituri".

<sup>2691</sup> See "Section VII(C)(7) Structure of the group", paras. 672 and 678-679; "Section X(A)(7)(a)(ii) Germain Katanga: President of the Ngiti militia of Walendu-Bindi *collectivité* in February 2003", para. 1334.

<sup>2692</sup> See "Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002".

predominantly Hema civilian population of the village and whom the Ngiti combatants considered synonymous with the UPC.<sup>2693</sup> It is apparent that all the camps rallied behind that design and prepared accordingly to launch the attack on Bogoro.

1143. It should be recalled that the Ngiti combatants of the *collectivité* subscribed to an anti-Hema ideology. As the Chamber has indicated, these same combatants called the Hema their “enemies” as they were believed to be oppressors and potential invaders of their territory.<sup>2694</sup>

1144. The Ngiti combatants were driven by vengefulness arising from the previous attacks to which they had been subjected. As the Chamber found, the evidence shows that prior to the attack on Bogoro, the Ngiti *collectivité* of Walendu-Bindi was hemmed in and attacked several times by the UPC and its allies between August and November 2002.<sup>2695</sup> To the Ngiti combatants, therefore, the UPC and the Hema as an ethnic group, were their enemy – to them, the two were of one ilk.<sup>2696</sup>

1145. It was primarily that ideology which instigated the action taken against the Hema population of Bogoro. In November 2002, further to the “Grievance Letter” written, *inter alia*, by prominent figures in Walendu-Bindi *collectivité* who felt threatened by the UPC, referred to as a Hema militia,<sup>2697</sup> Lendu and Ngiti

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<sup>2693</sup> See “Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003”, para. 600; “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>2694</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>2695</sup> See “Section VII(B) Evolution of the group of Ngiti commanders and combatants of Walendu-Bindi *collectivité* as of October 2002 including in preparation for the attack on Bogoro”, paras. 570-571. See, in particular, P-12, T. 200, p. 31; P-317, T. 230, pp. 8-9; D02-136, T. 241, pp. 19-20; D02-148, T. 279, pp. 6-7; D02-161, T. 270, pp. 25-26. See also [Prosecution Closing Brief](#), paras. 3 and 504-510; [Prosecution Closing Statements, T. 337](#), pp. 13-14.

<sup>2696</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”. See also “Section VIII(B)(2)(h) Objectives of the attackers”.

<sup>2697</sup> See “Section VII(B)(1) Delegation of prominent figures from Bedu-Ezekere *groupement* to Aveba in November 2002”, para. 577; “Section VII(B)(2) Delegation of prominent figures and combatants to Beni in November 2002”, para. 600; Section “VI(B)(3) Ethnic motivations of the Ngiti commanders and combatants”.

combatants decided to forge closer ties with the Beni authorities to further their struggle against the Hema “oppressor”. The rapprochement was brought about through EMOI, a structure composed of FAC officers, the RCD-ML leadership, APC representatives, the Mai Mai group and the FRPI. In this connection, the Chamber refers to its findings on the ties forged by the Ngiti combatants of Walendu-Bindi *collectivité* with the FRPI and the representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003.<sup>2698</sup>

1146. Furthermore, the acts committed by the Ngiti combatants against the civilian population of Bogoro were the culmination of preparation undertaken by the Walendu-Bindi militia, with APC support particularly as regards logistics, and within the *collectivité*. Several exhibits attest to the organisation of the attack by the Ngiti combatants of the *collectivité* some months beforehand. On this point, the Chamber specifically refers to its findings on the preparations for the attack.<sup>2699</sup>

1147. The Chamber has already noted the evidence showing that the Beni authorities supplied weaponry to the Ngiti militia for the purpose of attacking Bogoro, and demonstrating that numerous discussions of a military nature, as regards logistics and strategy took place between Beni and Aveba.<sup>2700</sup> It recalls in this regard its finding that 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

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<sup>2698</sup> See “Section VII(B)(2) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003”.

<sup>2699</sup> “Section VII(D) Preparations for the attack on Bogoro in Walendu-Bindi *collectivité*”.

<sup>2700</sup> See “Section VII(C)(4) Supply of weapons and ammunition for the battle of Bogoro”; “Section VII(B)(2) Ties forged by local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003”.

support in bolstering their chances in their struggle against the Hema and the UPC and in breaking the encirclement which beset them.<sup>2701</sup>

1148. In this connection, the Chamber accepts that the planning, per se, of the attack on Bogoro involved several local and regional protagonists and that the initial stages of planning took place in Beni. The fact remains that the Ngiti militia did indeed harbour its own design to attack the civilian population of Bogoro on 24 February 2003, notwithstanding the fact that this design was readily subsumed by a wider military offensive in Ituri against the UPC, which had been decided specifically by the Beni authorities.

1149. Lastly, it is worth underscoring that the ideology briefly described above was much more potent in the months preceding the attack as the Beni authorities used the Hema threat to rally combatants at strategic meetings held in November 2002.<sup>2702</sup> Moreover, Germain Katanga explained that the threat of a Hima-Tutsi empire was discussed by commanders and combatants in Aveba.<sup>2703</sup> The ideology was therefore flourishing at the precise time of the attack's preparation.<sup>2704</sup>

1150. The Chamber further considers that preparations within the *collectivité* preceding the attack and the ultimate modus operandi of the attack demonstrate that the Bogoro operation ensued from the design harboured specifically by the Ngiti militia to target the predominantly Hema civilian population of Bogoro.

1151. In this connection, it must be noted that the design to wipe out the Hema civilian population of Bogoro forms part of the continuum of another wide-scale operation undertaken several months earlier against Nyakunde. The design therefore built on a successful operation principally against the Bira ethnic group,

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<sup>2701</sup> See "Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003: Conclusion"; "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants"; "Section VII(B) Evolution of the group of the Ngiti commanders and combatants of Walendu-Bindi *collectivité* as of October 2002 including in preparation for the attack on Bogoro".

<sup>2702</sup> See, in particular, D02-300, T. 316, pp. 63-64.

<sup>2703</sup> See, in particular, D02-300, T. 325, pp. 53-54.

<sup>2704</sup> See "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants".

then allied to the Hema. Indeed, the Chamber has already stated that in Nyakunde in September 2002, the Bira were regarded as Hema allies, since the conflict was then “polarised” between the two main ethnic groups, the Lendu and the Hema.<sup>2705</sup>

1152. Several exhibits concerning the attack on Nyakunde in September 2002, *viz.* a matter of months before the battle of Bogoro, in which the Ngiti combatants constituted the main force, show that, with reinforcements from the APC, they specifically attacked Bira and Hema civilians.<sup>2706</sup> It also appears that they did so according to a predetermined plan that in several respects resembled the one adopted in Bogoro on 24 February 2003. The Chamber notes that at least three of the Ngiti commanders present during the September attack also took part in the battle of Bogoro, namely, Commanders Yuda and Garimbaya and Witness D02-148.<sup>2707</sup>

1153. Like the battle of Bogoro, the attack on Nyakunde resulted from an alliance between local combatants and the APC. The Ngiti were driven by vengefulness towards the Bira ethnic group, allied to the UPC Hema militia, who had just attacked them violently in Songolo. The APC meanwhile sought to slow the progress of UPC troops through Ituri.<sup>2708</sup>

1154. Several exhibits show that – as on 24 February 2003 – the combatants came from several directions and committed crimes against civilians according to a similar pattern to the one followed during the battle of Bogoro. Ngiti combatants are reported to have systematically massacred civilians because they belonged to

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<sup>2705</sup> See “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”; “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”. See also D02-160, T. 272, p. 62; D02-148, T. 278, p. 63; T. 279, pp. 6-7 and 47.

<sup>2706</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”. See also D02-148, T. 279, pp. 7-8.

<sup>2707</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”. See also D02-148, T. 279, pp. 7-8.

<sup>2708</sup> See “Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003: Conclusion”, para. 600.

the Bira, Hema and Gegere ethnic groups, mainly dispatching them by machete as part of an attack during which, according to the MONUC report, over 1,000 people died.<sup>2709</sup> Furthermore, the town's hospital and the town centre were destroyed and pillaged,<sup>2710</sup> as was the case in the village of Bogoro on 24 February 2003.

1155. Thus, in the light of the foregoing, it appears that the Ngiti militia of Walendu-Bindi *collectivité* fully intended to direct an attack against Bogoro's civilian population and mete out acts of violence to the village's Hema inhabitants. Accordingly, the Chamber finds that the attack which took place in that village was executed pursuant to an organisational policy to attack it with a view to not only wiping out the UPC troops there but also, and first and foremost, the Hema civilians who were present, this design forming part of a wider operation to reconquer Ituri.

1156. Ultimately, and in view of all of the aforesaid considerations, the Chamber concludes that it has been proved that on 24 February 2003, an attack was directed against the village's civilian population within the meaning of article 7(2)(a) of the Statute.

**b) The attack on Bogoro was of a systematic nature**

1157. The Chamber will now determine whether that attack may be characterised as widespread or systematic.

1158. From the sequence of attack and, specifically, from how the troops deployed, attacked the village and committed the crimes; the number of Hema civilians targeted; the pursuit of the Hema population who had survived the assault,

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<sup>2709</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0350 to DRC-OTP-0129-0351, paras. 52 and 56).

<sup>2710</sup> See "Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde of 5 September 2002". See also EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0351 to DRC-OTP-0129-0352, para. 58); D02-148, T. 279, p. 53; T. 280, pp. 4-5.

during the battle and thereafter; and lastly the destruction and pillaging of property, it is apparent that the attack was carried out in a coordinated and organised fashion.

1159. The Chamber recalls its conclusion that on the day of the attack on Bogoro, Ngiti troops of Walendu-Bindi *collectivité* from various camps mustered in Kagaba and Medhu in the immediate run-up to the operation, if not before, and from there converged on the village on 24 February 2003, attacking it with other combatants.<sup>2711</sup> It is clear from the sequence of events that the village was attacked very early in the morning, whilst it was still dark and the villagers were asleep in their homes. Scores of attackers came from all directions and their heavy gunfire made escape extremely difficult for Bogoro's inhabitants.<sup>2712</sup>

1160. The Chamber has also established that the Lendu and Ngiti combatants pursued anyone who crossed their path, making no distinction between ordinary villagers and UPC soldiers.<sup>2713</sup> It recalls that from the start of the attack, during the capture of the military camp and even after the fighting had ended, the attackers pursued the villagers, wounding or killing them by machete and firearms. Men, women, elderly people, children and, at times, babies were attacked in their homes, whilst in flight or seeking refuge at the Institute or in the bush, even though they took no part in the fighting.<sup>2714</sup> The Chamber specifically notes in this respect the testimony of P-161, who stated that during the attack a "lopi" was tasked with spotting people in hiding and pointing them out to the other combatants, in order to flush them out.<sup>2715</sup> The attackers also captured several

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<sup>2711</sup> See "Section VII(D) Preparations for the attack on Bogoro in Walendu-Bindi *collectivité*".

<sup>2712</sup> See "Section VIII(A)(3) How the attack proceeded".

<sup>2713</sup> See "Section VIII(B)(3) Murder as a crime against humanity (article 7(1)(a) of the Statute) and as a war crime (article 8(2)(c)(i)) and attack against civilians as a war crime (article 8(2)(e)(i)): Conclusions of law".

<sup>2714</sup> See "Section VIII(B)(3)(a) Conclusions of law on murder as a crime against humanity and as a war crime", paras. 858-866.

<sup>2715</sup> See "Section VIII(B)(3) Murder as a crime against humanity (article 7(1)(a) of the Statute) and as a war crime (article 8(2)(c)(i)) and attack against civilians as a war crime (article 8(2)(e)(i)): Findings of fact", para. 830. See also P-161, T. 110, pp. 51-53; T. 113, pp. 52-53.

civilians and sexually assaulted women who had concealed that they were Hema in order to escape certain death.<sup>2716</sup>

1161. Lastly, the Chamber noted that in the course of the attack, several witnesses stated that they had heard the attackers making threats and the victims weeping and begging for mercy. Various witnesses stated that combatants questioned inhabitants about their ethnic origin and several of them passed themselves off as non-Hema so that their lives would be spared.<sup>2717</sup> Lastly, the Chamber recalls that the attack cleared Bogoro of its Hema population.<sup>2718</sup>

1162. Accordingly, from the foregoing the Chamber finds that the attack on Bogoro was systematic in nature. That being so, the disjunctive language of the Statute does not require that the Chamber also rule on the widespread nature of the attack.<sup>2719</sup>

### **c) Nexus between the crimes committed and the attack**

1163. The Chamber recalls that the acts of violence that were committed specifically by Ngiti combatants of Walendu-Bindi *collectivité* occurred during the assault on Bogoro and directed against the Hema civilian population.

1164. As regards the crime of murder as a crime against humanity under article 7(1)(a) of the Statute, the Chamber considers it established that the crimes were perpetrated as part of the attack against the predominantly Hema civilian population carried out by the group of Ngiti combatants of Walendu-Bindi *collectivité*. Murder was in fact the main means of carrying out the attack and was integral to it. Thus, the victims perished according to the plan devised by the

<sup>2716</sup> See “Section VIII(B)(3)(a) Conclusions of law on the crime of attack against civilians”, para. 876.

<sup>2717</sup> See “Section VIII(B)(2)(h) Objectives of the attackers”, para. 853. “Section VIII(B)(3)(a) Conclusions of law on the crime of attack against civilians as a war crime”, para. 876; See “VIII(D)(2)(a) Rape”, paras. 989 and 997; “Section VIII(D)(2)(b) Sexual slavery”, paras. 1009 and 1014.

<sup>2718</sup> See “Section VIII(B)(2)(h) Objectives of the attackers”.

<sup>2719</sup> See “Section IX(A)(1)(c)(ii) A widespread or systematic attack”.

Ngiti combatants of Walendu-Bindi to “wipe out” the predominantly Hema civilian population of Bogoro.

1165. With specific regard to the acts of sexual violence committed against victims who pretended not to be Hema in order to escape certain death, the Chamber recalls that it need not be shown that each act was committed pursuant to or in furtherance of the policy but rather that a nexus between the act and the attack must be established. In this regard, the Chamber considers that the acts of sexual violence during the operation to wipe out Bogoro’s civilian population were committed with a same objective and objectively formed part of that operation. By no means could they constitute isolated acts.

1166. Furthermore, the perpetrators of the acts were members of the militia of Walendu-Bindi *collectivité*, and they committed the murders, rapes and sexual slavery in the knowledge of that attack and that their acts formed part of it.

### **3. Conclusion**

1167. In the light of the foregoing, the Chamber finds that the murders and rapes committed in Bogoro on 24 February 2003 and the enslavement which ensued that day formed part of a systematic attack principally directed against the village’s predominantly Hema civilian population that was launched pursuant to a policy of the Walendu-Bindi Ngiti militia.

## **B. WAR CRIMES**

1168. In its *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that between August 2002 and May 2003, an armed conflict took place in the territory of Ituri between a number of local organised armed groups, *inter alia*, the

UPC/FPLC, the FNI, the FRPI and PUSIC.<sup>2720</sup> Given that Uganda intervened directly in this armed conflict through the UPDF and that it was one of the main weapons and ammunition suppliers for those armed groups, the Pre-Trial Chamber considered the conflict international in nature.<sup>2721</sup>

1169. The arguments put forward by the parties and participants in their closing briefs, in particular in the light of the *Lubanga* Judgment, cast doubt on the Pre-Trial Chamber's characterisation of the conflict as international in nature.<sup>2722</sup>

1170. On 20 April 2012, the Chamber then afforded them notice of a possible change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court.<sup>2723</sup> The Chamber invited the parties and participants to impart during their closing statements their views on both the compatibility of the application of regulation 55, in the case at bar and at that juncture in proceedings, with the right to a fair trial, and on a possible recharacterisation of the nature of the armed conflict. It also stated that it would entertain such views in the final judgment.<sup>2724</sup> In any event, it invited the Defence, should the latter consider it necessary, to present additional evidence or to request any other guarantee under regulation 55(3)(b) of the Regulations of the Court and to submit a reasoned request to that effect by 1 May 2012.<sup>2725</sup> In its observations, the Defence submitted that it rested with the Prosecution to prove that the crimes had been committed in an international or non-international armed conflict, and in

<sup>2720</sup> [Decision on the confirmation of charges](#), para. 239.

<sup>2721</sup> [Decision on the confirmation of charges](#), para. 240. As regards the role played by Rwanda and the DRC central government, the Pre-Trial Chamber was unable to find that the two States intervened directly in the armed conflict in the territory of Ituri district between July 2002 and May 2003 ([Decision on the confirmation of charges](#), para. 241).

<sup>2722</sup> See, in particular, [Office of the Prosecutor, "Observations de l'Accusation à la suite du prononcé du jugement dans l'affaire Lubanga \(ICC-01/04-01/06-2842\)", 22 March 2012, ICC-01/04-01/07-3264-Red \(14 May 2012, ICC-01/04-01/07-3264-Red\)](#), paras. 5-6; [Observations of the common legal representative of the main group of victims on the Lubanga Judgment](#).

<sup>2723</sup> "Ordonnance relative aux modalités de présentation des conclusions orales", 20 April 2012, ICC-01/04-01/07-3274 ("20 April 2012 Order"), para. 13.

<sup>2724</sup> 20 April 2012 Order, para. 14.

<sup>2725</sup> 20 April 2012 Order, para. 14.

consequence considered that at that stage, it saw no reason to recall witnesses or tender new evidence, as this would effectively reverse the burden of proof.<sup>2726</sup>

1171. In its 7 May 2012 decision, the Chamber confirmed that it would entertain the Defence observations in the present judgment, but that it would not further seek its views on the need to tender additional evidence.<sup>2727</sup>

### **1. Applicable law**

1172. The Chamber notes that neither the Statute nor the Elements of Crimes define the concepts of “international armed conflict” or “armed conflict not of an international character” as provided by article 8(1) of the Statute. It further notes that the Statute and the Elements of Crimes explicitly refer to international law, and so the Chamber will define the two notions in accordance with such law and the method of interpretation which it has considered expedient.<sup>2728</sup>

1173. Like the Statute and the Elements of Crimes, the Geneva Conventions and their additional protocols do not provide an explicit definition of the notion of “armed conflict”. However, a definition that encompasses the concepts of international armed conflict and armed conflict not of an international character has been developed by other international courts, in particular the ICTY, and the Chamber refers to such authority:

[...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the

<sup>2726</sup> [Defence for Germain Katanga, “Defence Observations Pursuant to Regulation 55\(3\)\(b\) of the Regulations of the Court”, 1 May 2012, ICC-01/04-01/07-3281](#), paras. 3-4.

<sup>2727</sup> [Décision sur la mise en œuvre de l’ordonnance relative aux modalités de présentation des conclusions orales, 7 May 2012, ICC-01/04-01/07-3285](#), para. 6.

<sup>2728</sup> See “Section III(B) Method of interpretation”. See also [Rome Statute](#), article 8; [Elements of Crimes](#), article 8, Introduction.

whole territory under the control of a party, whether or not actual combat takes place there.<sup>2729</sup>

1174. Furthermore, depending on the parties involved in the hostilities, it is apparent to the Chamber that contemporaneous conflicts of a different nature may take place on a single territory<sup>2730</sup> and therefore that international and non-international conflicts may coexist.

1175. It is to be observed at the outset, as did Trial Chamber I,<sup>2731</sup> that some scholars, practitioners, and a particular line of authority from the ad hoc tribunals have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in the light of their shifting nature. In the view of the Chamber, that distinction is not only an established part of the international law of armed conflict, but most importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework.<sup>2732</sup> That distinction is especially important in that it is based on the capacity of actors, particularly non-State armed groups, to apply the relevant provisions of international humanitarian law effectively.

1176. The Chamber further observes that a nexus must be established between the crimes and the armed conflict in question. Indeed, the Elements of Crimes require that conduct constituting the offences envisaged by articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi), 8(2)(e)(vii) and 8(2)(e)(xii) of the Statute take place “in the context of” and are “associated with” an armed conflict. In this connection, the Chamber is of the view that the perpetrator’s conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place

<sup>2729</sup> [ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995](#), para. 70. See also [Lubanga Judgment](#), paras. 531-533.

<sup>2730</sup> [Lubanga Judgment](#), para. 540; [ICTY, Tadić Appeal Judgement](#), para. 84. See also [Defence Closing Brief](#), para. 749.

<sup>2731</sup> [Lubanga Judgment](#), para. 539.

<sup>2732</sup> See “Section III(B) Method of interpretation”.

in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed.<sup>2733</sup>

#### a) International armed conflict

1177. The Rome Statute framework does not define "international armed conflicts".

In the light of the relevant jurisprudence, and in agreement with the parties and participants in the instant case,<sup>2734</sup> the Chamber considers that an armed conflict is international:

[...] if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside with an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>2735</sup>

An international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on their behalf.<sup>2736</sup>

1178. To assess if an international armed conflict exists by reason of the indirect participation of a State, the Chamber must analyse and appraise the degree of control exerted by that State over one of the armed groups participating in the hostilities. In appraising the degree of such control, Trial Chamber I held the

<sup>2733</sup> [Decision on the confirmation of charges in Lubanga](#), para. 287. See also [ICTY, Kunarac et al., Appeal Judgement](#), para. 57; [ICTY, Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, Trial Judgement, 10 July 2008](#), para. 293; [ICTY, Prosecutor v. Stakić, Case No. IT-97-24-A, Trial Judgement, 22 July 2006](#), para. 342.

<sup>2734</sup> [Prosecution Closing Brief](#), paras. 26-30; [Defence Closing Brief](#), paras. 747-749; [Closing brief of the legal representative of child-soldier victims](#), paras. 50-51.

<sup>2735</sup> [Decision on the confirmation of charges in Lubanga](#), para. 209. See also [Lubanga Judgment](#), para. 541; [ICTY, Tadić Appeal Judgement](#), para. 84; [ICJ, Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Uganda\), 19 December 2005, ICJ Reports 2005](#); See also [Decision on the confirmation of charges in Bemba](#), para. 223; [International Committee of the Red Cross \(Jean Pictet, ed.\), Commentary on Geneva Convention IV \(1956\)](#), page 26.

<sup>2736</sup> [Lubanga Judgment](#), para. 541.

“overall control”<sup>2737</sup> test to be the correct approach, allowing a determination as to whether an armed conflict not of an international character has become internationalised due to the involvement of armed forces acting on behalf of another State. That test is met when the State “has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”.<sup>2738</sup> It is not required that the State give specific orders or direct each military operation.<sup>2739</sup>

1179. Further, the Elements of Crimes specify that the Court’s jurisdiction as regards the law of international armed conflict also extends to military occupation.<sup>2740</sup> In the Chamber’s estimation, and in view of the pertinent jurisprudence and treaty law, “territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised”.<sup>2741</sup> Hence, military occupation exists where a State’s military forces intervene in and exercise control over a territory beyond that State’s internationally recognised frontiers, whether that territory belongs to a hostile State, a neutral State or a co-belligerent,

<sup>2737</sup> [Lubanga Judgment](#), para. 541. See also [ICTY, Tadić Appeal Judgement](#), para. 137; [ICTY, Prosecutor v. Kordić and Čerkez, Case No. IT-94-1-A, Appeal Judgement, 17 December 2004](#) paras. 306-308. On this point, see also [Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Serbia and Montenegro\)](#), 26 February 2007, ICJ Reports 2007, paras. 402-407.

<sup>2738</sup> [ICTY, Tadić Appeal Judgement](#), para. 137. See also para. 138.

<sup>2739</sup> [ICTY, Tadić Appeal Judgement](#), para. 137. See also [ICTY, Aleksovski Appeal Judgement](#), paras. 144-146.

<sup>2740</sup> Elements of Crimes, footnote 34. See also Robert Kolb, “*Étude sur l’occupation and sur l’article 47 de la IV<sup>ème</sup> Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: Le degré d’intangibilité des droits en territoire occupé*”, 10 African Yearbook of International Law (2002), pp. 276-277 (“Robert Kolb, *Étude sur l’occupation et sur l’article 47 de la IV<sup>ème</sup> Convention de Genève du 12 août 1949*”); [International Committee of the Red Cross \(Jean Pictet, ed.\), Commentary on Geneva Convention IV \(1956\)](#), pp. 26-27.

<sup>2741</sup> [Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention \(IV\) respecting the Laws and Customs of War on Land, 18 October 1907](#), article 42. See also [Lubanga Judgment](#), para. 542; [Decision on the confirmation of charges in Lubanga](#), para. 212; [ICJ, Armed activities on the Territory of the Congo \(Democratic Republic of the Congo v. Uganda\)](#), 19 December 2005, ICJ Reports 2005.

provided that the deployment of forces has not been authorised by an agreement with the occupied power.<sup>2742</sup>

1180. In determining if the occupying power has established its authority, the following non-exhaustive list of factors may be relevant:

- > the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
- > the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- > the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- > a temporary administration has been established over the territory;
- > the occupying power has issued and enforced directions to the civilian population.<sup>2743</sup>

1181. The Chamber considers that since a situation may develop and shift from one type of conflict to another, the nature of an armed conflict must be determined in the light of the prevalent facts at a given time considered in their entirety. This is all the more important in protracted occupation as the assessment of the applicable legal framework becomes more complex.

1182. The Chamber holds that the nature of the hostilities taking place on an occupied territory or in connection with military occupation must be determined case-by-case, depending particularly on the parties to the conflict and the manner of their intervention. When a State enters into conflict with a non-governmental armed group located in the territory of a neighbouring State and the armed group acts under the control of its own State, the fighting falls within the definition of an

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<sup>2742</sup> See in this respect Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009), p. 8 ("Yutaka Arai-Takahashi, The Law of Occupation"); Robert Kolb, *Étude sur l'occupation et sur l'article 47 de la IV<sup>ème</sup> Convention de Genève du 12 août 1949*, pp. 278-279.

<sup>2743</sup> [ICTY, Naletilić and Martinović Trial Judgement](#), para. 217.

international armed conflict between the two States.<sup>2744</sup> However, the law applicable to a conflict between two armed groups not acting on behalf of a government, even if that conflict takes place on occupied territory,<sup>2745</sup> is not the law of international armed conflict.<sup>2746</sup> Rather, where the requirements set out below are met, such hostilities fall within the purview of the law of non-international armed conflict.

#### **b) Non-international armed conflict**

1183. In defining a non-international armed conflict, the Chamber refers to article 8(2)(f) of the Statute:<sup>2747</sup>

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

1184. The Chamber observes that this definition envisages two categories of non-international armed conflict: (1) conflict between the governmental authorities of the State where the conflict takes place and organised armed groups; (2) conflict between organised armed groups. The Chamber will also apply the law of non-international armed conflict to conflict between foreign governmental authorities

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<sup>2744</sup> [Lubanga Judgment](#), para. 541.

<sup>2745</sup> Here the Chamber need not make a determination on the law applicable to the actions of the occupying power.

<sup>2746</sup> See, in particular, Yutaka Arai-Takahashi, *The Law of Occupation*, p. 300; International Committee of the Red Cross (Tristan Ferraro), *Occupation and Other Forms of Administration of Foreign Territory* (2012), pp. 124-127; Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012), p. 48 ("Dapo Akande, Classification of Armed Conflicts: Relevant Legal Concepts"); Andreas Paulus and Mindia Vashakmadze, "Guerre asymétrique et notion de conflit armé – Tentative de conceptualisation", *91 Revue internationale de la Croix-Rouge* (2009), p. 115.

<sup>2747</sup> See also [Lubanga Judgement](#), paras. 534-536.

and organised armed groups where that State has intervened with the consent of the State on whose territory the armed confrontation is taking place.<sup>2748</sup>

1185. Trial Chamber I in *Lubanga* stated that article 8(2)(f) of the Statute requires only the existence of a “protracted” conflict between “organised armed groups”.<sup>2749</sup> The “organised armed groups” must therefore have a sufficient degree of organisation to enable them to carry out protracted armed violence and to implement the provisions of humanitarian law applicable to that type of conflict.

1186. For the purpose of determining whether an armed conflict was not of an international character, it must be decided whether a body was an organised armed group, and it may be relevant to consider the following non-exhaustive list of factors: the force or group’s internal hierarchy; its command structure and the rules applied within it; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.<sup>2750</sup> None of these factors are individually determinative. Accordingly, since article 8(2)(f) of the Statute requires only that the armed group be “organized”, the Chamber holds that some degree of organisation suffices to establish the existence of an armed conflict<sup>2751</sup> and recalls that those factors are to be assessed case-by-case. It underscores that exertion of control over a part of the territory by the groups concerned is not required.<sup>2752</sup> Similarly, article 8(2)(f) does

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<sup>2748</sup> Dieter Fleck “The law of non-international armed conflict” in *The Handbook of International Humanitarian Law* (2008), pp. 605-608. See also Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, pp. 62-63.

<sup>2749</sup> [Lubanga Judgment](#), para. 536.

<sup>2750</sup> [Lubanga Judgement](#), para. 537. See also [ICTY, Prosecutor v. Limaj et al., Case No. IT-03-66-T, Trial Judgement, 30 November 2005](#), para. 90; [ICTY, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Trial Judgement, 3 April 2008](#), para. 60; [ICTY, Prosecutor v. Boškoski, Case No. IT-94-1-A, Trial Judgement, 10 July 2008](#), paras. 199-203.

<sup>2751</sup> [ICTY, Prosecutor v. Limaj et al., Case No. IT-03-66-T, Trial Judgement, 30 November 2005](#), para. 89.

<sup>2752</sup> See also [Lubanga Judgement](#), paras. 536-537.

not specify responsible command as envisioned by article 1(1) of Additional Protocol II to the Geneva Conventions.<sup>2753</sup>

1187. Lastly, in determining whether an armed conflict not of an international character existed, it is expedient to consider its intensity, since article 8(2)(f) prescribes that the violence must be more than sporadic or isolated.<sup>2754</sup> In appraising the intensity of a potential conflict, the ICTY has held that the bench must have regard to, *inter alia*, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.<sup>2755</sup> This approach, in the view of the Chamber, is expedient and so it will proceed.

## 2. Submissions of the parties

1188. In the Prosecution's view, the evidence establishes beyond reasonable doubt that at least between August 2002 and July 2003, Ituri was the theatre of an armed conflict which saw the participation of local organised armed groups, including the Lendu militia and the FNI, FRPI, UPC/FPLC and PUSIC.<sup>2756</sup>

1189. The Prosecution submitted that in these proceedings, it matters little whether the armed conflict was international or not.<sup>2757</sup> Although the Pre-Trial Chamber

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<sup>2753</sup> See [Lubanga Judgement](#), paras. 536-537 and footnote 1635. As stated elsewhere in the judgment, the drafters of the Rome Statute appear to have deliberately refrained from including the additional requirements laid down by Additional Protocol II. [Decision on the confirmation of charges in Lubanga](#), paras. 232-234.

<sup>2754</sup> See also [Lubanga Judgement](#), para. 538. The ICTY found that the intensity of the conflict should be "used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." ([ICTY, Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Trial Judgement: Volume I, 23 February 2011](#), para. 1522).

<sup>2755</sup> See, in particular, [ICTY, Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, Trial Judgement, 27 September 2007](#) para. 407. See on this point [Lubanga Judgment](#), para. 538.

<sup>2756</sup> [Prosecution Closing Brief](#), para. 20.

<sup>2757</sup> [Prosecution Closing Brief](#), para. 24; [Prosecution Closing Statements, T. 336](#), pp. 59-60.

found that the said armed conflict was of an international character, the Prosecution argued that the Trial Chamber is not bound by this ruling.<sup>2758</sup> The Prosecution maintained that the armed conflict at issue in the instant case was not of an international character in that (i) “[TRANSLATION] no State armed force was engaged in military hostilities against a regular army”; (ii) “[TRANSLATION] the occupation of part of the territory of Ituri by Ugandan forces did not internationalise the armed conflict”; and (iii) even if the Ugandan occupation did internationalise the armed conflict, the attack on Bogoro was not of an international character.<sup>2759</sup>

1190. The Prosecution considered that the 24 February 2003 attack on Bogoro took place in the context of and was associated with an armed conflict pitting the Lendu and Ngiti militias against UPC forces and the Hema civilian population. It stated that the armed conflict encompassed several previous attacks.<sup>2760</sup>

1191. The Defence did not dispute that the attack on Bogoro took place in the context of an armed conflict.<sup>2761</sup> However, it took the view that the Prosecution failed to establish that the armed conflict was international.<sup>2762</sup>

1192. In the view of the Defence, there is evidence of foreign intervention: (1) Uganda allegedly violated the sovereignty of the DRC and occupied part of its territory; (2) the UPC allegedly formed an alliance with the RCD-Goma backed by Rwanda, which supplied it with weapons; and (3) the DRC, through the RCD-K/ML, allegedly planned and coordinated the attack on Bogoro. However, the Defence underscored that the Prosecution adduced no evidence to show that the UPC was actually under the overall control of Rwanda at the time of the attack on Bogoro.<sup>2763</sup> In terms of Uganda’s role, the Defence considered that Uganda’s

<sup>2758</sup> [Prosecution Closing Brief](#), para. 25. See also [Prosecution Closing Statements, T. 336](#), pp. 59-60.

<sup>2759</sup> [Prosecution Closing Brief](#), para. 26. See also paras. 27-30.

<sup>2760</sup> [Prosecution Closing Brief](#), para. 21.

<sup>2761</sup> [Defence Closing Brief](#), para. 745.

<sup>2762</sup> [Defence Closing Brief](#), paras. 746-750.

<sup>2763</sup> [Defence Closing Brief](#), para. 747.

occupation of Ituri gave rise to an international armed conflict with the DRC. Nevertheless, it submitted that the Prosecution did not conclusively establish that the fighting that took place in Bogoro was part of the international armed conflict between Uganda and the DRC, nor that it was part of a confrontation between the DRC and Rwanda.<sup>2764</sup>

1193. As regards a possible recharacterisation of the armed conflict, the Defence notes that the Prosecution did not argue that the hostilities constituted a non-international armed conflict until its Closing Brief.<sup>2765</sup> Moreover, the Defence asserts that the Chamber does not have the power to effect a legal recharacterisation of the charges in the absence of an earlier amendment of the charges.<sup>2766</sup> In the alternative, the Defence submits, the Chamber may not exercise this power without proper notice to the accused prior to the close of the defence case.<sup>2767</sup> Lastly, the Defence maintains that prejudice may also result from somewhat differing definitions of the crimes, and indeed, from the potential application of different rules of international humanitarian law.<sup>2768</sup>

1194. The Legal Representative of the main group of victims submits that the attack on Bogoro formed part of a wider armed conflict pitting Lendu and Ngiti forces against the Hema.<sup>2769</sup> To his mind, Uganda was “[TRANSLATION] deeply involved in this interethnic conflict” and supported one or other of the parties “[TRANSLATION] as its interests dictated”.<sup>2770</sup> The Legal Representative takes the view that Uganda’s involvement and presence in Ituri at the material time internationalised the conflict.<sup>2771</sup> However, in his view, should the Chamber not

<sup>2764</sup> [Defence Closing Brief](#), para. 750.

<sup>2765</sup> [Defence for Germain Katanga, “Defence Observations Pursuant to Regulation 55\(3\)\(b\) of the Regulations of the Court”, 1 May 2012, ICC-01/04-01/07-3281](#), para. 2.

<sup>2766</sup> [Defence Closing Brief](#), para. 752.

<sup>2767</sup> [Defence Closing Brief](#), para. 752.

<sup>2768</sup> [Defence Closing Brief](#), para. 759.

<sup>2769</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 265.

<sup>2770</sup> [Closing Brief of the common legal representative of the main group of victims](#), para. 265. See also [Closing statements of the common legal representative of the main group of victims, T. 33Z](#), p. 79.

<sup>2771</sup> [Closing Brief of the common legal representative of the main group of victims](#), paras. 78 and 265.

determine that the armed conflict was international, it could modify the legal characterisation and find that an armed conflict not of an international character took place.<sup>2772</sup> The Legal Representative underscored lastly that the characterisation of the armed conflict is of no real significance, given the circumstances of the case, as the elements of the crimes are identical in both cases<sup>2773</sup> and the recharacterisation would not prejudice the rights of the Defence.<sup>2774</sup>

1195. For his part, the Legal Representative of the child-soldier victims also submitted that the conflict was international in character, referring to the findings of the Pre-Trial Chamber.<sup>2775</sup>

### 3. Analysis

1196. In the instant case, the hostilities which lie before the Chamber for consideration took place in Ituri district in the period of August 2002 to May 2003. In the light of the specific circumstances of this case,<sup>2776</sup> the Chamber considers it necessary to rule on the nature of the conflict with reference to a shorter time frame falling within the period determined by the Pre-Trial Chamber: January to May 2003.

1197. Further, and given its previous finding that an international armed conflict and a non-international armed conflict may coexist on a single territory, including occupied territory,<sup>2777</sup> it will consider whether Ituri was under military occupation

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<sup>2772</sup> [Observations of the common legal representative of the main group of victims on the \*Lubanga Judgment\*](#), para. 8.

<sup>2773</sup> [Observations of the common legal representative of the main group of victims on the \*Lubanga Judgment\*](#), para. 7.

<sup>2774</sup> [Observations of the common legal representative of the main group of victims on the \*Lubanga Judgment\*](#), para. 8.

<sup>2775</sup> [Closing Brief of the legal representative of the child-soldier victims](#), paras. 50-55.

<sup>2776</sup> Specifically, the Chamber noted a shift in alliance, at least from January 2003 ("Section IX(B)(3)(a)(iii) Indirect intervention of other States, para. 1213).

<sup>2777</sup> The Chamber considers that the existence of a non-international armed conflict on an occupied territory does not, however, entail a loss of effective control on the part of the occupying power. This

and then determine the nature of any parallel armed conflict which may have encompassed specifically the attack on Bogoro and the alleged crimes.<sup>2778</sup> The following five questions must therefore be answered in turn: (1) Did Uganda occupy Ituri district from August 2002 to May 2003?; (2) Were the Ngiti militia, the UPC and the other actors in the conflict armed organised groups?; (3) Did these armed groups act on behalf of a State?; (4) Are the criteria of intensity of a non-international armed conflict met in the instant case?; and (5) Did the UPDF's involvement in certain battles internationalise the conflict which pitted the Ngiti and Lendu militias against the UPC on the occupied territory?

**a) Existence and nature of the armed conflict**

**i. Military occupation (1999-2003)**

1198. The Chamber notes at the outset that the parties are in agreement on certain facts: firstly, that Uganda established and exercised authority in Ituri as an occupying power until June 2003; and secondly, that the Ugandan authorities played a direct role in the administrative and political changes in that district from 1998 to 2003 by stimulating the creation of new political parties and new militias there.<sup>2779</sup>

1199. Ugandan military forces (the UPDF) were stationed on DRC territory from 1999.<sup>2780</sup> Documentary<sup>2781</sup> and testimonial<sup>2782</sup> evidence placed before the Chamber

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observation is, moreover, wholly consistent with the fact that the Statute does not require that a non-State armed group exercise control over part of the territory.

<sup>2778</sup> On this point, see, in particular, [Defence Closing Brief](#), para. 750.

<sup>2779</sup> [Agreement as to evidence](#), admissions 2(1) and 2(2).

<sup>2780</sup> They controlled, *inter alia*, sectors of Bunia, including the airport (P-2, T. 190, p. 40; D03-707, T. 327, p. 52; EVD-OTP-00163, EVD-OTP-00164, EVD-OTP-00165, EVD-OTP-00166, EVD-OTP-00167, EVD-OTP-00168, EVD-OTP-00169: Video excerpts – Meeting at Bunia airport).

<sup>2781</sup> See EVD-OTP-00285: MONUC report on the events in Ituri (see, in particular, DRC-OTP-0129-0334 and DRC-OTP-0129-0342 to DRC-OTP-0129-0343, paras. 4 and 27-28); EVD-OTP-00222: Human Rights Watch Report “*Le fléau de l’or*” (see, in particular, DRC-OTP-0163-0382 to DRC-OTP-0163-0392); EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0291 to DRC-OTP-0152-0292, para. 3); EVD-OTP-00207: United Nations Security Council resolution 1445 (DRC-OTP-0131-0144 to DRC-OTP-0131-0145 and DRC-OTP-0131-0147, paras. 2 and 16); EVD-D03-00066: Agreement

attests to the extent to which Ugandan military authorities and troops were present in eastern DRC and Ituri in particular. The Chamber has also noted that, contrary to the various agreements that were signed, Ugandan troops did not withdraw definitively from Ituri until July 2003.

1200. Further, it appears that the UPDF exerted control over the territory of Ituri, and the ICJ judgment describes in detail the forms such control took. In this regard, it is useful to recall a fact undisputed by the parties: in June 1999, General Kazini, Chief of Staff of the Ugandan national army, unilaterally decreed Ituri a “province” by the name of “Kibali-Ituri”.<sup>2783</sup> Ituri was thus elevated from the status of a mere “district” of Orientale province, acquiring greater administrative autonomy. UPDF forces in Ituri were also commanded by General Kazini during that period. He quickly established himself as the key authority in the region<sup>2784</sup> and was involved in the conflicts described in the section of the present judgment on the general background to the case.<sup>2785</sup> It was also General Kazini who appointed Adèle Lotsove as first Governor of Ituri in June 1999.<sup>2786</sup>

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between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on withdrawal of Ugandan troops from the Democratic Republic of the Congo; EVD-D03-00067: Amendment to the Luanda Agreement between the DRC and Uganda; EVD-D03-00084: Letter written by Floribert Ndjabu. See also EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0714, para. 175).

<sup>2782</sup> P-12, T. 199, pp. 21-22; T. 201, pp. 24-41; T. 203, pp. 8-11; P. 30, T. 179, pp. 18 and 39-41; T. 181, pp. 57-63 regarding EVD-D03-00037 and EVD-D03-00038 [Videos - Excerpt 8 DRC-D03-0001-0389 and Excerpt 9 DRC-D03-0001-0390 from DRC-OTP-0227-0061]: Meeting in Bunia on 23 January 2003 attended by General Salim Saleh of the UPDF; P-317, T. 229, p. 31; T. 230, p. 25; D02-236, T. 244, pp. 27-29 and 35; D02-300, T. 314, p. 44; T. 315, p. 23. See also the various videos showing Uganda’s occupation of Ituri before its withdrawal, EVD-OTP-00163 and EVD-OTP-00164 regarding P-2, T. 185, pp. 60-66; EVD-OTP-00181 regarding P-2, T. 187, pp. 38-39; EVD-OTP-00178 regarding P-2, T. 185, pp. 25-26 and T. 187, pp. 3-5; EVD-OTP-D02-00062 regarding P-2, T. 190, p. 48; EVD-D03-00043: Video excerpt regarding P-30, T. 183, p. 11; EVD-D03-00045 regarding P-2, T. 192, pp. 60-67; EVD-D03-00054 regarding P-2, T. 193, pp. 50-53; EVD-D03-00058 regarding P-2, T. 193, pp. 61-64.

<sup>2783</sup> [Agreement as to evidence](#), admission 2(1). See also EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0714, para. 175); P-12, T. 201, pp. 76 and 77.

<sup>2784</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0701 to DRC-OTP-0180-0702, para. 114).

<sup>2785</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0717 and DRC-OTP-0180-0723, paras. 187 and 209). See also D02-236, T. 248, pp. 3-4.

<sup>2786</sup> P-12, T. 201, p. 76; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0339, para. 20).

1201. Moreover, at no point during the period under consideration was the DRC able to exercise fully its sovereignty over Ituri. Both central and regional governmental authorities proved incapable of functioning publicly and performing their role on that part of its territory,<sup>2787</sup> even though they engaged in a counter-offensive in November 2002.

1202. In the Chamber's view, the decisions taken at that time and the resultant findings show that Uganda not only deployed and stationed its military forces in Ituri but also established and wielded its authority over that territory as an occupying power.

1203. The Chamber considers that the various agreements concluded, in particular between the DRC and Uganda with a view to, *inter alia*, managing the withdrawal of the Ugandan troops from Congolese territory, do not in any way suggest that the DRC had agreed to the deployment of Ugandan forces on its territory. As the ICJ has stated with regard to the aforementioned Lusaka Agreement,<sup>2788</sup> the various agreements took the situation on the ground as their starting point without, however, recognising the legality of the Ugandan troop presence in Ituri. In the Chamber's view, a similar approach prevailed when all the other agreements after the Lusaka Agreement were concluded.

1204. Lastly, the Chamber considers that the tactical rapprochement observed in the instant case between the DRC and Uganda, when the two States formed an alliance to expel the UPC from Ituri district in January 2003,<sup>2789</sup> does not prove that the DRC agreed to the occupation of a part of its territory by Ugandan troops. That alliance of convenience by no means equated to authorisation to deploy the UPDF as an occupying power on the territory of Ituri from 1999 to July 2003.

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<sup>2787</sup> EVD-OTP-00222: Human Rights Watch report "*Le fléau de l'or*" (DRC-OTP-0163-0389); EVD-D03-00098: Grievance Letter (DRC-OTP-0194-0352); D03-88, T. 300, p. 51; T. 301, p. 44. See also D02-300, T. 315, p. 23.

<sup>2788</sup> EVD-OTP-00229: ICJ, *Armed Activities on the Territory of the Congo* (DRC-OTP-0180-0698, para. 99).

<sup>2789</sup> "Section IX(B)(3)(a)(v) UPDF intervention in the hostilities".

1205. For all of these reasons, the Chamber finds that Uganda occupied Ituri during the time frame defined by the Pre-Trial Chamber – August 2002 to May 2003.

1206. Having held that both the law of international armed conflict and of non-international armed conflict applied to the various actors in hostilities occurring on occupied territory, the Chamber now considers it necessary to determine the nature of the armed conflict which encompassed the attack on Bogoro.

## ii. Presence of organised armed groups in Ituri

1207. In the light of the evidence on record, it is apparent to the Chamber that the UPC was a group with a hierarchical structure and internal discipline<sup>2790</sup> that occupied various military positions and had training facilities for its troops.<sup>2791</sup> Weapons were available to the group<sup>2792</sup> and it had the ability to conduct military operations.<sup>2793</sup> Further, the UPC had adopted a political programme and had official spokespeople.<sup>2794</sup>

1208. Furthermore, the APC, the armed wing of the RCD-ML,<sup>2795</sup> also constituted a group with a leadership and internal command structure;<sup>2796</sup> supplies and

<sup>2790</sup> D02-176, T. 255, pp. 22-24. See also EVD-D03-00064: Diagram by P-12 showing the communication of orders within the UPC; P-12, T. 200, p. 23; T. 202, pp. 38-42; EVD-D03-00065: UPC programme; EVD-D03-00042: Video excerpt of a UPC rally.

<sup>2791</sup> P-323, T. 116, pp. 70-71; D02-176, T. 255, pp. 23-29. See also P-12, T. 200, pp. 12-14.

<sup>2792</sup> P-323, T. 117, pp. 3-4; P-166, T. 227, p. 8; D02-176, T. 255, p. 29. See also P-12, T. 202, pp. 15-17, 23, 28 and 43-44; EVD-D02-00059: Video excerpt of a UPC arms depot.

<sup>2793</sup> See, in particular, P-12, T. 200, pp. 22-24 and 28-31; T. 202, p. 28; P-30, T. 179, pp. 3-4; D02-236, T. 241, pp. 19 and 20; T. 242, p. 35; D02-300, T. 315, pp. 25-28; T. 320, pp. 38-39; D02-148, T. 278, pp. 62-63; D02-160, T. 274, p. 25; D02-161, T. 270, p. 26; D02-176, T. 255, pp. 24 and 25; T. 256, pp. 17-18.

<sup>2794</sup> See, in particular, EVD-D03-00065: UPC Programme; EVD-D03-00042: Video excerpt of a UPC rally.

<sup>2795</sup> P-2, T. 191, pp. 52-53; T. 192, p. 50; P-30, T. 179, pp. 20-22; D02-236, T. 242, p. 44; D02-300, T. 316, p. 64; EVD-OTP-00222: Human Rights Watch report "*Le fléau de l'or*" (DRC-OTP-0163-0387 to DRC-OTP-0163-0388).

<sup>2796</sup> On the existence of a command staff within the APC, see D02-228, T. 249, p. 62. See also P-30, T. 179, p. 22; P-2, T. 191, p. 52; D02-300, T. 315, pp. 36-37 and 60. See also P-28, T. 219, pp. 18-19.

equipment were available to it;<sup>2797</sup> and it had the ability to plan military operations and put them into effect.<sup>2798</sup>

1209. Lastly, as regards the Ngiti militia, known at times from late 2002 as the FRPI, the Chamber will refer to the body of its findings of fact regarding the organisation of the militia before February 2003:<sup>2799</sup> its constituent troops were spread among several camps placed under the authority of various commanders; they had various means of communication and weapons and ammunition were available to them.<sup>2800</sup> Lastly, the members of that militia pursued common objectives and conducted joint military operations over a protracted period.

1210. The Chamber further observes that the various groups took part in the ongoing political process and, in particular, in a series of inter-Congolese negotiations<sup>2801</sup> which were being held at the time.

1211. From these various exhibits, the Chamber is in a position to find that in January 2003, if not before, each of those groups, namely, the UPC, the APC and the Ngiti militia, were armed and had a sufficient degree of organisation, as demonstrated by their structure, modus operandi and participation in military operations and, as the case may be, the political processes then set in motion.

### **iii. Indirect intervention of other States**

1212. The Chamber must now determine whether, between August 2002 and May 2003, and specifically after January 2003, those local armed groups acted on behalf

<sup>2797</sup> D02-300, T. 321, p. 69; T. 317, pp. 44 and 45; D02-148, T. 279, p. 32.

<sup>2798</sup> See, in particular, D02-136, T. 241, pp. 20-21; D02-300, T. 315, p. 40; D02-350, T. 253, pp. 35-36; D02-148, T. 279, pp. 7-8 and 48.

<sup>2799</sup> See "Section VII Organisation of the Walendu-Bindi *collectivité* combatants in the immediate run-up to the attack on Bogoro", in particular, paras. 628, 635, 640, 651, 661-663, 679 and 681.

<sup>2800</sup> See, in particular, D02-300, T. 317, pp. 44-45.

<sup>2801</sup> See, in particular, EVD-D03-00063: Kampala Understanding between the RCD-ML and the UPC; EVD-D03-00044: Agreement to End the Hostilities in Ituri; EVD-OTP-00195: Final report of the Ituri Pacification Commission; EVD-D02-00237: MONUC report of a CCGA meeting in Kinshasa (DRC-OTP-1029-0634, para. 2); EVD-OTP-00241: Joint UPC/FRPI press release; EVD-OTP-00244: Agreement between Iturian political and military forces.

of a State, i.e. as intermediaries of Uganda, Rwanda or the DRC, during the hostilities.

1213. As regards control, if any, exercised by Uganda over the UPC, the evidence shows that from the time of the founding of the UPC until late 2002, Uganda was directly involved in establishing the UPC and in training and arming its militias.<sup>2802</sup> Nevertheless, the evidence before the Chamber establishes that Uganda stopped supporting the UPC several months before the attack on Bogoro and even engaged in hostilities against that armed group.<sup>2803</sup> The Chamber takes the view that, although some evidence does suggest that after December 2002, Uganda equipped other local armed groups in cooperation with the DRC,<sup>2804</sup> none of that evidence proves that Uganda had a role in organising, coordinating or planning military operations undertaken by the Ngiti militia or, much less, the UPC, at the material time.

1214. As regards Rwanda's role, the Chamber recalls that it has already stated that in the eyes of the Ngiti combatants, the UPC was a Hema militia allied to Rwanda that sought to establish a Hema-Tutsi empire in Ituri.<sup>2805</sup> Furthermore, several exhibits demonstrate that Rwanda did provide logistical support to the UPC from December 2002. In particular, it helped by supplying weapons and ammunition

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<sup>2802</sup> P-268, T. 108, p. 49; D02-236, T. 244, p. 27; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0342-DRC-OTP-0129-0343, para. 27); EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0291, para. 3); EVD-OTP-00222: Human Rights Watch report "*Le fléau de l'or*" (DRC-OTP-0163-0392). See also EVD-D02-00147: Operational instructions (DRC-D02-0001-0933); EVD-D02-00202: Report of the Armed Forces of the Democratic Republic of the Congo on the ongoing operations in Ituri (DRC-D02-0001-0938). See also "Section VI(B) Main political events and incidents".

<sup>2803</sup> P-2, T. 191, pp. 59-60; P-30, T. 179, pp. 39-40; T. 182, pp. 68-69; P-166, T. 227, p. 8; P-317, T. 229, p. 31; D02-228, T. 250, p. 12; T. 251, pp. 63-64; T. 252, p. 16; D02-236, T. 248, pp. 4-6. See also D03-707, T. 331, p. 70; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0343, para. 28). See also [Defence Closing Brief](#), para. 653.

<sup>2804</sup> See, in particular, P-12, T. 197, p. 27; T. 201, pp. 24-41. See also P-317, T. 229, p. 31; D02-236, T. 243, pp. 15-17; T. 247, p. 77.

<sup>2805</sup> See "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants".

and training some of its combatants.<sup>2806</sup> Some evidence suggests that Rwanda intervened in matters concerning the UPC's internal command structure.<sup>2807</sup> However, save for the testimony of Witness P-12, such material is too general to enable the Chamber to truly assess the nature, modalities and development of the cooperation between the Rwandan military authorities and the persons that they allegedly appointed within the UPC. The Chamber considers that it cannot rely on P-12's testimony alone to find beyond reasonable doubt that the Rwandan State played a role in the coordination, planning or organisation of certain military actions undertaken by the UPC at the material time. Hence, the Chamber is not in a position to find that Rwanda exerted overall control over the UPC from late 2002.

1215. Moreover, and inasmuch as one of the parties to the conflict, namely the UPC, did not act under the control of a State, specifically Rwanda, the Chamber considers that it need not rule on the issue of whether the DRC did or did not exert overall control over the Ngiti militia after January 2003. It must be further noted that Uganda took part in the fighting alongside the organised armed groups confronting the UPC at the material time, as the Chamber will discuss below.

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<sup>2806</sup> EVD-OTP-00205: MONUC interim report on the events in Ituri (DRC-OTP-0152-0291, para. 3); EVD-OTP-00222: Human Rights Watch report "*Le fléau de l'or*" (DRC-OTP-0163-0392-DRC-OTP-0163-0394); P-12, T. 200, pp. 21-22; T. 202, pp. 15-17, 23-26, 28, and 42-47; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0343, para. 29). See also P-317, T. 230, p. 25; D02-0228, T. 252, p. 17; D02-236, T. 244, pp. 36-38; D02-350, T. 254, p. 18; EVD-D03-00047: Video excerpt; EVD-D03-00084: Letter written by Floribert Ndjabu.

<sup>2807</sup> P-12, T. 202, pp. 39-40 and 43-44; T. 203, p. 23. See also EVD-D03-00064: Diagram by P-12 showing the communication of orders within the UPC; EVD-OTP-00222: Human Rights Watch report "*Le fléau de l'or*" (DRC-OTP-0163-0392); EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0343, para. 29). On Thomas Lubanga's escape to Kigali, see P-12, T. 203, p. 24.

#### iv. Intensity of the conflict

1216. The Chamber observes that the existence of an armed conflict in Ituri at the time of the attack on Bogoro is not disputed by the parties.<sup>2808</sup> Similarly, they accepted that the fighting, *inter alia*, between the Ngiti militia and the UPC, was part of a cycle of violence that extended far beyond isolated acts falling outwith international humanitarian law.

1217. With specific reference to its foregoing review of the attacks that followed assault on Bogoro,<sup>2809</sup> the Chamber finds that the armed conflict was both protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in the Chamber's view, the evidence before it suffices to fulfil the intensity of the conflict requirement. It further notes that the United Nations Security Council recognised the existence of this armed conflict and adopted numerous resolutions on the matter.<sup>2810</sup>

1218. The armed conflict between the aforementioned groups was, as noted immediately above, a protracted armed conflict between organised armed groups and therefore fully meets the criteria of a non-international armed conflict.

#### v. UPDF intervention in the hostilities

1219. The Chamber must now determine whether Uganda's direct military intervention on the territory of the DRC that it occupied and in hostilities that mainly pitted the APC and Ngiti and Lendu militias against the UPC internationalised the conflict under its consideration.

<sup>2808</sup> [Defence Closing Brief](#), para. 745; [Prosecution Closing Brief](#), para.20; [Closing brief of the legal representative of the main group of victims](#), para. 52; [Closing brief of the legal representative of child-soldier victims](#), para. 49. See also T. 175, pp. 18-19; D02-300, T. 320, p. 20.

<sup>2809</sup> See "Section VI(B) Main political events and incidents".

<sup>2810</sup> EVD-OTP-00207: UN Security Council resolution 1445; EVD-OTP-00208: UN Security Council resolution 1457; EVD-OTP-00209: UN Security Council resolution 1468; EVD-OTP-00210: UN Security Council resolution 1493; EVD-OTP-00213: UN Security Council resolution 1484.

1220. Evidence on record suggests that in late 2002, a tactical rapprochement occurred between the DRC and Uganda for the purpose of putting in place a strategy to reconquer Ituri, then under UPC control.<sup>2811</sup>

1221. The Chamber considers it useful to recall the details provided by D02-236 as to the circumstances in which this tactical rapprochement between the DRC and Uganda was decided. He stated that an informal meeting took place<sup>2812</sup> on the sidelines of a meeting about the establishment of the Ituri Pacification Commission held in Dar es Salaam and attended by Presidents Kabila and Museveni.<sup>2813</sup> According to D02-236, President Kabila used this meeting to request that a delegation made up of, among others, the witness himself and Chief Kahwa (PUSIC) meet with him in Kinshasa for discussions of a more general nature on the “[TRANSLATION] mechanism” to be put in place to expel the UPC from Ituri.<sup>2814</sup> The witness stated that he was accompanied on this visit to the DRC by a Ugandan officer, General Salim Saleh’s aide-de-camp.<sup>2815</sup> D02-236 further reported that the Congolese President thus ensured that additional weapons would be provided and officers sent to wrest Ituri back from the UPC;<sup>2816</sup> the President also allegedly stated that he had come to an agreement with the Ugandan President to such end.<sup>2817</sup> In the Chamber’s opinion, the testimony of D02-236, who was present in person when President Kabila spoke those words, shows that the President’s prime objective was to secure Ugandan help to see through his campaign against UPC forces in Ituri.

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<sup>2811</sup> D02-236, T. 243, p. 17; T. 247, p. 77. See also P-12, T. 194, pp. 47-48 and 60-64; T. 203, pp. 9; EVD-D03-00066: Agreement between the DRC and Ugandan governments on the withdrawal of troops from the Democratic Republic of the Congo (in particular, DRC-D03-0001-0454, articles 2(2), 2(3), 2(4) and (5)); EVD-D03-00034: UPC press release.

<sup>2812</sup> D02-236, T. 243, pp. 15-16.

<sup>2813</sup> For this meeting, see also P-12, T. 194, pp. 47-48 and 60-64; T. 203, p. 9; EVD-D03-00066: Agreement between the DRC and Ugandan governments on the withdrawal of troops from the Democratic Republic of the Congo; EVD-D03-00067: Amendment to the Luanda Agreement between the DRC and Uganda.

<sup>2814</sup> D02-236, T. 243, pp. 15-16.

<sup>2815</sup> D02-236, T. 243, p. 17; T. 244, pp. 46-47.

<sup>2816</sup> D02-236, T. 247, p. 77.

<sup>2817</sup> D02-236, T. 243, p. 17. See also T. 247, p. 77.

1222. The Chamber also notes that the rapprochement described by D02-236 crystallised with the signature of a formal agreement by the supreme authorities of the two States<sup>2818</sup> and which made provision for a mechanism for cooperation in defence and security matters. The rapprochement was also reflected in the UPDF's involvement in certain operations against the UPC after the 24 February 2003 attack on Bogoro.<sup>2819</sup>

1223. The Chamber recalls that it is not in a position to find beyond reasonable doubt that there was a UPDF presence during the attack on Bogoro on 24 February 2003.<sup>2820</sup> However, it must determine the nature of the armed conflict as a whole and it is on the basis of the course of the hostilities between January 2003, when the split between the UPC and Uganda became official, and May 2003 that it will make a ruling.

1224. In addition to the 24 February 2003 attack, the Chamber notes that Mandro, where the UPC had a sizeable training centre,<sup>2821</sup> was attacked on 4 March 2003 by the UPDF and Ngiti and Lendu forces.<sup>2822</sup> Germain Katanga allegedly took part in that attack.<sup>2823</sup> The UPDF, supported by Lendu combatants, also fought the UPC at the battle of Bunia on 6 March 2003.<sup>2824</sup>

1225. The Chamber is of the view that the evidence on record proves that the DRC consented to the various military actions undertaken on its territory by Ugandan armed forces against the UPC as of January 2003.

<sup>2818</sup> EVD-D03-00066: Agreement between the DRC and Ugandan governments on the withdrawal of troops from the Democratic Republic of the Congo (DRC-D03-0001-0454, articles 2 and 5).

<sup>2819</sup> See, in particular, P-12, T. 197, p. 27; T. 210, pp. 24-25 and 43.

<sup>2820</sup> See "Section VIII(A)(3) How the attack proceeded", para. 735.

<sup>2821</sup> See, in particular, D02-300, T. 322, pp. 67-68; D03-707, T. 332, pp. 38-40; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0340 to DRC-OTP-0129-0341, para. 71).

<sup>2822</sup> D02-129, T. 272, p. 6; D02-148, T. 279, pp. 21-22; D03-707, T. 329, p. 51; T. 332, pp. 38-40. See also P-12, T. 197, pp. 27-28; P-28, T. 218, pp. 23 and 27; D03-88, T. 306, pp. 13-15; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0355, paras. 71-72).

<sup>2823</sup> P-160, T. 210, pp. 63-67; D02-228, T. 252, p. 25; D02-129, T. 272, pp. 9-10.

<sup>2824</sup> P-2, T. 192, p. 15; P-12, T. 197, pp. 32-33; P-30, T. 179, p. 40; D02-129, T. 272, pp. 6 and 8-9; D03-707, T. 331, pp. 62 and 69-70; P-12, T. 197, pp. 32-33; D02-148, T. 279, p. 23; D02-228, T. 251, pp. 63-65; D03-66, T. 298, pp. 9-13; D03-88, T. 302, p. 34; EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0355-DRC-OTP-0129-0356, para. 73).

1226. The Chamber considers that the law of occupation continues to apply to the UPDF, the armed force of the occupying power, and that the conflict pitting the UPDF against the DRC and the resistance forces mobilised against the occupation must be considered international. In contrast, the hostilities that commenced in January 2003, that is, from the time of the rapprochement between Uganda and the DRC with the aim of fighting the UPC forces newly allied to Rwanda, must be considered as a non-international conflict.

1227. Indeed, UPDF intervention in the armed conflict pitting the Ngiti and Lendu militias against the UPC, of which the attack on Bogoro village formed one episode, must be set apart from the contemporaneous international armed conflict resulting from the Ugandan occupation. These hostilities must be so distinguished, specifically on account of the change in Uganda's military strategy from late 2002 and in the relationship of the occupying force with both the occupied State and with groups representing that State on occupied territory. It must be recalled in this connection that, although the UPDF fought alongside the UPC against, *inter alia*, the Lendu and Ngiti militias until mid-2002 at least, the UPDF decided to engage the UPC, its erstwhile ally, and to support the Ngiti and Lendu militias in their battles.

1228. Accordingly, the Chamber finds that the DRC's consent to the various military operations undertaken on its territory by the Ugandan armed forces against the UPC from January 2003 onwards entails the application of the law of non-international armed conflict to those hostilities.

#### **vi. Conclusion**

1229. The Chamber thus finds that during the material period, and specifically between January and May 2003, the law of non-international armed conflict is applicable to the hostilities that took place in Ituri between armed groups that

included the Ngiti militia and the UPC. It further finds that the attack on Bogoro formed an integral part of that armed conflict.

1230. Lastly, the Chamber considers that the recharacterisation of the nature of the armed conflict as determined by the Pre-Trial Chamber in its *Decision on the confirmation of charges* does not in this case violate the rights of the Accused. It refers in this regard to the analysis in the section concerning regulation 55<sup>2825</sup> and underscores that the new characterisation of the armed conflict does not prompt it to modify the legal elements of the alleged crimes in substance. It further notes that the same facts and circumstances are clearly at issue.

#### **b) Nexus between the crimes and the non-international armed conflict**

1231. With regard to the war crimes of murder and attack against a civilian population proscribed by article 8(2)(c)(i) and 8(2)(e)(i) of the Statute,<sup>2826</sup> the Chamber notes that civilians were targeted by the combatants and, moreover, that the crimes were committed in Bogoro on 24 February 2003 during a series of clashes between two parties to the conflict. Therefrom, it concludes that the acts were closely linked to the ongoing armed conflict and that the perpetrators, some of whom were Ngiti combatants, in so acting, were aware of the factual circumstances that established its existence. Indeed, the Chamber observes that, given the breadth of the conflict and its impact across the region, it is difficult to imagine, in the particular context of the case, that anyone could be oblivious to the factual circumstances establishing the existence of an armed conflict.

1232. The Chamber finds beyond reasonable doubt that the same holds true for the acts of pillaging and destruction under articles 8(2)(e)(v) and 8(2)(e)(xii) of the Statute.<sup>2827</sup>

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<sup>2825</sup> See "Section X(C) Legal recharacterisation of the facts".

<sup>2826</sup> See "Section VIII(B)(3) Conclusions of law", paras. 870 and 879.

<sup>2827</sup> See "Section VIII(B)(3) Conclusions of law", paras. 948 and 957.

1233. Turning to the acts of rape, the Chamber notes that the victims were raped by combatants and, moreover, that the crimes took place when the two sides to the conflict clashed or immediately thereafter. It further observes that Witnesses P-249, P-353 and P-132 were brought by the combatants who had taken them prisoner to one of the Ngiti commanders in Bogoro.<sup>2828</sup> Furthermore, the Chamber considers that the presence, use and threat of weapons heightened the coercive nature of the environment in which the victims found themselves, aggravating the threats of death they received.<sup>2829</sup> In the Chamber's opinion, those offences were therefore connected to the ongoing hostilities, and the perpetrators of those rapes, who took an active part in that armed conflict, in so acting, were aware of the factual circumstances establishing the existence of the conflict.

1234. As to the war crime of sexual slavery under article 8(2)(e)(vi) of the Statute, the Chamber considers that the sexual enslavement of Witnesses P-132, P-249 and P-353 by Ngiti combatants who had attacked Bogoro or by men living in military camps took place, as did the crimes of rape, in the context of and was associated with the armed conflict. It observes that the three women were made sexual slaves in military camps<sup>2830</sup> and that their abduction was closely linked to the fighting. In the Chamber's opinion, those offences were therefore connected to the ongoing hostilities, and the perpetrators of those rapes, who took an active part in that armed conflict, in so acting, were aware of the factual circumstances establishing the existence of the conflict.

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<sup>2828</sup> See "VIII(D)(2)(a) Rape", para. 999. See also D02-148, T. 279, pp. 20-21; T. 280, pp. 40-41 and 62.

<sup>2829</sup> See "VIII(D)(2)(a)(i) Witness P-132", para. 990; "Section VIII(D)(2)(a)(ii) Witness P-249", para. 993; See, in particular, P-249, T. 135, pp. 49 and 51; P-132, T. 139, pp. 12-13.

<sup>2830</sup> See "Section VIII(D)(2)(b)(i) Sexual slavery: Witness P-132"; "Section VIII(D)(2)(b)(ii) Witness P-249"; "Section VIII(D)(2)(b)(iii) Sexual slavery: Witness P-353".

## X. CRIMINAL RESPONSIBILITY OF GERMAIN KATANGA

1235. The Chamber turns now to the criminal responsibility of Germain Katanga. To such end, it will first describe his role and powers within the Ngiti militia of Walendu-Bindi *collectivité*, and consider whether the mode of liability under article 25(3)(a) of the Statute accepted by the Pre-Trial Chamber finds application in the present case. The Chamber will then examine the conditions under which, in the case at bar, the initial mode of liability may be recharacterised and will satisfy itself that the requirements of regulation 55 of the Regulations of the Court are met. Lastly, in order to determine whether the mode of liability may be recharacterised on the basis of article 25(3)(d) of the Statute, the Chamber will consider the legal aspects of this mode of liability and whether the evidence placed before it allows it to hold Germain Katanga criminally responsible on this basis.

### A. ROLE AND POWERS OF GERMAIN KATANGA WITHIN THE NGITI MILITIA OF WALENDU-BINDI *COLLECTIVITÉ*

1236. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until his integration into the FARDC, Germain Katanga served as *de jure* supreme commander of the FRPI and had *de facto* ultimate control over FRPI commanders, who sought his orders for obtaining or distributing weapons and ammunition, and was the person to whom other commanders reported.<sup>2831</sup>

1237. The Chamber must therefore inquire as to Germain Katanga's position and role within the group of commanders and combatants of Walendu-Bindi

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<sup>2831</sup> [Decision on the confirmation of charges](#), para. 540 (footnotes omitted).

*collectivité* and, in particular, as to whether he was the common authority as described above.

1238. In this regard, the Chamber considers that a distinction must first be drawn between, on the one hand, the title Germain Katanga allegedly bore within the FRPI at the time and, on the other, the authority he allegedly wielded over the *collectivité's* combatants. Indeed, even had it not been demonstrated that the Accused was the "President of the FRPI" at the material time, the Prosecution's argument would be no less valid because, since, as the Defence noted,<sup>2832</sup> of import in establishing Germain Katanga's responsibility is in fact whether he exerted control over the Ngiti combatants of Walendu-Bindi *collectivité* before the attack on Bogoro.

### **1. Submissions of the parties and participants**

1239. The Prosecution alleged that Germain Katanga was the Commander-in-Chief and President of the FRPI at the time of the attack on Bogoro.<sup>2833</sup> It submitted that the Accused had replaced Colonel Kandro at the head of all the Ngiti combatants of Walendu-Bindi *collectivité* before the end of 2002. The Accused subsequently kept this position when the combatants took on the name "FRPI" and he then took the title of President of the FRPI.<sup>2834</sup> In late 2002, therefore, Germain Katanga was not only commander of all Aveba-based combatants but also of all Ngiti combatants of Walendu-Bindi *collectivité*.<sup>2835</sup> According to the Prosecution, the most senior commanders in Aveba who reported to the Accused were Garimbaya, a company commander, Commander Mbadu, who headed the BCA camp, and Commander Move.<sup>2836</sup> It further contended that the Aveba-based

<sup>2832</sup> [Defence Closing Statements](#), T. 338, p. 36.

<sup>2833</sup> [Prosecution Closing Brief](#), para. 177.

<sup>2834</sup> [Prosecution Closing Brief](#), para. 178; See also [Closing Brief of the common legal representative of the main group of victims](#), para. 223.

<sup>2835</sup> [Prosecution Closing Brief](#), para. 146.

<sup>2836</sup> [Prosecution Closing Brief](#), para. 146.

officers under Germain Katanga's orders included Safari, Pascal Alezo Sipa, Émile Muhito, John (the Accused's younger brother), Safari Ndekote, Kachuaki, Nyarka and Shari.<sup>2837</sup>

1240. Still according to the Prosecution, the evidence on record shows that the Accused had authority over the commanders and all the combatants of all the camps of Walendu-Balendu *collectivité*, save for a certain Kisoro.<sup>2838</sup> As aforementioned, the Prosecution further maintained that Germain Katanga was informed by his subordinates of the activities taking place in the camps, that he visited the camps and that he had the power to enforce discipline and, where necessary, punish the commanders and combatants.<sup>2839</sup> The Prosecution relied on the testimony of several witnesses, documentary and audio-visual evidence, and events before and after the attack on Bogoro as proof of uninterrupted use of the term "President" to refer to Germain Katanga and to establish the existence, within the FRPI, of an effective military hierarchy at whose apex Germain Katanga stood during the attack.<sup>2840</sup>

1241. In the Defence submission, Germain Katanga was neither *de jure* nor *de facto* commander of the Ngiti combatants at the time of the attack on Bogoro.<sup>2841</sup> Although he was Commander of Aveba, his authority was effectively limited to the 60 men from the Atele Nga position, and only from January 2003 did he gradually wield authority over the combatants in the BCA camp.<sup>2842</sup>

1242. According to the Defence, the Accused had no power of command outside Aveba at the material time and had no authority over the local commanders in

<sup>2837</sup> [Prosecution Closing Brief](#), para. 146.

<sup>2838</sup> [Prosecution Closing Brief](#), paras. 146, 152 and 154; See also [Closing Brief of the common legal representative of the main group of victims](#), paras. 221-225; [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 83-85.

<sup>2839</sup> [Prosecution Closing Brief](#), para. 203; [Prosecution Closing Statements](#), T. 337, pp. 18-19.

<sup>2840</sup> [Prosecution Closing Brief](#), paras. 217-225.

<sup>2841</sup> [Defence Closing Brief](#), paras. 1224-1231.

<sup>2842</sup> [Defence Closing Brief](#), paras. 578, 664, 668 and 1264; [First Defence observations on article 25\(3\)\(d\)](#), para. 74.

other sectors. In fact, there was no hierarchy and each commander had his own stronghold and his followers obeyed his orders.<sup>2843</sup> It further submitted that the Accused had no control over Garimbaya, the Company Commander based in Aéro Camp, who reported only to his fellow APC soldiers at the BCA camp.<sup>2844</sup>

1243. The Defence further argued that given his young age and that he had grown up elsewhere, it was absurd to think that Germain Katanga could have asserted his authority over combatants who were much older and much more experienced than he was and who had close ties with the APC, which had trained them. According to the Defence, the Accused had no means by which to punish the commanders and combatants.<sup>2845</sup>

1244. Lastly, in the Defence opinion, Germain Katanga was not “President” of the FRPI, as it had none at the time. It was of the view that on 24 February 2003 Germain Katanga’s only role was to act as coordinator between the authorities in Beni and the local combatants, a role that did not vest him with any military authority over the other commanders and combatants of the *collectivité*.<sup>2846</sup> It was the Defence submission that only after the attack on Bogoro did the Accused become President of the Ngiti combatants, over whom, however, he struggled to assert his authority.<sup>2847</sup>

1245. The Chamber will now make a number of findings of fact concerning the powers and role of Germain Katanga within the Ngiti militia of Walendu-Bindi *collectivité*. To this end, it will examine his relations with the fetish-priests of the *collectivité*; his position and role vis-à-vis the authorities in Beni from November 2002; his role in the receipt, storage and distribution of weapons and ammunition;

<sup>2843</sup> [Defence Closing Brief](#), paras. 666 and 668; [First Defence observations on article 25\(3\)\(d\)](#), para. 80.

<sup>2844</sup> [Defence Closing Brief](#), paras. 665-668; [Defence Closing Statements, T. 340](#), pp. 9-10.

<sup>2845</sup> [Defence Closing Brief](#), paras. 666, 1264 and 1272.

<sup>2846</sup> [Defence Closing Brief](#), paras. 585-600, 664-668 and 1269; [Defence Closing Statements, T. 338](#), p. 36; [First Defence observations on article 25\(3\)\(d\)](#), paras. 55, 63, 77 and 80.

<sup>2847</sup> [Defence Closing Brief](#), paras. 668, 1224-1226 and 1230; [First Defence observations on article 25\(3\)\(d\)](#), para. 74. See also [Defence Closing Brief](#), paras. 717 and 719.

his title and the powers he wielded in Aveba; and, lastly, whether he was President of the Ngiti militia of Walendu-Bindi *collectivité*.

## 2. Social and military status of Germain Katanga

1246. In the Prosecution's view, Germain Katanga possessed all the requisite attributes to lead the combatants of Walendu-Bindi *collectivité*. He was a seasoned combatant who had already distinguished himself by his courage, and who, unlike the other soldiers, was educated and had ties with the Ngiti community.<sup>2848</sup> The Defence did not dispute such observations, which, in its view, explain precisely why Kakado appointed Germain Katanga President of the combatants in March 2003.<sup>2849</sup>

1247. In court, Germain Katanga described himself as member of the Ngiti ethnic group,<sup>2850</sup> whilst pointing out that he was not proficient in the Ndruna or Kingiti languages.<sup>2851</sup> In fact, his mother tongue is Kingwana, a sub-dialect of Swahili<sup>2852</sup> spoken in the eastern province of Maniema [and] in the region of Ituri where he is from.<sup>2853</sup> It was not until 1998, he explained, that he went to Walendu-Bindi *collectivité* for the first time, settling in Aveba where he was reunited with his biological father, with whom he had become acquainted that same year.<sup>2854</sup> He went on to explain that his uncle,<sup>2855</sup> who had brought him up and whom he considered his father, was a soldier in the Zaïrean armed forces of President Mobutu.<sup>2856</sup>

<sup>2848</sup> [Prosecution Closing Brief](#), paras. 127, 179, 181 and 183.

<sup>2849</sup> [Defence Closing Brief](#), para. 1226.

<sup>2850</sup> D02-300, T. 314, p. 21.

<sup>2851</sup> D02-300, T. 314, pp. 21 and 31.

<sup>2852</sup> D02-300, T. 314, p. 21.

<sup>2853</sup> D02-300, T. 314, p. 21.

<sup>2854</sup> D02-300, T. 314, p. 27; T. 320, p. 62.

<sup>2855</sup> D02-300, T. 315, pp. 20-21

<sup>2856</sup> D02-300, T. 314, p. 30.

1248. The Accused stated that he received an education and underwent basic military training at a centre for President Mobutu's civil guard, but that he never held such a position, since by 1996 Mobutu no longer had any real control over eastern Ituri.<sup>2857</sup> He also described himself as a good hunter, who could track animals in the forest and stated that between 2001 and 2002, he lived off the poaching of elephants and okapis whose tusks and hide he sold to make ends meet.<sup>2858</sup> In this regard, he explained that he plied his trade in Nyabiri, Walendu-Bindi *collectivité*, where he went regularly to sell ivory and hide.<sup>2859</sup> He portrayed himself as a man of the forest,<sup>2860</sup> as corroborated by Witness P-12 to whom the Accused had described his youth.<sup>2861</sup>

1249. Germain Katanga further recounted that he would, as necessary, fight as part of his community's self-defence and that his life was thus divided between the two activities.<sup>2862</sup> He explained that he underwent a traditional ritual before subscribing to "*combattantisme*". At the time, his adoptive mother gave him the "[TRANSLATION] blessing", which authorised him to go into battle and ensured that he would return alive.<sup>2863</sup>

1250. The Chamber notes that the Accused told the Court that his deeds during the attack on the village of Kazana in 2001 had earned him a reputation for bravery. He also acknowledged that he was known to the Ugandan authorities for the resistance he had put up against them, even before he came to his own government's attention.<sup>2864</sup> This is why his name allegedly "[TRANSLATION] circulated" among the Iturian, Congolese and Ugandan authorities after the fall of

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<sup>2857</sup> D02-300, T. 314, p. 32; T. 324, p. 79.

<sup>2858</sup> D02-300, T. 315, p. 22.

<sup>2859</sup> D02-300, T. 315, p. 29.

<sup>2860</sup> D02-300, T. 315, pp. 45-46.

<sup>2861</sup> P-12, T. 197, pp. 16-17; T. 198, p. 46.

<sup>2862</sup> D02-300, T. 324, p. 62.

<sup>2863</sup> D02-300, T. 320, pp. 55-56.

<sup>2864</sup> D02-300, T. 314, p. 56-57; T. 324, p. 79.

Bunia in August 2002.<sup>2865</sup> Accordingly, the Chamber considers that in August 2002, Germain Katanga was a particularly seasoned and well-known combatant.

### **3. Relations between the fetish-priests, Germain Katanga and the combatants of Walendu-Bindi *collectivité***

1251. According to the Prosecution, the fetish-priests, and Kakado in particular, wielded no authority whatsoever over the military activities of Germain Katanga and the combatants of Walendu-Bindi *collectivité* during the attack on Bogoro. It submitted that their role was only to act as spiritual guides, who merely dispensed fetishes, and that Germain Katanga alone had the power to issue orders to the combatants under his control.<sup>2866</sup>

1252. The Defence, on the contrary, argued that military authority rested at the time with the fetish-priests.<sup>2867</sup> It recalls that Germain Katanga respected Kakado and Kasaki's authority and that, according to the Accused, Kakado had sent Kasaki to the Aveba camp to supervise the combatants, dictate to them what they must do and make fetishes for them.<sup>2868</sup>

1253. On that matter, the Chamber will refer first to the testimony of two witnesses from very different backgrounds – D02-148, a local combatant, and D02-228, an RCD-ML intelligence officer – who both underscored the undeniable authority which the fetish-priests wielded directly over the combatants. D02-148 explained that before mounting an assault, combatants would go to the fetish-priests who tested them. If they failed the tests, they were prohibited from combat because they risked being killed.<sup>2869</sup> Certain conditions were attached to the fetishes given to combatants and were mostly identical from one battle to the other, proscribing

<sup>2865</sup> D02-300, T. 325, p. 29.

<sup>2866</sup> [Prosecution Closing Brief](#), paras. 200-201 and 221; See also [Closing Brief of the common legal representative of the main group of victims](#), para. 219.

<sup>2867</sup> See, *inter alia*, [Defence Closing Brief](#), para. 1275; [First Defence observations on article 25\(3\)\(d\)](#), para. 77.

<sup>2868</sup> D02-300, T. 315, pp. 33 and 36; T. 316, p. 35; T. 324, pp. 78-80.

<sup>2869</sup> D02-148, T. 279, p. 28; T. 279, p. 36.

rape in combat<sup>2870</sup> and theft of property.<sup>2871</sup> These fetishes could also consist of potions or incisions to a part of the body.<sup>2872</sup> The combatants took the fetishes into battle, and they purportedly provided a measure of protection, particularly by shielding them from bullets.<sup>2873</sup> If the group of combatants did not comply with the conditions laid down by the fetish-priest, it would suffer a crushing defeat.<sup>2874</sup> D02-148 also stated that Colonel Kandro had sought Kakado's authorisation to build a camp in Sogolo.<sup>2875</sup>

1254. D02-228 confirmed the existence of such practices, stating that the fetish-priests were highly respected, wielded undeniable authority and held real sway over the population, especially in military matters. They decided when and how war would be waged and who distributed the fetishes.<sup>2876</sup> The witness also underlined that after the signature of the March 2003 Agreement to End the Hostilities, he heard that Kakado enjoyed "[TRANSLATION] significant authority within the FRPI resistance".<sup>2877</sup> D02-01, for his part, testified that ranks were conferred upon combatants in one of two ways: either they were promoted for their "[TRANSLATION] intelligence" and their "[TRANSLATION] ability to conduct themselves properly in the community" or Kasaki would confer ranks upon them.<sup>2878</sup>

1255. Germain Katanga also underlined the significance of the role played by both Kakado and Kasaki, in particular before battle. He stated that after Kakado, Kasaki was the most powerful elder of Walendu-Bindi *collectivité* and had at the

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<sup>2870</sup> See D02-300, T. 316, pp. 20 and 21; D02-148, T. 279, pp. 25-26 and 36.

<sup>2871</sup> D02-148, T. 279, p. 36.

<sup>2872</sup> D02-148, T. 279, pp. 25 and 28.

<sup>2873</sup> D02-148, T. 279, p. 26.

<sup>2874</sup> D02-148, T. 279, p. 36.

<sup>2875</sup> D02-148, T. 278, pp. 61-62.

<sup>2876</sup> D02-228, T. 252, pp. 64-66.

<sup>2877</sup> D02-228, T. 250, pp. 52-53. See also P-12, T. 199, pp. 4-5

<sup>2878</sup> D02-01, T. 277, p. 11.

time encouraged resistance against the Ugandans.<sup>2879</sup> In this regard, the Chamber must recall and point out that Kakado headed the CODECO agricultural cooperative<sup>2880</sup> and was represented by Kazaki in Aveba.<sup>2881</sup>

1256. The Chamber also draws attention to several items of documentary evidence which clearly illustrate the fetish-priests' involvement in both the military and civilian life of the *collectivité*. A case in point is the Memorandum of Understanding of 5 June 2002, whose chapter entitled "[TRANSLATION] Resolutions", under the head of "[TRANSLATION] Security", recommended the "[TRANSLATION] dismantling of the Kakado and Kandro networks".<sup>2882</sup> Furthermore, the document entitled "*Rapport de service*" [Report of the immediate office], dated 6 March 2003 and signed by Commander Oudo, reported a matter of an entirely military nature to "[TRANSLATION] His Excellency the Chairman of CODECO in Tchey", that is, Kakado.<sup>2883</sup> Likewise, the "Evangelization" letter of 29 January 2003<sup>2884</sup> on matters pertaining to the administrative set-up and public order was copied to Kasaki. Lastly, Kasaki signed the "Prohibition on bearing arms" letter, which proscribed the bearing of arms at marketplaces.<sup>2885</sup>

1257. Lastly, the Chamber notes that Germain Katanga maintained close personal ties with Kasaki. In fact, when giving evidence, the Accused emphasised that he was very close to Kasaki. In that regard, he recalled that he had served as one of his bodyguards in September 2002<sup>2886</sup> and underlined that Kasaki trusted him.<sup>2887</sup>

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<sup>2879</sup> D02-300, T. 314, p. 55; T. 315, pp. 29-32.

<sup>2880</sup> D02-300, T. 319, p. 21. See also T. 314, p. 40. The Chamber does not know, however, on the basis of evidence on record, the precise role which the organisation played in February 2003.

<sup>2881</sup> D02-300, T. 315, p. 56.

<sup>2882</sup> EVD-OTP-0027: Memorandum of Understanding on the Resolution of Inter-Ethnic Conflict (DRC-OTP-0136-0206).

<sup>2883</sup> EVD-D02-00231: Report of the immediate office; D02-300, T. 325, p. 47.

<sup>2884</sup> EVD-OTP-00238: "Evangelization" letter

<sup>2885</sup> EVD-OTP-00278: "Prohibition on bearing arms" letter.

<sup>2886</sup> D02-300, T. 315, p. 45.

<sup>2887</sup> D02-300, T. 324, pp. 60-64 and 70.

Germain Katanga also stated that he accompanied Kasaki during his travels,<sup>2888</sup> that he had lent him his assistance on several occasions, particularly in ritual ceremonies,<sup>2889</sup> that Kasaki listened to him, and that he had even been able to stand up to him and persuade him to back down from his initial stance in an incident about returning property to Akobi, the customary chief of the *collectivité*.<sup>2890</sup> On that occasion, Kakado had made a point of thanking the Accused for intervening.<sup>2891</sup> Lastly, Germain Katanga underlined that his poaching activities were “[TRANSLATION] protected” by Kasaki.<sup>2892</sup>

1258. The Chamber must therefore note that the fetish-priests were directly concerned with military matters, although it cannot be said that they had a role on the battle-field proper. Further still, it appears that the fetish-priests were involved in person with the combatants in the run-up to combat, when they played a role pivotal to the combatants inasmuch as, to their eyes, the involvement of fetish-priests directly affected the course of battle. They therefore held definite sway over commanders and combatants alike. Furthermore, in the light of the various evidence garnered, the Chamber considers it established that Germain Katanga maintained particularly close ties of mutual trust and respect, specifically with Kasaki – a fetish-priest whose importance in Walendu-Bindi *collectivité* has been demonstrated – both as regards military and commercial matters.

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<sup>2888</sup> D02-300, T. 324, p. 65.

<sup>2889</sup> D02-300, T. 324, p. 63.

<sup>2890</sup> D02-300, T. 314, p. 53 and pp. 56-57; T. 324, pp. 60-61.

<sup>2891</sup> D02-300, T. 324, pp. 60-61.

<sup>2892</sup> D02-300, T. 315, pp. 29-30.

#### 4. Germain Katanga: delegation leader and the Beni authorities' figure of choice from November 2002

1259. The Chamber considers it expedient to delineate precisely Germain Katanga's role in the aforementioned relations forged between the Beni authorities and the Ngiti militia of Walendu-Bindi to which he then belonged.

1260. The Prosecution submitted in this regard that the most persuasive evidence of the effectiveness of the military authority wielded by the Accused was given when Germain Katanga stated, as has been noted,<sup>2893</sup> that he had meetings with the RDC-ML and EMOI authorities which were based in Beni. In the view of the Prosecution, the Accused could meet such senior figures only because he himself was an important military figure of authority and was recognised as such.<sup>2894</sup> It also noted that the aforementioned delegation that travelled from Aveba to Beni in November 2002 was composed of prominent persons and combatants and was led by Germain Katanga, which necessarily confirmed that he was the military leader of the *collectivité* and had control over the operations. In the Prosecution's view, the meeting between the prominent persons from Walendu-Bindi *collectivité* and those from Bedu-Ezekere *groupement* that was held in Aveba before the departure for Beni could only have taken place with the approval of the Accused, who, at the time, was the military leader of the *collectivité*.<sup>2895</sup>

1261. In the view of the Defence, Germain Katanga was selected to head the delegation of combatants from Aveba, but his role went no further.<sup>2896</sup> According to the Accused, the delegation to Beni consisted of around 60 prominent persons and combatants.<sup>2897</sup> After claiming that in that delegation, he was merely the

<sup>2893</sup> See "Section VII(B)(2)(a) Delegation to Beni and inception of collaboration between EMOI and local combatants".

<sup>2894</sup> [Prosecution Closing Brief](#), para. 211; [First Prosecution observations on article 25\(3\)\(d\)](#), para. 53.

<sup>2895</sup> [Prosecution Closing Brief](#), paras. 209-210; [First Prosecution observations on article 25\(3\)\(d\)](#), para. 52.

<sup>2896</sup> [Defence Closing Brief](#), paras. 582 and 1267.

<sup>2897</sup> D02-300, T. 316, p. 58.

leader of the combatants from Aveba, Germain Katanga finally stated that he headed the delegation of combatants,<sup>2898</sup> underscoring that it was Muganga Leba, the administrative secretary of Walendu-Bindi *collectivité*,<sup>2899</sup> who led the prominent figures.<sup>2900</sup> He explained that the members of the delegation had been selected on the basis of merit and that he had gone to Beni by invitation, not really knowing what would happen.<sup>2901</sup>

1262. The Chamber notes that, before that trip, Katanga had already left Aveba in October 2002, leading a delegation of around 50 combatants to meet with Commander Hilaire of the 11th battalion of the APC, then based in Marabo, between Komanda and Bunia. At the time, travel arrangements for the planned trip to Beni were to be discussed, in particular to ensure that it could be made safely. The Accused explained that the elders had selected him to head the delegation because of his language skills.<sup>2902</sup> In the course of the trip, Katanga was prompted to take part in the battle of Chay, during which he was wounded, an event that, in his own words, “[TRANSLATION] did not go unnoticed” upon his return to Aveba and “[TRANSLATION] worried many people”.<sup>2903</sup>

1263. The Chamber has no reason to doubt the credibility of Germain Katanga’s account of the two trips. It does, however, question the scant explanations he gave as to what prompted him to lead the combatants in the delegation that went to Beni, and remains circumspect as to the purely linguistic reasons that led him to head the delegation from Marabo.

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<sup>2898</sup> D02-300, T. 316, p. 58; T. 322, p. 19.

<sup>2899</sup> D02-300, T. 325, p. 7.

<sup>2900</sup> D02-300, T. 316, p. 58.

<sup>2901</sup> D02-300, T. 322, p. 24.

<sup>2902</sup> D02-300, T. 315, pp. 61-62; T. 316, pp. 12-13.

<sup>2903</sup> D02-300, T. 316, pp. 14-16; T. 324, pp. 72-73.

1264. Witness D02-228, for his part, testified that he met the Accused for the first time in Beni in or around December 2002.<sup>2904</sup> He stated that, although he had heard of him, he was not aware of his role, and that only after the meeting did he learn that Germain Katanga was “[TRANSLATION] the leader of the combatants in Aveba”.<sup>2905</sup> Similarly, the witness explained, he heard of “[TRANSLATION] President Germain Katanga” only in late 2004.<sup>2906</sup> He nevertheless confirmed that he saw “[TRANSLATION] General Germain” arrive in Beni with a delegation of combatants and civilians, stating clearly that it was *his* delegation.<sup>2907</sup>

1265. In the Chamber’s view, this witness’s testimony is particularly reliable in this regard, specifically in that he was able to recall with ease certain details of his meeting with Germain Katanga in Beni, in December 2002.<sup>2908</sup> The Chamber also notes that the witness made no distinction between a delegation of combatants, allegedly headed by Germain Katanga, and a separate delegation of prominent persons. On the contrary, D02-228 stated that he had no recollection of a second delegation.<sup>2909</sup>

1266. Witness D03-88, the Chief of Bedu-Ezekere *groupement*, testified that upon arrival in Beni, the delegation went to the RDC-ML office, where discussions ensued to establish who was the “[TRANSLATION] leader”, the “[TRANSLATION] head of the mission”.<sup>2910</sup> D02-228 and a certain Sambidhu, the witness stated, said that in their view, the leader of the mission was Germain Katanga, who kept silent, and they allegedly challenged D03-88 when he claimed to be the leader of the “[TRANSLATION] mission from the Djugu area”.<sup>2911</sup> D03-88 testified that he was ultimately given that status, whereas Germain Katanga was recognised as the

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<sup>2904</sup> D02-228, T. 250, p. 7.

<sup>2905</sup> D02-228, T. 250, pp. 7-8.

<sup>2906</sup> D02-228, T. 250, p. 8.

<sup>2907</sup> D02-228, T. 251, pp. 32-35.

<sup>2908</sup> See D02-228, T. 251, pp. 33-35.

<sup>2909</sup> D02-228, T. 251, pp. 33-34.

<sup>2910</sup> D03-88, T. 301, p. 51; T. 304, p. 50.

<sup>2911</sup> D03-88, T. 301, p. 51; T. 304, p. 50.

leader of the mission from “[TRANSLATION] the southern area”.<sup>2912</sup> Lastly, unlike Germain Katanga, D03-88 also made no distinction between a delegation of prominent persons and a delegation of combatants.

1267. The Defence did not dispute that Germain Katanga and the combatants met with the APC, the RCD-ML and EMOI authorities at the time.<sup>2913</sup> It underlined that people in Aveba “naturally” saw Katanga as important because of his relations with Beni, which did not however translate into his *de jure* or *de facto* authority over the combatants from Aveba or from elsewhere in the *collectivité*.<sup>2914</sup>

1268. The Chamber notes in this regard that Germain Katanga acknowledged that whilst in Beni he had attended several meetings to which, as he and D03-88 both stated, D03-88 and the prominent persons had not been invited because they concerned “[TRANSLATION] military matters”, which, according to D03-88, “[TRANSLATION] did not concern them”.<sup>2915</sup> It should be noted that, in addition to the meeting with the RCD-ML President Mbusa Nyamwisi held the day after the delegation’s arrival, the Accused, confirming Witness D02-228’s account on this point,<sup>2916</sup> mentioned meetings with the APC Chief of Staff (Kazareka), the EMOI Chief of Staff (Aguru), a close adviser to Mbusa Nyamwisi (Unringi-Padolo), and Lieutenant-Colonel Duku.<sup>2917</sup> At the meetings, it is alleged, military, logistical and strategic matters were discussed, including the supply of weapons, ammunition, various equipment and medicine by EMOI to the militia members.<sup>2918</sup> Germain Katanga added that the meetings also addressed the objectives to be pursued with the weapons thus received, particularly those which formed part of the strategy to reconquer Ituri and the positions ceded by the APC in

<sup>2912</sup> D03-88, T. 301, p. 51; T. 304, p. 50.

<sup>2913</sup> [Defence Closing Brief](#), paras. 583, 595 and 1267. See, *inter alia*, [First Defence observations on article 25\(3\)\(d\)](#), para. 53.

<sup>2914</sup> [Defence Closing Brief](#), para. 1229.

<sup>2915</sup> D03-88, T. 301, p. 57; D02-300, T. 316, pp. 62 and 64.

<sup>2916</sup> D02-228, T. 251, pp. 32-35.

<sup>2917</sup> D02-300, T. 316, pp. 61-62 and 64; T. 317, pp. 5-8.

<sup>2918</sup> D02-300, T. 316, pp. 64-65; T. 317, pp. 5-8.

Walendu-Bindi.<sup>2919</sup> The Accused further explained that those with whom he spoke, experts who had attended military academies, discussed military strategy with him.<sup>2920</sup>

1269. In the light of the foregoing, the Chamber considers that, in October and November 2002, Germain Katanga headed the two delegations of combatants that went to Marabo and then to Beni. In such capacity, Germain Katanga, as the figure of choice representing his *collectivité*, took part in several meetings in Beni with EMOI, RDC-ML and APC authorities, at which important military matters were discussed, including the delivery of weapons as part of the strategy to reconquer Ituri, and at which the attack on Bogoro was allegedly “[TRANSLATION] discussed”.<sup>2921</sup> Of further note is that the Accused specified that, between the November 2002 trip and 24 February 2003, he went to Beni on at least four other occasions.<sup>2922</sup> Accordingly, the Chamber finds that at the time, the Accused acted as a military partner in talks held with a view to reconquering Ituri.

##### **5. Role of Germain Katanga in the receipt, storage and distribution of weapons and ammunition**

1270. It is now expedient to dwell, as invited by the Prosecution, on the role of Germain Katanga following the first trip to Beni but also thereafter, in the receipt, storage and distribution of weapons and ammunition from Beni and intended for the Ngiti militia in prospect of the attack on the village of Bogoro.<sup>2923</sup>

1271. Although the Defence accepts that weapons and ammunition were delivered to Aveba following the first trip to Beni, it underlined that the Accused was not

<sup>2919</sup> D02-300, T. 316, p. 65.

<sup>2920</sup> D02-300, T. 317, p. 7.

<sup>2921</sup> D02-300, T. 317, p. 8.

<sup>2922</sup> D02-300, T. 317, p. 7.

<sup>2923</sup> [Prosecution Closing Brief](#), paras. 212-213, 521, 523 and 626; See also [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 50 and 54-56; [Closing Brief of the common legal representative of the main group of victims](#), paras. 87-89 and 269; [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 86; [Closing Brief of the legal representative of the child-soldier victims](#), paras. 176-177 and 179.

personally the recipient and maintained that Germain Katanga's alleged involvement in the receipt or distribution of the weapons has not been clearly established.<sup>2924</sup> In any event, it noted that the weapons and ammunition thus delivered were intended to implement the EMOI and APC's legitimate political and strategic objective of fighting the UPC throughout the province of Ituri and which encompassed the non-criminal plan to attack Bogoro.<sup>2925</sup>

**a) Receipt and storage of weapons and ammunition**

1272. The Chamber has already stated that the weapons and ammunition from Beni were transferred to Aveba as that location was advantageous.<sup>2926</sup> In this regard, the Prosecution noted that the Accused had returned to Aveba from Beni aboard an aeroplane carrying ammunition and foodstuffs, which were stored at his home, and that this was also so for weapons and ammunition which were delivered by subsequent flights.<sup>2927</sup> The Defence maintained that the weapons were stored at the BCA camp and not at Germain Katanga's home.<sup>2928</sup>

1273. As regards the first weapons delivery in December 2002, two testimonies are laid before the Chamber in addition to the evidence of the Accused. D03-88, for whom there is no dispute that he returned from Beni with the first delivery, testified that the entire consignment (weapons, ammunition and food) was brought to "[TRANSLATION] Germain Katanga's place".<sup>2929</sup> According to Witness P-28, the weapons and ammunition were stored at the place where Germain Katanga lived, his father's house.<sup>2930</sup> The Chamber is in considerable doubt as to

<sup>2924</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 77 and 82; [Third Defence observations on article 25\(3\)\(d\)](#), para. 31.

<sup>2925</sup> See, *inter alia*, [Defence Closing Brief](#), paras. 1159 and 1207-1208; [First Defence observations on article 25\(3\)\(d\)](#), paras. 76 and 82; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 31 and 58.

<sup>2926</sup> See "Section VII(C)(1) Main military camps and commanders".

<sup>2927</sup> [Prosecution Closing Brief](#), para. 212.

<sup>2928</sup> [Defence Closing Brief](#), paras. 662, 1209 and 1267.

<sup>2929</sup> D03-88, T. 304, pp. 62-63.

<sup>2930</sup> P-28, T. 217, p. 28.

whether P-28 was in Aveba at the time,<sup>2931</sup> and so considers his statements on the first weapons transport to be hearsay. The fact remains that the witness's testimony was corroborated in various respects by that of D03-88<sup>2932</sup> and, in particular, on the crucial issue of the weapons' destination after they were unloaded from the aeroplane, that is, Katanga's home – his father's house in the neighbourhood of Atele Nga.<sup>2933</sup>

1274. The Accused, however, claimed that the weapons were bound for his house but were diverted and covertly routed to a well-guarded depot at the BCA camp; they did “[TRANSLATION] not go to his place” because he had no “[TRANSLATION] space to put them”.<sup>2934</sup> In this regard, the Chamber must question the credibility of such statements. In fact, during its site visit in January 2012, the Chamber noted that to convey such a consignment to Germain Katanga's home from the airport would entail taking an entirely opposite direction to the BCA camp, which does not seem at all logical. Furthermore, Germain Katanga's stated wish to proceed with discretion so as not to “[TRANSLATION] reveal the depot”<sup>2935</sup> also appears most inconsistent with the chosen route to the BCA camp. Accordingly, the Chamber can only treat the Accused's claim with great caution and considers that Witnesses P-28 and D03-88 are much more credible than the Accused on this matter.

1275. It should be added that whereas it is not possible to determine exactly to which weapons and ammunition delivery she referred, Witness D02-161 stated that when an aeroplane landed, Germain Katanga was called and the weapons were brought to the BCA camp, where he was.<sup>2936</sup> When questioned specifically on this point, D02-161 did however state that she did not know the final

<sup>2931</sup> See “Section V(A)(1) Credibility of P-28”.

<sup>2932</sup> Including with respect to the existence of ammunition in plastic bags and food.

<sup>2933</sup> D03-88, T. 304, p. 62.

<sup>2934</sup> D02-300, T. 322, p. 26.

<sup>2935</sup> D02-300, T. 322, p. 26.

<sup>2936</sup> D02-161, T. 269, pp. 39-40.

destination of the weapons because there were “[TRANSLATION] two commanders in the same camp”.<sup>2937</sup> Accordingly, the Chamber observes that this witness was unable to provide a meaningful answer to the question.

1276. As regards the subsequent deliveries, the Chamber notes that, according to Germain Katanga, from early February 2003, when APC Commander Blaise Koka arrived in Aveba, deliveries were stored in that Commander’s home in Atele Nga.<sup>2938</sup> On this point, the Accused however claimed that on 15 February 2003, when Commander Kishore descended on the airfield to demand weapons, it happened that the weapons had been sent at Blaise Koka’s behest to the BCA camp rather than to the latter’s home.<sup>2939</sup> Moreover, of particular note in the Chamber’s view, is that on the same day and after he had been taken to Germain Katanga’s home, Kisoro was given a pack of cartridges prepared by Lieutenant Bipe and containing AK-47 ammunition and shells.<sup>2940</sup> This event thus also confirms the presence of ammunition stocks where the Accused lived shortly before the battle of Bogoro. Lastly, the Chamber notes that, given the reasons he advanced to explain why he did not go to Bogoro, Germain Katanga had to remain in Aveba specifically to protect the ammunition that had not been taken for the operation.<sup>2941</sup>

1277. Lastly, the Chamber notes that, in a letter dated 17 February 2003, Cobra Matata conveyed his dissatisfaction to Commander Oudo, based in Tutu Medhu, at not having received sufficient weapons and ammunition.<sup>2942</sup> He speculated whether the weapons were intended only for the Ndhuru family (Germain Katanga’s family)<sup>2943</sup> and whether he might have to travel to Beni himself. In the

<sup>2937</sup> D02-161, T. 269, p. 39.

<sup>2938</sup> D02-300, T. 317, p. 46.

<sup>2939</sup> D02-300, T. 317, pp. 54 and 58.

<sup>2940</sup> D02-300, T. 317, pp. 57-58.

<sup>2941</sup> D02-300, T. 318, p. 13.

<sup>2942</sup> EVD-D02-00243: Cobra Matata’s complaint (DRC-OTP-1024-0092).

<sup>2943</sup> D02-300, T. 325, p. 29; D02-161, T. 219, p. 29.

Chamber's view, the letter and its reply<sup>2944</sup> show that Germain Katanga's "[TRANSLATION] family" received ammunition directly from Beni.

1278. From all of the foregoing, it appears that from the time of the return from Beni in December 2002 until the immediate run-up to the battle of Bogoro, Germain Katanga facilitated the receipt of weapons and ammunition, which, at least in part, were stored at the place where he then lived.

### **b) Distribution of weapons and ammunition**

1279. The Prosecution alleged that the FRPI commanders came to Aveba to stock up on weapons and ammunition, which the Accused distributed as they were under his control.<sup>2945</sup>

1280. In the case at bar it is undisputed that in February 2003, before the attack on Bogoro, the local combatants had just received a considerable quantity of weapons.<sup>2946</sup> The Defence acknowledged that ammunition was delivered to Aveba and distributed to various camps including those in Olongba, Kagaba and Aveba and that Commanders Cobra Matata, Oudo Mbafefe, Joël Angulumu, Alpha Bebi and other commanders and combatants came to "[TRANSLATION] pick up their share".<sup>2947</sup> The Defence submitted that some of the weapons supplied to the combatants, particularly the heavy weapons, were in fact meant for the APC men among them<sup>2948</sup> and that the decision to make these deliveries had been taken by the authorities in Beni.<sup>2949</sup>

<sup>2944</sup> EVD-D02-00243: Cobra Matata's complaint (DRC-OTP-1024-0093).

<sup>2945</sup> [Prosecution Closing Brief](#), paras. 213, 505 and 522.

<sup>2946</sup> [Prosecution Closing Brief](#), para. 526; [Defence Closing Statements, T. 338](#), pp. 10-11.

<sup>2947</sup> [Defence Closing Brief](#), para. 1207.

<sup>2948</sup> See, in particular, Defence [Closing Statements, T. 340](#), p. 14.

<sup>2949</sup> See, in particular, [First Defence observations on article \(25\)\(3\)\(d\)](#), para. 77.

1281. The Chamber notes that several witnesses did mention that the ammunition delivered to Aveba was redistributed to the various camps in the *collectivité*.<sup>2950</sup> Moreover, Germain Katanga stated that weapons went from Aveba to Kagaba, Singo or Songolo,<sup>2951</sup> explaining that as a rule, Yuda could come for supplies “[TRANSLATION] at any time” due to his front line position in Kagaba.<sup>2952</sup> According to D02-228, a pre-prepared document from Beni specified the recipients and the quantities of weapons to be delivered to them, and distribution proceeded accordingly.<sup>2953</sup>

1282. The Defence concurred that given the situation in Walendu-Bindi at the material time, the overriding need was for weapons and ammunition without which no battle could be waged. In fact, the Ngiti combatants had very few means by which to acquire weapons and the logistical support from the RCD-ML and APC was pivotal to their defeat of the UPC in Bogoro.<sup>2954</sup> It further underscored that the Accused’s testimony “shows that multiple combatants went off to Beni regularly to buy their own weapons and munitions.”<sup>2955</sup>

1283. Regarding Germain Katanga’s role in distributing weapons and ammunition, the Defence contended that the sole reason for his involvement was the existence of an airstrip in Aveba. It argued that the Accused’s action was taken under the supervision of Blaise Koka, who had moved to Aveba specifically to oversee delivery and distribution operations which were planned and rolled out by the EMOI/RCD-ML/APC alliance in Beni.<sup>2956</sup> The Defence further argued that

<sup>2950</sup> P-28, T. 217, pp. 35 and 42-43; D02-161, T. 269, pp. 38-45; D02-228, T. 249, p. 65.

<sup>2951</sup> D02-300, T. 318, p. 17.

<sup>2952</sup> D02-300, T. 317, p. 46.

<sup>2953</sup> D02-228, T. 249, p. 65.

<sup>2954</sup> [Defence Closing Brief](#), para. 1167.

<sup>2955</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 33, D02-300, T. 317, pp. 11-12.

<sup>2956</sup> [Defence Closing Brief](#), paras. 1208 and 1267; [First Defence observations on article 25\(3\)\(d\)](#), para. 77; [Third Defence observations on article \(25\)\(3\)\(d\)](#), para. 31.

Germain Katanga had no direct control over the distribution of weapons or over their use.<sup>2957</sup>

1284. Germain Katanga's role in the operations was mentioned by D03-88, and by the Accused himself in connection with the briefly described incident involving Commander Kisoro.

1285. D03-88 explained that upon the return of the delegation which had gone to Beni, Germain Katanga became involved when weapons were distributed to commanders such as Yuda,<sup>2958</sup> who were waiting on the airstrip to "[TRANSLATION] share out" the ammunition.<sup>2959</sup> That involvement preceded the transportation of the remaining weapons to the Accused's house.<sup>2960</sup>

1286. D03-88 stated that he himself had asked for ammunition but the commanders present, including Yuda, Dark and Safco, whom the Witness described as Germain Katanga's "[TRANSLATION] people", objected.<sup>2961</sup> He further stated that Germain Katanga, who had initially refused to give him ammunition if he did not "[TRANSLATION] give" them combatants, ultimately decided to give him 1200 bullets. According to the Witness, the Accused then addressed his "[TRANSLATION] followers", telling them to "[TRANSLATION] give that to him" and he was provided with a crate of ammunition.<sup>2962</sup>

1287. The same witness also confirmed that Germain Katanga had the power to allot "[TRANSLATION] rounds of ammunition".<sup>2963</sup> In the Chamber's view, D03-88's testimony, which it considers credible in this regard, shows that Germain

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<sup>2957</sup> See for example, [Defence Closing Brief](#), paras. 607, 621, 624-625; [First Defence observations on article 25\(3\)\(d\)](#), para. 77; [Third Defence observations on article 25\(3\)\(d\)](#), para. 36.

<sup>2958</sup> D03-88, T. 304, pp. 62-63.

<sup>2959</sup> D03-88, T. 304, pp. 63-64.

<sup>2960</sup> D03-88, T. 304, pp. 62-63.

<sup>2961</sup> D03-88, T. 301, p. 61; T. 304, pp. 62-63.

<sup>2962</sup> D03-88, T. 301, p. 61; T. 304, pp. 63-64.

<sup>2963</sup> D03-88, T. 304, p. 64.

Katanga had the power to give ammunition to the commanders and to determine the amount.

1288. The Chamber further notes Germain Katanga's claim that he "[TRANSLATION] could identify [the] combatants [who] did not deserve ammunition", since their location made them unmanageable and they were "[TRANSLATION] not good for the population".<sup>2964</sup> It also notes that during the aforementioned incident involving Commander Kisoro, who had come to demand ammunition, the Accused took the initiative of bringing Kisoro to his home to calm him down and of providing him with what was in fact the wrong ammunition, as would later become clear. The Accused asked Commander Kisoro for his requirements, which were granted, and a package was then prepared.<sup>2965</sup>

1289. Further, as emphasised by D02-161, whose testimony on this point must be considered credible,<sup>2966</sup> when an aeroplane carrying weapons and ammunition landed, Germain Katanga was called before the weapons were taken to the BCA camp.<sup>2967</sup> The Chamber also recalls that when he was asked whether the ammunition and other supplies from Beni were sent to Bedu-Ezekere *groupement*, Germain Katanga told the Court that they were not. He mentioned that he would certainly have been notified as he was kept informed about the "[TRANSLATION] weapons which left Aveba for Kagaba, Aveba for Singo and Aveba for Songolo".<sup>2968</sup>

1290. Lastly, the fact that a document listing the recipients of the weapons was drawn up in advance in Beni<sup>2969</sup> and that APC commanders such as Mike 4 (from January 2003) and Blaise Koka (from February 2003) were present in Walendu-

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<sup>2964</sup> D02-300, T. 325, p. 16.

<sup>2965</sup> D02-300, T. 317, p. 58.

<sup>2966</sup> See "Section V(A)(1)(b)(i) Other testimonial evidence" para. 141.

<sup>2967</sup> D02-161, T. 269, p. 39.

<sup>2968</sup> D02-300, T. 318, p. 17.

<sup>2969</sup> D02-228, T. 249, p. 65.

Bindi *collectivité* did not seem to have had any significant impact in that regard, inasmuch as no other witness named them as distributors of weapons, although questions had been specifically put about Blaise Koka.<sup>2970</sup> D02-350 mentioned that Germain Katanga was “[TRANSLATION] in charge” in November 2002 in Aveba,<sup>2971</sup> even though, according to him, Mbusa Nyamwisi sent soldiers such as Blaise Koka and Lieutenant Bipe from Beni to train the combatants and lead operations in preparation for the attack on Bogoro and Bunia.<sup>2972</sup>

1291. In the body of evidence on the distribution of weapons the Chamber notes that Germain Katanga consistently appears as a key figure. He had the power to assess weapons and ammunition requirements, to decide not only the basis for their apportionment but also the quantity of ammunition to allot and, accordingly issue instructions, which were obeyed. The various examples show that Germain Katanga allocated weapons in the presence of commanders of Walendu-Bindi *collectivité* and that, as D03-88 testified, they had to comply with the Accused’s decision.

1292. Furthermore, he was always informed when the supplies left Aveba. In fact it appears that Aveba was where the weapons and ammunition received from Beni had to be apportioned and where certain decisions to such end were taken. In this regard, it should be noted that frequent reference was made to his home as the place where the weapons and ammunition were stored and where apportionment could be decided.

1293. As aforementioned, the Chamber previously found that the Ngiti commanders and combatants of that *collectivité* consulted a common authority located in Aveba.<sup>2973</sup> The Chamber will now clarify whether Germain Katanga

<sup>2970</sup> D02-129, T. 271, pp. 29-30 and 35; D02-148, T. 279, p. 16.

<sup>2971</sup> D02-350, T. 253, p. 44.

<sup>2972</sup> D02-350, T. 253, pp. 44 and 45. See also D02-228, T. 249, p. 67.

<sup>2973</sup> See “Section VII(C)(7)(a) Existence of an organised group”

was that common authority and specifically examine his powers and role in Aveba and Walendu-Bindi *collectivité*.

## 6. Germain Katanga: consulted authority in Aveba

### a) Title held in Aveba

1294. The Chamber notes that D02-161 testified that when she arrived Aveba in late September 2002,<sup>2974</sup> Germain Katanga was the commander.<sup>2975</sup> D02-160, who lived in Gety at the material time but regularly went to Aveba,<sup>2976</sup> also stated that prior to the battle of Bogoro, Germain Katanga was a commander based in Aveba.<sup>2977</sup> The Chamber notes that the witness explained, somewhat unclearly, that, according to him, the Accused could not be the commander-in-chief of the Aveba combatants since he did not control a camp and was not in charge of running the local market.<sup>2978</sup> According to D02-350, when he became acquainted with the Accused during supply missions to Beni, the Accused was “[TRANSLATION] in charge” in Aveba.<sup>2979</sup> D02-228 stated that after meeting Germain Katanga for the first time in or around December 2002, he learnt that he was the “[TRANSLATION] leader in charge of the combatants in Aveba.”<sup>2980</sup> Lastly, as the Accused himself put it, only on the occasion of the trip to Beni in November 2002 did he introduce himself as the “[TRANSLATION] Commander of Aveba”.<sup>2981</sup>

1295. The Chamber also considers that it must rely on several testimonies which made apparent that Germain Katanga was referred to as Colonel and considered the leader of Aveba. In this respect, it attaches particular importance to D03-88’s evidence. Hence it notes that although not specifically questioned on the matter,

<sup>2974</sup> D02-161, T. 269, p. 20.

<sup>2975</sup> D02-161, T. 268, pp. 15-6.

<sup>2976</sup> D02-160, T. 274, p. 18.

<sup>2977</sup> D02-160, T. 272, pp. 67-68.

<sup>2978</sup> D02-160, T. 274, pp. 18-9.

<sup>2979</sup> D02-350, T. 253, p. 43.

<sup>2980</sup> D02-228, T. 250, pp. 7-8.

<sup>2981</sup> D02-300, T. 317, p. 20; T. 324, pp. 67-68.

the witness freely described Germain Katanga as “[TRANSLATION] the leader who was the colonel” “[TRANSLATION] in the Bolo region” (Aveba), when he went there in November 2002.<sup>2982</sup> Later in his testimony and in response to a question about Aveba concerning the time when the delegation was flying back from Beni in mid-December 2001, the witness stated: “[TRANSLATION] Mister Prosecutor, I’ve told you several times, the leader was Germain Katanga [...]. I’ve already told you I don’t know how many times I have to repeat myself for you to understand.”<sup>2983</sup> Similarly, according to D02-129, in early 2003, Germain Katanga was a “[TRANSLATION] Colonel”<sup>2984</sup> and the leader in Aveba.<sup>2985</sup> P-28 stated that upon his arrival in Aveba – in early January 2003, in the view of the Chamber – “[TRANSLATION] Colonel” Germain Katanga was in charge of the presidency in Aveba.<sup>2986</sup> Finally, D02-129, who lived in Aveba from January 2003, testified that at that time, the Accused was a Colonel based in Aveba.<sup>2987</sup>

1296. The Chamber further notes that the “Evangelization” letter of 29 January 2003, written by Pastor Matata-Alude, is addressed to “[TRANSLATION] His Excellency Colonel Katanga-Nduro Germain in Aveba-Mukubwa” and refers to him as “[TRANSLATION] your great eminence”.<sup>2988</sup> Lastly, D02-350 testified that Germain Katanga was in charge of the resistance operations in Aveba in the run-up to the attack on Bogoro.<sup>2989</sup>

1297. To the Chamber it is therefore apparent that as of late 2002, Germain Katanga bore the title of commander or military leader of Aveba, was often referred to as “Colonel” and was thus regarded as a military leader.

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<sup>2982</sup> D03-88, T. 304, p. 33.

<sup>2983</sup> D03-88, T. 304, pp. 65-66.

<sup>2984</sup> D02-129, T. 271, p. 23.

<sup>2985</sup> D02-129, T. 271, p. 55.

<sup>2986</sup> P-28, T. 216, pp. 64-65.

<sup>2987</sup> D02-129, T. 271, p. 23.

<sup>2988</sup> EVD-OTP-00238: “Evangelization” Letter.

<sup>2989</sup> D02-350, T. 253, p. 46.

## b) Military powers wielded in Aveba

1298. To determine whether Germain Katanga exerted effective military power in Aveba, the Chamber must analyse the nature of his hierarchical relationship with the commanders of the camps known as BCA and Aéro in Aveba.<sup>2990</sup>

1299. The Chamber recalls at the outset that, in its view, P-28's claim that he was a combatant in the Aveba militia strains credibility. It did however consider that he could provide useful information about the militia, particularly as to how it operated, and underscored, moreover, that he was in Aveba in early February 2003. The Chamber will therefore draw on his testimony concerning the ties between Germain Katanga and the commanders of Aveba where it relates to an essential point concerning the Accused's responsibility, provided that it does not constitute the sole testimony on the matter.<sup>2991</sup>

1300. Firstly, regarding the authority Germain Katanga exerted over Commander Garimbaya, P-28, who the Chamber has recognised, is related to Mr Katanga, stated that the commander reported to Germain Katanga, explaining that Garimbaya was merely a company Commander.<sup>2992</sup> The witness also stated that Garimbaya headed Germain Katanga's escort, that he was immediately below the Accused in the hierarchy,<sup>2993</sup> and that Germain Katanga entrusted him with responsibility for Aéro Camp.<sup>2994</sup> Part of P-28's testimony is corroborated by that of D02-259, who also confirmed that Garimbaya headed Germain Katanga's guard.<sup>2995</sup> However, D02-148, who claimed to have gone regularly to Aveba, disputed that Garimbaya was tasked with providing security for Germain Katanga and merely confirmed that he commanded the company at the

<sup>2990</sup> See "Section VII(C)(1) Main military camps and commanders".

<sup>2991</sup> See "Section V(A)(1) Credibility of P-28".

<sup>2992</sup> P-28, T. 217, p. 5.

<sup>2993</sup> P-28, T. 221, p. 49.

<sup>2994</sup> P-28, T. 217, p. 6.

<sup>2995</sup> D02-259, T. 285, p. 53.

airport.<sup>2996</sup> The Chamber however notes that the witness was not examined further on the hierarchical relationship which then existed between the Accused and Garimbaya. D02-134 also confirmed that Garimbaya was responsible for Aéro camp, although when questioned on this point, he stated that he could not say whether he also headed Germain Katanga's escort.<sup>2997</sup> Lastly, D02-160, who at that time lived in Gety but often went to Aveba,<sup>2998</sup> stated that he did not recall the name of Commander Garimbaya but did recall the names of Germain Katanga and Mbadu.<sup>2999</sup>

1301. Although the Chamber is in a position to find that there was a hierarchical military relationship between Garimbaya, who was in charge of troops stationed at Aéro camp, and Germain Katanga, it cannot rely on P-28's testimony alone to determine whether the Accused could hand down operational orders to him which he obeyed or whether the orders were relayed to soldiers in his camp.

1302. With respect to the relationship between Commander Mbadu of the BCA Camp and the Accused, the Chamber recalls that when questioned about who commanded all the combatants in Aveba, the same Witness, D02-160, testified somewhat unclearly and even contradictorily, that Mbadu, whom he described as a platoon commander, was the commander-in-chief in Aveba, also stating that he could not distinguish between the two ranks.<sup>3000</sup> The Chamber further noted that D02-161 testified that Mbadu was the commander of the BCA camp,<sup>3001</sup> whereas P-28 stated that Mbadu was a company commander stationed at BCA and that he reported to Germain Katanga.<sup>3002</sup> Lastly, D02-129, who lived in Aveba from

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<sup>2996</sup> D02-148, T. 279, pp. 10-11 and 44-45; T. 280, p. 11.

<sup>2997</sup> D02-134, T. 259, pp. 50-53.

<sup>2998</sup> D02-160, T. 274, p. 18.

<sup>2999</sup> D02-160, T. 274, p. 20.

<sup>3000</sup> D02-160, T. 274, pp. 14-20.

<sup>3001</sup> D02-161, T. 268, p. 20.

<sup>3002</sup> P-28, T. 217, pp. 5-6.

January 2003, stated that only after his departure did he learn that Mbadu was in charge of the BCA camp.<sup>3003</sup>

1303. In that regard, the Chamber notes that Germain Katanga told the Court that Mbadu was the commander of the combatants quartered at the BCA camp and stated, in commenting on an incident in January 2003,<sup>3004</sup> that regarding “[TRANSLATION] [h]is authority,” he was above Mbadu,<sup>3005</sup> thereby admitting that at that time, Mbadu was his subordinate. He, however, explained, but not to the satisfaction of the Chamber, that he was unable “[TRANSLATION] to command” him as his own camp was “[TRANSLATION] outlying” and that their relationship was primarily one of “[TRANSLATION] cooperation”.<sup>3006</sup> Yet, during its site visit in January 2012, the Chamber could see that the distance between the BCA camp and the Atele Nga position in no way prevented the Accused from readily making daily visits.<sup>3007</sup> The Chamber therefore does not accept Germain Katanga’s explanations on that latter point.

1304. To explain to the Court that he had no real authority over Mbadu, Germain Katanga volunteered two statements. Firstly, he stated that in early January 2003, Kazaki ran into some “[TRANSLATION] problems” with Mbadu regarding the theft of weapons and that Kazaki “[TRANSLATION] sent someone to go [...] call [Germain Katanga] and then to come with a force to tell [...] Commander Mbadu not to do that again”.<sup>3008</sup> Secondly, he stated that as of that dispute, “[TRANSLATION] Mbadu’s authority started to wane”, adding that thenceforth he, Germain Katanga, “[TRANSLATION] gradual[ly]” “[TRANSLATION] started to dominate [...] the BCA combatants” who “[TRANSLATION] considered [him] their

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<sup>3003</sup> D02-129, T. 271, p. 23.

<sup>3004</sup> D02-300, T. 317, pp. 28-29.

<sup>3005</sup> D02-300, T. 317, p. 25.

<sup>3006</sup> D02-300, T. 317, pp. 25-26.

<sup>3007</sup> [Site Visit Report](#).

<sup>3008</sup> D02-300, T. 317, pp. 28-29.

leader".<sup>3009</sup> Finally, he added that Commander Iringa was then appointed by Kasaki to head the BCA camp.<sup>3010</sup>

1305. In the view of the Chamber, the information furnished by the Accused, contradictory as it may sometimes be, does confirm that within the militia in early 2003, Germain Katanga outranked Mbadu and that he exerted authority over the combatants quartered at the BCA camp, who considered him their leader. The Chamber was, however, not in a position to establish how such military authority was exerted and specifically whether Germain Katanga wielded *de facto* command, direction and control authority over Mbadu or the combatants in the BCA camp.

1306. In the light of the foregoing, the Chamber found that in the immediate run-up to the attack on Bogoro, Germain Katanga was Garimbaya and Mbadu's superior in Aveba, and that he was a consulted authority. However, save for the 60 men in the Atele-Nga position, the Chamber does not find that he was responsible for the command, direction and control of the commanders and combatants stationed there.

#### **7. Germain Katanga: President of the Ngiti militia of Walendu-Bindi *collectivité***

1307. The Chamber will now return to the earlier distinction it drew between the title held by the Accused and the role he is alleged to have effectively performed.

##### **a) Title held in Walendu-Bindi *collectivité***

##### **i. Inheritance of Colonel Kandro's mantle in October 2002**

1308. The Prosecution contended that Germain Katanga inherited Colonel Kandro's mantle as leader of the Ngiti combatants of Walendu-Bindi *collectivité* after his

<sup>3009</sup> D02-300, T. 317, pp. 28-29.

<sup>3010</sup> D02-300, T. 315, pp. 33 and 36; T. 316, p. 35; T. 324, p. 88.

death in September 2002. It explained that against the backdrop of prevailing insecurity after Kandro passed away, the need to replace him had in fact become apparent and that Germain Katanga, a respected soldier, had then succeeded him without however heading “*Garrison Mobile*”, whose command Yuda had assumed.<sup>3011</sup>

1309. The Defence recalled that at the time of Kandro’s death, the combatants had no real structure and disputes the claims that the Accused had replaced Kandro. It maintained that Germain Katanga became the leader of the Ngiti combatants only on 3 March 2003 and that such appointment could not have predated the attack on Bogoro, given the infighting which had ensued among the various autonomous combatant groups in the aftermath of Kandro’s death.<sup>3012</sup>

1310. As to whether, after Kandro’s death,<sup>3013</sup> Germain Katanga became the leader of the Ngiti combatants, a number of testimonies on the matter lie before the Chamber. After a series of questions put by the Prosecution, D02-148 maintained that, in his opinion, Germain Katanga had not been appointed to Kandro’s position.<sup>3014</sup> D02-01, for his part, stated that upon Kandro’s death, Germain Katanga had not become the leader of the Ngiti combatants because “[TRANSLATION] Cobra was there”<sup>3015</sup> and that he had risen to the position only after the battle of Bogoro.<sup>3016</sup> D02-161 stated that upon Kandro’s death, his “[TRANSLATION] position” had been given to Germain Katanga, a position whose duties, however, the Witness spontaneously added, he had not ultimately

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<sup>3011</sup> [Prosecution Closing Brief](#), paras. 132 and 188. See also [Closing Brief of the legal representative of the main group of victims](#), para. 218; [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 80.

<sup>3012</sup> [Defence Closing Brief](#), paras. 572 and 1226; [Defence Closing Statements, T. 338](#), p. 35.

<sup>3013</sup> In September 2002, Kandro was the leader of all the Ngiti combatants of Walendu-Bindi *collectivité* (“Section VII(A)(2)(a) Centralisation of command”).

<sup>3014</sup> D02-148, T. 280, pp. 10-11.

<sup>3015</sup> D02-01, T. 277, p. 52.

<sup>3016</sup> D02-01, T. 277, pp. 52-53.

performed.<sup>3017</sup> D02-129 mentioned that Germain Katanga had effectively replaced Kandro but in retracting his earlier statement,<sup>3018</sup> specified that Kandro was not the leader of all the Ngiti combatants but only of “*Garnison*”.<sup>3019</sup>

1311. D02-236 testified that he heard of Germain Katanga when Kandro died because people referred to him by name and stated that he was most “[TRANSLATION] cooperative”.<sup>3020</sup> After stating that Kandro initially led all the combatants in the *collectivité*,<sup>3021</sup> P-28 added that he too had heard that after Kandro’s death, Kakado had appointed Germain Katanga leader of all the combatants of Walendu-Bindi *collectivité*,<sup>3022</sup> which, according to the witness, was common knowledge.<sup>3023</sup> Lastly P-12 testified that Germain Katanga himself had told him that after Kandro’s death, shortly after the fighting in Nyakunde, he had been appointed as his replacement despite his youth.<sup>3024</sup>

1312. The Chamber notes that D02-236’s statements are very general. As to P-12’s statements, it notes that the witness expressed himself clearly without, however, being able to provide further information as to whether the Accused had actually inherited Kandro’s mantle. As concerns P-28’s testimony, the Chamber notes that he initially maintained that upon Kandro’s death, Cobra, and later Germain Katanga, had replaced him, but then adverted again to Cobra. When questioned about Cobra’s return, the witness ultimately confirmed that Germain Katanga had been appointed leader of the combatants by Kakado without, however,

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<sup>3017</sup> D02-161, T. 269, p. 38.

<sup>3018</sup> D02-129, T. 271, p. 57.

<sup>3019</sup> D02-129, T. 271, p. 56.

<sup>3020</sup> D02-236, T. 243, pp. 35-36.

<sup>3021</sup> P-28, T. 217, p. 13.

<sup>3022</sup> P-28, T. 217, pp. 13 and 14.

<sup>3023</sup> P-28, T. 217, p. 13.

<sup>3024</sup> P-12, T. 195, pp. 15-17; T. 197, p. 16 ; T. 201, pp. 20-21.

alluding again to Cobra's appointment.<sup>3025</sup> The Chamber finds these statements unclear and can accord them only very little probative value.

1313. Although several witnesses stated that Germain Katanga had been mentioned by name on the occasion of Kandro's death and succession and, moreover, that the Accused seemed to then enjoy a good reputation locally, the Chamber cannot at this juncture state that the Accused replaced Kandro after his death by becoming the leader of the combatants of Walendu-Bindi *collectivité*. Too much imprecision and uncertainty surround this point, particularly as to the exact date of that succession and, more fundamentally, as to whether he effectively assumed that position. Further still, as the Chamber has already stated, it was not in a position to find that Kandro's command was actually centralised in September 2002, thus casting further doubt on Germain Katanga's effective assumption of that position.<sup>3026</sup>

**ii. Germain Katanga: President of the Ngiti militia of Walendu-Bindi *collectivité* in February 2003**

1314. As regards Germain Katanga's title, and without prejudice to the role he performed and the powers which he wielded over the Walendu-Bindi *collectivité* combatants, the Chamber would first point out that none of the three witnesses, D02-228, D02-236 or D02-350, testified that the Accused was appointed to head the FRPI as of late 2002, whereas they had a direct part in the creation of the new force. The Chamber recalls that on the subject of its composition, the three witnesses pointed to a series of protagonists, specifying their roles, with no reference, however, to the election of a president or even to Germain Katanga by name.<sup>3027</sup> In the Chamber's opinion, it cannot therefore be stated that the FRPI authorities officially appointed Germain Katanga as its President in late 2002.

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<sup>3025</sup> P-28, T. 217, pp. 13-14.

<sup>3026</sup> See "Section VII(A)(2)(a) Centralisation of command".

<sup>3027</sup> See "Section VI(B) Main political events and incidents".

Nonetheless, in the Prosecution's view, such appointment is not essential, since, in its submission, Germain Katanga became the *de facto* military leader of the FRPI when the movement of Ngiti combatants of Walendu-Bindi decided to take on that name.<sup>3028</sup>

1315. Furthermore, a number of documentary exhibits on the subject are laid before the Chamber. It first observes that two letters predate the attack on Bogoro: the 29 January 2003 "Evangelization" letter<sup>3029</sup> and the 9 February 2003 "Prohibition on bearing arms" letter.<sup>3030</sup> The Chamber points out that although the Defence contended that there is no proof of the letters' exact provenance and that they are no more than "documentary hearsay",<sup>3031</sup> their authenticity does not appear to be open to challenge insofar as the original documents were obtained in a seizure effected at the behest of the *Tribunal de grande instance de Bunia* at Medhu Camp on 23 September 2004, during a search undertaken with United Nations assistance, and as they were in MONUC's custody until they were handed to the Office of the Prosecutor.<sup>3032</sup> The 29 January 2003 "Evangelization" letter,<sup>3033</sup> it is recalled, is addressed to "[TRANSLATION] His Excellency Colonel Katanga-Nguru Germain in Aveba-Mukubwa", referred to as "[TRANSLATION] your great eminence". The letter informs him of an evangelization campaign in Kagaba Section and states that he is thus "[TRANSLATION] apprised of the situation which will take place in our *collectivité* of Walendu-Bindi, whose oversight rests with you for the time being". Several persons, first Kasaki, in his capacity as "[TRANSLATION] superintendent of the front-line [*chargé de front*]", but also various military authorities, including Major Ngorima in Kagaba and the Company

<sup>3028</sup> [Prosecution Closing Brief](#), para. 194.

<sup>3029</sup> EVD-OTP-00238: "Evangelization" letter.

<sup>3030</sup> EVD-OTP-00278: "Prohibition on bearing arms" letter.

<sup>3031</sup> [Defence Closing Statements, T. 338](#), pp. 37-39.

<sup>3032</sup> In this regard, see T. 95, pp. 75-76; T. 323, p. 53; [Decision on Bar Table Motions](#); [Prosecution Closing Brief](#), para. 218; [Prosecution Closing Statements, T. 340](#), pp. 33-34.

<sup>3033</sup> EVD-OTP-00238: "Evangelization" letter.

Commander stationed in Gety-État, Walendu-Bindi, are copy recipients of the letter.

1316. In the view of the Prosecution, that the letter was copied for information to other majors and commanders in the *collectivité* in Kagaba and Gety and that its author addressed Germain Katanga as “Colonel”, *viz.* outranking the combatants to whom the letter was copied, establishes that Germain Katanga was their superior and that he wielded supreme authority over all of the Ngiti commanders and combatants.<sup>3034</sup>

1317. In the Defence view, that the author of the letter addresses Germain Katanga as Colonel in no way establishes his supreme authority over Walendu-Bindi *collectivité*, since it denotes a rank and not a position and the use of terms of respect simply reflects courtesy on the part of the author of the letter.<sup>3035</sup> The Defence further submitted that said author addresses Germain Katanga in precise terms – “[TRANSLATION] Colonel in Aveba Mukubwa”, which is not the “[TRANSLATION] President of the Walendu-Bindi combatants”. The Defence further took the view that the author addresses Germain Katanga as a person having a degree of responsibility but not necessarily sole responsibility for the *collectivité*. Lastly the Defence considered that the language of the letter shows that oversight for the *collectivité* as a whole did not lie with the Accused, since the chosen terms may also denote that only oversight “[TRANSLATION] of the terrain”, that is, the “area”, was at issue.<sup>3036</sup>

1318. The Chamber notes that whilst giving evidence, Germain Katanga stated that he did not know whether the letter had reached his “[TRANSLATION] administration”, whether it had been received by his personal secretary and

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<sup>3034</sup> [Prosecution Closing Brief](#), para. 219.

<sup>3035</sup> [Defence Closing Brief](#), paras. 1238 and 1240.

<sup>3036</sup> [Defence Closing Brief](#), paras. 1242-1244.

whether the secretary had acknowledged its receipt. In any event he maintained that he was unacquainted with it.<sup>3037</sup>

1319. For the Chamber, the letter establishes that administration and oversight of a territory extending beyond the strict confines of Aveba were considered to rest with Germain Katanga since notice of the forthcoming events in that section of the territory was given to him and not the Kagaba authorities. As the Chamber has previously pointed out, the leaders of armed groups took over the roles traditionally held by administrators, businessmen, traditional chiefs and law enforcement officers.<sup>3038</sup> Accordingly, the Chamber concludes, in the light of such evidence, that Germain Katanga was regarded as being vested with a certain authority of an administrative nature over Walendu-Bindi *collectivité*. However, from the single reference to the rank of “Colonel” in the letter, the Chamber is unable to infer that Germain Katanga was the superior of all the Ngiti military authorities of Walendu-Bindi *collectivité*.

1320. The 9 February 2003 “Prohibition on bearing arms” letter<sup>3039</sup> from Kasaki, the “Superintendent of the front-line”,<sup>3040</sup> copied to various military authorities of Walendu-Bindi *collectivité* and to Kakado, Chairman of CODECO, was addressed to “the President of the Movement in Aveba Mkubwa”. It urges him to do his utmost to ensure compliance with a prohibition on the bearing of firearms by soldiers at a cattle market.

1321. For the Prosecution, this letter establishes Germain Katanga’s authority. The letter shows, in its view, that he headed the Ngiti movement and that he had power of control over his subordinates. The Prosecution maintained that the “President” and addressee can be none other than Germain Katanga since the

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<sup>3037</sup> D02-300, T. 323, p. 59.

<sup>3038</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-00129-335, para. 7).

<sup>3039</sup> EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>3040</sup> D02-300, T. 325, p. 47.

letter only post-dates by 10 days the “Evangelization” letter, which mentions Germain Katanga’s oversight of Walendu-Bindi *collectivité* and refers to him as “[TRANSLATION] his Excellency Colonel” in Aveba. Further still, the Prosecution submitted that the reference to Germain Katanga as “President” in this letter is corroborated by the “Evangelization” letter. Lastly, the Prosecution submitted that there was no President other than Germain Katanga in Aveba prior to the attack on Bogoro.<sup>3041</sup>

1322. The Defence maintained that it is unproven that the letter was addressed to Germain Katanga, since the Accused testified in court that he had been unaware of the letter, that it bore acknowledgement of its receipt in Tatu and that it was unproven that it had been received in Aveba.<sup>3042</sup> In this respect, the Defence pointed out that the “Evangelization” letter makes reference to “Colonel Katanga”, whereas the “Prohibition on bearing arms” letter refers to the “President of the Movement”, which, in its view, is contradictory.<sup>3043</sup> The Defence further noted that had Germain Katanga really been President, the “Evangelization” letter would have used that term.<sup>3044</sup> Lastly, the Defence argued that the “Prohibition on bearing arms” letter was not addressed to Germain Katanga but to Kakado, and that the letter was intended only to inform him of a decision which had already been taken.<sup>3045</sup> The Defence further contended that only on 3 March 2003 did Kakado place the combatants of Walendu-Bindi *collectivité* under Germain Katanga’s authority, by appointing him “[TRANSLATION] President of the combatants”.

1323. The Chamber notes that the “Prohibition on bearing arms” letter was addressed to the “President of the Movement, in Aveba Mukbwa”, who was

<sup>3041</sup> [Prosecution Closing Brief](#), paras. 220-221.

<sup>3042</sup> D02-300, T. 323, pp. 48-50.

<sup>3043</sup> Defence Closing Brief, para. 1247.

<sup>3044</sup> Defence Closing Brief, para. 1248.

<sup>3045</sup> Defence Closing Brief, para. 1249.

urged to “pull out all the stops”.<sup>3046</sup> The very terms of the letter attest to Kasaki’s expectation that its addressee would bring all his influence and power to bear to secure compliance with the prohibition he had laid down by all of the copy recipients, that is, by soldiers, members of command staffs, commanders and commanders of companies, operations and garrisons throughout the territory of Walendu-Bindi *collectivité*. It is apparent to the Chamber that this “President of the Movement in Aveba Mukbwa” could not have been Kakado, whose name is unmentioned but who appears as a copy recipient in his capacity as PDG [*Président directeur général* (Chairman)] of CODECO in Tchey,<sup>3047</sup> nor Kasaki, the letter’s author, nor Mbadu, commander of the BCA camp in Aveba, whom the Accused described as subordinate to him,<sup>3048</sup> nor Garimbaya, company commander in Aéro camp –<sup>3049</sup> both, clearly, being unable to claim that position.

1324. When in the course of his testimony, the Chamber invited him to explain the respective positions held by certain addressees of the letter, particularly those addressed as “[TRANSLATION] commander in Aveba” and “[TRANSLATION] President of the movement in Aveba”, the Accused stated:

[TRANSLATION] [...] if I recall correctly, I would say that the commander in Aveba, it could have been me or it could have been, at that time, given that it was in February, Iringa (phon.). I now find it unclear because the word “President of the movement” has been used. Is it ... In “To the President of the movement”, I wonder: is it me or is it another president instead? And which president was it, of which movement. That’s what I’m now struggling to understand, here. It was the President.... I apologise.... Whether it was the FRPI President or instead was it a president, well there are a great many acronyms reflecting changes to the names of movements in our part of the world. I don’t know, but if these names came after the third of March, I could have been one of the recipients at that point [...].<sup>3050</sup>

1325. The Chamber notes that the Accused, whilst appearing somewhat unclear, stated that he could have been the “[TRANSLATION] commander in Aveba” or

<sup>3046</sup> EVD-OTP-00278: “Prohibition on bearing arms” letter.

<sup>3047</sup> D02-300, T. 325, p. 47.

<sup>3048</sup> D02-300, T. 317, p. 25.

<sup>3049</sup> D02-300, T. 315, p. 54; T. 324, p. 74.

<sup>3050</sup> D02-300, T. 325, pp. 30-32.

“[TRANSLATION] the President of the movement” to whom the letter was addressed, adding that he did not ultimately know whether he was one of the addressees of the “Prohibition on bearing arms” letter.<sup>3051</sup>

1326. The 3 March 2003 “Gold tax levy” letter also lies before the Chamber.<sup>3052</sup> It recalls that the reliability of the letter is not open to challenge insofar as it was also seized in the same circumstances as the “Prohibition on bearing arms” and “Evangelization” letters.<sup>3053</sup> The letter was addressed by Cobra Matata to the President of the FRPI in Bolo, Aveba, and it informed the addressee of the reintroduction of a procedure for taxing gold purchases in Talolo sector, Bavi.

1327. The Prosecution stated that in court, Germain Katanga authenticated Cobra Matata’s signature and the stamp which, according to him, is still in existence.<sup>3054</sup> It asserted that “President of the FRPI” denotes Germain Katanga and that the letter establishes that several days after the attack on Bogoro, the Accused headed that force and was informed by his subordinates of matters concerning the levying of taxes. The letter, in its view, reflects his position of authority over the FRPI combatants in the immediate run-up to 3 March 2003 and evinces continuity of the position he held.<sup>3055</sup>

1328. The Defence, however, argued that the letter merely proves that on 3 March 2003, Cobra Matata described the Accused as President of the FRPI but certainly not that this description was accurate or that Germain Katanga wielded such authority over all the Walendu-Bindi combatants ten days earlier, on 24 February 2003. The Defence claimed that Cobra Matata opted for the appellation “President of the FRPI” over “President of the combatants” out of jealousy at Germain

<sup>3051</sup> D02-300, T. 325, pp. 30-32, in particular, p. 32, lines 14-16.

<sup>3052</sup> EVD-OTP-00239: “Gold tax levy” Letter.

<sup>3053</sup> See in this regard, T. 95, pp. 75-76; T. 323, p. 53; [Decision on Bar Table Motions; Prosecution Closing Brief](#), para. 218; [Defence Closing Statements, T. 338](#), pp. 37-39; [Prosecution Closing Statements, T. 340](#), pp. 33-34.

<sup>3054</sup> See D02-300. T. 323, p. 34.

<sup>3055</sup> [Prosecution Closing Brief](#), para. 222; [Prosecution Closing Statements, T. 336](#), p. 31.

Katanga's appointment as leader of the Ngiti combatants, since he did not want to draw attention to the latter's title.<sup>3056</sup> The Defence further underscored that in the letterhead of the 17 February 2003 letter from Cobra Matata to Oudo,<sup>3057</sup> Cobra does not state his office to be "*FRPI – Cabinet de Colonel* [FRPI – Immediate Office of the Colonel]", but rather "*Mouvement de libération lendu, Comité de sécurité* [Lendu Liberation Movement, Security Committee]". It contended that as he did not recognise himself as part of the FRPI prior to the attack on Bogoro, there is no reason to believe that he recognised Germain Katanga as such before 24 February 2003.<sup>3058</sup>

1329. Here, too, Germain Katanga claimed not to have received the letter, that he saw it for the first time in The Hague, that it was not addressed to him and that the salutation "[TRANSLATION] To the President of the FRPI in Bolo" did not apply to him.<sup>3059</sup> The Accused further maintained in court that since both were present at a ceremony on 3 March 2003 during which Kakado appointed him "[TRANSLATION] President of the combatants",<sup>3060</sup> Cobra Matata must have used the title of "President" after hearing Kakado utter it.<sup>3061</sup>

1330. The Chamber notes that Colonel Cobra Matata, who described himself as "[TRANSLATION] Supreme Chief of Staff"<sup>3062</sup> and who served as a commander in Walendu-Bindi at least from the period before the attack on Nyakunde until September 2002,<sup>3063</sup> nonetheless considered it necessary to give notice of and thus report the administrative and fiscal initiative which he had just taken. Yet, the person to whom he wrote on 3 March 2003 held the position of FRPI President in Aveba. The Chamber recalls that on this date Germain Katanga was already

<sup>3056</sup> [Defence Closing Brief](#), paras. 1254-1259; [Defence Closing Statements, T. 338](#), p. 38.

<sup>3057</sup> EVD-D02-00243: Cobra Matata's complaint.

<sup>3058</sup> [Defence Closing Brief](#), para. 1256.

<sup>3059</sup> D02-300, T. 323, pp. 32-34.

<sup>3060</sup> D02-300, T. 319, pp. 19 and 23.

<sup>3061</sup> D02-300, T. 319, pp. 18 and 23; T. 323, p. 32.

<sup>3062</sup> See also in this regard, EVD-D02-00045: Handwritten document "FRPI History".

<sup>3063</sup> See for example, D02-160, T. 272, p. 55; D02-300, T. 321, p. 52.

“President of the movement”, that the FRPI had in fact been in existence for a number of months and according to the Accused, the combatants had taken on that name.<sup>3064</sup> The Chamber is therefore of the view that on 3 March 2003, Cobra Matata, a Ngiti commander, did address Germain Katanga as “[TRANSLATION] President of the FRPI”, who, according to him, had powers of an administrative and fiscal nature.

1331. The Defence submitted that Germain Katanga’s appointment as “[TRANSLATION] President of the Ngiti combatants of Walendu-Bindi” post-dated the 24 February 2003 attack. In its view, confusion had arisen inasmuch as although Kakado had indeed appointed Germain Katanga “President of the combatants” of Walendu-Bindi on 3 March 2003, the title of “President of the FRPI” was only made official in 2004, and, in any event, according to the Defence, the title was not a rank but a position.<sup>3065</sup>

1332. The Chamber therefore notes with surprise that apart from the Accused himself, only one witness, D02-148, mentioned the event which constituted the ceremony of appointment of 3 March 2003, whereas, according to Germain Katanga, many members of the *collectivité*, including commanders and combatants, were invited and attended in large numbers.<sup>3066</sup> The Accused specified that Kakado, Kasaki, church members, *localité* chiefs, Commander Cobra Matata, Commander Kisoro and perhaps even Commander Alpha Bebi and Commander Move were in attendance that day.<sup>3067</sup> The Chamber notes that D02-01, who at the time was the secretary of Commander Move, who was based in Nyabiri and Nyaga, made no mention of the ceremony but stated that Kasaki

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<sup>3064</sup> See “Section VI(B) Main political events and incidents”; “Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003”.

<sup>3065</sup> [Defence Closing Brief](#), paras. 717 and 719.

<sup>3066</sup> D02-300, T. 319, p. 20. See also D02-228, T. 252, p. 70 (The Chamber notes that the witness was not present in Walendu-Bindi *collectivité*).

<sup>3067</sup> D02-300, T. 320, pp. 63-64, 68-70.

conferred the ranks upon combatants.<sup>3068</sup> The Chamber also notes, by way of example, that neither D02-129 nor D02-134, who at the time were living in Aveba and knew the Accused, mentioned such an event. It further recalls that according to P-28, it was after Kandro's murder in September 2002 that Bayonga (Kakado) appointed Germain Katanga as leader of all the combatants.<sup>3069</sup>

1333. The Chamber further recalls that before 3 March 2003, reference had already been made to a certain "President of the Movement" in the "Prohibition on bearing arms" letter dated 9 February 2003 and copied to Kakado.<sup>3070</sup> Lastly, the Chamber considers Germain Katanga's version of events, in which on that date Kakado was unaware of the existence of FRPI<sup>3071</sup> and he was himself given the title President of the combatants of Walendu-Bindi, and not of the FRPI, *viz.* the *Force de résistance patriotique en Ituri*, to be inconsistent with the letter bearing Kasaki's "*chargé de front patriotique en Ituri*" [Superintendent of the Front-line in Ituri] stamp – this is particularly so given the relationship between the two fetish-priests. That version of events is even more at variance with the document of 6 March 2003 entitled *Rapport de Service* [report of the immediate office] from Commander Oudo, member of the "*cabinet du commandant de bataillon chargé des opérations*" [immediate office of the battalion commander in charge of operations] in the FRPI to Kakado only three days after the ceremony on 3 March 2003 and including various FRPI members among its addressees. Lastly, the Chamber fails to comprehend how Kakoko, an important figure in the *collectivité* who, as already noted, was involved in local military life and, moreover, had very close ties to Kasaki who was living in Aveba, could not have been informed of the appellation "FRPI" in March 2003, whereas the Accused claimed that the

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<sup>3068</sup> D02-01, T. 277, pp. 11 and 36.

<sup>3069</sup> P-28, T. 217, pp. 13-14.

<sup>3070</sup> EVD-OTP-00278: "Prohibition on bearing arms" letter.

<sup>3071</sup> D02-300, T. 319, p. 23.

adoption of that name by the local combatants dated from the time of his return from Beni in December 2002.<sup>3072</sup>

1334. It is the view of the Chamber that from the documentary evidence cited, considered in the light of the body of evidence on record, it is in a position to find beyond reasonable doubt that by 9 February 2003, if not before, Germain Katanga was the “President” of the Ngiti militia, at times called FRPI, in Walendu-Bindi *collectivité*. The Chamber considers that the body of evidence aforesaid shows that save for Germain Katanga, no one in Aveba at that time could claim the title “*Président du mouvement*” [President of the Movement], a movement which was in the process of taking on the name “FRPI”.<sup>3073</sup> Furthermore, administration, oversight, security and public order within the *collectivité* were considered to rest with Germain Katanga and he was regarded as an important military figure of authority.

1335. The Chamber will now determine the nature and effectiveness of the power wielded by Germain Katanga militarily within Walendu-Bindi *collectivité* and endeavour to establish whether, beyond the military authority attributed to him, he was in fact able to exercise such powers.

**b) Military powers wielded within Walendu-Bindi *collectivité***

1336. In this regard, the Chamber turns first to P-28’s testimony. When he arrived in Aveba, in the Chamber’s estimation in early February 2003, that is, before the attack on Bogoro, Germain Katanga was, according to the witness, already the leader of all the combatants in Walendu-Bindi *collectivité*,<sup>3074</sup> was in charge of all the camps and issued orders to combatants. The Chamber cannot however

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<sup>3072</sup> D02-300, T. 317, pp. 20-22.

<sup>3073</sup> See, in particular, “Section VII(B)(2) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003.”

<sup>3074</sup> P-28, T. 217, p. 13.

ascertain the type of order.<sup>3075</sup> Placed before the Chamber for consideration is the testimony of D03-88, according to which in late 2002, Germain Katanga's military authority was limited to Irumu territory where Walendu-Bindi *collectivité* lies.<sup>3076</sup> When questioned as to whether the Accused took orders from a superior in Irumu territory, D03-88 replied that he did not know.<sup>3077</sup>

1337. Furthermore, regarding the Prosecution's allegation that the Accused had the power to enforce discipline within the *collectivité*, from the evidence on record found to be credible, it cannot be determined whether the commanders themselves could be disciplined or whether there was any oversight of disciplinary procedures or disciplinary action, if any, meted out against the commanders of the various camps in the *collectivité*.

1338. The Chamber will now analyse the relevant body of evidence on the existence of effective power exerted by Germain Katanga within the *collectivité*. The Chamber recalls that it has already adverted to the role that the Accused effectively played in receiving, storing and distributing weapons and ammunition in Walendu-Bindi.

**i. Germain Katanga: facilitator between the local commanders and the APC**

1339. Germain Katanga stated that after leaving Beni he returned to Aveba in the second week of December 2002, "[TRANSLATION] as the mission had been defined"<sup>3078</sup> and that he had "[TRANSLATION] changed [his] status from Commander of Aveba [to] become the coordinator in Aveba"<sup>3079</sup> of the APC units

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<sup>3075</sup> P-28, T. 217, p. 23.

<sup>3076</sup> D03-88, T. 305, p. 28.

<sup>3077</sup> D03-88, T. 305, p. 28.

<sup>3078</sup> D02-300, T. 324, p. 42.

<sup>3079</sup> D02-300, T. 317, p. 20.

and local combatants.<sup>3080</sup> He stated that in the immediate run-up to the attack on Bogoro he still held that position.<sup>3081</sup> The position of coordinator was warranted by the existence of an airstrip in Aveba and the need to ensure the smooth coexistence of local combatants and APC troops, given that they were pursuing the common goal of retaking positions from the UPC and driving that force out of Ituri,<sup>3082</sup> and since no one in Ituri was attending to proper coordination.<sup>3083</sup> It meant acting as a mediator between the soldiers in the camp and the population. This entailed bringing about a rapprochement between the local combatants and the APC so as to ensure that “[TRANSLATION] little” instructions from Beni<sup>3084</sup> were relayed – instructions which, moreover, he did not describe – therefore requiring that it be made clear to the combatants that they were the allies of the APC and to ensure that messages from Beni were received and understood in Aveba.<sup>3085</sup> Germain Katanga further stated that the role of coordinator, seeking to unite the local combatants with the APC, had been previously held by Colonel Kandro although the term coordinator had not been used at the time.<sup>3086</sup> The Accused explained that sometimes disagreements would arise between the two groups of combatants<sup>3087</sup> and that when that happened, he succeeded in calming them down.<sup>3088</sup> As an example he referred to his attempt to reconcile Commanders Yuda and Cobra Matata,<sup>3089</sup> as well as Commanders Mbadu and Bebi in Aveba, in October 2002.<sup>3090</sup> The Chamber however notes that both events predated his first trip to Beni and that, as he himself put it, Mbadu and Bebi were not APC men, but

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<sup>3080</sup> D02-300, T. 324, p. 68. See also [Defence Closing Brief](#), paras. 598-600 and 664; [Defence Closing Statements, T. 340](#), pp. 16 and 18; [Third Defence observations on article 25\(3\)\(d\)](#), para. 26.

<sup>3081</sup> D02-300, T. 317, p. 24.

<sup>3082</sup> D02-300, T. 324, p. 71.

<sup>3083</sup> D02-300, T. 324, p. 71.

<sup>3084</sup> D02-300, T. 317, pp. 24-25.

<sup>3085</sup> D02-300, T. 324, p. 69.

<sup>3086</sup> D02-300, T. 324, p. 70.

<sup>3087</sup> D02-300, T. 324, p. 69.

<sup>3088</sup> D02-300, T. 324, p. 70.

<sup>3089</sup> D02-300, T. 325, pp. 3-4.

<sup>3090</sup> D02-300, T. 324, p. 69.

rather, “[TRANSLATION] locals”.<sup>3091</sup> When invited by the Chamber to clarify whether his youth was an impediment to achieving such rapprochement, Germain Katanga responded that “[TRANSLATION] with cooperation, I could always get the message across” and that when he was “[TRANSLATION] blocked” he could ask Kasaki, whose “[TRANSLATION] trust [he had] earned”, to intervene, thus securing “[TRANSLATION] success” and a “[TRANSLATION] definitive solution”.<sup>3092</sup> He further explained that in practice it was impossible to intervene as coordinator beyond the confines of Aveba.<sup>3093</sup>

1340. Finally, German Katanga stated that as coordinator, he kept the *phonie* in his home, as well as the satellite device given to him in Beni, on which EMOI, APC Command Staff or Mbusa Nyamwisi could call him directly to ensure that local combatants were available for operations decided by the Beni authorities.<sup>3094</sup> He further stated that he was “[TRANSLATION] informed” and that he was “[TRANSLATION] almost at the centre of things” because he “[TRANSLATION] could say: Yes, the combatants are there; they are available...”.<sup>3095</sup> Despite such assertions, the Defence argued that the role of coordinator in no way entailed the coordination of planning activities or military operations.<sup>3096</sup>

1341. The Chamber notes that the Accused claimed to have acted as a mediator between local combatants and the APC even before December 2002. For instance, it recalls that he led the delegation which travelled to the vicinity of Komanda in October 2002 to meet with Major Hilaire of the APC before participating in the battle of Eringeti just before Christmas 2002 and that he was also the head of the

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<sup>3091</sup> D02-300, T. 324, p. 69.

<sup>3092</sup> D02-300, T. 324, pp. 69-70.

<sup>3093</sup> D02-300, T. 325, p. 3.

<sup>3094</sup> D02-300, T. 325, p. 19.

<sup>3095</sup> D02-300, T. 325, p. 19.

<sup>3096</sup> See, *inter alia*, [First Defence observations on article 25\(3\)\(d\)](#), paras. 55, 57 and 63.

delegation which in November 2002 went to Beni on behalf of Walendu-Bindi *collectivité*.<sup>3097</sup>

1342. In the Chamber's view, the role of coordinator, as described by Germain Katanga, testifies to the real military authority he wielded within Walendu-Bindi *collectivité*. As has been noted previously, in Aveba Germain Katanga played a central role in the supply and distribution of weapons and ammunition to the various commanders in the *collectivité*,<sup>3098</sup> and it fell to him to attempt to resolve any disputes that arose between the local combatants and the APC.

1343. The information on the status of the available forces in Walendu-Bindi, which he claimed he was always able to provide, presupposes that he had a certain degree of authority within the *collectivité*. The provision of such information at short notice required his regular contact with the camp commanders in order to have up-to-date knowledge of the status of the forces available on the ground and their capacity to mobilise and deploy quickly. It would have been impossible to obtain such information had Germain Katanga not had a degree of authority over the commanders, and it seems clear that the military authorities in Beni would never have entrusted such an important mission to someone who was unable to make enquiries and get results.

#### **ii. Germain Katanga's trips to the camps**

1344. Witness P-132 stated that whilst she was at one of the Ngiti camps after being abducted during the attack on Bogoro on 24 February 2003, she saw Germain Katanga three times when he made visits to the camp. On the first occasion, he arrived by motorbike with two bodyguards. Upon arrival, he addressed the camp authorities, the "[TRANSLATION] soldiers". She explained that she saw the Accused

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<sup>3097</sup> See "Section X(A)(4) Germain Katanga: delegation leader and the Beni authorities' figure of choice from November 2002".

<sup>3098</sup> See "Section X(A)(5) Role of Germain Katanga in the receipt, storage, and distribution of weapons and ammunition".

that day with her own eyes and that he saw and greeted her,<sup>3099</sup> that he had received a “[TRANSLATION] very warm welcome”, as “[TRANSLATION] a figure of authority”, that he was saluted by men standing to attention and that he had then entered the house of the battalion commander, who at that time was Yuda. She stated that after he left, she was told that he was “[TRANSLATION] our President” and that he lived in Bolo, that is to say Aveba.<sup>3100</sup> Regarding the second encounter, the Witness stated that the Accused arrived from Bunia in the evening, that she saw him then, and that he spent the night in Kagaba in the houses at the camp before continuing onwards to Bolo.<sup>3101</sup> Finally, the witness stated that she saw Germain Katanga for a third time when he was going to Bunia, and she said that on that occasion, he again received a warm welcome from the soldiers at the camp and that he was a figure of authority.<sup>3102</sup>

1345. Whereas the Chamber has noted that in her earlier statements the witness gave somewhat contradictory accounts on this point,<sup>3103</sup> it considers that the account she gave in court, under oath, is reliable and, in its view, has significant probative value, particularly since it is corroborated on a number of points by several witnesses. The Chamber notes for instance that, according to D02-129, the Accused travelled outside the camp by motorbike accompanied by an escort,<sup>3104</sup> which Germain Katanga also confirmed.<sup>3105</sup> P-28 and D02-01 also testified that a leader made trips, notably by motorbike, to the various camps.<sup>3106</sup> P-353, likewise, testified<sup>3107</sup> to the manner in which such visits were made and the authority held by the person who made them. In this regard, the Chamber notes that P-353 stated that, when she was being held captive at one of the Ngiti militia’s camps

<sup>3099</sup> P-132, T. 140, pp. 14-15; T. 141, pp. 32-33.

<sup>3100</sup> P-132, T. 140, pp. 5-7.

<sup>3101</sup> P-132, T. 140, pp. 8-9.

<sup>3102</sup> P-132, T. 140, pp. 10-12.

<sup>3103</sup> P-132, T. 143, pp. 21, 23 and 26-27.

<sup>3104</sup> D02-129, T. 271, p. 59; T. 272, pp. 5, 13 and 35-36.

<sup>3105</sup> D02-300, T. 320, pp. 57-58 and 63.

<sup>3106</sup> P-28, T. 217, pp. 14, 23 and 44; D02-01, T. 277, p. 10.

<sup>3107</sup> P-353, T. 213, p. 62; T. 215, p. 61.

between 24 February 2003 and June 2003, she had witnessed the visit of the – unidentified – “[TRANSLATION] President”, who, according to the camp commander’s bodyguard, was “[TRANSLATION] [...] the leader of everybody. Nobody else gives out orders. He is above all of us.”<sup>3108</sup>

1346. The Chamber further notes that, according to D02-148, under whom some of the combatants at the Kagaba camp served, it was obligatory to obey the orders of the supreme commander, whom, moreover, he did not identify, and he could not prohibit his men from disobeying such orders.<sup>3109</sup>

1347. Accordingly, in the light of these testimonies, the Chamber is satisfied that it was Germain Katanga, referred to as “President”, who visited the various military camps in Walendu-Bindi *collectivité* several times during the period in which the hostilities in Bogoro took place. He was accorded due respect and was received by the militia members as a figure of authority. However, on the basis of this evidence, the Chamber is unable to assess the nature of the orders given during the visits or whether they were in fact implemented.

**iii. Germain Katanga: Commander Dark’s superior after the battle of Bogoro**

1348. The Prosecution alleged that Commander Dark, present in Bogoro in the immediate aftermath of the 24 February 2003 attack for the purpose of protecting the spoils of victory, reported to Germain Katanga. In support it relied on the testimony of P-317, a MONUC investigator, who stated that when she went to Bogoro on 26 March 2003, the Ugandan commander providing support to the mission had introduced her to Dark, with whom she spoke for around half an

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<sup>3108</sup> P-353, T. 213, p. 62.

<sup>3109</sup> D02-148, T. 280, pp. 59-60.

hour.<sup>3110</sup> In the course of the conversation, Dark told P-317 that he headed the Lendu forces in Bogoro and that Germain Katanga was his superior.<sup>3111</sup>

1349. The Defence pointed out that Commander Dark is currently in the FARDC and could have been readily located and called as a witness to explain his statements. The Defence considers that the Chamber has thus been deprived of the opportunity to hear him and the Defence has been deprived of the opportunity to cross-examine him. The Defence takes the view that any statement by Dark should, therefore, be accorded very little weight, if any.<sup>3112</sup>

1350. The Chamber notes that Commander Dark was the authority in charge of Bogoro after the victory.<sup>3113</sup> Further, it cannot but that his reference to Germain Katanga as his superior makes clear that in late March 2003, the Accused had authority over him.

#### **iv. Role of Germain Katanga in the Agreement to End the Hostilities**

1351. For the Prosecution, the 18 March 2003 Agreement to End the Hostilities<sup>3114</sup> and the circumstances of its signature establish that Germain Katanga held a position of supreme authority over all the FRPI combatants and that such position was acknowledged by all the other parties involved in the pacification process.<sup>3115</sup> In the Prosecution view, the Accused undertook, on behalf of the FRPI, to secure compliance with the agreement's provisions because he recognised that he had the means of exerting control over his subordinates.<sup>3116</sup>

<sup>3110</sup> P-317, T. 228, pp. 28 and 30-31; T. 229, pp. 53-54.

<sup>3111</sup> P-317, T. 228, p. 31.

<sup>3112</sup> [Defence Closing Brief](#), para. 1149.

<sup>3113</sup> See, in particular, D02-300, T. 318, pp. 31-32; EVD-OTP-00166: Video excerpt – Meeting at Bunia airport on 7 March 2003.

<sup>3114</sup> EVD-D03-00044: Agreement to End the Hostilities in Ituri.

<sup>3115</sup> [Prosecution Closing Brief](#), para. 223.

<sup>3116</sup> [Prosecution Closing Brief](#), para. 223.

1352. In the submission of the Defence, the document shows that at the time, Germain Katanga had a sufficient degree of recognition to sign on behalf of the Ngiti community, as was also the case for Pascal Alezo Sipa and D02-228, who also signed on behalf of the FRPI; it nonetheless considers that the exhibit has no probative value as regards February 2003.<sup>3117</sup> For the Defence, the FRPI was thus a developing notion and Germain Katanga only officially became its President on 8 February 2004.<sup>3118</sup> The Defence further notes that D02-228 stated that the Accused and other FRPI members were taken to MONUC, which required them to sign the document.<sup>3119</sup> The Defence views D02-228's statements as corroborating in this regard Germain Katanga's in-court testimony that General Kale Kayihura had asked him to go to sign the ceasefire, that a pre-signed document was handed to him, that he had no time to read it and that he, in turn, had been asked to sign it on the FRPI's behalf.<sup>3120</sup> The Defence underlines that the Accused further stated that D02-228 and Pascal Alezo Sipa had been present and that they had been asked to sign the document with him<sup>3121</sup> since he did not want to be alone in entering into an undertaking on behalf of the *collectivité* and wanted the intellectuals to also sign.<sup>3122</sup> Lastly, Germain Katanga claimed not to have read the document because he felt uneasy since the cameras and video-recordings unsettled him.<sup>3123</sup>

1353. The Chamber notes that the Agreement to End the Hostilities, which Germain Katanga acknowledged signing under MONUC's aegis on 22 March 2003, was signed under the "FRPI" head, meaning therefore that he and two other persons were empowered to enter into an undertaking on behalf of its members. It also observes that a combatant such as the Accused could not have remained

<sup>3117</sup> [Defence Closing Brief](#), para. 1261.

<sup>3118</sup> [Defence Closing Brief](#), para. 1261.

<sup>3119</sup> See D02-228, T. 250, p. 19.

<sup>3120</sup> D02-300, T. 318, p. 43.

<sup>3121</sup> See D02-300, T. 318, pp. 43 and 46.

<sup>3122</sup> D02-300, T. 323, p. 3.

<sup>3123</sup> D02-300, T. 323, p. 4.

indifferent to the Agreement as the cessation of hostilities was at stake. Given the importance of the matter, the Chamber doubts the credibility of Germain Katanga's assertion that he signed the document without first acquainting himself with it, particularly given the notable brevity of the Agreement. The Chamber further notes that at the express request of General Kale Kayihura and MONUC representatives, the Accused was invited to sign with one of his close associates, Pascal Alezo Sipa, and with D02-228, on 22 March 2003, that is four days after most of the other signatories. In this respect, P-12 explained that MONUC had expressly invited the three men "[TRANSLATION] to oblige them to sign" the Agreement because, even though they did not constitute an officially recognised group, they were "[TRANSLATION] involved in the war in Ituri".<sup>3124</sup> That the MONUC representatives and General Kale Kayihura insisted on Germain Katanga's signature shows that his presence was most desired and that he was therefore, in no uncertain terms, a key figure in the conflict then raging in Ituri and with whom it was necessary to negotiate.

**v. Germain Katanga: member of the FNI/FRPI Command Staff from March to April 2003**

1354. To demonstrate Germain Katanga's military authority, the Prosecution pointed to his appointment in April 2003 to the Command Staff of the FNI/FRPI movement to represent "[TRANSLATION] the south", whereas a person by the name of Kiza and D02-236 were appointed to represent the "[TRANSLATION] north".<sup>3125</sup> The Prosecution argued that to be appointed to represent the "[TRANSLATION] south", he must already have been the FRPI military leader in Walendu-Bindi and have wielded both authority and power of command over his subordinates. In its view, therein lay recognition on the part of other military

<sup>3124</sup> P-12, T. 195, p. 44.

<sup>3125</sup> [Prosecution Closing Brief](#), para. 199.

leaders<sup>3126</sup> of the authority which was already his – an argument which the Defence contested. For the Defence, given that Germain Katanga had been appointed leader of the Ngiti combatants in March 2003, his appointment to represent the south was unsurprising, particularly, moreover, as he was Kakado’s choice.<sup>3127</sup>

1355. The Chamber is of the opinion that these events do in fact show the importance of the role Germain Katanga played in the FRPI movement in March and April 2003. In its opinion, the same holds true for his appointment on 22 March 2003 as Deputy Chief of Staff of the new FNI/FRPI alliance, whose existence, albeit short-lived, is uncontested.<sup>3128</sup>

1356. The Chamber now turns to a video excerpt concerning a meeting held at Bunia airport.<sup>3129</sup> It shows footage of Germain Katanga at the meeting attended by the Ugandan General Kale Kayihura and various other commanders of militias active in Ituri. The meeting was held by that general officer at his Bunia airport headquarters, after the signature of 18 March 2003 Agreement to End the Hostilities but before Ugandan UPDF troops left Bunia on 6 May 2003.<sup>3130</sup>

1357. The excerpt shows a certain Justin Lohbo introducing the FRPI attendees at General Kale Kayihura’s request.<sup>3131</sup> He thus introduced Germain Katanga as “[TRANSLATION] the Commander-in-Chief of the Patriotic Force of Resistance in Ituri” and as “[TRANSLATION] a figure of authority”;<sup>3132</sup> the Accused stated that he came from Geti.<sup>3133</sup> Pascal Alezo Sipa introduced himself as an assistant to Germain Katanga in intelligence matters and Serge Lobho Kawa as commander of

<sup>3126</sup> [Prosecution Closing Brief](#), para. 199.

<sup>3127</sup> [Defence Closing Brief](#), para. 1270.

<sup>3128</sup> [Defence Closing Brief](#), para. 732; D02-300, T. 318, p. 47; T. 319, p. 18.

<sup>3129</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport.

<sup>3130</sup> P-2, T. 187, pp. 4-13.

<sup>3131</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport; P-2, T. 187, p. 9.

<sup>3132</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport (DRC-OTP-1019-0382); P-2, T. 190, p. 26.

<sup>3133</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport; P-2, T. 187, p. 9.

operations.<sup>3134</sup> In the excerpt, Germain Katanga, Pascal Alezo Sipa and Serge Lobho Kawa were described as “[TRANSLATION] visitors” and General Kale Kayihura expressed his good fortune at receiving “[TRANSLATION] high-ranking visitors” from the Songolo Geti region whom he had not met before.<sup>3135</sup> Moreover, Justin Lobho can be seen at times presenting Germain Katanga as “[TRANSLATION] a colonel” or “[TRANSLATION] his superior”.<sup>3136</sup>

1358. The Chamber concludes therefrom that at that meeting held between 18 March 2003 and 6 May 2003, Germain Katanga was introduced and regarded as the FRPI Commander-in-chief. It takes the view that these events, which post-dated the attack on Bogoro, attest to the continuity of Germain Katanga’s authority and influence in military terms within the FRPI. Nonetheless, the Chamber cannot infer from these events that he had effective power of command over the combatants of the Ngiti militia on 24 February 2003.

## 8. Conclusion

1359. The foregoing analysis shows that at the material time, and in Walendu-Bindi *collectivité*, Germain Katanga – who bore the title Commander or Chief of Aveba – was a seasoned and well-known soldier with close ties to the fetish-priests in the *collectivité*, who respected him.

1360. He had undeniable military authority over the *collectivité*. Administration, oversight, security and public order within the *collectivité* were considered to rest with him and he was regarded as a military figure of authority. That authority crystallised in late 2002 and became increasingly established after the battle of Bogoro, as the body of evidence covering the period after the attack shows. As early as November 2002, Germain Katanga led the delegation of combatants and

<sup>3134</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport; P-2, T. 187, pp. 9-10.

<sup>3135</sup> EVD-OTP-00179: Video excerpt – Meeting at Bunia airport; P-2, T. 187, p. 8; P-2, T. 190, pp. 21, 26-27, 30-33 and 42.

<sup>3136</sup> P-2, T. 190, p. 39.

prominent persons to Beni. Indeed not only was he the focal point for the various commanders of the Ngiti militia, but he also represented the militia vis-à-vis the authorities in Beni. In that capacity he could attend high-level meetings and take military decisions.

1361. Therefore, at least from early February 2003, Germain Katanga bore the title of “President” of the Ngiti militia which, as the Chamber has noted, gradually adopted the name FRPI in the run-up to the attack on Bogoro.

1362. Regarding the powers which the Accused actually wielded, the Chamber found that, in Aveba, he facilitated the receipt and storage of weapons and ammunition and had the power not only to allot them to the Walendu-Bindi commanders but also to decide the quantity of ammunition allocated, as his instructions in this regard were followed.

1363. However, apart from his powers to receive, store and distribute weapons and ammunition, the Chamber is not in a position to find beyond reasonable doubt that Germain Katanga wielded powers of command and control in all areas of military life and over all the commanders and combatants in Walendu-Bindi *collectivité*.

1364. In actual fact, whereas the Accused moved around the Ngiti camps in the *collectivité* where he was received as a figure of authority, and whereas he could issue orders to the commanders and combatants within that *collectivité*, the Chamber was unable to ascertain the exact nature of the orders or whether they were obeyed.

1365. In the view of the Chamber, his titles Commander or Chief of Aveba and “President” of the Ngiti militia, at times called “FRPI”, the effectiveness of his authority over the supply and distribution of weapons and ammunition to the militia members, and his various roles as facilitator and negotiator do not,

however, support a finding beyond reasonable doubt that Germain Katanga was vested, as the Prosecution alleged, with effective hierarchical power over all the commanders and combatants of the Ngiti militia in Walendu-Bindi *collectivité*. Accordingly, the Chamber is unable to rule on the existence of centralised command within the Ngiti militia of Walendu-Bindi *collectivité*.

## **B. RESPONSIBILITY WITHIN THE MEANING OF ARTICLE 25(3)(A) OF THE STATUTE (INDIRECT COMMISSION)**

### **1. Applicable law under article 25(3)(a)**

1366. The case at bar requires the Chamber to determine the concept of “commission through another person”, within the meaning of article 25(3)(a) of the Statute, which no trial chamber has hitherto had to define. Indeed, Pre-Trial Chamber I confirmed some of the charges brought against the accused persons, Germain Katanga and Mathieu Ngudjolo, on the basis of joint commission through another person (“indirect co-perpetration”).<sup>3137</sup>

1367. On 18 December 2012, having severed the case against the two Accused, the Chamber unanimously acquitted Mathieu Ngudjolo of all charges. On that occasion, it first turned its attention to the indirect component of the mode of liability charged, having noted that in the Pre-Trial Chamber’s view, Mathieu Ngudjolo’s involvement was closely linked to his position of authority.<sup>3138</sup> Further to a rehearsal of the facts concerning indirect commission which was as independent as possible<sup>3139</sup> of any legal criteria, particularly those set forth in the

<sup>3137</sup> [Decision on the confirmation of charges](#), paras. 573-581. The cases were severed on 21 November 2012. See [21 November 2012 Decision](#).

<sup>3138</sup> [Ngudjolo Judgment](#), paras. 110 and 111.

<sup>3139</sup> [Ngudjolo Judgment](#), para. 110. Of note is that on that occasion, the Chamber chose to rehearse and analyse facts which were founded on a structural approach to indirect commission.

*Decision on the confirmation of charges*,<sup>3140</sup> the Chamber found Mathieu Ngudjolo not guilty for the purposes of article 25(3)(a) of the Statute.

1368. In this case, the evidence before it does not allow the Chamber to dismiss out of hand the application of indirect commission vis-à-vis Germain Katanga, without first specifying the constituent elements of the mode of liability. This was not so in *Ngudjolo*, where the Chamber was unable to establish beyond reasonable doubt that he was one of the commanders of Bedu-Ezekere *groupement* – a *sine qua non* to the application of the mode of liability in the case against him.

1369. The Chamber must therefore set forth a legal definition of indirect commission, particularly where it emerges that such commission is the work of an intermediary bearing criminal responsibility.

#### **a) Submissions of the parties and participants**

##### **i. Prosecution**

1370. In the Prosecution view, through its reliance on the theory of control over crime, the Pre-Trial Chamber duly interpreted article 25 of the Statute.<sup>3141</sup> It considered the substratum of the theory to be sound and that the Pre-Trial Chamber's interpretation of both co-perpetration and commission through another person merits endorsement by the Chamber.<sup>3142</sup> Further, in its opinion, indirect co-perpetration, the mode of liability confirmed by the Pre-Trial Chamber, does indeed find justification in the Rome Statute.<sup>3143</sup>

1371. Whereas the Prosecution advocated a careful review of two constituent elements of co-perpetration,<sup>3144</sup> it did not, however, suggest modifications to the

<sup>3140</sup> [Decision on the confirmation of charges](#), Section IV-A.

<sup>3141</sup> [Office of the Prosecutor, "Prosecution's Pre-Trial Brief on the Interpretation of Article 25\(3\)\(a\)", 19 October 2009, ICC-01/04-01/07-1541\("Prosecution observations on article 25\(3\)\(a\)"\)](#), paras. 1 and 12.

<sup>3142</sup> [Prosecution observations on article 25\(3\)\(a\)](#), para. 23.

<sup>3143</sup> [Prosecution observations on article 25\(3\)\(a\)](#), para. 20.

<sup>3144</sup> The Prosecution advocated revisiting the nature of the requisite contribution and the subjective elements of co-perpetration ([Prosecution observations on article 25\(3\)\(a\)](#), paras. 1 and 12).

indirect component of the mode of liability charged, stating its agreement with all of the Pre-Trial Chamber's findings in this respect.<sup>3145</sup>

1372. In the Prosecution's submission, the mental elements laid down by article 30 of the Statute must find application here, and, therefore the material elements of the crimes must be committed with intent and knowledge. As regards the subjective elements specific to indirect co-perpetration, in its view, it rested with the Prosecution to show that the Accused was aware of the factual circumstances which allowed him to exercise control over the crime.<sup>3146</sup>

## ii. Defence

1373. The Defence for Germain Katanga contended that the Pre-Trial Chamber's interpretation allowing simultaneous application of joint commission and indirect commission should be dismissed as flawed and highly controversial.<sup>3147</sup> It noted, nonetheless, that, considered separately, the two species of liability could be relied on by the Court and the constituent elements of co-perpetration did not give rise to great concern.<sup>3148</sup> Hence, it suggested that adjustments be made to the theory created by the Pre-Trial Chamber.<sup>3149</sup>

1374. The Defence acknowledged that the drafters of the Statute had reached agreement to include direct and indirect modes of liability under article 25 so as to subsume "not only those who play an essential role in the foreground, but those behind the scenes as well."<sup>3150</sup> However, it considered the definition given

<sup>3145</sup> [Prosecution observations on article 25\(3\)\(a\)](#), para. 21. See also [Prosecution Closing Brief](#), paras. 107-108 and 116-119.

<sup>3146</sup> [Prosecution observations on article 25\(3\)\(a\)](#), para. 22; [Prosecution Closing Brief](#), para. 122.

<sup>3147</sup> [Defence for Germain Katanga, "Corrigendum to : 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 \("Defence observations on article 25\(3\)\(a\)"\)](#), paras. 2, 7 and 9-26; [Defence Closing Brief](#), paras. 1111-1113; [Defence Closing Statements, T. 338](#), pp. 53-54.

<sup>3148</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 27.

<sup>3149</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 2.

<sup>3150</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 13.

to indirect commission controversial,<sup>3151</sup> noting that the Pre-Trial Chamber essentially relied on the works of theorist Claus Roxin to adopt the theory of control over the organisation.<sup>3152</sup> It further emphasised that the Pre-Trial Chamber cited only two scholars in support of recognition of the concept of perpetrator-by-means by the world's major legal systems and adverted to only four countries when enumerating cases tried on the basis of the concept of control over the organisation.<sup>3153</sup> Thus the Defence disputed that the theory of control over the organisation is "widely accepted".<sup>3154</sup> It pointed out that Roxin's theory has received much criticism and that crimes committed by a fully responsible physical perpetrator could be attributed to an indirect perpetrator only where that person wields effective control over the physical perpetrator.<sup>3155</sup>

1375. The Defence argued that should the Chamber decide to draw on Roxin's theory, an accused could incur liability only for acts committed by persons under his or her direct control and such control could not be less tight than that exerted by a superior within the meaning of article 28 of the Statute.<sup>3156</sup> In its Closing Brief, the Defence further contended that the evidence must show that the Accused was the "mastermind" of the criminal plan.<sup>3157</sup> It asserted that such proof requires more than soliciting or inducing inasmuch as it presupposes recourse to any means of causing another person to commit a crime, provided that the crime ensues from the indirect perpetrator's exertion of control over the physical perpetrator.<sup>3158</sup>

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<sup>3151</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 29. See also [Defence Closing Statements, T. 338](#), p. 53.

<sup>3152</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 29.

<sup>3153</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 30.

<sup>3154</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 31.

<sup>3155</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 33.

<sup>3156</sup> [Defence observations on article 25\(3\)\(a\)](#), paras. 33-34. See also [Defence Closing Statements, T. 338](#), p. 60.

<sup>3157</sup> [Defence Closing Brief](#), para. 1217.

<sup>3158</sup> [Defence Closing Brief](#), paras. 1217 and 1299. See also [Defence Closing Statements, T. 338](#), pp. 60- 61.

1376. Moreover, it is imperative, the Defence underscored, that application of article 25 of the Statute strictly respect the principle of legality and that the interpretation of the provisions on criminal responsibility stay within the parameters of custom, save where the language of said article departs clearly therefrom.<sup>3159</sup>

### iii. Legal representatives

1377. The two legal representatives of victims filed a joint brief. They wholly concurred with the Pre-Trial Chamber's construction of article 25(3)(a) of the Statute,<sup>3160</sup> advising the Chamber against substantive alterations to such interpretation.<sup>3161</sup>

1378. In criminal law, they recalled, the distinction between perpetrators of and accessories to a crime is necessary<sup>3162</sup> and constitutes "[TRANSLATION] one of most widely accepted pillars of criminal law throughout all legal systems and national and international legislation".<sup>3163</sup> They were further in agreement with the Pre-Trial Chamber's endorsement of the principle of control over the crime to distinguish between perpetrators of and accessories to a crime.<sup>3164</sup>

1379. The legal representatives of victims submitted that indirect commission as a form of criminal liability is recognised by the principal legal systems and that the drafters intended to incorporate it into the text of article 25 of the Statute.<sup>3165</sup> As to its application, reliance on control over the organisation as a criterion of indirect

<sup>3159</sup> [Defence observations on article 25\(3\)\(a\)](#), para. 35. See also [Defence Closing Statements, T. 338](#), pp. 53-54.

<sup>3160</sup> [Legal representatives of victims, "Mémoire des Représentants légaux des victimes sur l'interprétation de l'article 25,3,a du Statut", 19 October 2009, ICC-01/04-01/07-1539 \("Observations of the legal representatives of victims on article 25\(3\)\(a\)"\)](#), p. 7. See also [Closing Brief of the Legal representative of the child-soldier victims](#), paras. 137 and 143; [Closing brief of the common legal representative of the main group of victims](#), para. 266.

<sup>3161</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 10.

<sup>3162</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 4.

<sup>3163</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 4.

<sup>3164</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 7.

<sup>3165</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 7.

commission is, in their view, proper in that it holds to account the leadership of an organisation whose members executed the crime.<sup>3166</sup> The criterion, they also underscored, has the virtue of allowing accused persons to mount a defence and set out “[TRANSLATION] the position they held in the organisation [...] and the powers with which they were vested”.<sup>3167</sup> Thus, the legal representatives maintained, the criteria developed by the Pre-Trial Chamber in confirming indirect commission must be followed.<sup>3168</sup>

1380. To conclude, the legal representatives advocated reliance also on the subjective elements on which the Pre-Trial Chamber expounded in its interpretation. The accused persons therefore had to satisfy the subjective elements of the crimes as defined in article 30 of the Statute and also have been aware of the factual circumstances enabling them to exercise control over the crimes.<sup>3169</sup>

## **b) Analysis**

1381. Article 25 of the Statute lays down the modes of individual criminal responsibility:

### **Article 25 Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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<sup>3166</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 8.

<sup>3167</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 8.

<sup>3168</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 8.

<sup>3169</sup> [Observations of the legal representatives of victims on article 25\(3\)\(a\)](#), p. 9.

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim 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; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

1382. Here, regard will be had to the analysis undertaken and the solutions hitherto determined by several benches of the Court which have had occasion to rule on article 25 of the Statute.<sup>3170</sup> The Chamber considers that, to a large extent and as it

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<sup>3170</sup> Statute, article 21(2) (“[...] The Court may apply principles and rules of law as interpreted in its previous decisions” [emphasis added]).

will show below, it need not discard the interpretation of the law on individual responsibility founded on the theory of control over the crime.<sup>3171</sup>

**i. Concept of “commission” within the meaning of article 25(3)(a) of the Statute**

1383. It is the Chamber’s view that the language of article 25 of the Statute on individual criminal responsibility differentiates between the perpetrators of and the accessories to a crime. It notes that the various modes of liability listed in article 25(3) *aforecited* provide, first and foremost, that a person may be considered criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person “commits” the crime.<sup>3172</sup> Thereafter follow the modes of liability which concern participation in the commission of a crime by another person. Thus articles 25(3)(b) to 25(3)(d) of the Statute<sup>3173</sup> provide that a person may be criminally responsible and liable for punishment for ordering, soliciting or inducing;<sup>3174</sup> aiding, abetting or otherwise assisting;<sup>3175</sup> or in any other way contributing<sup>3176</sup> to “the commission [...] of such a crime”.

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<sup>3171</sup> The Chamber notes that all of the pre-trial and trial chambers appear to have hitherto endorsed the criterion of control over the crime in order to distinguish between perpetrators of and accessories to a crime. See, in particular, [Decision on the confirmation of charges](#), paras. 480-486; [Lubanga Judgment](#), para. 994; [Decision on the confirmation of charges in Lubanga](#), paras. 326-341; [Decision on the confirmation of charges in Bemba](#), para. 347; [Decision on the Confirmation of Charges in Abu Garda](#), paras. 152; -349; [Decision on the confirmation of charges in Banda and Jerbo](#), para. 126; [Decision on the confirmation of charges in Mbarushimana](#), para. 279; [Decision on the Confirmation of Charges in Ruto et al.](#), paras. 291-292; [Decision on the Confirmation of Charges in Kenyatta et al.](#), para. 296; [Warrant of arrest issued in Al Bashir](#), para. 210; [Situation in the Libyan Arab Jamahiriya, Pre-Trial Chamber I, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”](#), 27 June 2011, ICC-01/11-01/11-1 (“Warrants of arrest in Gaddafi et al.”), para. 68.

<sup>3172</sup> Statute, article 25(3)(a). See also Kai Ambos, “Article 25” in O. Triffterer (Editor), [Commentary on the Rome Statute of the International Criminal Court \(2008\) \(“Ambos in Triffterer”\)](#), pp. 747-748; Albin Eser, “Individual Criminal Responsibility” in A. Cassese, P. Gaeta and J. Jones (Editors), [The Rome Statute of the International Criminal Court: A Commentary](#), Vol. I.B (2002), (“Eser in Cassese”), p. 771.

<sup>3173</sup> The Chamber’s analysis will not address article 25(3)(e), which provides for an alternative form of responsibility, incitement to the crime of genocide, or consider the responsibility of commanders and other superiors, within the meaning of article 28 of the Statute.

<sup>3174</sup> Statute, article 25(3)(b).

<sup>3175</sup> Statute, article 25(3)(c).

<sup>3176</sup> Statute, article 25(3)(d).

1384. The modes of liability set forth in article 25(3) of the Statute differentiate between persons whose conduct *constitutes* commission of the crime per se<sup>3177</sup> and those whose conduct is solely *connected* to the commission of a crime by another person.<sup>3178</sup> For the Chamber, the latter species of conduct specifically corresponds to various forms of accessoryship. Accordingly, it views the distinction between “perpetrator” and “accessory” to inhere in article 25(3) of the Statute.<sup>3179</sup>

1385. In the foregoing forms of participation in the commission of a crime, accessorial liability is always contingent on the existence of a principal.<sup>3180</sup> An accessory can be held criminally liable as such, only where a person commits or attempts to commit a crime within the jurisdiction of the Court. Principal liability, however, imports in essence autonomy as it does not hinge on the liability of a third person.

1386. The Chamber underscores that article 25 of the Statute adverts not to the *guilt* of accused persons but to their *individual criminal responsibility*. Therefore, a person responsible as an instigator, for the purposes of article 25(3)(b), may incur a penalty akin or even identical to that handed down against a person found responsible as a perpetrator of the same crime.<sup>3181</sup> In effect, article 25 of the Statute

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<sup>3177</sup> See the use of the verb “to commit”, Statute, article 25(3)(a).

<sup>3178</sup> See the use of various verbs (to order, to aid, etc.), Statute, articles 25(3)(b) to (d). In this sense, article 25(3)(d) is the most explicit, since it criminalises contributions “to the commission or attempted commission of such a crime by a group of persons”. See also [Ambos in Triffterer](#), p. 746; Roger S. Clark, “Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court”, 6 *New Zealand Yearbook of International Law* (2008), pp. 226-229.

<sup>3179</sup> [Ambos in Triffterer](#), pp. 745-746; Eser in Cassese, pp. 782, 787-788 and 820; Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, 5 *Journal of International Criminal Justice* (2007), p. 957. See also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), pp. 36 and 39.

<sup>3180</sup> See, in particular, [Lubanga Judgment](#), para. 998; [Tadić, Appeal Judgement](#), para. 229(i). See also Eser in Cassese, pp. 783, 787-788, 795-796, 798 and 802; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 64; Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2010), p. 117; George P. Fletcher, *Rethinking Criminal Law* (2000), p. 636; Frédéric Desportes and Francis Le Gunehec, *Droit pénal général* (2009), pp. 515-516.

<sup>3181</sup> Of note is that several national criminal codes (Germany, Spain and most criminal codes in Latin America) foresee an identical penalty for liability as an accessory to instigation and as a perpetrator. See Eser in Cassese, p. 782; Francisco Muñoz-Conde and Héctor Olásolo, “The Application of the

merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime does not under any circumstances constitute a “hierarchy of blameworthiness”,<sup>3182</sup> let alone enunciate a tariff, not even implicitly.<sup>3183</sup> Hence, it is not precluded that having adjudged guilt, a bench may choose to mete out mitigated penalties to accessories, although to do so is not peremptory. The fact remains that neither the Statute nor the Rules of Procedure and Evidence prescribe a rule for the mitigation of penalty for forms of liability other than commission<sup>3184</sup> and the Chamber sees no automatic correlation between mode of liability and penalty. From this it is clear that a perpetrator of a crime is not *always* viewed as more reprehensible than an accessory.<sup>3185</sup>

1387. Ultimately, the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.

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Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain”, 9 *Journal of International Criminal Justice* (2011), pp. 114, 118 and 131; Héctor Olásolo, *Tratado de autoría y participación en derecho penal internacional* (2013), pp. 190 (footnote 183) and 293; George P. Fletcher, *Rethinking Criminal Law* (2000), pp. 644-645. See also *Report of the International Law Commission on the work of its forty-eighth session, May 6 to July 26, 1996, UN GAOR, 51st Session, Supp. No. 10 (A/51/10)*, p. 20.

<sup>3182</sup> In this regard, see also the analysis which connects guilt to articles 30 and 32; Eser in Cassese, pp. 903-904.

<sup>3183</sup> The Rules of Procedure and Evidence lay down that the determination of sentence must take account of the degree of participation (Rules of Procedure and Evidence, rule 145; Statute, article 78(1)). See also Eser in Cassese, p. 787.

<sup>3184</sup> Statute, articles 76, 77 and 78; Rules of Procedure and Evidence, rules 145 and 146.

<sup>3185</sup> Claus Roxin, “Crimes as Part of Organized Power Structures”, 9 *Journal of International Criminal Justice* (2011), p. 202; Eser in Cassese, p. 782. The Chamber therefore does not concur with the view taken by certain publicists that article 25(3) makes provision for a hierarchy of blameworthiness. See for example, Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, 5 *Journal of International Criminal Justice* (2007), p. 957. See also in this regard, [Separate Opinion of Judge Adrian Fulford to the Lubanga Judgment](#), para. 8; [Concurring opinion of Judge Christine Van den Wyngaert to the Ngudjolo Judgment](#), paras. 22-28.

1388. That article 25 of the Statute explicitly lays down such a distinction makes it paramount, in the Chamber's view, to determine the guiding principle which distinguishes perpetrator from accessory. This, in its opinion, is a necessary exercise in that article 25 is silent as to the distinguishing criterion, and the principle of legality mandates that the utmost be done to guarantee foreseeability of the law.<sup>3186</sup>

1389. To such end, the Chamber will dispense with any distinguishing criterion which could render redundant any provision of article 25(3) defining a given mode of liability, or which would infringe another statutory provision, particularly article 30. Even though the Chamber remains entirely cognizant of possible commonalities between certain modes of liability, States Parties' itemisation thereof casts a duty on the Chamber to ensure, in good faith, that each such mode takes full effect.

1390. The Chamber hereby sets out three possible approaches: a so-called "objective" approach which lays stress on the material elements of the crime; a "subjective" approach which refers to the mental element of the crime; and an approach founded on control over the crime.

1391. The objective approach emphasises the realisation of one or more material elements of the crime. According to this approach, a person may be considered a perpetrator of a crime only where he or she physically executes out some of its elements. Recourse to this criterion clearly cannot be reconciled<sup>3187</sup> with the provisions of article 25(3)(a) of the Statute, which states that a person shall be criminally responsible as a principal where he or she commits a crime through one or more persons.<sup>3188</sup> A configuration such as that laid down in article 25(3)(a) of the Statute – which provides for a form of indirect commission – requires the

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<sup>3186</sup> Statute, article 22.

<sup>3187</sup> See, in particular, [Decision on the confirmation of charges](#), footnote 642.

<sup>3188</sup> Of note is that the Rome Statute is the first international instrument to explicitly govern this form of international criminal liability. See, in particular, Eser in Cassese, p. 793.

definition of the perpetrator to encompass both the physical perpetrators of the crimes and the persons who direct their realisation without executing them themselves.<sup>3189</sup>

1392. The subjective approach places an emphasis on the mental element, whilst dispensing with the execution of the material elements of the crimes as the criterion which differentiates between perpetrators of and accessories to a crime. According to this approach, therefore, a perpetrator is a person who contributes to the crime with intent to commit it, irrespective of the significance of the contribution. This criterion has been adopted by the ad hoc international criminal tribunals, whose statutes, unlike that of the Court, leave undefined the mental element for all crimes and modes of liability.<sup>3190</sup> Indeed, it must be underlined that, as article 30 provides and as the General introduction to the Elements of Crimes stipulates, where no reference is made to a mental element for any particular conduct, consequence or circumstance listed, the bench is duty-bound to apply article 30. The subjective approach cannot therefore be reconciled with the law which the Court must apply since the mental element defined in article 30 of the Statute applies both to perpetrators, for the purposes of article 25(3)(a), and to certain forms of accessoryship, particularly those enfolded by article 25(3)(b), since the text of the article leaves the volitional element unspecified.<sup>3191</sup> Accordingly, and by virtue of this alone, it appears that the subjective approach, on this sole basis, precludes any distinction between perpetrator and accessory.

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<sup>3189</sup> [Decision on the confirmation of charges in Lubanga](#), paras. 330-333; [Lubanga Judgment](#), para. 1003; [Decision on the confirmation of charges](#), para. 485; Kai Ambos, "Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'" in A. Nollkaemper, H. van der Wilt (Eds.), *System Criminality in International Law* (2009), ("Ambos in Nollkaemper"), pp. 143-144.

<sup>3190</sup> See, in particular, [Tadić, Appeal Judgement](#), para. 228 and 229-iv; [ICTY, Prosecutor v. Milutinović et al., Appeals Chamber, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003](#), para. 20; [ICTY, Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004](#), para. 102(ii).

<sup>3191</sup> Article 30 adverts to the mental element which, unless otherwise provided, applies to all persons who are criminally responsible under the Statute. See also Eser in Cassese, pp. 902 and 933.

1393. This therefore leaves control over the crime – the sole criterion to amalgamate both objective and subjective components – for the differentiation between perpetrators of and accessories to a crime.<sup>3192</sup> The Chamber considers necessary a definition of perpetrator which: (1) encompasses those persons who perform the acts which constitute the material elements of the crime and those who intentionally determine its course through the control which they wield;<sup>3193</sup> and (2) does not impede application of article 30 of Statute, where the mental element is unspecified, that is, at least in the scenarios contemplated by articles 25(3)(a) and (b).

1394. The Chamber is therefore of the view that the “control over the crime” criterion appears the most consonant with article 25 of the Statute, taken as a whole, and best takes its surrounding context into account, in due consideration of the terms of article 30.

1395. To the Chamber, the decisive argument is not recognition of the “control over the crime” theory in domestic legal systems. As stated in the section of the judgment concerning applicable law, it behoves the Chamber to afford precedence to application of the Statute and, in contrast to the ad hoc tribunals, it need not inquire into the existence of a rule of international custom.<sup>3194</sup> Here, the prime consideration of the Chamber is to satisfy itself that the guiding principle allowing effect to be given to the distinction between the perpetrators of and accessories to a crime which, as aforementioned, inheres in article 25(3) of the Statute, enables the body of relevant provisions of this article concerning individual criminal responsibility to take full effect.

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<sup>3192</sup> Or “intermediate theory”. See in this regard, George P. Fletcher, *Rethinking Criminal Law* (2000), p. 655.

<sup>3193</sup> [Lubanga Judgment](#), para. 1003; [Decision on the confirmation of charges](#), para. 485.

<sup>3194</sup> In this respect, regard must be had to the distinction drawn by the Chamber in the present judgment between applicable law and the method of interpretation, said method allowing the Chamber, where necessary, to draw on customary law in the course of systemic interpretation (See III. Method of interpretation of the founding texts of the Court”).

1396. The Chamber will accordingly rely on the criterion of control. It considers that under article 25(3)(a) of the Statute, the perpetrators of a crime are those who control its commission and who are aware of the factual circumstances allowing them to exert such control. Thus the indirect perpetrator has *the power to decide whether and how the crime will be committed*<sup>3195</sup> insofar as that person determines its perpetration. An accessory, however, exerts no such control. By way of example, whereas participation as an instigator under article 25(3)(b) may entail a position of authority, it requires a contribution consisting solely of prompting or encouraging a decision to act – the power to decide on the execution of the crime remains the preserve of another person. The Chamber emphasises that article 30 finds application in these two scenarios.

1397. The Chamber will now define the indirect component of the form of responsibility confirmed by Pre-Trial Chamber I (indirect co-perpetration) and to such end will examine the constituent elements of indirect commission.

**ii. Concept of “commission through another person” within the meaning of article 25(3)(a) of the Statute**

1398. Under the terms of article 25(3)(a), a person shall be criminally responsible as an indirect perpetrator where that person commits a crime within the jurisdiction of the Court “through another person, regardless of whether that other person is criminally responsible”. The provision does indeed appear to contemplate two possible forms of indirect commission: one arising from a person who does not bear criminal responsibility and another brought about by a criminally responsible person. The language chosen by the drafters of the Statute, among the

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<sup>3195</sup> [Decision on the confirmation of charges](#), para. 518. See also George P. Fletcher, *Rethinking Criminal Law* (2000), pp. 672-673; Claus Roxin, “Crimes as Part of Organized Power Structures”, 9 *Journal of International Criminal Justice* (2011), pp. 198-199.

final amendments to article 25 before its adoption,<sup>3196</sup> necessarily incorporates an alternative and it rests, therefore, with the Chamber to set out one or more of the legal criteria which allow effective implementation of this two-fold conception of indirect commission.

1399. In the Chamber's view, and in accordance with its foregoing definition of perpetrator, criminal responsibility as an indirect perpetrator is incurred where a person:

- > exerts control over the crime whose material elements were brought about by one or more persons;
- > meets the mental elements prescribed by article 30 of the Statute and the mental elements specific to the crime at issue; and
- > is aware of the factual circumstances which allow the person to exert control over the crime.

1400. On the basis of the method of interpretation which it considered expedient, the Chamber takes the view that only these three constituent elements conform to the statutory requirements.

1401. As regards the first element, control over the crime whose material elements were brought about by one or more persons, the Chamber notes that, pursuant to article 25(3)(a) of the Statute, such control may take various forms which, moreover, are not mutually exclusive. Whereas ascertainment of whether and how the crime was committed, and, hence, the control exerted thereover, is unproblematic where an individual commits the crime in person, it is an entirely different matter when that person commits the crime through another person. Hence the need for the Chamber to set out the main forms, in regard to the law,

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<sup>3196</sup> See [Preparatory Committee on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, "Article B b., c. and d.: Individual criminal responsibility: Chairman's text", 19 February 1997, A/AC.249/1997/WG.2/CRP.2/Add.2.](#)

which such control over the crime may take and which allow the evidence to be construed in an orderly and foreseeable manner.

1402. Some of the forms which such control may assume and which readily spring to mind concern exertion of control over the will of the physical perpetrators. Most such cases will entail persons who bear no criminal responsibility or who may be exonerated of some or all responsibility. They correspond to the conventional and widely accepted forms of indirect commission according to which the physical perpetrator is, in the eyes of the perpetrator-by-means, a mere tool or instrument for the commission of the crime. Such cases may involve an indirect perpetrator who exerts control over the will of physical perpetrators who, for example, act under duress or by mistake, or who are afflicted by mental deficiency or impairment. In most cases, therefore, the physical perpetrator or the executor will not bear full responsibility for his or her actions and the existence of grounds for excluding criminal responsibility must be considered.<sup>3197</sup> Articles 31 to 33 of the Statute enumerate such defences and lay down the conditions under which they apply.

1403. Other forms of control may include the existence of an organised apparatus of power whose leadership may be assured that its members will effect the material elements of the crime. Having regard to the aims of the Statute of the Court, not only need indirect commission involving two or a limited number of persons be envisioned, but so too must the commission of crimes by a larger number of persons, belonging to a same structure and acting collectively and systematically

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<sup>3197</sup> See [Kai Ambos, "The Fujimori Judgment", 9 \*Journal of International Criminal Justice\* \(2011\)](#), p. 147; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), pp. 69-71. See also [Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", 5 \*Journal of International Criminal Justice\* \(2007\)](#), pp. 181-183; Florian Jessberger and Julia Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*: German Doctrine at the Hague?", 6 *Journal of International Criminal Justice* (2008), pp. 857, 860 and 868; [Ambos in Triffterer](#), pp. 752 and 755; Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", 5 *Journal of International Criminal Justice* (2007), p. 964; Eser in Cassese, pp. 793-795; Francisco Muñoz-Conde and Héctor Olásolo, "The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain", 9 *Journal of International Criminal Justice* (2011), pp. 114 and 121-122; George P. Fletcher, *Rethinking Criminal Law* (2000), pp. 665-666.

– in all likelihood, it is this latter type of criminality which will, more often than not, come before the Court for determination.<sup>3198</sup> The collective nature of the crimes appears in several provisions of article 25(3) of the Statute and there is no reason to exclude such situation in the event of commission through an intermediary.<sup>3199</sup> However, the structure envisioned in respect of article 25(3)(a) must allow the aforementioned requirement of control over the crime to be met.

1404. Here, regard must be had to the theory of “control over the organisation” (*Organisationsherrschaft*), in which “perpetrator behind the perpetrator” liability comes into play.<sup>3200</sup> This theory is the work of Claus Roxin and appears to be invoked mostly in scenarios where a crime was committed through persons bearing criminal responsibility. Again, it cannot, however, be ruled out that persons not bearing criminal responsibility operate within an organisation. It therefore cannot be asserted that Roxin’s theory views all physical perpetrators as criminally responsible and it is quite possible that, within that organisation, certain persons who brought about the material elements of the crime may be absolved of all responsibility.

1405. To the Chamber, the theory is consonant with the foregoing constituent elements of indirect commission, since exertion of control over an apparatus of power allows control over the crimes committed by its members; a perpetrator behind the perpetrator may, therefore, be at work. In this regard, the Pre-Trial

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<sup>3198</sup> Whereas the judgment which the Chamber handed down in *Ngudjolo* did not state the legal criteria of indirect commission, it too set out and analysed facts founded on a structural approach to indirect commission. In that judgment, it held that “the mainstay of the case” was the authority which Mathieu Ngudjolo wielded in the group of Bedu-Ezekere combatants ([Ngudjolo Judgment](#), para. 492. See also para. 496) and having analysed the facts by bringing to the fore the exertion of power over a hierarchical organisation, it ruled that the Accused had to be acquitted ([Ngudjolo Judgment](#), para. 502: “Furthermore, the Chamber underscores that, in any event, its analysis has not provided it with credible evidence to find that Mathieu Ngudjolo had issued military orders or instructions, taken steps to enforce such orders or instructions, initiated disciplinary proceedings or ordered sanctions of this kind.”) See also [Ngudjolo Judgment](#), paras. 404 and 501- 503.

<sup>3199</sup> See “Section III(B) Method of interpretation”.

<sup>3200</sup> Claus Roxin, “Crimes as Part of Organized Power Structures”, 9 *Journal of International Criminal Justice* (2011). See also [Ambos in Triffterer](#), pp. 752-755.

Chamber held that where a crime is committed by members of an “organised and hierarchical apparatus of power”, “[t]he highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed”.<sup>3201</sup>

1406. For the Chamber, this does not mean that the theory of control over the organisation is the one and only legal solution that allows the provisions of article 25(3)(a) concerning commission by an intermediary to be construed. As such, the theory need not be held up as an essential constituent element of commission by an intermediary. As mentioned above, the sole indispensable criterion, in its view, is the indirect perpetrator’s exertion, in or other some fashion, including from within an organisation, of control over the crime committed through another person.

1407. Having so observed, consideration now must be afforded to the criteria of this form of indirect commission: the nature of the organisation and the control exerted thereover – two legal criteria which will allow a bench to engage in a meaningful factual analysis of the control over the crime.

1408. In respect of the first criterion, the Chamber recalls that the organisation must possess very specific features in order for some of its leaders to be considered perpetrators for the purposes of article 25(3)(a) of the Statute. The key to the superior’s securing of control over the crime is the functional automatism which propels the apparatus of power.<sup>3202</sup> The superior need not control the will of each executor through, for example, coercion or deception,<sup>3203</sup> since the superior knows

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<sup>3201</sup> [Decision on the confirmation of charges](#), paras. 515 and 518. See also Claus Roxin, “Crimes as Part of Organized Power Structures”, 9 *Journal of International Criminal Justice* (2011), pp. 198-199.

<sup>3202</sup> See, in particular, [The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1](#), para. 36; [Warrants of arrest issued in Gaddafi et al](#), para. 69; [The Prosecutor v. Simone Gbagbo, Pre-Trial Chamber III, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, ICC-02/11-01/12-2-Red](#), para. 28.

<sup>3203</sup> Claus Roxin, “Crimes as Part of Organized Power Structures”, 9 *Journal of International Criminal Justice* (2011), p. 198.

that if a member of the organisation refuses to comply, another will usually be available to step in and somehow ensure the execution of the orders issued.<sup>3204</sup> It is the interchangeability of potential executors which makes it possible to establish that the organisation consists of several persons who may replace one another and who are all in a position to bring about the material elements of the crimes. Stated otherwise, in an apparatus of power, the superior's orders are automatically executed, at least on account of the interchangeability of the potential physical perpetrators.<sup>3205</sup>

1409. This key feature of the organisation, discerned in such functional automatism, secures the superior's control over the crime, irrespective of the members' identity. Control over the crime ensues, therefore, from the nature of the organisation and its structural dynamics – any personal ties between the perpetrator-by-means and the executor are ultimately inconsequential, even where they may be taken into account.<sup>3206</sup> The apparatus somehow operates autonomously and both its existence and survival must not depend on any personal relationships between its members. As put by Roxin:

If half a dozen anti-social elements join forces to commit joint crimes and choose one of their number as leader, this is not yet a 'power structure' [*Machtapparat*]. The community is based on the participants' individual relationships to each other and does not possess an existence independent of change in membership, which the specific form of control in such cases requires.<sup>3207</sup>

1410. To the Chamber, this type of structure, proof of whose existence in both a factual and legal sense presents a particular challenge, is not, however, inconsistent with the very varied manifestations of modern-day group criminality wherever it arises. It cannot be reduced solely to bureaucracies akin to those of

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<sup>3204</sup> Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2010), pp. 119-120; Ambos in Nollkaemper, p. 145; [Kai Ambos, "The Fujimori Judgment", 9 Journal of International Criminal Justice \(2011\)](#), p. 154.

<sup>3205</sup> [Decision on the confirmation of charges](#), paras. 515-518; [Ambos in Triffterer](#), p. 754.

<sup>3206</sup> Ambos in Nollkaemper, pp. 144-145.

<sup>3207</sup> Claus Roxin, "Crimes as Part of Organized Power Structures", 9 *Journal of International Criminal Justice* (2011), p. 204.

Third Reich Germany and which lie at the root of the theory. It is the existence of an organised and hierarchical apparatus of power, characterised by near-automatic obedience to the orders it hands down, which will allow a court to find certain members of the structure responsible as perpetrators of crimes whose material elements were committed by their subordinates. The Chamber recognises that the modalities of control over persons can be increasingly varied and sophisticated and that it is particularly difficult to conceive of and grasp the nature and internal dynamics of contemporary criminal organisations. In this regard, the Chamber underscores that within the organisations themselves, the other forms of responsibility under article 25(3) of the Statute may apply.

1411. In respect of the second criterion, the Chamber will consider the matter of control wielded by the leadership of the organisation. Whilst the existence of an apparatus of power is, in Roxin's theory, a *sine qua non*, the liability of the perpetrator also rests on the exertion of control and genuine authority over the organisation. The Chamber considers that the criterion of control must be construed as requiring that the indirect perpetrator use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed.<sup>3208</sup>

1412. The two criteria of this form of indirect commission, as described above, ensure that an accused will be found to be a perpetrator only where he or she really exerts control over the course of events occasioning the crime.<sup>3209</sup> Persons wielding control over the apparatus of power, therefore, are unquestionably those in the organisation who conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution. Ultimately only

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<sup>3208</sup> Claus Roxin, "Crimes as Part of Organized Power Structures", 9 *Journal of International Criminal Justice* (2011), p. 204. See also [Ambos in Triffterer](#), p. 754.

<sup>3209</sup> Claus Roxin, "Crimes as Part of Organized Power Structures", 9 *Journal of International Criminal Justice* (2011), pp. 198-199 and 203.

where they effectively wield their authority over the apparatus of power such that its members execute the material elements of the crimes may they be viewed as perpetrators.<sup>3210</sup> Otherwise put, only those persons who control, effectively and undisturbed, at least part of an apparatus of power may oversee the execution of a criminal activity.<sup>3211</sup>

### iii. Mental elements of indirect commission

1413. As aforementioned, to incur criminal responsibility as an indirect perpetrator, the accused must, *inter alia*, meet the mental elements laid down in article 30 of the Statute<sup>3212</sup> and, as the case may be, any mental elements specific to the crime at issue, and furthermore, must have been aware of the factual circumstances which allow his or her exertion of control over the crime.

1414. In addition to satisfying the mental elements set forth in article 30 and the intent specific to certain crimes – ingredients whose contours are delineated above – the Chamber further considered that indirect commission requires the perpetrator’s awareness of the factual circumstances which allow him or her to exert control over the crime. In accordance with the constituent elements of indirect commission which it identified, and recalling in this respect that the control exerted over a crime committed through one or more other persons may take several forms, the Chamber acknowledges that an accused’s awareness of the exertion of control may also assume various forms.

1415. Stated otherwise, the indirect perpetrator must be in a position of awareness of the ingredients fundamental to his or her exertion of control over the crime, given that they depend on the form of indirect commission involved. Accordingly, in the present case and since indirect commission through control

<sup>3210</sup> See in this regard, [Decision on the confirmation of charges](#), para. 514.

<sup>3211</sup> [Ambos in Triffterer](#), p. 754; Ambos in Nollkaemper, p. 154; Kai Ambos, “The Fujimori Judgment”, [9 Journal of International Criminal Justice \(2011\)](#), pp. 151-153; Héctor Olásolo, *Tratado de autoría y participación en derecho penal internacional* (2013), p. 208.

<sup>3212</sup> See “Section VIII(B)(1)(a)(ii)(a) Applicable law under article 30”.

over the organisation is at issue, the Chamber will satisfy itself that when exerting such control, the indirect perpetrator was aware of the position he or she held within the organisation and the essential features of the organisation which secured the aforementioned functional automatism.

### c) Conclusion

1416. The Chamber concludes that to incur criminal responsibility as an indirect perpetrator a person must:

- exert control over the crime whose material elements were brought about by one or more persons, which, in the case at bar, will be met where the commission of the crime is secured through the exertion of control over an apparatus of power;
- meet the mental elements prescribed by article 30 of the Statute and the mental elements specific to the crime at issue; and
- be aware of the factual circumstances which allow the person to exert control over the crime.

## 2. Conclusions of law

1417. The Chamber recalls its finding that the Ngiti combatants of Walendu-Bindi *collectivité* were organised in a single militia.<sup>3213</sup> In this regard, it refers to its findings that the militia constituted an organisation within the meaning of article 7(2) of the Statute.<sup>3214</sup>

1418. As to the internal workings of the Ngiti militia, the Chamber considers it established that, in February 2003, it had a centralised system for the supply of

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<sup>3213</sup> See “Section VII(C)(7)(a) Existence of an organised group”.

<sup>3214</sup> See “Section IX(A)(2)(a)(ii) The Ngiti combatants of Walendu-Bindi constituted an organisation within the meaning of article 7(2) of the Statute”.

weapons and ammunition in Aveba.<sup>3215</sup> The militia mustered thousands of combatants,<sup>3216</sup> dispensed military training to some of them and held military parades, demonstrating the existence of a certain degree of discipline.<sup>3217</sup> The Chamber found that the Ngiti militia was distributed among several camps, all headed by at least one commander,<sup>3218</sup> although the evidence on record did not allow it to determine the precise nature of the subordinate-superior relationship between the commanders and their men.

1419. The militia had a President, located in Aveba, and who, in the view of the Chamber, acted as a “focal point” with oversight over the community;<sup>3219</sup> administration, oversight, security and public order within the *collectivité* were considered to rest with him as was military authority.<sup>3220</sup> However, apart from his powers to receive, store and distribute weapons and ammunition,<sup>3221</sup> the evidence did not allow the Chamber to find that the President of that militia performed the **role** of a superior.<sup>3222</sup> It has not been proven that vis-à-vis that *collectivité*, he had the material ability to issue and ensure execution of orders,<sup>3223</sup> or furthermore, that he had the power to mete out disciplinary action against commanders. The Chamber therefore found it impossible to rule on the existence of a centralised command within the Ngiti militia of Walendu-Bindi *collectivité*.<sup>3224</sup>

1420. Accordingly, although it is established that Germain Katanga was indeed at the apex of the organisation, the absence of a centralised and effective chain of

<sup>3215</sup> See “Section VII(C)(7)(a) Existence of an organised group”, para. 675.

<sup>3216</sup> See “Section VI(C)(2) Troop numbers in Walendu-Bindi *collectivité* in February 2003”, para. 568.

<sup>3217</sup> See “Section VII(C)(3) Combatant training”, para. 640.

<sup>3218</sup> See “Section VII(C)(7)(a) Existence of an organised group”, para. 674.

<sup>3219</sup> See “Section VII(C)(7)(a) Existence of an organised group”, para. 678.

<sup>3220</sup> See “Section X(A)(8) Role and powers of Germain Katanga: Conclusion”, para. 1360; “Section X(A)(7)(a)(ii) Germain Katanga: President of the Ngiti militia of Walendu-Bindi *collectivité* in February 2003”, para. 1334.

<sup>3221</sup> “Section X(A)(5) Role of Germain Katanga in the receipt, storage and distribution of weapons and ammunition”.

<sup>3222</sup> See “Section X(A)(8) Role and powers of Germain Katanga: Conclusion”.

<sup>3223</sup> See “Section X(A)(8) Role and powers of Germain Katanga: Conclusion”. See in this regard, “Section X-A-7-b. Military powers wielded within Walendu-Bindi *collectivité* in February 2003”.

<sup>3224</sup> See “Section X(A)(8) Role and powers of Germain Katanga: Conclusion”, para. 1365.

command impels the following conclusions: it is not established that (1) in February 2003, the Ngiti militia was an organised apparatus of power; and (2) Germain Katanga, at that time, wielded control over the militia such as to exert control over the crimes for the purposes of article 25(3)(a) of the Statute.

1421. Consequently, the Chamber considers that it need not determine whether the other constituent elements of commission are established and must therefore find that the Prosecution has not established that Germain Katanga committed, within the meaning of article 25(3)(a), the alleged crimes.

### C. LEGAL RECHARACTERISATION OF THE FACTS

1422. Before embarking on its analysis, the Chamber will rehearse to the utmost the various briefs on the proposed legal recharacterisation of the mode of liability in the case at bar.

#### 1. Procedural background

1423. As mentioned above, in its decision of 21 November 2012, the Chamber decided by majority to implement regulation 55 of the Regulations of the Court, notifying the parties and participants to the proceedings that the mode of liability under which the Accused initially stood charged might undergo legal recharacterisation on the basis of article 25(3)(d) of the Statute.<sup>3225</sup> The Appeals Chamber upheld the decision by majority on 27 March 2013.<sup>3226</sup>

1424. In April 2013, the parties and the participants filed with the Chamber submissions on the proposed legal recharacterisation, in regard to points both of

<sup>3225</sup> [21 November 2012 Decision](#).

<sup>3226</sup> [27 March 2013 Appeals Chamber Judgment](#). See also [Defence for Germain Katanga, "Defence Request for Leave to Appeal the Decision 3319", 21 December 2012, ICC-01/04-01/07-3323 \("Request for Leave to Appeal the 21 November 2012 Decision"\)](#); [Decision on the "Defence Request for Leave to Appeal the Decision 3319", 28 December 2012, ICC-01/04-01/07-3327 \("28 December 2012 Decision"\)](#).

law and of fact, as the Chamber had directed<sup>3227</sup> with reference to regulation 55(2) of the Regulations of the Court.<sup>3228</sup> Responding by majority decision of 15 May 2013 to a Defence motion, the Chamber transmitted to the parties and participants additional factual material, which, in its view, could form the basis for the legal recharacterisation contemplated, also furnishing an initial, brief analysis of the constituent elements of article 25(3)(d)(ii) of the Statute. It accounted for the succinctness of the material thus transmitted and made clear that only in the present judgment would it expound on all its grounds on that point.<sup>3229</sup>

1425. Drawing on the further information thus transmitted, the Prosecution and the legal representative of child-soldier victims supplemented their factual observations on 24 May, as did the Defence on 3 June 2013.<sup>3230</sup> On that occasion, the Defence reiterated its intention stated on 15 April 2013<sup>3231</sup> to conduct further investigations,<sup>3232</sup> adding that it did not rule out recalling witnesses, including certain Prosecution witnesses.<sup>3233</sup>

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<sup>3227</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\); Legal representative of the child-soldier victims, "Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3319 relative à la mise en œuvre de la norme 55 du Règlement de la Cour et à la disjonction des charges", 8 April 2013, ICC-01/04-01/07-3366 \("First observations of the legal representative of the child-soldier victims on article 25\(3\)\(d\)"\); First Prosecution observations on article 25\(3\)\(d\); First Defence observations on article 25\(3\)\(d\)](#). See also *Décision relative à la demande d'enregistrement au dossier de décisions et de requêtes communiquées uniquement par courriel*, 19 February 2014, ICC-01/04-01/07-3432 ("19 February 2014 Decision"), confidential annex 2.

<sup>3228</sup> [21 November 2012 Decision](#), paras. 53-57. See also 19 February 2014 Decision, confidential annex 1.

<sup>3229</sup> [15 May 2013 Decision](#), paras. 11 and 14. See also 19 February 2014 Decision, confidential annex 4.

<sup>3230</sup> [Legal representative of the child-soldier victims, "Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3371", 24 May 2013, ICC-01/04-01/07-3375; Office of the Prosecutor, "Prosecution's Observations on the 'Décision relative à la transmission d'éléments juridiques et factuels complémentaires'", 24 May 2013, ICC-01/04-01/07-3376; Second Defence observations on article 25\(3\)\(d\)](#). See also 19 February 2014 Decision, confidential annexes 3 and 5.

<sup>3231</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 181-189 and 194.

<sup>3232</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 47-57 and 59.

<sup>3233</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 51. Further to a Prosecution motion, to which the Defence did not object, the Chamber authorised the Prosecution to file a reply [[Office of the Prosecutor, "Demande d'autorisation de répliquer aux 'Defence Observations on the Decision transmitting additional legal and factual material \(regulation 55\(2\) and 55\(3\) of the Regulation of the Court\)'" ICC-01/04-01/07-3379-Conf-Corr, 5 June 2013, ICC-01/04-01/07-3380; Defence for Germain](#)

1426. By decision of 26 June 2013,<sup>3234</sup> the Chamber did not deny the Defence prayer for leave to conduct further investigations.<sup>3235</sup> Nonetheless, it prescribed a time limit of 11 weeks for the submission of the definitive list of the witnesses it intended to recall and the persons whom it wished to call. The Chamber further invited the Defence to apprise it of any difficulties encountered and to move the Bench, where necessary and on an exceptional basis, for further time. In so responding to the first Defence request to that end, the Chamber also instructed the Registry to respond as a matter of urgency to any request it might receive for review of Defence team funding arrangements with a view to reinstating the team.<sup>3236</sup>

1427. Further to a motion brought before it,<sup>3237</sup> the Chamber granted the Defence further time to submit the first list of witnesses and/or any persons it identified as potential Defence witnesses and wished to call.<sup>3238</sup> The Defence filed its observations on the matter on 5 August 2013.<sup>3239</sup> In so doing, it informed the Chamber that after travelling to the DRC in late July 2013, where it met three

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[Katanga, “Defence Response to Prosecution ‘Demande d’autorisation de répliquer aux ‘Defence Observations on the Decision transmitting additional legal and factual material \(regulation 55\(2\) and 55\(3\) of the Regulations of the Court\)’”, 6 June 2013, ICC-01/04-01/07-3381; \*Decision granting leave to reply\*, 6 June 2013, ICC-01/04-01/07-3382\]. Said filing and the Defence response were received on 11 and 17 June 2013, respectively \[\[Office of the Prosecutor, “Corrigendum du ‘Réplique de l’Accusation aux ‘Defence Observations on the Decision transmitting additional legal and factual material \\(regulation 55\\(2\\) and 55\\(3\\) of the Regulations of the Court\\) ICC-01/04-01/07-3379-Conf-Corr’”, 12 June 2013, ICC-01/04-01/07-3384-Conf-Exp-Corr \\(12 June 2013, ICC-01/04-01/07-3384-Red2\\); \\*Defence for Germain Katanga, Defence Reply to ‘Réplique de l’Accusation aux ‘Defence Observations on the Decision transmitting additional legal and factual material \\(regulation 55\\(2\\) and 55\\(3\\) of the Regulations of the Court\\)’”, 17 June 2013, ICC-01/04-01/07-3386-Red \\(“Defence 17 June 2013 Reply”\\)\\]\\*\]\(#\)\].](#)

<sup>3234</sup> [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 \(“26 June 2013 Decision”\)](#), paras. 17-18.

<sup>3235</sup> [First Defence observations on article 25\(3\)\(d\), para. 194; Second Defence observations on article 25\(3\)\(d\), para. 59.](#)

<sup>3236</sup> [26 June 2013 Decision](#), paras. 47-51.

<sup>3237</sup> Defence for Germain Katanga, “Defence Request for Extension of Time”, 11 July 2013, ICC-01/04-01/07-3390-Conf.

<sup>3238</sup> [Ordonnance autorisant une prorogation de délai, 12 July 2013, ICC-01/04-01/07-3392.](#)

<sup>3239</sup> [Defence for Germain Katanga, “Defence Observations following the \*Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013\*”, 5 August 2013, ICC-01/04-01/07-3394-Conf \(“First Defence observations on further investigations”\).](#)

Prosecution witnesses whom it initially considered recalling, it had ultimately decided not to do so.<sup>3240</sup>

1428. The Defence filed fresh observations on 17 September 2013,<sup>3241</sup> the date of expiry of the time afforded by the Chamber for submission of: (1) the definitive list of persons, who in the Defence view, could potentially provide useful information; and (2) new documentary evidence which it might be minded to tender in court. It then explained that it was impossible for it to furnish such a list and informed the Chamber that for reasons beyond its control, it had been unable to undertake the investigations which it considered necessary.<sup>3242</sup> It underscored that it had nonetheless done its utmost to complete the investigations intended to identify potential Defence witnesses, but that its efforts had been frustrated by contemporaneous military activity in Walendu-Bindi *collectivité* and North Kivu<sup>3243</sup> and the consequent insecurity. In filing the observations, the Defence submitted a list of 43 potential witnesses whom it had been unable to meet.<sup>3244</sup> It then restated its desire for the Chamber to desist from the legal recharacterisation envisioned: such a course of action, it submitted, would, perforce, be antithetical to the right to a fair trial enshrined in article 67(1) of the Statute.<sup>3245</sup>

1429. On 18 September 2013, the Chamber directed the Registrar to submit observations on the Defence's analysis of the difficulties encountered in pursuing further investigations occasioned by the prevailing situation in the DRC, in Ituri in particular, from July 2013 until 15 September 2013 inclusive.<sup>3246</sup> In particular,

<sup>3240</sup> [First Defence observations on further investigations](#), para. 12.

<sup>3241</sup> Defence for Germain Katanga, "Defence Second Observations following the *Décision relative aux requêtes présentée par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*", 17 September 2013, ICC-01/04-01/07-3397-Conf ("Second Defence observations on further investigations") and Annex A ("First annex").

<sup>3242</sup> Second Defence observations on further investigations, para. 2.

<sup>3243</sup> Second Defence observations on further investigations, para. 11.

<sup>3244</sup> Second Defence observations on further investigations, para. 38.

<sup>3245</sup> Second Defence observations on further investigations, para. 46. See also [First Defence observations on article 25\(3\)\(d\)](#), para. 192.

<sup>3246</sup> [Demande d'observations adressée au Greffier de la Cour sur l'écriture 3397-Conf de la Défense de Germain Katanga, 18 September 2013, ICC-01/04-01/07-3398 \("18 September 2013 Order"\)](#), para. 9.

the Chamber wished to ascertain “[TRANSLATION] whether the insecurity had, at that time, reached such a level that it effectively precluded travel to the locations listed in the Defence’s brief [Nyakunde in particular] and the holding of meaningful meetings with possible witnesses”<sup>3247</sup> and “[TRANSLATION] whether [...] the situation was likely to improve in the short term”.<sup>3248</sup> The Chamber also inquired as to whether the Registrar had “[TRANSLATION] any information, irrespective of its nature, not mentioned in the Defence brief and which needed to be brought to its attention”.<sup>3249</sup>

1430. The Registrar filed his observations on 23 September 2013.<sup>3250</sup> Concurring with the Defence, he stated: “[TRANSLATION] the factors which frustrated the missions planned for August lie outside the control of the Defence or the Court”.<sup>3251</sup> Nevertheless he differentiated between the areas envisioned. He also confirmed that the planned missions to Kasenyi, Tchomia, Aveba, Gety and Bavi, “[TRANSLATION] would not have been possible”.<sup>3252</sup> He specified however that “[TRANSLATION] up until 23 August 2013, [...] travel under military escort to Bogoro, Zombe [sic] and Nyankunde was feasible” and that “[TRANSLATION] [t]ravel to Goma and Beni was possible up until 21 August 2013”.<sup>3253</sup> In his conclusions, the Registrar considered it necessary to point out that “[TRANSLATION] had the Defence planned to travel before that period, missions to those areas would have been possible”. The legal representatives of the victims, in a joint brief, and the Prosecution also set out their observations on the difficulties raised by the Defence.<sup>3254</sup> The Prosecution drew attention to various points, which

<sup>3247</sup> [18 September 2013 Order](#), para. 9.

<sup>3248</sup> [18 September 2013 Order](#), para. 9.

<sup>3249</sup> [18 September 2013 Order](#), para. 9.

<sup>3250</sup> The Registrar, “*Observations du Greffe en application de la Décision ICC-01/04-01/07-3398*”, 23 September 2013, ICC-01/04-01/07-3400-Conf (“Registrar’s observations on further investigations”).

<sup>3251</sup> Registrar’s observations on further investigations, para. 18.

<sup>3252</sup> Registrar’s observations on further investigations, para. 18.

<sup>3253</sup> Registrar’s observations on further investigations, para. 18.

<sup>3254</sup> Office of the Prosecutor, “*Corrigendum de la Réponse de l’Accusation aux ‘Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses*

in its opinion, constituted a lack of diligence on the part of the Defence in the conduct of its further investigations.<sup>3255</sup>

1431. Further to a Defence motion,<sup>3256</sup> the Chamber granted it leave to file observations on the issues “concerning a possible lack of diligence” on its part and “the actuality and relevance of its further investigations”.<sup>3257</sup> The Chamber then made clear that in the judgment it would rule on whether the difficulties raised by the Defence were real and on the consonance of the recharacterisation procedure with the rights of the Accused and would then entertain the body of observations laid before it on the matter.<sup>3258</sup> Lastly, having underscored that further investigations were not the only possible means of mounting a defence, the Chamber invited the Defence to state its views on the existing body of evidence on record to allow it to adapt its defence strategy to the new legal characterisation envisioned.<sup>3259</sup> To such end, it enjoined the Defence to file any observations which it considered necessary, specifically on the topics determined by the Chamber in its 26 June 2013 Decision.<sup>3260</sup>

1432. On 4 October 2013, the Defence filed its observations on the submissions of the Registrar, the Prosecution and the legal representatives and appended thereto its

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observations 3379 et 3386 des 3 et 17 juin 2013’ ICC-01/04-01/07-3397-Conf”, 26 September 2013, ICC-01/04-01/07-3402-Conf-Corr (26 September 2013, ICC-01/04-01/07-3402-Conf-Red-Corr) (“Prosecution observations on further Defence investigations”); Legal representatives of victims, “Observations sur le document intitulé ‘Defence second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*’” (ICC-01/04-01/07-3397-Conf)”, 25 September 2013, ICC-01/04-01/07-3401-Conf.

<sup>3255</sup> Prosecution observations on further Defence investigations, paras. 18-22.

<sup>3256</sup> Defence for Germain Katanga, “Defence Request for Leave to Reply”, 30 September 2013, ICC-01/04-01/07-3403-Conf; Defence for Germain Katanga, “ADDENDUM to: Defence Request for Leave to Reply”, 1 October 2013, ICC-01/04-01/07-3404-Conf.

<sup>3257</sup> [Decision on the Defence observations \(document 3397-Conf of 17 September 2013\), 2 October 2013, ICC-01/04-01/07-3406-tENG \(“2 October 2013 Decision”\)](#), para. 15.

<sup>3258</sup> [2 October 2013 Decision](#), para. 14.

<sup>3259</sup> [2 October 2013 Decision](#), para. 17.

<sup>3260</sup> [2 October 2013 Decision](#), paras. 17-18.

correspondence with the Registry on its planned missions.<sup>3261</sup> It further underscored that were the Chamber to proceed to judgment on the basis of article 25(3)(d) of the Statute, prolongation of the further investigations would be necessary to the fairness of proceedings.<sup>3262</sup>

1433. Since the Defence was silent as to the request for a status conference made by the Prosecution in its observations of 26 September 2013,<sup>3263</sup> the Chamber considered, by order of 10 October 2013, that such a hearing need not be held.<sup>3264</sup> It added that a status conference would not further enlighten the Bench, particularly given all of the observations initially furnished by the parties, the participants and the Registrar and the additional clarifications subsequently provided by the Defence for Germain Katanga.<sup>3265</sup>

1434. On 25 October 2013,<sup>3266</sup> having been accorded additional time by the Chamber, the Defence filed further observations on the evidence on record at the Chamber's invitation.<sup>3267</sup> It pointed out that, were the Bench to embark on recharacterisation on the basis of article 25(3)(d) of the Statute, fairness mandated that it be afforded the opportunity to investigate afresh,<sup>3268</sup> whilst underlining that any further delay occasioned by additional investigations would perforce delay unnecessarily the conclusion of the trial.<sup>3269</sup> Citing in support the Dissent to the 2 October 2013 Decision, it took the view that the Chamber could not render judgment without first ruling on the issue of its inability to undertake investigations in the DRC and

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<sup>3261</sup> Defence for Germain Katanga, "Defence Observations on the Registry, Prosecution and Victim Representatives' Observations", 4 October 2013, ICC-01/04-01/07-3407-Conf ("Third Defence observations on further investigations") and Annex B ("Second annex").

<sup>3262</sup> Third Defence observations on further investigations, paras. 6-7.

<sup>3263</sup> Prosecution observations on further Defence investigations, para. 25.

<sup>3264</sup> [Order on the Defence's observations concerning the observations of the Registrar, the Prosecutor and the Legal Representatives \(document 3407-Conf of 4 October 2013\), 10 October 2013, ICC-01/04-01/07-3412-tENG \("10 October 2013 Order"\)](#).

<sup>3265</sup> [10 October 2013 Order](#), para. 5.

<sup>3266</sup> [Third Defence observations on article 25\(3\)\(d\)](#).

<sup>3267</sup> [2 October 2013 Decision](#), para. 18.

<sup>3268</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 8, 91 and 93(ii)(a).

<sup>3269</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 8.

on its prayer for additional time to that end.<sup>3270</sup> Finally, relying on articles 64(2) and 69(4) of the Statute, the Defence moved the Chamber to exclude from its analysis certain parts of the Accused's *viva voce* evidence since, in the Defence contention, the Bench had provoked information on Germain Katanga's contribution to the attack on Bogoro by putting questions to him without affording him notice that his answers might be used against him in a subsequent legal recharacterisation.<sup>3271</sup>

1435. By decision of 19 November 2013,<sup>3272</sup> the Chamber recalled the terms of its 2 and 10 October 2013 decisions, reiterating that only in the present judgment would it rule on the consonance of the recharacterisation procedure with the rights of the Accused, and thereby adjudge compliance with the stipulations of regulation 55 of the Regulations of the Court.<sup>3273</sup>

1436. On 11 December 2013, the Defence prayed the Chamber to suspend permanently the proceedings against Germain Katanga.<sup>3274</sup> It maintained that it had been unable to conduct the necessary investigations on account of the prevailing insecurity in Walendu-Bindi *collectivité* – a circumstance beyond its control.<sup>3275</sup> However, it took the view that the pursuance of further investigations was a central element to appraisal of the fairness of the procedure.<sup>3276</sup> For the Defence, conviction on the basis of article 25(3)(d) would deprive the Accused of his article 67(1)(b) and 67(1)(e) rights under the Statute.<sup>3277</sup> Accordingly, it submitted that the Chamber must stay the proceedings and such stay must be

<sup>3270</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 12-13.

<sup>3271</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 17, 92 and 93(ii)(b).

<sup>3272</sup> [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 \("19 November 2013 Decision"\)](#).

<sup>3273</sup> [19 November 2013 Decision](#), para. 12.

<sup>3274</sup> Defence for Germain Katanga, "Defence Request for a Permanent Stay of Proceedings", 11 December 2013, ICC-01/04-01/07-3422 ("Request for Stay of Proceedings").

<sup>3275</sup> Request for Stay of Proceedings, para. 37.

<sup>3276</sup> Request for Stay of Proceedings, para. 40.

<sup>3277</sup> Request for Stay of Proceedings, para. 40.

permanent, failing which the right of the Accused to be tried within a reasonable time would also be violated.<sup>3278</sup>

1437. Lastly, on 27 January 2014, the Defence filed final and most succinct observations informing the Chamber that, in its view, the situation in eastern DRC had not improved over the past two months, such that any travel there for investigations remained impossible.<sup>3279</sup>

## 2. Relevant provisions

1438. Regulation 55 of the Regulations of the Court, entitled “Authority of the Chamber to modify the legal characterisation of facts” 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.

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.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(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).

1439. Article 64 of the Statute sets out the “Functions and powers of the Trial Chamber”, mandating, *inter alia*, that it:

<sup>3278</sup> Request for Stay of Proceedings, para. 49. See also paras. 50-56.

<sup>3279</sup> [Defence for Germain Katanga, “Defence Further Report on the Security Situation in Eastern DRC”, 27 January 2014, ICC-01/04-01/07-3427.](#)

2. [...] 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.

1440. Article 67 of the Statute sets out the minimum guarantees to which the accused is entitled at trial. The provisions of relevance here read:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

[...]

(e) 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;

[...]

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[...]

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

### 3. Analysis

1441. In the following section, the Chamber, on whom the duty is cast to ensure that the trial is fair and expeditious, will examine the consonance of the legal recharacterisation contemplated with the requirements of the Statute and the Regulations of the Court.

1442. Firstly, it must be recalled that the Appeals Chamber unambiguously and unanimously upheld the legality of regulation 55 of the Regulations of the Court vis-à-vis the provisions of the Statute.<sup>3280</sup> Endorsing the entire grounds and holdings of the 8 December 2009 judgment and consistent with the stance taken in its previous rulings,<sup>3281</sup> the Chamber is of the view that the legality of the regulation need not be reviewed.

1443. Nor will the present judgment revisit the legality of the implementation of regulation 55 at the deliberations stage. In its 21 November 2012 Decision, whilst observing that notice, in the case at bar, had been afforded at an advanced stage of the proceedings, the Chamber saw nothing, in principle, to preclude its implementation of the provision at the deliberations stage.<sup>3282</sup> Irrespective of its potential impact on the rights of the Accused, recourse to such a procedure at an advanced stage was therefore entertained and disposed of by the Appeals Chamber in its 27 March 2013 Judgment, wherein it held:

[W]hile it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible, Mr Katanga's argument that the timing of the Impugned Decision is incompatible with the terms of regulation 55 (2) of the Regulations of the Court is not persuasive.<sup>3283</sup>

It thereby upheld the possibility for a trial chamber to afford notice to the parties only at the deliberations stage that the legal characterisation of the facts might be modified in accordance with regulation 55(2) of the Regulations of the Court. Nonetheless, it added that it was necessary to ensure that the trial remained fair.<sup>3284</sup>

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<sup>3280</sup> [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "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", 8 December 2009, ICC-01/04-01/06-2205, paras. 66-72, 73-78 and 82-87. See also \[27 March 2013 Appeals Chamber Judgment\]\(#\).](#)

<sup>3281</sup> See, in particular, [21 November 2012 Decision](#), paras. 10-11.

<sup>3282</sup> [21 November 2012 Decision](#), para. 20.

<sup>3283</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 24.

<sup>3284</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 1.

1444. Hence, the issue remains that of whether, in the case at bench, the proposed recharacterisation may be effected without exceeding the facts and circumstances described in the charges and whether, in view of all of the circumstances of the case, implementation of regulation 55 may occasion unfairness of the proceedings against Germain Katanga, by depriving him of the minimum guarantees afforded by article 67(1) of the Statute.

**a) Whether the extent of the legal recharacterisation of the facts exceeds the facts and circumstances described in the charges**

1445. The Chamber rehearsed the facts founding the legal recharacterisation in two core documents: the 21 November 2012 Decision and, to a greater extent, in addressing a Defence motion, in the 15 May 2013 Decision. Moreover, issuance of the Appeals Chamber judgment between 21 November 2012 and 15 May 2013 further illuminated the matter.

1446. The Defence contended that the legal recharacterisation envisioned by the Chamber, as enunciated in the 21 November 2012 and 15 May 2013 Decisions, cannot be effected in the case at bar without exceeding the facts and circumstances described in the charges.<sup>3285</sup> In its view, the recharacterisation contemplated requires new facts to be established: the existence and composition of a group of combatants in Walendu-Bindi *collectivité* and Germain Katanga's role and contribution to the group. The Chamber will analyse these arguments in the first two sub-sections below.

1447. More generally, the Defence further considered that recharacterisation would entail the Chamber's alteration of the narrative in a fundamental way, particularly as regards the nature of the relationship between the Accused and the physical perpetrators of the crimes and the structure of the group in

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<sup>3285</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 7, 46 and 58; [Third Defence observations on article 25\(3\)\(d\)](#), para. 16.

question.<sup>3286</sup> The Chamber will turn its attention to this argument in a third subsection analysing the extent of the envisioned legal recharacterisation of the facts. In this regard, it recalls that in its review of the procedure undertaken on 27 March 2013, the Appeals Chamber did not at the outset note that the change in characterisation contemplated in the case at bar would “immediately” entail a departure from the facts and circumstances described in the charges.<sup>3287</sup> Nonetheless, the Appeals Chamber judgment also makes clear that its review was “limited”<sup>3288</sup> and that it lay with the Chamber to “demonstrate” in its judgment that the recharacterisation did not exceed the facts and circumstances.<sup>3289</sup> Accordingly, it behoves the Chamber to so verify in the present decision.

1448. First, it bears underscoring, as it did in the 21 November 2012 Decision,<sup>3290</sup> that the Chamber endorses the definition of the term “facts” used by the Appeals Chamber in its 8 December 2009 Judgment:

In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.<sup>3291</sup>

1449. Said definition, wherein the term “facts” is clearly equated with the expression “factual allegations”, was reaffirmed by the Appeals Chamber in its 27 March 2013 Judgment. On that occasion, it stated that it was unpersuaded by the Defence argument that only “material facts”, but not “subsidiary or collateral

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<sup>3286</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 157.

<sup>3287</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 46.

<sup>3288</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 46.

<sup>3289</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 45.

<sup>3290</sup> [21 November 2012 Decision](#), footnote 37.

<sup>3291</sup> [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “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”, 8 December 2009, ICC-01/04-01/06-2205](#), footnote 163.

facts” may be subject to a change in legal characterisation.<sup>3292</sup> It further recalled that it had not determined in the 8 December 2009 Judgment how narrowly or broadly the “facts and circumstances described in the charges” as a whole should be understood.<sup>3293</sup>

1450. The Chamber wishes further to specify that its analysis will also inquire as to whether the “factual elements” underpinning the new characterisation and as itemised in the 21 November 2012 and 15 May 2013 Decisions, appear in the *Decision on the confirmation of charges* – otherwise put, whether they are “within” and do not exceed the facts contained in the said decision.<sup>3294</sup> It will also inquire as to whether they constitute “facts” in the sense of substantiating the legal elements of the crimes or the criminal responsibility.

1451. The decision handed down by the Pre-Trial Chamber will constitute its principal reference.<sup>3295</sup> Where the Pre-Trial Chamber considered express reference to the Document Containing the Charges necessary,<sup>3296</sup> the Chamber will verify that the said document did contain the information which clearly states the factual allegations in question.

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<sup>3292</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 50.

<sup>3293</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 50.

<sup>3294</sup> See in this regard, [21 November 2012 Decision](#), para. 31 adverting, in respect of the latter expression, to the precise language of regulation 55 of the Regulations of the Court.

<sup>3295</sup> See in this regard, [Decision on the Filing of a Summary of the Charges](#), para. 31; [Defence for Germain Katanga, “Defence Observations on a ‘Summary Document Reflecting the Charges’”, 6 October 2009, ICC-01/04-01/07-1509](#), para. 2(i); [Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, ICC-01/04-01/07-956-tFRA \(“13 March 2009 Order”\)](#), para. 9.

<sup>3296</sup> Regulations of the Court, regulation 52.

**i. Existence and composition of the group of commanders and combatants of Walendu-Bindi *collectivité***

1452. In the 15 May 2013 Decision,<sup>3297</sup> which supplements the 21 November 2012 Decision<sup>3298</sup> and sought to provide additional factual material to the Defence, the Chamber stated:

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

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

a) attacking UPC military elements in Bogoro, as well as the village itself, in order to “wipe [it] out”, involving the commission of the crimes confirmed by the Pre-Trial Chamber,<sup>3299</sup> in an attack which targeted the predominantly Hema civilian population, as such;<sup>3300</sup> and

b) implementing a common policy which was part of a larger campaign of reprisals specifically directed against the predominantly Hema civilians living in villages in the Ituri region, a demonstration of the opposition of the group from Walendu-Bindi *collectivité* to any alliance with the UPC (Hema) and a means to “wipe out” the village of Bogoro so as to ensure control over the road to Bunia, thereby facilitating the transit of goods between Bunia and Lake Albert;<sup>3301</sup>

ii. the members of the group, in particular those who committed crimes, felt hatred towards the Hema population;<sup>3302</sup>

iii. amongst the group were the commanders and combatants from the network of different camps in Walendu-Bindi *collectivité* established throughout its five *groupements*,<sup>3303</sup> including those in Aveba, Kagaba, Olongba, Medhu, Lakpa, Nyabiri, Bukiringi, Gety, Mandre, Bavi and Bulanzabo;

iv. the commanders who were members of this group included German Katanga, Garimbaya, Mbadu, Yuda, Dark, Ngorima, Cobra Matata, Oudo

<sup>3297</sup> This decision also referred to the [Decision on the confirmation of charges](#) as “DCC” and to the [“Document summarising the charges confirmed by the Pre-Trial Chamber”](#) as the “Summary of the Charges”.

<sup>3298</sup> See in this regard, [21 November 2012 Decision](#), paras. 27, 29 and 30.

<sup>3299</sup> See, in particular, DCC, paras. 284, 298, 302, 306, 307, 319, 325, 326, 334, 338, 347, 354, 387, 424, 425, 426, 427, 434, 435, 436, 442, 443 and 444.

<sup>3300</sup> See, in particular, DCC, paras. 275 and 403; [Summary of the Charges](#), para. 18.

<sup>3301</sup> See, in particular, DCC, para. 413; [Summary of the Charges](#), paras. 15, 20 and 24.

<sup>3302</sup> DCC, paras. 275, 280, 386, 426 and 555 (iii).

<sup>3303</sup> DCC, paras. 6 and 543.

Mbafefe, Lobho Tchamangere, Move, Alpha Bebi, Joel Androso, Joel Anguluma and Kisoro;<sup>3304</sup>

v. these camps had a military structure, and the commanders could communicate with each other;<sup>3305</sup> arms and ammunition obtained in Beni were distributed to the commanders ahead of the attack on Bogoro;<sup>3306</sup> and

vi. on the eve of the attack, several commanders took up positions with their troops in Medhu or Kagaba in order to launch the Bogoro operation.<sup>3307</sup>

1453. As regards establishment of these factual allegations, the Defence maintained that the recharacterisation contemplated requires the establishment of new facts. It contended that the commanders whom the Chamber sought to encompass in the “group of persons acting with a common purpose” do not explicitly appear in the *Decision on the confirmation of charges* or are only mentioned in footnotes or sporadically.<sup>3308</sup> That all such camps cooperated to the extent of belonging to a single group, the Defence further submitted, does not constitute a fact described in the *Decision on the confirmation of charges*.<sup>3309</sup> Lastly, it submitted that the said decision contains no factual statement regarding the hatred of the members of group towards the Hema population.<sup>3310</sup>

1454. As to the existence of a single group in Walendu-Bindi *collectivité*, the Chamber wishes to recite the precise facts which the Pre-Trial Chamber found to be established in accordance with article 61(5) of the Statute. As aforementioned

<sup>3304</sup> DCC, para. 413, footnote 546; para. 540, footnote 698; para. 543, footnote 709; [Summary of the Charges](#), para. 68, footnote 131. See also [27 March 2013 Appeals Chamber Judgment](#), footnote 66.

<sup>3305</sup> DCC, para. 543.

<sup>3306</sup> DCC, para. 555 (ii).

<sup>3307</sup> DCC, para. 548.

<sup>3308</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 21-23. See also [Third Defence observations on article 25\(3\)\(d\)](#), paras. 48-49.

<sup>3309</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 22. See also [Dissenting Opinion of Judge Christine Van den Wyngaert to the 15 May 2013 Decision, 20 May 2013, ICC-01/04-01/07-3371-Anx \(“Dissent to the 15 May 2003 Decision”\)](#), para. 15.

<sup>3310</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 35. See also [Dissent to the 15 May 2003 Decision](#), paras. 16 and 17 (“[...] dealing with allegations that would have been of little relevance under the original charges, but which are central to the alternative charges as framed by the Chamber itself”).

in the 21 November 2012 and 15 May 2013 Decisions, regard must be had in the main to paragraphs 6 and 543 of the *Decision on the confirmation of charges*:

6. According to the evidence presented for the purposes of the confirmation hearing, by the end of 2002, Germain Katanga was a military leader of a predominantly Ngiti combatant group. The group allegedly became known in Ituri as the *Force de Résistance Patriotique en Ituri* (“the FRPI”), and its forces were allegedly based in the Walendu Bindi *collectivité* of the Irumu territory in the Ituri district.

[...]

543. There is sufficient evidence to establish substantial grounds to believe that the FRPI, over which Germain Katanga had the command, was a hierarchically organised group. This is shown in particular by the fact that:

- i. the FRPI was organised into camps within the Irumu territory, in the Walendu Bindi *collectivité* and that each of these camps had a commander;
- ii. Germain Katanga was the commander of the Aveba camp which served as the headquarters of the FRPI;
- iii. the FRPI was a military structured organisation divided into sectors, battalions and companies;
- iv. FRPI commanders had the ability to communicate with each other through hand-held short range radios; there was also a *phonie* at Germain Katanga’s headquarters in Aveba; Germain Katanga notably used these assets to give his orders;
- v. Germain Katanga, in his powers as a superior leader, had the ability to jail and adjudicate – for instance, he executed 12 FRPI soldiers for creating troubles at Lake Albert, And punished an Ngiti soldier for raping an Ngiti woman.<sup>3311</sup>

1455. In the case at bar, the Pre-Trial Chamber opted for a mode of liability founded on control over the organisation – namely the FRPI (article 25(3)(a) of the Statute). It cast the FRPI as an apparatus of power based on hierarchical relationships between superiors and subordinates.<sup>3312</sup> Whereas the “Factual background” in the *Decision on the confirmation of charges* adverts to a group of combatants quartered in Walendu-Bindi *collectivité* and whereas the trial essentially canvassed the issue of whether the Accused headed the group, that a camp or commander belonged

<sup>3311</sup> [Decision on the confirmation of charges](#), paras. 6 and 543 (footnotes omitted).

<sup>3312</sup> [Decision on the confirmation of charges](#), para. 500 *et seq.*

to that group is therefore a matter inherent to the charges.<sup>3313</sup> In the view of the Chamber, that matter additionally concerns factual allegations which underpin one of the legal elements of the criminal responsibility charged.

1456. Hence, the trial proceedings, further and as a matter of course concerned to a great extent whether the FRPI, with a centralised command in Aveba, was a hierarchically organised group,<sup>3314</sup> whether its members were organised into camps within Irumu territory in Walendu-Bindi *collectivité* and whether a commander headed each such camp. Otherwise put, it was a matter of ascertaining how the commanders and combatants performed their activities, and specifically whether they constituted a single group. Also requiring ascertainment was the relationship between Germain Katanga and the members of the group of Ngiti commanders and combatants of Walendu-Bindi *collectivité* and whether the command structure was actually vertical.<sup>3315</sup>

1457. The Chamber previously analysed the body of Prosecution contentions and the various arguments advanced by the Defence on such issues.<sup>3316</sup> As aforementioned in the part of the present judgment concerning the organisation of the militia of Walendu-Bindi *collectivité*, in fact, at the close of the trial, the Defence had the opportunity to speak to the structural links which may have existed between the various camps and commanders of that *collectivité* and the manner of their cooperation, when responding to Prosecution allegations on the existence of an organisation for the purposes of article 25(3)(a) in the *collectivité* in the run-up to the battle of Bogoro.<sup>3317</sup> The Chamber cannot therefore accept the Defence submission that the close collaboration noted between the camps and commanders in Walendu-Bindi *collectivité*, which were listed in the 15 May 2013

<sup>3313</sup> See in this regard, [26 June 2013 Decision](#), paras. 24 and 25.

<sup>3314</sup> See, in particular, T. 80, p. 59.

<sup>3315</sup> See, in particular, P-267, T. 171, p. 18.

<sup>3316</sup> See "Section VII(C) Organisation of the Walendu-Bindi *collectivité* combatants in the run-up to the attack on Bogoro". See also "Section X(A) Role and powers of Germain Katanga within the Ngiti militia of Walendu-Bindi *collectivité*".

<sup>3317</sup> See, for example, [Defence Closing Brief](#), paras. 572, 574, 575, 666, 667 and 668.

Decision, constitutes a “new fact”, which “appears nowhere”<sup>3318</sup> in the Pre-Trial Chamber’s decision.

1458. Turning now to the camps where the group was quartered and their commanders, the Chamber also notes that the *Decision on the confirmation of charges* makes mention of several of them and refers in a footnote to a sufficiently detailed list of camps and commanders which the Prosecution laid before the Pre-Trial Chamber in its Document Containing the Charges:<sup>3319</sup> Cobra Matata (Bavi/Olongba), Yuda and Dark (Kagaba), Oudo (Medhu), Lobho Tchamangare (Lapka), Beby (Bukiringi) and Katanga (Aveba). This is why most of the names were restated in the 15 May 2013 Decision.

1459. Moreover, between issuance of the Pre-Trial Chamber’s 26 September 2008 Decision and the Chamber’s 15 May 2013 Decision, a host of questions, repeatedly put to witnesses throughout the trial, were specifically aimed at identifying the commanders and camps of Walendu-Bindi *collectivité*, with the clear aim of discerning and grasping the membership of such camps and the leadership of the group of combatants in the run-up to the attack on Bogoro. Questions were put both to the Prosecution and Defence witnesses. New names and places not expressly adverted to by the Pre-Trial Chamber – whose objective, it must be recalled, is not to conduct an exhaustive trial before the trial proper – were volunteered by the witnesses heard by the Chamber. In any event, the Chamber must underscore that the names of camps and commanders listed in the 15 May 2013 Decision were all mentioned at trial and in the closing briefs of the parties and participants, and without any contestation as to whether they fell within the factual narrative contained in the *Decision on the confirmation of charges*. Finally, such names and locations enabled the Defence, at the close of the trial, to arrive at

<sup>3318</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 23.

<sup>3319</sup> [Decision on the confirmation of charges](#), para. 6 (footnote 14); [Office of the Prosecutor, “Amended Document Containing the Charges Pursuant to Article 61\(3\)\(a\) of the Statute”, 26 June 2008, ICC-01/04-01/07-649-Anx1A](#), para. 42.

its own typology of the commanders in Walendu-Bindi *collectivité*<sup>3320</sup> and to which the Chamber itself adverted when addressing the existence of an organised group in the instant case.

1460. In this regard, legal recharacterisation aside, it would be unreasonable to require a trial bench not to rely on evidence concerning certain locations and persons for the sole reason that a pre-trial chamber did not identify them *by name* in the course of an analysis which nonetheless made clear reference to them in essence.

1461. Accordingly, in the opinion of the Chamber, the existence of an entity consisting of a cluster of camps and commanders who cooperated with one another and formed a whole is indeed a fact on which the Pre-Trial Chamber relied in its analysis, both in consideration of Germain Katanga's individual responsibility and in relation to the contextual elements of the crimes,<sup>3321</sup> and which lies at the heart of the proceedings brought against the Accused on the basis of article 25(3)(a) of the Statute. To the Chamber, this fact evidently entails factual allegations which underpin one of the legal elements of the criminal responsibility charged. Accordingly, it may draw on such a fact in consideration of Germain Katanga's responsibility under article 25(3)(d).

1462. Finally, as regards the intention which drove the group of commanders and combatants of Walendu-Bindi *collectivité*, the Chamber would first point out that the Pre-Trial Chamber expressly satisfied itself that the subjective elements of the crimes were established in respect of their physical perpetrators, namely the FRPI combatants.<sup>3322</sup> Further still, it undertook that factual analysis for all of the crimes it examined, save for the use of child soldiers. It is the Chamber's view that in addition to the common policy directed at the civilian population and confirmed by the Pre-Trial Chamber, as paragraph 20 of the Chamber's 15 May 2013

<sup>3320</sup> [Defence Closing Statements, T. 340](#), pp. 7-14.

<sup>3321</sup> See, for example, [Decision on the confirmation of charges](#), para. 239.

<sup>3322</sup> [Decision on the confirmation of charges](#), para. 245.

Decision underscores, said intention concerns a series of factual allegations underpinning a legal element of the crimes charged.

1463. The Chamber notes that the group's desire to attack specifically the Hema population is made most clear in the *Decision on the confirmation of charges*.<sup>3323</sup> By way of example, the Pre-Trial Chamber considered there to be sufficient evidence to establish substantial grounds to believe that prior to mounting the attack, combatants from FRPI and FNI militias sang songs whose lyrics clearly stated that they would kill the Hema but spare the Ngiti or Bira.<sup>3324</sup> For the group, it was a matter of killing the Hema civilians during the attack on Bogoro<sup>3325</sup> out of vengeance for massacres perpetrated in other villages which were believed to be their doing.<sup>3326</sup>

1464. Moreover, in their closing briefs, the parties also addressed the group's intention and, in a wider sense, the ethnic character of the conflict. Thus, the Prosecution asserted that the Lendu and Ngiti perceived all Hema as the enemy<sup>3327</sup> and that they were generally driven by a desire for vengeance fuelled by ethnic hatred.<sup>3328</sup> The Defence for Germain Katanga countered this argument with a number of submissions, including with respect to the subjective elements of the crimes.<sup>3329</sup>

1465. Accordingly, and contrary to the arguments raised, a central pillar of the initial Prosecution case, as confirmed by the Pre-Trial Chamber, was that the objective of the attack on Bogoro was the elimination of the resident and predominantly Hema civilian population, arising, *inter alia*, out a desire for vengeance which the group of commanders and combatants of Walendu-Bindi *collectivité* harboured towards the population.

<sup>3323</sup> [Decision on the confirmation of charges](#), see, in particular, paras. 275, 279, 403, 406, 411-413.

<sup>3324</sup> [Decision on the confirmation of charges](#), see, in particular, paras. 280 and 405.

<sup>3325</sup> [Decision on the confirmation of charges](#), para. 406.

<sup>3326</sup> [Decision on the confirmation of charges](#), para. 426.

<sup>3327</sup> [Prosecution Closing Brief](#), para. 527.

<sup>3328</sup> [Prosecution Closing Brief](#), para. 512.

<sup>3329</sup> [Defence Closing Statements, T. 340](#), pp. 5 and 6; [Defence Closing Brief](#), paras. 858, 1313-1317.

1466. Ultimately, it is apparent from the foregoing that the Defence arguments on this first matter are unfounded.

**ii. Role and contribution of Germain Katanga**

1467. In its 15 May 2013 Decision, the Chamber determined:

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

- i. seeking to contribute to the attack carried out against the civilian population of the village of Bogoro;<sup>3330</sup>
- ii. facilitating communication amongst the members of the group themselves, by providing the liaison between them and other local or regional authorities (Beni) and by enabling effective preparation for the attack, by means of his position of authority in Aveba and Walendu-Bindi *collectivité* on the eve of the battle of Bogoro;<sup>3331</sup>
- iii. travelling to Beni to obtain arms and ammunition and distributing them to the various camps in Walendu-Bindi *collectivité*.<sup>3332</sup>

23. Regarding the third factual element, the Chamber notes that Germain Katanga's position of authority over the commanders and combatants in Aveba and in Walendu-Bindi *collectivité* on the eve of the battle of Bogoro and, more so than the title of coordinator which he claimed, the functions which he allegedly assumed as part of the "overall coordinating role" he played are particularly important.<sup>3333</sup>

1468. In this respect, the Defence pointed out that the *Decision on the confirmation of charges* is couched only in terms of the Accused's overall coordinating role in the context of the common plan implemented with Mathieu Ngudjolo.<sup>3334</sup> It took the view that it is unclear from the decision how the Accused's conduct constitutes a contribution to the criminal activity of the group without exceeding the facts and circumstances of the case.<sup>3335</sup>

<sup>3330</sup> [Summary of the Charges](#), para. 27.

<sup>3331</sup> DCC, para. 540; [Summary of the Charges](#), para. 61.

<sup>3332</sup> DCC, para. 555 (ii).

<sup>3333</sup> [15 May 2013 Decision](#), paras. 22 and 23.

<sup>3334</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 37-38.

<sup>3335</sup> In this regard, the Defence appears to adopt Judge Christine Van den Wyngaert's argument ([Dissent to the 15 May 2003 Decision](#), para. 18).

1469. As aforementioned in the 21 November 2012 and 15 May 2013 Decisions, in this respect, regard must be had in the main to paragraphs 540 and 555(ii) of the *Decision on the confirmation of charges*:

540. Firstly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until his integration into the FARDC, Germain Katanga:

- i. served as *de jure* supreme commander of the FRPI; and
- ii. had *de facto* ultimate control over FRPI commanders, commanders who sought his orders for obtaining or distributing weapons, and ammunitions and was the person to whom other commanders reported.

[...]

555. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the meeting in Aveba to the day of the attack against the village of Bogoro on 24 February 2003:

[...]

- ii. Germain Katanga played an overall coordinating role in the implementation of the common plan, in particular, by:
  - a. having direct and ongoing contacts with the other participants in the implementation of the common plan;
  - b. personally travelling to Beni to obtain weapons and ammunitions;
  - c. distributing the weapons and ammunitions not only to the FRPI commanders but also to the FNI; and
  - d. organising the meeting at his Aveba camp where the attack against Bogoro village was planned.<sup>3336</sup>

In this connection, it should be underlined that the Pre-Trial Chamber further framed the common plan as intrinsically criminal in its designs to “attack the village of Bogoro by ‘wiping out’ the village of its UPC military elements and of the Hema civilians”.<sup>3337</sup>

1470. As the Chamber stated in its 21 November 2012 Decision, the contribution described by the Pre-Trial Chamber is expressly defined as an essential

<sup>3336</sup> [Decision on the confirmation of charges](#), paras. 540 and 555(ii) (footnotes omitted).

<sup>3337</sup> [Decision on the confirmation of charges](#), para. 548(ii).

contribution resulting in the realisation of the objective elements of the crime.<sup>3338</sup> The Prosecution Closing Brief, as a matter of course, asserted that “[TRANSLATION] the Accused persons’ essential contribution occasioned the commission of crimes”<sup>3339</sup> – a statement, which, moreover, comports with the form of commission foreseen under article 25(3)(a). Further still, the contribution to the crimes is, in a factual sense, depicted with reference to conduct engaged in during *implementation* of the criminal plan to wipe out Bogoro.<sup>3340</sup>

1471. In the case at bench, the proposed recharacterisation does not exceed the facts and circumstances described in the charges since the Chamber confines its examination to the same acts and same conduct relied on by the Pre-Trial Chamber, specifically at paragraph 555(ii) concerning Germain Katanga’s coordinating role in the implementation of the common plan. The Chamber is further of the view that the recharacterisation concerns factual allegations which underpin one of the legal elements of the criminal responsibility charged.

1472. Further, as regards the extent of contribution, contrary to the Defence contention, the Appeals Chamber did not accept that it is “obviously impermissible” to re-characterise the facts so that the role of Mr Katanga “changes from [...] that of an essential contribution to that of a significant but not necessarily essential contribution”:

Any change from [...] being alleged to be a principal to being alleged to have in fact been an accessory will always necessarily involve a change in the characterisation of the role. Were such a change not to be permissible, it would defeat the purpose of regulation 55 of the Regulations of the Court. The Trial Chamber would be constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole.<sup>3341</sup>

<sup>3338</sup> [Decision on the confirmation of charges](#), paras. 524-525. See also [21 November 2012 Decision](#), para. 25.

<sup>3339</sup> [Prosecution Closing Brief](#), part 9.2.

<sup>3340</sup> [Decision on the confirmation of charges](#), para. 555 *et seq.*

<sup>3341</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 57.

Accordingly, the Chamber considers that the matter of whether Germain Katanga made a “significant contribution”<sup>3342</sup> to the crimes committed is undeniably part of the facts and circumstances described in the charges.

1473. As to Germain Katanga’s knowledge of the group’s intention to commit the crimes which formed part of the common purpose, the Chamber refers to its 21 November 2012, 15 May 2013 and 26 June 2013 Decisions.

### iii. Alteration of the Pre-Trial Chamber’s narrative

1474. As aforementioned, the Defence argued that the Chamber has propounded a new factual scenario which excludes a major aspect of the case: the joint planning of the attack on Bogoro by Germain Katanga and Mathieu Ngudjolo.<sup>3343</sup> It further submitted that the Chamber is fundamentally altering the Pre-Trial Chamber’s narrative, by transforming the type of relationship then extant between the Accused and the physical perpetrators of the crimes.<sup>3344</sup>

1475. On this point, regard must be had to the 27 March 2013 Judgment of the Appeals Chamber, which determined that it appeared “inevitable that a change in characterisation would result in a change of narrative to a certain extent”.<sup>3345</sup> Further, it did not accept “that a change in the narrative exceed[ed] *per se* the facts and circumstances described in the charges.”<sup>3346</sup> The Chamber therefore considers it inopportune to call into question the validity of the contemplated legal characterisation merely on account of an alteration to the Pre-Trial Chamber’s narrative. Instead, in its opinion, it is proper to afford consideration to the type and ambit of the alteration which such procedure would entail in the case at bar.

<sup>3342</sup> See “Section X(D)(1)(b)(iii) The accused made a significant contribution to the commission of the crime”.

<sup>3343</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 157; [Third Defence observations on article 25\(3\)\(d\)](#), para. 47.

<sup>3344</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 157. See also in this regard, [Dissenting opinion of Judge Christine Van den Wyngaert to the 21 November 2012 Decision, 21 November 2012, ICC-01/04-01/07-3319](#), paras. 18-22; [Dissent to the 15 May 2013 Decision](#), paras. 21-26.

<sup>3345</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 58.

<sup>3346</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 58.

1476. In analysing Germain Katanga’s criminal responsibility within the meaning of article 25(3)(d), there can be no question of entertaining fresh facts concerning the commission of the crimes or new conduct alleged against the Accused and which would constitute a contribution to the crimes. Instead, it is a matter of bringing to the fore<sup>3347</sup> 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 analysing only the contribution of the Accused, and his contribution alone, to their commission of the crimes, such contribution no longer being “essential” but “significant”. The sole aspect specific to Germain Katanga on which the Chamber will not rely, whereas its importance to the Pre-Trial Chamber’s narrative was clear, is that of the joint planning of the attack with Mathieu Ngudjolo. To so proceed, in the Chamber’s view, does not alter the narrative to the extent of exceeding the facts and circumstances.

1477. The Chamber wishes to point out that the body of its findings of fact concerning the crimes, the organisation of the group of combatants of Walendu-Bindi *collectivité* and Germain Katanga’s role are founded on the factual allegations concerning the Accused which the Prosecution advanced in respect of the mode of liability defined by article 25(3)(a)<sup>3348</sup> – this is apparent from the statement of the facts in the present judgment, which accords in every respect with that furnished by the Pre-Trial Chamber. In analysing Germain Katanga’s responsibility on the basis of article 25(3)(d), the Chamber will also draw on such findings. Admittedly, one aspect of the case which was the focus of Defence endeavours at trial – Germain Katanga’s planning of the attack on Bogoro – is central to the charges confirmed by the Pre-Trial Chamber. It remains the case that the charges were also founded on his provision of an essential contribution

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<sup>3347</sup> [21 November 2012 Decision](#), para. 32. See also [Decision on the Filing of a Summary of the Charges](#), para. 21.

<sup>3348</sup> See “Section VII Creation, evolution and organisation of the group of commanders and combatants of Walendu-Bindi *collectivité* and objectives pursued”; “Section X(A) Role and powers of Germain Katanga within the Ngiti militia of Walendu Bindi *collectivité*”.

which brought about the objective elements of the crimes,<sup>3349</sup> viz. on the analysis of a body of factual allegations substantiating a legal element of the criminal responsibility charged: Germain Katanga's role, vis-à-vis Beni and those there, in the distribution of weapons and ammunition in Walendu-Bindi *collectivité*<sup>3350</sup> and the *de facto* authority which he wielded over the combatants and commanders in the group.<sup>3351</sup>

1478. Lastly, the Chamber acknowledges that as a result of the proposed recharacterisation, the structured and hierarchical character of the Ngiti militia is no longer so essential to the case as regards the establishment of Germain Katanga's responsibility. This notwithstanding, whereas the Pre-Trial Chamber stated that the group constituted an organised and hierarchical apparatus of power entailing near-automatic obedience to orders by its members,<sup>3352</sup> it also explicitly relied on, in regard to points of law, and analysed in factual terms the Accused's responsibility for the commission of crimes through persons bearing criminal responsibility, namely the Ngiti combatants of the FRPI. Thus, the group's *intentional* commission of the crimes is a facet specific to the case, whose contours the Pre-Trial Chamber defined, and was also canvassed at trial. Furthermore, the analysis of Germain Katanga's responsibility on the basis of article 25(3)(d) remains founded on the factual allegations as to the authority he wielded over the members of the group of Ngiti combatants and the fact that the physical perpetrators of the crimes committed them intentionally and knowingly.

1479. Although the Accused's contribution will henceforth be analysed through the lens of accessoryship to the criminal acts of the group, as identified by the Pre-Trial Chamber, the proposed recharacterisation remains underpinned by the

<sup>3349</sup> [Decision on the confirmation of charges](#), Section IV(B)(5) and para. 524. See also [Defence Closing Brief](#), para. 1201.

<sup>3350</sup> [Decision on the confirmation of charges](#), para. 555-ii.

<sup>3351</sup> [Decision on the confirmation of charges](#), para. 540.

<sup>3352</sup> See in this regard, [Dissenting Opinion of Judge Christine Van den Wyngaert to the 21 November 2012 Decision](#), para. 22. See also [First Defence observations on article 25\(3\)\(d\)](#), para. 157.

same facts belonging, on the whole, to a similar narrative. That certain aspects of the case are made salient does not, in the Chamber's view, under any circumstances fundamentally alter the narrative.

**iv. Decision not to recharacterise the crime of using children under the age of 15 years to participate actively in the hostilities**

1480. The Chamber has been compelled to take a different position as regards the legal recharacterisation of the crime of using children under the age of 15 to participate actively in the hostilities.

1481. On 21 November 2012, in affording notice to the parties and participants of the possibility of legal recharacterisation, the Chamber stated that that it would not consider the crime of using children under the age of 15 years to participate actively in hostilities on the basis of article 25(3)(d) of the Statute.<sup>3353</sup> Thus, it recalled that the crime was confirmed by the Pre-Trial Chamber on the basis of article 25(3)(a),<sup>3354</sup> since both accused, and Germain Katanga in particular, stood charged as "direct co-perpetrators". In this regard, the Legal Representative of child-soldier victims moved the Chamber to state the grounds which had prompted it to refrain from such recharacterisation and specifically advanced a different legal recharacterisation for the crime at issue.<sup>3355</sup>

1482. The legal recharacterisation contemplated by the Chamber and its reach rest, to a substantial extent, on the Pre-Trial Chamber's finding that the crimes were committed by persons who were members of the group of combatants of Walendu-Bindi *collectivité*, a group then named FRPI. Thus, as aforementioned in respect of the Accused's criminal responsibility on the basis of article 25(3)(d) and as concerns the crimes of murder (articles 7(1)(a) and 8(2)(c)(i), attack against civilians (article 8(2)(e)(i)), rape (articles 7(1)(g) and 8(2)(e)(vi)), sexual slavery

<sup>3353</sup> [21 November 2012 Decision](#), para. 7.

<sup>3354</sup> [21 November 2012 Decision](#), para. 2.

<sup>3355</sup> [First observations of the legal representative of the child-soldier victims on article 25\(3\)\(d\)](#), see, in particular, paras. 17 and 19.

(articles 7(1)(g) and 8(2)(e)(vi)), pillaging (article 8(2)(e)(v)) and destruction (article 8(2)(e)(xii)), the Chamber will rely on the intentional commission of the crime by FRPI members.

1483. The same, it must be noted, cannot be said for the criminal responsibility which the Accused may accrue for the crime proscribed by article 8(2)(e)(vii) of the Statute. Whereas the Pre-Trial Chamber found that there were substantial grounds to believe that *members of the FRPI* had intentionally committed the first-mentioned crimes,<sup>3356</sup> it undertook no similar analysis for the commission of the crime of using child soldiers. Upon consideration of that crime, it found that there were substantial grounds to believe that *Germain Katanga* had committed the crime within the meaning of article 25(3)(a): its analysis of the subjective elements so attests.<sup>3357</sup> For the Chamber, legal recharacterisation entailing modification of joint direct commission, as just described, to a form of accessoryship, such as that provided for by article 25(3)(d) of the Statute, would necessarily entail exceeding the facts and circumstances of the case, in contravention of article 74 of the Statute and the specific provisions of regulation 55 of the Regulations of the Court.

#### v. Conclusion

1484. From all of the foregoing, it is clear that the factual allegations underpinning the recharacterisation are, in essence, those rehearsed in the *Decision on the confirmation of charges* and which founded the Pre-Trial Chamber's conclusions of law in respect of *Germain Katanga* on the basis of article 25(3)(a). Therefrom, the Chamber concludes that the proposed recharacterisation is wholly consonant with the stipulations of regulation 55(1) of the Regulations of the Court and articles 67(1) and 74(2) of the Statute.

<sup>3356</sup> [Decision on the confirmation of charges](#), para. 245.

<sup>3357</sup> [Decision on the confirmation of charges](#), paras. 253-263.

**b) Whether the Accused was informed promptly and in detail of the nature, cause and content of the charges**

1485. From article 74(2) of the Statute and regulation 52 of the Regulations of the Court taken together, a “charge” must be understood as:

- a statement of the facts and circumstances *including* the time and place of the alleged crimes, given that the term “fact” denotes, as aforementioned, the factual allegations underpinning each of the legal elements of the crime charged; and
- a legal characterisation of the facts, which must accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation therein under articles 25 and 28 of the Statute.<sup>3358</sup>

1486. The right of an accused to be informed promptly and in detail of the charges against him or her encompasses, therefore, both the facts and their legal characterisation. In respect of the legal characterisation of the facts, the Chamber has already stated that the requirements of article 67(1)(a) of the Statute were met,<sup>3359</sup> since, in the case at bar, the Accused had been put on notice that the legal characterisation could be changed pursuant to regulation 55(2) of the Regulations of the Court. Attention must also be drawn to the Appeals Chamber ruling on the matter in its 27 March 2013 Judgment<sup>3360</sup> that implementation of regulation 55, in and of itself, at the deliberations stage, does not cast doubt on the fairness of the proceedings. Accordingly, the Chamber takes the view that this matter need not be revisited.

1487. As to the facts, none of the factual allegations on which the Chamber may rely in examining Germain Katanga’s criminal responsibility within the meaning of

<sup>3358</sup> See, in particular, [Decision on the Filing of a Summary of the Charges](#), para. 10.

<sup>3359</sup> [21 November 2012 Decision](#), paras. 21-34.

<sup>3360</sup> [27 March 2013 Appeals Chamber Judgment](#), paras. 94 and 100.

article 25(3)(d) of the Statute, in its view, exceed those to which the Pre-Trial Chamber adverted in its analysis of article 25(3)(a).

1488. Insofar as the facts underpinning the new legal characterisation clearly appear in the *Decision on the confirmation of charges*, the Chamber should satisfy itself that initial notice of the charges, as confirmed by the Pre-Trial Chamber, did not violate the stipulations of article 67(1)(a) of the Statute. It is expedient, specifically since the Defence raised the matter before trial commenced, to inquire as to whether the Chamber's modus operandi as of issuance of the *Decision on the confirmation of charges*, when considered as a whole, satisfied the requirements of article 67(1)(a) of the Statute. In addressing this point, the Chamber will afford consideration to fresh information which may have been available to the Defence in the time between issuance of the Pre-Trial Chamber's Decision pursuant to article 61 of the Statute and the commencement of trial.

1489. Inasmuch as certain facts clearly assume greater prominence when considered in respect of article 25(3)(d) of the Statute, the Chamber must also satisfy itself that the Defence was sufficiently informed of the facts underpinning the new legal characterisation. To such end, it must entertain the additional information which the Defence initially obtained in the 21 November 2012 Decision and subsequently throughout implementation of the recharacterisation procedure.

1490. In this regard, the Chamber recalls, as it did in its 21 October 2009 Decision, "that strict compliance with the provisions of articles 64(2) and 67(1)(a) of the Statute requires that the decision should set out, with a maximum of precision, the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes".<sup>3361</sup> Further still, it considers that, here it must scrutinise the Accused's conduct with the utmost circumspection so as to satisfy itself that the conduct constituting the contribution to the crime was described in

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<sup>3361</sup> [Decision on the Filing of a Summary of the Charges](#), para. 31.

sufficient detail when notice was first provided. Since the Accused's responsibility is now framed as accessoryship, the conduct which may establish this mode of liability must be viewed as a fact of particular importance.

**i. Pre-trial notice of the charges concerning Germain Katanga's responsibility under article 25(3)(a) of the Statute**

1491. Before considering whether, in the case at bar, notice of the charges met the requirements of precision and clarity aforementioned, it is necessary to recapitulate briefly and in general terms certain peculiarities of the proceedings specific to the Court's Statute and to set out the Chamber's *modus operandi* in the instant case.

1492. First, the Chamber recalls that under the Rome Statute, the Pre-Trial Chamber confirms and hence circumscribes the charges before the Court. To do so, it relies, *inter alia*, on the document containing the charges tendered by the Prosecution pursuant to regulation 52 of the Regulations of the Court prior to the confirmation hearing and, where necessary, on the evidence led by the Prosecution.<sup>3362</sup>

1493. As the Legal Representative of child-soldier victims pointed out,<sup>3363</sup> the *Decision on the confirmation of charges* cannot be seen simply as an indictment, which does no more than state the essential facts on which the Prosecution will rely. The decision, handed down by a triumviral bench, is, in the case at bar, a document of 250 or so pages wherein the Pre-Trial Chamber scrutinises the factual allegations which the Prosecution intends to establish at trial. In addition to specifying the relevant Prosecution evidence tendered, the decision sets out the reasoning behind the Pre-Trial Chamber's confirmation of some of those factual allegations. Of further note is that such allegations sometimes include additional factual material which provides a better grasp of the context surrounding the

<sup>3362</sup> T. 78, p. 4.

<sup>3363</sup> T. 78, pp. 27-29.

conduct alleged. Lastly, it should be underlined that in its decision pursuant to article 61(7) of the Statute, the Pre-Trial Chamber chose, where necessary, to refer to the Document Containing the Charges, as it furnishes further details of the content of the factual allegations.

1494. Secondly, the Chamber wishes to underscore that in the case at bar and as it so directed,<sup>3364</sup> the Prosecution produced a table which set out in orderly and systematic fashion the body of evidence on which it was to rely at trial.<sup>3365</sup> The Chamber considered such a table necessary, particularly to impart to the Defence further particulars of the charges, thus providing a clear and comprehensive overview of the incriminating evidence and its connection to the charges brought against the accused persons. Such orderly correlation between the evidence and each factual allegation contained in the *Decision on the confirmation of charges* is also a hallmark of the present case. The Chamber recalls in this regard its 13 March 2009 Decision, wherein it opined that such a table ensured “that there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber” and that compared to a narrative document containing the charges, it offered “the added benefit of additional detailed information and more precision”.<sup>3366</sup>

1495. Having so recalled, it should also be noted that on 11 March 2009, the Defence stressed the importance it attached, specifically in the light of the provisions of

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<sup>3364</sup> [13 March 2009 Order](#), paras. 5-16 (“the Table of Incriminating Evidence breaks down each confirmed charge into its constituent elements - contextual circumstances as well as material and mental elements - as prescribed by the *Elements of crimes*. For each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passage(s), which are directly relevant to the specific factual allegation.”, para. 13).

<sup>3365</sup> [Office of the Prosecutor, “Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge”, 27 May 2009, ICC-01/04-01/07-1174 and annexes \(“Table” or “Table of Incriminating Evidence”\); Office of the Prosecutor, “Prosecution’s Amended Table of Incriminating Evidence and Amended List of Evidence”, 16 November 2009, ICC-01/04-01/07-1643 and annexes. See also \[13 March 2009 Order\]\(#\), para. 12.](#)

<sup>3366</sup> [13 March 2009 Order](#), paras. 5 and 7.

article 67(1)(a) of the Statute, to receiving a clear and precise charge sheet. It then requested that the Prosecution produce a single reference document containing the charges confirmed by the Pre-Trial Chamber for trial.<sup>3367</sup> The Chamber entertained this motion, articulated in the broadest of terms, and considers that it was disposed of in its ruling of 13 March 2009, wherein it did not enjoin the Prosecution to produce a new document containing the charges, but directed from it the Table of Incriminating Evidence aforementioned.<sup>3368</sup>

1496. The Defence described the Table produced as a “useful tool” which furnished a detailed picture of the evidence to be relied on by the Prosecution in support of each charge.<sup>3369</sup> Nonetheless, the Defence reiterated its broad request for the production of a single reference document.<sup>3370</sup>

1497. Responding on 21 October 2009 to the Defence’s concern, the Chamber ordered, on an exceptional basis,<sup>3371</sup> the production of a “Summary of the Charges” setting out with concision the facts underpinning each charge confirmed by the Pre-Trial Chamber. Underscoring “the volume” of the material already disclosed to the Defence and “the difficulties experienced in collating it”, the Chamber considered that, in the circumstances, it was necessary to have a single, concise and intelligible reference document in order for the Defence to be “better apprised” of the nature, cause and content of the charges against the

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<sup>3367</sup> [Defence for Germain Katanga, “Defence Application for an Amended Document Containing the Charges”, 12 March 2009, ICC-01/04-01/07-954.](#)

<sup>3368</sup> [13 March 2009 Order](#), paras. 4 and 7.

<sup>3369</sup> [Defence for Germain Katanga, “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](#), para. 6.

<sup>3370</sup> [Defence for Germain Katanga, “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](#), para. 1. See also [Defence for Germain Katanga, “Defence Proposals to Remedy Deficiencies in the Notice of the Accused”, 14 August 2009, ICC-01/04-01/07-1377](#), paras. 8-9.

<sup>3371</sup> [Decision on the Filing of a Summary of the Charges](#), see, in particular, para. 29.

Accused.<sup>3372</sup> It then further instructed the Prosecution to amend its Table with due regard for the Defence suggestions.<sup>3373</sup>

1498. On 3 November 2009, the Prosecution accordingly filed a 46-page Summary.<sup>3374</sup> The Defence commented that its wish – a clear and concise synthesis of the facts underpinning the charges – had been fulfilled,<sup>3375</sup> but stated however the need for further time in which to make a detailed analysis of the document in the light of the new Table,<sup>3376</sup> which in essence it underscored, was but a synopsis of the charges.

1499. Although the Chamber had drawn attention to the purely technical nature of the resultant Summary in a decision on 10 November 2009,<sup>3377</sup> the Defence maintained that the notice of the charges contained some imprecision, which, to its mind, could raise concerns as to the trial's fairness.<sup>3378</sup>

1500. In a motion brought just a matter of days before the trial commenced, and with specific reference, on this occasion, to the terms used by the Pre-Trial Chamber and repeated in the Summary, the Defence identified and raised a series

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<sup>3372</sup> [Decision on the Filing of a Summary of the Charges](#), paras. 11-12.

<sup>3373</sup> [Decision on the Filing of a Summary of the Charges](#), p. 20. In this respect, it must be emphasised that in an order of 27 July 2009, the Chamber noted that the Table was not actually fit for the initial purpose of clearly setting out the charges against the Accused and the supporting allegations. This observation can be explained by the Prosecution's decision to refer to the document containing the charges which the Office of the Prosecutor had prepared before the charges were confirmed, rather than to the decision which the Pre-Trial Chamber had ultimately handed down. However in that same order, the Chamber further noted that neither Defence team had thought that it need specify how the table failed to provide them with the information which they considered necessary – as aforementioned, the Defence for Germain Katanga simply requested, in the broadest of terms, that a new document containing the charges be produced ([Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses](#), 27 July 2009, ICC-01/04-01/07-1337, paras. 7-9).

<sup>3374</sup> [Summary of the Charges](#).

<sup>3375</sup> T-74, pp. 26-27. See also [Defence for Germain Katanga, "Defence Observations on the Document Summarising the Charges"](#), 19 November 2009, ICC-01/04-01/07-1653 ("Defence observations on the Summary of the Charges"), para. 4.

<sup>3376</sup> [Defence for Germain Katanga, "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.

<sup>3377</sup> [Decision on the Request of the Defence for Germain Katanga for an Extension of Time for its Observations on the Summary of Charges \(Regulation 35 of the Regulations of the Court\)](#), 10 November 2009, ICC-01/04-01/07-1619-tENG, para. 8.

<sup>3378</sup> [Defence observations on the Summary of the Charges](#).

of issues, which, in its submission, merited clarification in accordance with article 67(1)(a) of the Statute.<sup>3379</sup> It took the view that certain expressions used by the Pre-Trial Chamber were potentially ambiguous and that it behoved the Prosecution to state their meaning. Accordingly, it requested that a new, more precise summary of the charges be filed. Of note is that this was the first time that the Defence had raised the issue of imprecision of certain passages of the *Decision on the confirmation of charges* and it did so in concrete terms, with specific examples.

1501. The Chamber disposed of and declined to grant the motion in an oral decision of 23 November 2009.<sup>3380</sup> That decision, it must be pointed out, was preceded by a discussion before the Chamber<sup>3381</sup> shortly before trial commenced, wherein the Chamber specifically asked the Defence whether it ultimately considered the Pre-Trial Chamber's Decision insufficiently precise as regards the Accused's right to notice of the charges. It further stated that the new Table filed by the Prosecution appeared to allay some of the doubts which the Defence had raised.<sup>3382</sup>

1502. During the same discussion, the Defence took the view that there was factual imprecision in the Pre-Trial Chamber's decision and consequently in the Summary.<sup>3383</sup> It requested that the Prosecution give further precision on the factual assertions which the Pre-Trial Chamber had confirmed.<sup>3384</sup> The Prosecution, for its part, recalled that on 25 June 2008,<sup>3385</sup> the Pre-Trial Chamber had ruled on a great many of the imprecisions raised by the Defence<sup>3386</sup> and was

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<sup>3379</sup> [Defence observations on the Summary of the Charges.](#)

<sup>3380</sup> [Oral decision, T-79](#), p. 1 *et seq.*

<sup>3381</sup> T-78, p. 3 *et seq.*

<sup>3382</sup> T-78, p. 7.

<sup>3383</sup> T-78, p. 8.

<sup>3384</sup> T-78, p. 10.

<sup>3385</sup> Pre-Trial Chamber I, [Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648.](#)

<sup>3386</sup> T-78, pp. 19-20.

of the opinion that all of the documents tendered by the Office of the Prosecutor addressed the issues raised by the Defence.<sup>3387</sup>

1503. In an oral decision issued immediately after the aforementioned discussion, the Chamber stated that it was alive to the needs of the Defence. Since the Defence had underlined that its requested delineation of the precise contours of the case proceeding to trial was not decisive, insofar as it had advised that it would enter a plea of not guilty, the Chamber specified that the ambit of the case “[TRANSLATION] was contained” in two documents: the *Decision on the confirmation of charges* and the exhaustive Table of Incriminating Evidence. It therefore invited the Defence to contact the Office of Prosecutor in relation to the two documents, so as to exchange any information that might duly illuminate it. Lastly, the Chamber wished to be apprised of the outcome of the exchange.<sup>3388</sup>

1504. The following day, upon commencement of trial, Germain Katanga pleaded not guilty to each charge read out by the court officer at the Chamber’s behest.<sup>3389</sup> The Defence sought leave to appeal the oral decision on 30 November 2009.<sup>3390</sup> Despite asserting that the Prosecution was the only competent authority and in a position to clarify the purportedly imprecise information, the Defence considered the Chamber’s oral decision unlawful and pointed out that the Accused’s right pursuant to article 67 would be denied absent full clarification of all the points raised in his 19 November 2009 brief.<sup>3391</sup>

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<sup>3387</sup> T-78, p. 21 and 23.

<sup>3388</sup> T-79, pp. 2-3.

<sup>3389</sup> T-80, p. 14 *et seq.*

<sup>3390</sup> [Defence for Germain Katanga, “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](#). See also [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](#).

<sup>3391</sup> [Defence for Germain Katanga, “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](#), paras. 3 and 14.

1505. On 2 December 2009, having sought leave to appeal, the Prosecution, as agreed, produced a document seeking to dispel the ambiguities identified by the Defence in its 19 November 2009 observations. The 52 page-document, conveyed to the Chamber by e-mail on 3 December 2009, took the form of an internal memorandum entitled “Communication of details in response to Defence Motion 1653” (“the 2 December 2009 Memorandum”).<sup>3392</sup>

1506. The Chamber observes that, thereafter, no observation from the Defence regarding the document was forthcoming, despite the importance which this aspect of the case held for it, as it had further underlined when seeking leave to appeal. The Defence took no particular objection to its content and did not see fit to move the Chamber anew. Thenceforth, the matter of the precision of the charges was not addressed again, whether during the trial, in the Defence’s closing brief or in its closing statements on Germain Katanga’s criminal responsibility under article 25(3)(a) of the Statute.

1507. Upon scrutiny of the body of relevant documents (the *Decision on the confirmation of charges*, the Table of Incriminating Evidence, the Summary and the 2 December 2009 Memorandum), the Chamber further notes that the imprecisions which the Defence raised on 19 November 2009 and saw as a source of ambiguity were all addressed either in the body of the said documents or in their footnotes, that is, if they needed dispelling in pursuance of a meaningful defence on the basis of article 25(3)(a).

1508. In any event, the ambiguities discerned by the Defence were clearly dispelled at trial and its Closing Brief shows that it was able to mount an effective defence on the various points raised. This body of documents which, it bears repeating, all stem from the Chamber’s stated desire to correlate the evidence with each factual allegation, allowed the Defence to make informed and precise reference to aspects both temporal (dates of the attacks which preceded and post-dated the attack on

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<sup>3392</sup> 19 February 2014 Decision, confidential annex 8.

Bogoro, dates of the rape and sexual enslavement and dates of the use of child soldiers and pillaging) and geographic (attack on Nyakunde and names of the FNI and FRPI camps where the child soldiers were allegedly trained) and, further still, to the circumstances of the Accused's conduct (identity of the child soldiers whose services he may have enlisted, identity of the women subjected to sexual slavery, names of certain commanders who had a part in contriving the common plan, ethnicity of the combatants who committed the crimes of rape, sexual slavery, destruction and pillaging, and the membership of a specific group).

1509. The foregoing impels the conclusion that the many Defence requests for precision were all met. In addition to the clarification thus obtained, the Defence was therefore furnished with clear and sufficiently detailed information before trial commenced.

**ii. Notice of the charges in the procedure concerning regulation 55 of the Regulations of the Court**

1510. Upon issuance of the 21 November 2012 Decision, the Defence first raised the imprecision of that which, in its view, constituted new allegations brought in respect of the possible application of article 25(3)(d) of the Statute.<sup>3393</sup> It contended that the 21 November 2012 Decision was deficient and did not constitute adequate notice.<sup>3394</sup> The Defence was of the further opinion that even after the Chamber had provided additional factual material,<sup>3395</sup> it was still not in a position to respond to the new mode of liability envisioned, even emphasising that at the beginning of the trial, it had been presented with a clear picture of the charges to which it had to answer.<sup>3396</sup>

<sup>3393</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 16. See also [Third Defence observations on article 25\(3\)\(d\)](#), para. 51.

<sup>3394</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 4.

<sup>3395</sup> [15 May 2013 Decision](#).

<sup>3396</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 11.

1511. This criticism appears first and foremost to form part of reasoning aimed at arguing that the contemplated recharacterisation exceeded the facts and circumstances contained in the charges, a matter which has just been addressed. However, since certain factual aspects assume particular salience in the context of the new legal characterisation envisaged, the Chamber considers that it must further consider the matter, as, moreover, the Appeals Chamber so ordered.

1512. In a general sense, the Appeals Chamber considered that “more detailed information about the factual allegations to which the potential change in the legal characterisation of the facts relate[s]” could be required, adding that such information could be provided subsequently in the proceedings, that is, after notice was given.<sup>3397</sup> Returning to the case at bar, it pointed out that in the 21 November 2012 Decision the Chamber had provided little detail as to the group of persons acting with a common purpose.<sup>3398</sup>

1513. The Chamber duly noted the Appeals Chamber judgment and, by decision of 15 May 2013, furnished the Defence with a more detailed list of the facts described by the Pre-Trial Chamber which underpin the new legal characterisation. The Defence thus had the benefit of a more precise statement of the facts concerning the composition of the group acting with a common purpose, the common purpose, the acts and conduct constituting Germain Katanga’s contribution, and his awareness thereof. As regards the commission of the crimes, the Chamber also invited the Defence “to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants from Walendu-Bindi *collectivité*”.<sup>3399</sup>

1514. The Chamber thereby sought to pinpoint the specific facts to which it would refer in the envisioned recharacterisation by additionally connecting them to the constituent elements of article 25(3)(d) which it had also imparted, even though,

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<sup>3397</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 101.

<sup>3398</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 102.

<sup>3399</sup> [15 May 2013 Decision](#), paras. 20-25.

in its opinion, those factual allegations concerned issues with which the parties and participants were well-acquainted and which had been canvassed at trial.

1515. The fact remains, in the Defence opinion, that adequate notice should have afforded greater precision as to: (1) the common purpose, by specifying, *inter alia*, the meetings which Germain Katanga allegedly attended and who attended;<sup>3400</sup> (2) identification of the group concerned, the reference to its geographical whereabouts being insufficient;<sup>3401</sup> (3) the planning of the attack and the cooperation between the commanders in organising and planning the assault on Bogoro;<sup>3402</sup> and (4) the identity of the physical perpetrators of the crimes committed.<sup>3403</sup>

1516. As regards the meetings and the planning of the attack, in its 26 June 2013 Decision, the Chamber advised the Defence against confining 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 communication of a decision which it may have formally taken.<sup>3404</sup> It wished to expound specifically on that point so that the Defence could make observations which were even more informed as to the type of information it might need. In any case, even assuming that the existence of such meetings was essential for proof of the common purpose, it behoved the Defence to advert to those previously canvassed at trial, by referring, for example, to the meeting mentioned in paragraph 548 (vi) of the *Decision on the confirmation of charges* and which the Prosecution analysed in its Closing Brief.<sup>3405</sup>

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<sup>3400</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 14; [Second Defence observations on article 25\(3\)\(d\)](#), para. 33; [Third Defence observations on article 25\(3\)\(d\)](#), para. 24.

<sup>3401</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 9-12, 15 and 97; [Third Defence observations on article 25\(3\)\(d\)](#), para. 4.

<sup>3402</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 22 and 30; [Third Defence observations on article 25\(3\)\(d\)](#), para. 50.

<sup>3403</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 83; [Third Defence observations on article 25\(3\)\(d\)](#), para. 76. See also [Second Defence observations on article 25\(3\)\(d\)](#), para. 19.

<sup>3404</sup> [26 June 2013 Decision](#), paras. 27 and 28.

<sup>3405</sup> [Prosecution Closing Brief](#), para. 536.

1517. As to identification of the group and cooperation among its members, the Chamber specifically advised the Defence to refer to the body of evidence led to substantiate the allegation of the existence of an organised and hierarchical entity.<sup>3406</sup> The Chamber considered that the Defence had all the necessary information inasmuch as, given how the Pre-Trial Chamber had framed the charges, the parties and participants were able to debate lengthily in court the matter of, *inter alia*, how the members of the group of Ngiti commanders and combatants of Walendu-Bindi *collectivité* performed their activities and specifically, whether they constituted a single, homogenous group: the structure of the present judgment so attests.

1518. Turning lastly to the identity of the physical perpetrators of the crimes, the Chamber is of the view that it furnished all the necessary information in its 15 May 2013 Decision, making specific reference, once again, to the Ngiti combatants of Walendu-Bindi *collectivité*, at times identified by the name FRPI, and restating for the Defence, and not for the first time, the name of the camps and commanders who were members of the group which acted with a common purpose.<sup>3407</sup> Whereas the Chamber acknowledged that the identification of the physical perpetrators of the crimes was touched upon only briefly during the examination of the witnesses in court,<sup>3408</sup> it must be noted that the matter did not however pass uncanvassed by the proceedings, since witnesses were specifically questioned on the subject.<sup>3409</sup> Furthermore, the Chamber made equally plain that the crimes committed by the Ngiti combatants of Walendu-Bindi *collectivité* would be the sole focus of its analysis. Ultimately, it considers that proof of the actual *identity* of the physical perpetrators of the crimes (name and civil status), need not perforce be provided, whether in relation to article 25(3)(a) or

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<sup>3406</sup> [15 May 2013 Decision](#), para. 21; [26 June 2013 Decision](#), paras. 21-23.

<sup>3407</sup> [15 May 2013 Decision](#), para. 20 iii and iv. See also [26 June 2013 Decision](#), para. 25.

<sup>3408</sup> [26 June 2013 Decision](#), paras. 35-36.

<sup>3409</sup> See, in particular, P-132, P-268, P-353 and V-2.

article 25(3)(d). It therefore takes the view that such information did not necessarily have to be imparted to the Defence.

1519. The Chamber considers it important to underscore anew that the procedure for which regulation 55 of the Regulations of the Court makes provision does not seek to embark on a retrial on fresh charges with fresh factual allegations. Whereas the Chamber wished to provide as many particulars as possible to the Defence – given the importance now assumed by certain factual material and the insistence on the part of the Defence, once apprised of the approach which the Majority was minded to adopt – it considered that it need not, however, prepare a new indictment or set forth fresh allegations.

1520. In the present case, it is those facts and circumstances – confirmed by the Pre-Trial Chamber and discussed for several months at trial, throughout the presentation of both the incriminating and exonerating evidence – which necessarily prompted the Chamber to contemplate legal recharacterisation. In satisfying itself that notice of the facts concerning the new legal characterisation was sufficiently precise, regard must be had not only to the information furnished by the Chamber further to the 21 November 2012 Decision, but also to all information which, given the conduct of the hearings and their content, was clearly already in the hands of the Defence.

1521. Whereas several points raised by the Defence assume particular salience in respect of the new characterisation, as, moreover, the Chamber has had occasion to note, it must be pointed out that all such points were debated at trial. It was precisely in the light of what was then canvassed and the body of information garnered in the course of those hearings that the Defence was able to present its case on the guilt of Germain Katanga, for the purposes of article 25(3)(d) of the Statute, in its various observations on the new mode of liability.

1522. Furthermore, the Chamber notes that the arguments raised by the Defence to substantiate its grievance of imprecision in the facts underpinning the legal

recharacterisation envisioned<sup>3410</sup> are, to a very great extent, identical to the complaints of imprecision which it saw fit to raise at the outset of trial, when notice of the charges was initially given and in the run-up to the *Decision on the confirmation of charges*.<sup>3411</sup> This observation, moreover, confirms the Chamber's analysis on the matter of whether the recharacterisation exceeds the facts and circumstances described in the charges.

1523. The Defence further argued that if the safeguards of article 67(1)(a) of the Statute were to be fully respected, the Chamber was duty-bound to provide it with the evidence to be used in the recharacterisation and to apprise it of the Bench's position regarding the remaining evidence on record after several witnesses were dismissed.<sup>3412</sup>

1524. 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. Turning now to the analysis of witness credibility, the Chamber considers that the Defence prayers on the matter were disposed of in its 15 May 2013 Decision. On that occasion, it underscored that the Defence "ha[d] already benefitted", "as an exception", "[TRANSLATION] from the initial, detailed analysis of the credibility of some of the most important Prosecution witnesses, and of Defence witnesses".<sup>3413</sup> Not once did it intimate that the Defence was entitled to avail itself of the analysis of witness credibility or of the evidence on record before judgment was handed down, but instead considered that in that instance, and with due regard for the circumstances specific to the case, it was expedient, for the purposes of guaranteeing a fair trial,

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<sup>3410</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 9-12, 15 and 97; [Third Defence observations on article 25\(3\)\(d\)](#), para. 51.

<sup>3411</sup> [Defence for Germain Katanga, "Defence Motion seeking the Amendment of the Document containing the Charges"](#), 9 June 2008, ICC-01/04-01/07-574; Pre-Trial Chamber I, [Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008](#), ICC-01/04-01/07-648

<sup>3412</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 141-142; [Second Defence observations on article 25\(3\)\(d\)](#), para. 13.

<sup>3413</sup> [15 May 2013 Decision](#), para. 14.

to impart forthwith the information to the Defence so that it might respond more promptly and more effectively to the recharacterisation proposed.

1525. Finally, in the Defence view, inasmuch as the facts described by the Pre-Trial Chamber were, at that stage of the proceedings, based on witnesses who were found not credible at the close of trial, the notice afforded by the Chamber in the case at that stage was inadequate.<sup>3414</sup>

1526. The Chamber considers that such argument misapprehends the role of the Pre-Trial Chamber, that it is improper to call into question the well-established fact that the Prosecution is entitled to lead new evidence at trial,<sup>3415</sup> and that the incriminating evidence, as regards the factual allegations which the Prosecution sought to establish, is duly identified in the table summarising the charges.

### iii. Conclusion

1527. Having regard to the circumstances and particulars set out in the *Decision on the confirmation of charges* and the specific measures taken during the pre-trial proceedings and as of implementation of regulation 55, the Chamber considers that the Accused was duly informed in detail of the nature, cause and content of the charges.

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<sup>3414</sup> [Second Defence observations on article 25\(3\)\(d\)](#), in particular paras. 26, 29, 34-35, 37 and 59.

<sup>3415</sup> See, in particular, Rome Statute, article 64(3)(c). See also [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence"](#), 13 October 2006, ICC-01/04-01/06-568, paras. 2, 54 and 56; [The Prosecutor v. Callixte Mbarushimana, Appeals Chamber, 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 2012, ICC-01/04-01/10-514, para. 44; [Dissenting Opinion of Judge Silvia Fernández de Gurmendi to Pre-Trial Chamber I's decision in 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-Anx-Corr, paras. 14-16.

**c) Whether the Accused had the right to remain silent**

1528. The Defence for Germain Katanga moved the Chamber to refrain from reliance on or to exclude Germain Katanga's *viva voce* evidence in accordance with articles 64(2) and 69(4) of the Statute, so that the rights of the Accused may be upheld. To its mind, a conviction founded on the proposed recharacterisation would offend minimum fair trial guarantees, specifically the right of the Accused to remain silent or against self-incrimination.<sup>3416</sup> Specifically, the Defence contended that when the Chamber, in the person of its Presiding Judge, put questions to Germain Katanga, he was unaware that the charges might be recharacterised – a state of affairs which could, therefore, affect the Accused's right against self-incrimination.<sup>3417</sup> His decision to testify, it is submitted, was uninformed, whereas the ability of an accused person to make an informed decision as to whether to waive the right to remain silent is contingent on the said person knowing in detail the nature of the charges brought against him or her and an awareness that certain parts of his or her testimony may be considered incriminating.<sup>3418</sup> In the Defence view, had the Accused been put on notice of the possibility of change of the mode of liability before presenting his case, he would have adopted a more passive defence strategy and probably would not have elected to give evidence in court.<sup>3419</sup>

1529. In its 21 November 2012 Decision, the Chamber considered that the Accused's decision to testify was deliberate and that he had in no way been forced or coerced into so doing. It thus stated:

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<sup>3416</sup> [Defence for Germain Katanga, "Defence's Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 10 January 2013, ICC-01/04-01/07-3339 \("Defence appeal brief on lawfulness of activation of regulation 55"\)](#), para. 14.

<sup>3417</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 163-164; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 17 and 92.

<sup>3418</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 164 and 168-169.

<sup>3419</sup> [Defence appeal brief on lawfulness of activation of regulation 55](#), para. 92; [First Defence observations on article 25\(3\)\(d\)](#), para. 166.

49. In practice, the right not to be compelled to testify against oneself (“privilege against self-incrimination”) seeks to ensure that confessions obtained under duress or by coercion or subterfuge cannot be used at trial in disregard of the expressed will of the accused to remain silent.

50. The right not to testify against oneself is related to, among others, the right to have one’s decision whether to testify respected.

51. In the case at bar, no doubt exists regarding the fact that, once all the witnesses called by the parties and participants had been heard, German Katanga freely chose, in the presence of his counsel, also to testify before the Chamber and to answer any questions it might put to him. It has not been shown, or indeed contended, that he was subjected to pressure or duress of any kind or that he was a victim of subterfuge of any sort whatsoever. Accordingly, the right “not [to] be compelled to incriminate [oneself] or to confess guilt” has not been violated in that none of the evidence used was obtained from testimony provided involuntarily by the Accused. Quite the contrary; he spontaneously presented various accounts, explanations and comments to the Chamber in the knowledge that they might later be used to incriminate him.<sup>3420</sup>

1530. The Chamber wishes to further underscore the terms of a decision which it issued on 13 September 2011, that is, only two weeks before Germain Katanga started to give evidence. The decision specifically concerned a request for assurances with respect to non-incrimination brought by his then Co-accused:

7. As regards the assurances provided for in rule 74 of the Rules, the Chamber considers that the accused do not require them, as they benefit from protection against self-incrimination. Indeed, according to article 67(1)(g) of the Statute, the accused has the right to remain silent and cannot be compelled to testify. However, 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.

8. The testimony of the accused may thus be used as evidence against them in the present case. Moreover, if they decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate.

9. Further, as correctly stated by the Prosecution, the assurances under Rule 74 are meant to compel witnesses to answer questions when they object to do so on the ground that answering might tend to incriminate them. The Chamber is of the view that it would thus be inappropriate to apply this rule to an accused who has knowingly chosen to commit himself to answer all questions falling within the scope of cross-examination.<sup>3421</sup>

<sup>3420</sup> [21 November 2012 Decision](#), paras. 49-51 (footnotes omitted).

<sup>3421</sup> [Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination](#), paras. 7-9.

1531. In the case at bar, the Accused waived his right to remain silent. He willingly made an informed decision, with the guidance of counsel,<sup>3422</sup> to testify and take the initiative to raise or dwell on various topics which he deemed significant to the charges against him. Hence, the Chamber cannot be accused of not respecting his right to remain silent. Accordingly, the Chamber considers the Defence prayer unfounded in this regard.

**d) Whether the Accused's case has been given a fair hearing**

1532. On two occasions at least, the Defence raised the appearance of bias on the part of the Majority of the Bench following the decision which it issued on 21 November 2012. In its view, the issue ensues from implementation of regulation 55 at the deliberation stage and from the very nature of the intervention.<sup>3423</sup> To the Defence, the proposed change of mode of liability, at this late stage in the proceedings, gives the impression that the Majority is seeking to convict the Accused.<sup>3424</sup> Furthermore, by embarking of its own accord on a recharacterisation of the mode of liability – a prerogative of the Prosecution, which at no time raised such a possibility – the Chamber acted *ultra vires*.<sup>3425</sup>

1533. The Chamber addressed this matter in its 21 November 2012 Decision, holding that implementation of regulation 55 at the deliberation stage did not violate the impartiality which article 67(1) of the Statute prescribes.<sup>3426</sup> Thus, it declared:

19. Indubitably, legal recharacterisation of the facts at the deliberation stage may raise concerns about an appearance of partiality on the part of the judges who may be thought to be already convinced of the accused's guilt, or to be seeking to establish it at all costs. Nonetheless, any such concerns should, in any event, be objectively justified in light of the particular circumstances of the case. Unless it is considered that implementation of regulation 55 during deliberations automatically calls into question the impartiality of the judges

<sup>3422</sup> See, in particular, [Defence Closing Brief](#), paras. 525-526.

<sup>3423</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 9; [Defence appeal brief on lawfulness of activation of regulation 55](#), paras. 14(G) and 63.

<sup>3424</sup> [Defence appeal brief on lawfulness of activation of regulation 55](#), para. 14(G)(i) and 63-65.

<sup>3425</sup> [Defence appeal brief on lawfulness of activation of regulation 55](#), para. 14(G)(ii) and 66.

<sup>3426</sup> [21 November 2012 Decision](#), para. 19.

who made the decision, which would, in the Majority's view, be excessive, in the present case, the Majority cannot be accused of lacking impartiality. Admittedly, the Chamber's deliberations on the Accused's initial mode of liability under article 25(3)(a) is already well under way. This notwithstanding, the ongoing deliberations have not, to date, focused on the specific issue of Germain Katanga's potential liability under article 25(3)(d) of the Statute. This issue is now open to discussion and the submissions of the parties and participants in this respect will be decisive. Moreover, the Majority's decision to consider a legal recharacterisation of the facts regarding Germain Katanga was based on a thorough review of the evidence in the case.<sup>3427</sup>

1534. It further recalls that the matter was disposed of by the Appeals Chamber in its 27 March 2013 Judgment upholding the impugned decision:

104. First, the Trial Chamber does not risk being seen as "performing a prosecutorial function". Regulation 55 of the Regulations of the Court exists so as to assist the judges in ensuring that justice is done in individual cases by means of giving notice that the legal characterisation of facts may be subject to change in pursuing its duty to establish the truth and "to close accountability gaps". Regulation 55 of the Regulations of the Court specifically empowers the Trial Chamber to give such notice, even in the absence of a request by the Prosecutor to that effect. Giving such notice is therefore a neutral judicial act, which, without more, has no impact on the impartiality of the Judges exercising their powers. As argued by the Prosecutor, if the argument of Mr Katanga were to be accepted, then the provision would, in effect, be rendered inapplicable.

105. Second, the Appeals Chamber specifically finds that the stage of the proceedings at which regulation 55 of the Regulations of the Court was invoked also does not give rise to an appearance of bias. The Appeals Chamber does not conclude that any of the considerations that were outlined in the previous paragraph are affected by the stage at which the notice under regulation 55 of the Regulations of the Court is given. Finally, the Appeals Chamber does not accept that the language used in the Impugned Decision affects its conclusion: the Trial Chamber was fully aware that the final decision on the legal re-characterisation, if any, would and could only be taken in the decision pursuant to article 74 of the Statute, following, *inter alia*, the receipt of submissions from the parties.<sup>3428</sup>

1535. Since the Appeals Chamber has made most plain its position on the lack of bias of the Bench hearing this case, and since no valid reason has been identified at this juncture to cast further doubt on the impartiality of the Majority, the Majority considers that it need not entertain the matter further. Accordingly, the

<sup>3427</sup> [21 November 2012 Decision](#), para. 19 (footnotes omitted).

<sup>3428</sup> [27 March 2013 Appeals Chamber Judgment](#), paras. 104-105 (footnotes omitted).

argument of the violation of the right of the Accused to a fair trial is also unfounded.

**e) Whether the Accused had adequate time and facilities for the preparation of the defence**

1536. As a preliminary comment, it must be underlined that during the period preceding notice of the recharacterisation and once duly informed of the charges, the Defence had the opportunity to call those witnesses whom it wished to testify for Germain Katanga and to cross-examine the Prosecution witnesses. At that time, it was entirely at liberty to lay before the Chamber its conception of the case, to impugn certain facts, as presented by the Prosecution witnesses, and to cast doubt on their credibility.

1537. Regulation 55(3) of the Regulations of the Court mandates that in affording notice of a possible change to the legal characterisation, as was the case on 21 November 2012, the Chamber is duty-bound, in application of paragraph 2, to ensure, *inter alia*, that the accused has adequate time and facilities for the effective preparation of the defence.

1538. In this respect, it must be recalled that where regulation 55 of the Regulations of the Court is implemented, further investigations or searches for new evidence are not the only possible means of mounting a defence. In fact, the Defence also has the possibility of stating its position in the light of and with regard to the existing body of evidence in the record, thereby allowing it to adapt its defence strategy to the new legal characterisation envisioned. It must therefore have the possibility to clarify, supplement and nuance the oral and written submissions which it previously advanced in respect of the mode of liability initially confirmed by the Pre-Trial Chamber.<sup>3429</sup>

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<sup>3429</sup> [2 October 2013 Decision](#), para. 17.

1539. To satisfy itself that the legal characterisation contemplated duly meets the requirements of article 67(1)(b) and 67(1)(e) of the Statute, the Chamber will therefore review the circumstances in which the recharacterisation phase of the proceedings took place. It will dwell particularly on all of the measures it took to protect the rights of the Accused. First under consideration will be the matter of the opportunity, in the broadest sense, which was afforded to the Defence to: (1) present its case on the recharacterisation envisioned and to put across its view on the correlation between the law on article 25(3)(d) with existing evidence on record; and (2) the opportunity accorded to it to tender new evidence into the record, following notice of possible recharacterisation. In this respect, the leading of new evidence, subsequent to the implementation of regulation 55, may take a number of forms: the recalling of witnesses who testified at trial, whether for the Prosecution or the Defence; the calling and the testimony of new witnesses, be they persons whom the Defence met in the course of its earlier investigations<sup>3430</sup> or newly identified persons; and the tendering of new documentary evidence.

**i. The opportunity to present its case on the recharacterisation envisioned and on the correlation of existing evidence with the law on article 25(3)(d)**

1540. The Chamber first notes that all of the incriminating evidence relied on by the Prosecution was canvassed and tendered into the record prior to notice of the recharacterisation. It observes in this respect that counsel for Germain Katanga had, both prior to notice of the legal recharacterisation and thereafter, the opportunity and means to mount a complete defence and to advance every argument on the Prosecution witnesses' live evidence concerning the initial factual allegations. Hence, in the present case, evidence was led in complete adversariality.

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<sup>3430</sup> Jean Logo, an investigator for the Defence, testified that he had spoken to over 800 people (D02-258, T. 289, pp. 57 and 58).

1541. The Chamber recalls that on numerous occasions and over the course of several months, the Defence was in a position to present its case in respect of all the issues raised by the legal recharacterisation contemplated. It submitted written observations supplementing, bolstering or nuancing its initial arguments and responded to those of the Prosecution and the legal representatives of victims.

1542. As aforementioned, the Defence prepared three documents setting out its observations on legal and factual issues and on substantive matters arising from the legal recharacterisation envisioned,<sup>3431</sup> as well as one reply.<sup>3432</sup> For the purposes of its preparation, the Defence team, entirely reinstated in late November 2012,<sup>3433</sup> was also afforded the three months of the appellate proceedings against the 21 November 2012 decision affording notice.<sup>3434</sup>

1543. In addition, the Chamber wishes to draw particular attention to three measures it considered important to implement, and did so at its own initiative to facilitate the Defence's preparation.

1544. Firstly, it informed the Defence on 21 November 2012 that it was dismissing two Prosecution witnesses, P-219 and P-250. In so doing, the Chamber allowed the Defence, at that juncture, to take account of its appraisal of the credibility of certain key Prosecution witnesses, considering that "[t]his information w[ould] allow the Defence to identify more quickly that evidence to which it does not need to refer in the current context."<sup>3435</sup> The measure, of which the Defence availed itself in preparation of its three briefs, undoubtedly saved it time, allowing it to respond with much greater efficiency to the proposed recharacterisation.

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<sup>3431</sup> [First Defence observations on article 25\(3\)\(d\)](#); [Second Defence observations on article 25\(3\)\(d\)](#); [Third Defence observations on article 25\(3\)\(d\)](#).

<sup>3432</sup> [Defence 17 June 2013 Reply](#).

<sup>3433</sup> [Annex to the 28 December 2012 Decision, ICC-01/04-01/07-3327-AnxA](#).

<sup>3434</sup> See also [26 June 2013 Decision](#), para. 44.

<sup>3435</sup> [21 November 2012 Decision](#), para. 39.

1545. Secondly, in its 15 May 2013 Decision, the Chamber saw fit to impart to the parties and participants the constituent elements of the mode of liability for which article 25(3)(d) of Statute makes provision.<sup>3436</sup> Thus, as of its second brief on the subject, the Defence was in a position to better tailor and impart relevance to its observations inasmuch as it was informed of the constituent elements of the law on which the Chamber intended to rely. Thus apprised, the Defence was able to dispense with alternative arguments on the application of the constituent elements of the mode of liability contemplated. Of note, however, is that, in some regards, the Defence subsequently elected to expound a factual argumentation which did not adopt the legal elements which the Chamber had sought to bring to its attention.<sup>3437</sup>

1546. Thirdly, on 2 October 2013 and of its own accord, the Chamber again invited the Defence to submit, if it so desired and on the basis of the existing evidence on record, further observations on the gamut of topics determined in its 26 June 2013 Decision.<sup>3438</sup>

1547. Ultimately, the Defence observations, both factual and legal, and entertained in the Chamber's analysis of Germain Katanga's responsibility, were undeniably facilitated and simplified by the measures it took.

## **ii. The opportunity to tender new evidence into the record**

1548. Once put on notice pursuant to regulation 55(2) of the Regulations of the Court, the Defence essentially strove to underline the importance of conducting further investigations, maintaining that some factual material underpinning the new legal characterisation entailed aspects new to the case. Accordingly, it informed the Chamber of the many issues which, in its view, were insufficiently analysed and explored in the evidence on record and which it wished to analyse

<sup>3436</sup> [15 May 2013 Decision](#), para. 16.

<sup>3437</sup> See, for example, [Second Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3438</sup> [2 October 2013 Decision](#), para. 18.

and pursue further in prospect of legal recharacterisation effected on the basis of article 25(3)(d) of the Statute.

1549. Thus in its 26 June 2013 Decision, the Chamber itemised the various points which the Defence wished to investigate further<sup>3439</sup> by grouping them in clusters of topics, and thus opined:

17. [...] 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. Only subsequently will the Chamber rule on the need to grant more detailed requests brought before it.<sup>3440</sup>

It accorded the Defence three months for the conduct of additional investigations.<sup>3441</sup>

1550. Based on information from the Defence, the Chamber enjoined the Registry to adjudge, as a matter of urgency, any application for review of the funding arrangements for its team in prospect of further investigations.<sup>3442</sup> Indeed, the Defence had stated that it was operating with a depleted team and at the time had neither investigators nor co-counsel, which was the case for one month, from April to May 2013. Nonetheless, it neglected to mention that, save for the month

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<sup>3439</sup> At the time, the Chamber identified six different topics: (1) the relationship between the Accused and the members of the Ngiti group of commanders and combatants and the extent of the cooperation between the various combatants, commanders and camps prior to the attack on Bogoro; (2) the meetings between the group members and Germain Katanga's presence or absence at meetings where a criminal plan was discussed; (3) the behaviour of the group members prior to the battle of Bogoro and Germain Katanga's particular knowledge thereof (in particular, the battle of Nyakunde); (4) the identification of the physical perpetrators of the crimes and excesses by combatant groups other than the Ngiti; (5) Germain Katanga's coordinating role; and (6) the supply of weapons and their use in the 24 February 2003 attack on Bogoro.

<sup>3440</sup> [26 June 2013 Decision](#), paras. 17-18.

<sup>3441</sup> [26 June 2013 Decision](#). The Chamber is of the view that in this regard, the Defence need not seek leave to conduct the investigations it considers necessary.

<sup>3442</sup> [26 June 2013 Decision](#), paras. 47-51.

mentioned, its team had been fully reinstated as of late November 2012 and that thenceforth and upon its request, funds could be released for the further investigations which its 21 December 2012 application for leave to appeal had already presented as necessary.<sup>3443</sup> Lastly, the Chamber wishes to underscore that, until June 2013, at no time did the Defence see it necessary to move the Chamber pursuant to regulation 83(4) of the Regulations of the Court, which concerns the scope of legal assistance paid by the Court.

1551. In the said 26 June 2013 Decision, the Chamber directed the Defence to provide by 29 July 2013 an initial list of witnesses whom it wished to call and to submit the final list of its evidence by 17 September 2013. It emphasised that, in accordance with regulation 35 of the Regulations of the Court, the Chamber should be moved forthwith and by reasoned request, as regards any extension of time.<sup>3444</sup>

1552. Further in the 26 June 2013 Decision, the Chamber was also careful to delineate clearly the purview, as it saw it, of regulation 55:

56. [...] The Chamber therefore fully accepts that in the light of this new account of the facts, the Defence might consider it necessary to scrutinise certain facets of the case record not considered of paramount importance when the initial legal characterisation was considered. However – and this bears underscoring – the objective of the procedure established by regulation 55 is not a retrial or, as the Defence has itself stated, is not to afford the parties and participants a second bite at the cherry.<sup>3445</sup>

1553. It 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 investigations so that the latter could arrive at a definitive list of persons, if any, whom it might seek to recall or call.<sup>3446</sup> Mindful, however, that the new procedural phase should proceed

<sup>3443</sup> [Request for Leave to Appeal the 21 November 2012 Decision](#), para. 54. See also [Defence appeal brief on lawfulness of activation of regulation 55](#), paras. 49 and 51.

<sup>3444</sup> [26 June 2013 Decision](#), para. 45.

<sup>3445</sup> [26 June 2013 Decision](#), para. 56.

<sup>3446</sup> [26 June 2013 Decision](#), para. 18.

expeditiously, it wished to circumscribe it by laying down the foregoing time limits.

1554. The Chamber must further underline that, in its 26 June 2013 Decision, it made clear that it would rule on the propriety and necessity of recalling specific witnesses in the light of specific motions from the Defence.<sup>3447</sup>

**a. New evidence from recalled witnesses**

1555. The Defence first stated that it foresaw recalling certain Prosecution witnesses to question them further on the identification of the physical perpetrators of the crimes.<sup>3448</sup> To this end, the Chamber therefore satisfied itself of the prompt and full cooperation of the Prosecution and the Registry.<sup>3449</sup>

1556. The Defence subsequently stated that, in close cooperation with the Office of the Prosecutor, it had undertaken a short mission to the DRC during which it was able to meet and question P-323, P-233 and P-268, the three Prosecution witnesses whose recall it had raised.<sup>3450</sup> Ultimately, the Defence explained that although the witnesses, particularly P-323, had undoubtedly provided further and relevant information, it did not, however, seek their recall nor that of any other Prosecution witness.<sup>3451</sup> The Chamber must therefore conclude that the Defence was afforded the opportunity to recall these various witnesses, specifically to question them in greater detail as to facts of particular salience to the legal recharacterisation, but notes, however, that the Defence elected not to do so.

1557. Turning now to Defence witnesses, the Defence first stated that it envisioned recalling some, including Witnesses D02-148 and D02-176.<sup>3452</sup> Although the

<sup>3447</sup> [26 June 2013 Decision](#), paras. 18, 52-56 and 61.

<sup>3448</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 51. See also [Defence 17 June 2013 Reply](#), paras. 13, 18 and 19.

<sup>3449</sup> See, in particular, [26 June 2013 Decision](#), paras. 36, 44 and 59; 19 February 2014 Decision, confidential annex 6.

<sup>3450</sup> [First Defence observations on further investigations](#), paras. 9-10.

<sup>3451</sup> [First Defence observations on further investigations](#), para. 12.

<sup>3452</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 53.

Chamber invited the Defence to make clear whether it intended to seek their recall, no response was forthcoming.<sup>3453</sup> The Defence subsequently confirmed in its first observations on its further investigations that it did not intend to seek the recall of Witnesses D02-350 and D02-236.<sup>3454</sup> It then added that it needed more time to decide whether to seek the recall of Witness D02-228 and informed the Chamber that it was not in a position to provide an answer as regards the recall of the other Defence witnesses whom it had mentioned.<sup>3455</sup> From the various Defence requests and observations filed, particularly its 17 September 2013 observations, it is clear to the Chamber that the Defence chose not to recall its witnesses.

**b. New evidence from the calling of new witnesses or the admission of new documentary evidence**

1558. The Defence stated that, as part of its new investigations, it planned to travel to Ituri (primarily to Bogoro, Aveba, Zumbe, Tchomia, Gety, Bavi, Nyakunde, Kasenyi, Kagaba and Bunia), North Kivu (Beni and Goma) and Kinshasa to meet potential witnesses.

1559. To ascertain whether it had adequate time and facilities for the preparation of the defence, it is necessary to determine in particular whether it had the resources to further investigate as it wished. To this end, and with reference to the observations of the parties, participants and the Registrar, the Chamber will first turn to the modus operandi of the Defence, the circumstances of its investigations, specifically the difficulties encountered, and the measures which would have been feasible. It will then appraise the implications of such factors on the fairness of the proceedings.

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<sup>3453</sup> [26 June 2013 Decision](#), para. 37.

<sup>3454</sup> [First Defence observations on further investigations](#), para. 14.

<sup>3455</sup> [First Defence observations on further investigations](#), paras. 14-15.

(i) *Modus operandi of the Defence*

1560. As concerns Defence investigations actually undertaken, the succinct information it provided makes clear that its investigator was able to travel to Bunia, where he stayed for a number of weeks,<sup>3456</sup> and visit Bogoro and Zombe in August 2013.<sup>3457</sup> The Defence further stated that three members of its team travelled to Bunia and Kinshasa in late August 2013 for investigative purposes,<sup>3458</sup> but that travel to other places of real interest to it had to be cancelled. It also seems that in early September 2013, members of the Defence team spent one day in Makala Prison trying to meet potential witnesses, but to no avail.<sup>3459</sup>

(ii) *Investigative difficulties encountered*

1561. The Defence maintains that owing to difficulties encountered when it decided to travel to the DRC in July, August and September 2003, it was not in a position to undertake meaningful investigations and, hence, tender new evidence into the record. It explained that the difficulties arose out of circumstances wholly independent of its volition and beyond its control.<sup>3460</sup>

1562. The Chamber notes that many of the obstacles thus raised had already been encountered before and during the trial in the course of earlier investigations, since the situation in Ituri has always been particularly volatile. By way of example, in his in-court testimony, Defence investigator Jean Logo specifically described the regional security situation in July 2011, and in Walendu-Bindi in

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<sup>3456</sup> First Defence observations on further investigations, para. 16; Second Defence observations on further investigations, para 19.

<sup>3457</sup> Second Defence observations on further investigations, para. 22.

<sup>3458</sup> Second Defence observations on further investigations, paras. 15 and 23.

<sup>3459</sup> Second Defence observations on further investigations, paras. 36-37.

<sup>3460</sup> See, in particular, Second Defence observations on further investigations, paras. 2 and 41.

particular, as very volatile.<sup>3461</sup> In his words, it was “[TRANSLATION] dangerous to go there” due to the presence of certain armed groups.<sup>3462</sup>

1563. In its 5 August 2013 brief, the Defence stated that it had been unable to further investigate as it had wished in Walendu-Bindi, Beni and Goma.<sup>3463</sup> In two subsequent briefs of 17 September and 4 October 2013, it also complained of poor roads and maintained that whilst it was possible to drive between Bunia and Lake Albert in July 2013, driving conditions had deteriorated by 16 August 2013 such that planned missions to Tchomia and Kasenyi had to be cancelled.<sup>3464</sup> It also drew attention to the limited telephone network coverage and noted that the damage to important radio transmitters by the M-23 forces then active in eastern DRC had further obstructed communication.<sup>3465</sup> Although contact was made with some witnesses, it claims that it encountered difficulties in arranging meetings with potential witnesses by telephone, given, moreover, that few Ngiti own telephones.<sup>3466</sup>

1564. Without wishing to cast doubt on the foregoing difficulties, the Chamber is of the view that they must be put into perspective. In that connection, it notes that the Prosecution and the Legal Representatives of the victims disputed the actual significance of the obstacles raised and the Legal Representatives recalled that such difficulties constantly afflicted the parties and participants when travelling in the field.<sup>3467</sup> The Registrar was of the view that in some cases, the lack of

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<sup>3461</sup> D02-258, T. 286, pp. 53-55.

<sup>3462</sup> D02-258, T. 288, p. 73.

<sup>3463</sup> [First Defence observations on further investigations](#), para. 16.

<sup>3464</sup> Second Defence observations on further investigations, para. 11; Third Defence observations on further investigations, para. 25.

<sup>3465</sup> Second Defence observations on further investigations, para. 11; Third Defence observations on further investigations, paras. 21-24.

<sup>3466</sup> Third Defence observations on further investigations, para. 24.

<sup>3467</sup> Prosecution observations on further Defence investigations, paras. 11 and 15; Legal Representatives of Victims, “*Observations sur le document intitulé ‘Defence second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013’ (ICC-01/04-01/07-3397-Conf)*”, 25 September 2013, ICC-01/04-01/07-3401-Conf, para. 16.

security on the roads could be overcome by the use of military escort in certain circumstances.<sup>3468</sup> As regards the obstacles occasioned by malfunctioning radio transmitters, the Chamber remarks that, in any event, telephone did not, as the Defence itself put it, seem to be the best means of contacting its witnesses. Indeed, it stated that the telephone numbers which it had for potential witnesses frequently changed, their contacts often mistrusted telephones and that face-to-face meetings were preferable<sup>3469</sup> – a point which it most certainly made during its earlier investigations. Viewed from this perspective, the difficult conditions it describes do not therefore appear entirely unprecedented.

1565. The Chamber further wishes to note that in the view of the Registrar, it was impossible to travel to Aveba, Tchomia, Gety, Bavi and Kasenyi between July and September 2013.<sup>3470</sup> The Chamber also notes that several of the witnesses whom the Defence planned to meet lived in these areas.<sup>3471</sup>

1566. The Chamber notes, further still, that as of 21 August 2013, it had become impossible to travel to Goma and Beni and that as of 23 August, the same held true for travel to Bogoro, Zombe and Nyakunde.<sup>3472</sup> Defence investigations were therefore affected by unforeseen events, which in some cases entirely precluded its travel to a given area and in other instances temporarily impeded it.

1567. On a different subject, the Defence argued that during the course of its investigations it had been unable to speak in confidence and to forge a relationship of trust with those whom it met. Further still, it maintained that its investigator was only able to have limited contact with potential witnesses.<sup>3473</sup> From the information laid before the Chamber, it appears that the Defence was well-placed to identify and meet *in situ*, including through its investigator, a

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<sup>3468</sup> Registrar's observations on further investigations, paras. 4-6.

<sup>3469</sup> Third Defence observations on further investigations, para. 24.

<sup>3470</sup> Registrar's observations on further investigations, para. 18.

<sup>3471</sup> First annex.

<sup>3472</sup> Registrar's observations on further investigations, see, in particular, para. 18.

<sup>3473</sup> Second Defence observations on further investigations, paras. 34-37.

number of potential witnesses.<sup>3474</sup> It further notes that similar difficulties had already arisen, since the Defence itself had pointed out at trial that some persons identified as potential Defence witnesses had voiced concerns about testifying, at times refusing outright to do so for fear of implicating “to a greater or lesser extent” the Kinshasa government in the attack on Bogoro.<sup>3475</sup>

*(iii) Measures which would have been feasible*

1568. As to feasible action, the Chamber remarks, as did the Registrar, the neutral organ of the Court, which it made a point of specifically consulting on the matter, that the Defence could travel under MONUSCO military escort to Bogoro, Zumbe or Nyakunde.<sup>3476</sup> The observations laid before the Chamber on the subject confirm that, at the time, the Security and Safety Section could provide a military escort.<sup>3477</sup> The Chamber must note, moreover, that the Defence investigator’s planned missions to Beni were cancelled<sup>3478</sup> and that the Registrar’s observations confirm that a mission to the area was feasible up until 21 August 2013.<sup>3479</sup> Lastly, as regards cancellation of travel to Beni scheduled for late August 2013, the Registrar informed the Chamber that “[TRANSLATION] [n]either the Security and Safety Section nor UNDSS made any such recommendation”, and that “[TRANSLATION] the Defence team decided to cancel its mission to Beni”.<sup>3480</sup>

1569. More generally, the Chamber also notes that it was the Defence which decided to postpone again, and at the eleventh hour, the investigations scheduled for

<sup>3474</sup> See also [First Defence observations on further investigations](#), para. 16.

<sup>3475</sup> Defence for Germain Katanga, “Urgent Defence Request to Vary the Chamber’s Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus”, 21 January 2011, ICC-01/04-01/07-2659-Conf-Exp (18 March 2011, ICC-01/04-01/07-2659-Conf-Red), paras. 2-4.

<sup>3476</sup> The Registrar further pointed out that on the basis of the plan prepared by the Defence, the scheduled one-day mission to Bogoro and two-day mission to Zumbe were also feasible (Registrar’s observations on further investigations, see, in particular, paras. 5-7 and 18). See also Second Defence observations on further investigations, paras. 20-21.

<sup>3477</sup> Registrar’s observations on further investigations, para. 7.

<sup>3478</sup> Second Defence observations on further investigations, para. 12.

<sup>3479</sup> Registrar’s observations on further investigations, para. 18.

<sup>3480</sup> Registrar’s observations on further investigations, para. 14.

early August 2013.<sup>3481</sup> Of further note is that the Registrar emphasised that as of 1 August 2013, he had been “[TRANSLATION] awaiting an updated mission plan from the Defence team so as to request a MONUSCO military escort”. He informed the Chamber that “[TRANSLATION] [a]bsent a mission plan, the military escort could not [...] be confirmed”.<sup>3482</sup> Accordingly, the Chamber observes that the missions planned for early August 2013 and which the Defence decided to postpone on 2 August 2013<sup>3483</sup> were, however, in the Registry’s opinion, feasible and arrangements had been made. The further information which the Registry imparted in this respect is therefore surprising and merits restating:

[TRANSLATION] Therefore, as aforementioned, Security and Safety Section can only issue recommendations on missions on the basis of an updated mission plan. The submission of a mission plan and regular updates to it as the situation changes constitute mandatory security requirements at the Court, which also apply to members of Defence teams. On at least two occasions, Security and Safety Section’s inquiries, conveyed through Counsel Support Section, went unanswered. Failure to reply cannot alone explain why travel was impossible, but probably contributed to the present difficulties. The Registry takes this opportunity to remind the Defence of the need to comply with mandatory security requirements.<sup>3484</sup>

1570. The Chamber further notes that the Defence was offered alternatives to obviate its travel to the most high-risk areas of the DRC. It was advised to hold interviews with potential witnesses in Bunia or Uganda.<sup>3485</sup> The Defence, however, chose not to take up such alternative proposals.<sup>3486</sup>

1571. Of further note is that the Chamber had occasion to underscore, even before the additional Defence investigations commenced, that recourse to methods of testimony other than physical appearance in court was foreseeable,<sup>3487</sup> adding: “where manifest that a witness is unable to appear within such time as to comply

<sup>3481</sup> Second Defence observations on further investigations, para. 19. See also Second annex, e-mail of 2 August 2013.

<sup>3482</sup> Registrar’s observations on further investigations, para. 6.

<sup>3483</sup> Second annex; Third Defence observations on further investigations, para. 19.

<sup>3484</sup> Registrar’s observations on further investigations, para. 17 (footnotes omitted).

<sup>3485</sup> Registrar’s observations on further investigations, para. 6.

<sup>3486</sup> Registrar’s observations on further investigations, para. 18. See also in this regard, Third Defence observations on further investigations, paras. 27-28.

<sup>3487</sup> [26 June 2013 Decision](#), para. 65.

with the duty of celerity cast on the Chamber, the Bench will assess whether recourse must be had to the provisions of rule 68(a) of the Rules.”<sup>3488</sup> Although the Defence made mention of video link testimony,<sup>3489</sup> it nonetheless chose not to use it in that instance.

### c. Analysis

1572. The right to adequate time and facilities for the proper preparation of the defence presupposes that the Defence team will have sufficient time to conceive, prepare and raise meaningful and effective grounds of defence which are tailored to its case. The right to a fair trial, of which the principle of equality of arms forms an integral part, mandates, furthermore, that each party to proceedings be afforded a reasonable opportunity to present its case under conditions which do not clearly disadvantage it vis-à-vis its adversary.

1573. The determination as to whether the right to adequate time and facilities for the defence was violated cannot be a wholly abstract analysis. Everything turns on the specific circumstances of the case which the accused, counsel and the members of the Defence team had to confront and the nature and status of the proceedings.

1574. The Chamber acknowledges that in the instant case, recourse to the provisions of regulation 55 at an advanced stage in the proceedings, to a certain extent compelled the Accused to redirect, and perhaps complement his defence, which required special preparation on his part within a short space of time. Notice of a possible legal recharacterisation before the Defence rested its case would undoubtedly have lessened the impact – which, however, should not be overstated – that implementation of such a procedure may have had on its right

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<sup>3488</sup> [26 June 2013 Decision](#), para. 65. Rule 68(a) of the Rules of Procedure and Evidence provides that transcripts of *viva voce* evidence may be admitted into the record under certain circumstances.

<sup>3489</sup> [Defence 17 June 2013 Reply](#), para. 22.

to adequate time and facilities for the preparation of its defence.<sup>3490</sup> Thus, in particular to alleviate the situation, the Chamber implemented various measures to ease the Defence's preparation and enable it to respond more effectively to the new mode of liability.<sup>3491</sup> In so doing and within the legal framework circumscribed by regulation 55, the Chamber endeavoured, as far as possible, to lend assistance to the Defence where so petitioned.

1575. The precise terms of regulation 55 show that other than the provision of notice of the implementation of the recharacterisation procedure, only one procedural duty is cast on the Chamber, a duty clearly set out at paragraphs 2 and 3(a), which must be read together: it behoves the Bench, after consideration of the evidence on record, to allow the parties and participants to make submissions on the proposed recharacterisation, and, to such end, specifically ensure that the Accused has adequate time and facilities for the effective preparation of his defence in accordance with article 67(1)(b) of the Statute.

1576. As concerns the opportunity to examine or have examined a witness, to call a new witness or to present other evidence, for which paragraph 3(b) of the regulation makes provision, and which may entail investigations, the Chamber has already stated that not only did such investigations not constitute the only possible means of mounting a defence, but also, and first and foremost, that the Defence is not vested with the automatic right to avail itself of such means. In this regard, the regulation in no uncertain terms makes the opportunity contingent on the discretion of the Chamber with whom lies the prerogative to appraise whether it is "necessary".<sup>3492</sup> As regards this last point, the Chamber in any event considered that the Prosecution was unauthorised to seek the introduction of new

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<sup>3490</sup> See, in particular, [First Defence observations on article 25\(3\)\(d\)](#), para. 146.

<sup>3491</sup> See, in particular, "Section X(C)(3)(e)(i) The opportunity to present its case on the recharacterisation envisioned and on the correlation of the existing evidence with the law on article 25(3)(d)", paras. 1544-1547.

<sup>3492</sup> [21 November 2012 Decision](#), para. 57; [15 May 2013 Decision](#), paras. 27 and 28; [26 June 2013 Decision](#), paras. 53-56; [2 October 2013 Decision](#), para. 17.

evidence on the alternative mode of liability contemplated and that to grant it this opportunity anew would afford it an undue advantage.<sup>3493</sup>

1577. Hence, the Chamber must inquire as to whether, with respect to the existing evidence, the Defence, availing itself of the necessary human and financial resources, was able to present its case on the new recharacterisation. In this instance, the Defence, composed of an entirely new team as of late November 2012,<sup>3494</sup> had the necessary human and financial resources to produce all the analyses and observations which it deemed necessary. As underscored, it did so by obtaining not only the Chamber's analysis of the credibility of certain key Prosecution witnesses but also of the law on the new characterisation envisaged. Subsequently and in the course of its rulings, the Chamber saw it necessary to provide it with numerous references to the relevant parts of the *Decision on the confirmation of charges*, to set out its views on some of the Decision's factual allegations to which it would refer<sup>3495</sup> and to specify how some of the issues raised by the Defence could be tackled and understood, including as regards the camps and commanders of Walendu-Bindi *collectivité*,<sup>3496</sup> the common purpose<sup>3497</sup> and the group's criminal intention.<sup>3498</sup>

1578. The submissions produced by the Defence, as provided for by regulation 55(2) of the Regulations of the Court, were therefore fully informed. Further still, it bears recalling that the Chamber took the initiative to invite further submissions from the Defence on the existing evidence on record, even though it had already done so in its first and second briefs. In fact, it appears that immersed in its

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<sup>3493</sup> [21 November 2012 Decision](#), para. 56.

<sup>3494</sup> [Annex to the 28 December 2012 Decision, ICC-01/04-01/07-3327-AnxA.](#)

<sup>3495</sup> [15 May 2013 Decision](#), paras. 19, 21, 23 and 25.

<sup>3496</sup> [26 June 2013 Decision](#), para. 25.

<sup>3497</sup> [26 June 2013 Decision](#), paras. 27 and 28.

<sup>3498</sup> [26 June 2013 Decision](#), paras. 30-32.

investigations, the Defence had somehow “overlooked”<sup>3499</sup> the procedural opportunity to which regulation 55 nonetheless attaches particular importance.

1579. The Chamber notes that ultimately the Defence was able to undertake part of the further investigations it had desired to conduct, whereas they were not indispensable to the fairness of the trial. In this respect, it must be recalled that the Chamber was well-disposed to the Defence’s exploration of certain issues and even saw fit to set out for it in detail those factual topics which appeared particularly relevant to the legal recharacterisation context.<sup>3500</sup> In pursuing its further investigations, the Defence once more availed itself of the necessary human and financial resources and, moreover, was in a position to move the Registry to that end well before July 2013. Apprised, as from the of 21 November 2012 Decision, of the possibility of a legal recharacterisation of the mode of liability, the Defence was able to start developing its strategy for further investigations and promptly take all the necessary measures.<sup>3501</sup> The Chamber must note further that the Defence merely made frequent references to the prospect of fresh investigations, whilst displaying from the outset the utmost doubt as to their potential outcome, even suggesting that they should in any event be postponed.<sup>3502</sup>

1580. The outcome of the further investigations is known in part: the Defence ultimately chose not to recall the Prosecution witnesses whom it considered material and whom it could have met in the DRC, electing also not to recall its witnesses, whom it had mentioned by name.

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<sup>3499</sup> [2 October 2013 Decision](#), para. 17.

<sup>3500</sup> [26 June 2013 Decision](#), paras. 17 and 58.

<sup>3501</sup> See, in particular, [26 June 2013 Decision](#), para. 44.

<sup>3502</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 55; [Request for Leave to Appeal the 21 November 2012 Decision](#), para. 50; [First Defence observations on further investigations](#), para. 16; [Defence appeal brief on lawfulness of activation of regulation 55](#), para. 49. See also [Second Defence observations on further investigations](#), para. 2.

1581. The Defence declined to justify specifically the need to further investigate persons whom the Defence investigator had “[TRANSLATION] pursued”<sup>3503</sup> and succeeded in contacting in the DRC and who had not testified at trial. It so refrained on 17 September 2013, upon expiry of the time imparted and thereafter, despite the Chamber’s express direction for such justification.<sup>3504</sup> Indeed, in both the 15 May 2013 and 26 June 2013 decisions, the Chamber had stressed the importance of receiving material to allow it to appraise whether it was “necessary” to implement the provisions of regulation 55(3)(d) of the Regulations of the Court.<sup>3505</sup>

1582. The Chamber must further point out that, whereas pursuance of interviews with certain persons whom the Defence may have met for the first time in summer 2013 may have been important, it was at liberty to request an extension of time, provided that, as the Chamber had made clear, justification was provided.<sup>3506</sup> Yet, once more the Defence refrained from availing itself of the opportunity which the Chamber had nonetheless expressly offered, other than generally seeking further time for its investigations – no further information or justification was forthcoming as to the importance of a given piece of *viva voce* evidence to its case or its relevance to the recharacterisation.<sup>3507</sup>

1583. In addition, had the persons pursued and met *in situ* voiced concern at the prospect of speaking and hence testifying, the Defence should have taken action for the implementation of the proper protection procedures as provided by the founding instruments for situations of this kind. Once again, it must be noted that it chose not to seek protective measures which, had it genuinely needed to call such persons, would have allowed it to do so in optimal conditions.

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<sup>3503</sup> Second Defence observations on further investigations, para. 22. See also Third Defence observations on further investigations, paras. 19 and 24.

<sup>3504</sup> [26 June 2013 Decision](#), para. 62; [2 October 2013 Decision](#), para. 15.

<sup>3505</sup> [15 May 2013 Decision](#), para. 27; [26 June 2013 Decision](#), paras. 53 and 54.

<sup>3506</sup> [26 June 2013 Decision](#), para. 45.

<sup>3507</sup> See in this regard, Second Defence observations on further investigations, paras. 2 and 45; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 8 and 93(ii)(a).

1584. The Chamber must assume that since it had the resources necessary for the purpose, the Defence did its utmost to secure fresh evidence of relevance to its case in the areas to which it was able to travel. If the investigations undertaken proved unsatisfactory, it was entirely at liberty to so observe. No automatic right vests in the defence to secure an outcome which always suits its case. The Chamber notes that the Defence had a reinstated team which enjoyed access to the body of evidence on record and had the opportunity to gather further evidence. That the Defence was unable to uncover fresh evidence of relevance to its case and to bolster the arguments which it wished to bring to the fore does not, however, mean that it was unable to prepare effectively.

1585. Admittedly, the Defence was unable to travel to all areas of interest. Here it is important to underscore that the fairness of proceedings requires only that the defence be afforded optimal access to information which it considers of relevance to mounting a defence.<sup>3508</sup> Access to information is an important ingredient of a fair trial, but restricted access thereto, be it the creature of circumstances or of any other ilk, is not intrinsically incompatible with the fairness requirement.

1586. Moreover, it must be noted that the Chamber, and it, would appear, the Defence itself were unable to appraise the relevance of any information which may have been provided by the vast majority of potential witnesses living in the areas to which travel was precluded. Indeed, the First annex makes clear that part of the Defence investigations consisted entirely of engaging in a “fishing expedition” on the basis of the barest of information, which sometimes concerned solely the person’s whereabouts – no information of a temporal nature or alluding to the experience of the potential witness was provided.<sup>3509</sup> At no time, therefore,

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<sup>3508</sup> Defence for Germain Katanga, “Urgent Defence Motion for Cooperation of the DRC Government”, 23 February 2010, ICC-01/04-01/07-1900-Conf-Exp (25 August 2011, ICC-01/04-01/07-1900-Red2), paras. 19.

<sup>3509</sup> The persons are those identified as follows: D-097, D-132, D-084, D-063, D-150, D-269, D-039, D-275, D-217, D-278, D-113, D-114, D-018, D-101, D-082, D-027, D-200, D-284, D-221, D-227 and D-213 (First annex).

was the Chamber in a position to appraise the relevance of the information which such potential witnesses may have brought.

1587. It is true that the list furnished by the Defence includes a number of witnesses who, at first sight, could conceivably be relevant on account of their presence at the battle of Bogoro, or in Nyakunde in 2002. However, the Chamber notes that the overwhelming majority of them appeared to live<sup>3510</sup> in areas which the Defence actually visited or to which, as mentioned, it could have travelled (Beni and Goma in particular). Of note is that the Defence did not impart the information which would have allowed the Chamber to gauge the significance of such evidence and does not appear to have exploited all of the resources at its disposal to meet with the potential witnesses living in areas to which it decided not to travel unimpeded by security considerations. The aforementioned unilateral decision taken on 2 August 2013 to postpone the investigations is particularly decisive in that regard.

1588. From all of the foregoing, it is the Chamber's view that, in the instant case, the stipulations of article 67(1)(b) of the Statute, and hence article 67(1)(e) were not violated.

**f) Whether the Accused was tried within a reasonable time**

1589. The Chamber recalls that in its 21 November 2012 Decision,<sup>3511</sup> it ruled on how the right to be tried without undue delay must be construed and how, in that respect, the phase preceding the implementation of regulation 55 must be appraised.

1590. Regarding the conduct of the phase concerning the implementation of regulation 55, the Chamber heeded the Appeals Chamber's direction to ensure that it proceeded fairly but also, and particularly when it entered the latter stages,

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<sup>3510</sup> Third Defence observations on further investigations, para. 18.

<sup>3511</sup> [21 November 2012 Decision](#), paras. 43-46.

within a reasonable time. The analysis set down in this section, the perfect regularity in the sequence of written submissions, which were produced at its behest, and the decisions it rendered since 21 November 2012 show, if proof were needed, that the Bench was ever mindful of the need for expeditiousness. Faced with the need to achieve a delicate balance, it ensured that the Defence could play its part under the fairest possible conditions and it did so by responding to each of the Defence's written submissions and offering guidance to the Defence, whilst steering the recharacterisation procedure within a strict timeframe.

1591. It is the Chamber's view that the requirements of article 67(1)(c) were fully respected.

#### **4. Conclusion**

1592. Accordingly, the Chamber considers that it has overseen the fair and expeditious conduct of the trial in the case at bench, with due regard for the rights of the Accused.

1593. As to the 11 December 2013 Defence motion to stay the proceedings,<sup>3512</sup> the Chamber recalls that in adjudging a remedy of that nature, the Appeals Chamber held a stay to be a "drastic remedy"<sup>3513</sup> to which recourse would only be countenanced where a fair trial is precluded by breaches of the fundamental rights of the accused.<sup>3514</sup>

1594. As the Chamber previously found, the difficulties which beset the Defence investigations did not entail any violation of the rights of the Accused, and articles 67(1)(b), 67(1)(c) and 67(1)(e) in particular.

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<sup>3512</sup> Request for Stay of Proceedings; "Section X(C)(1) Procedural background", para. 1436.

<sup>3513</sup> [\*The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"\*](#), 8 October 2010, ICC-01/04-01/06-2582, para. 55.

<sup>3514</sup> [\*The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 \(2\) \(a\) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772\*](#), para. 37.

1595. Accordingly, the Chamber cannot grant the Defence motion for a permanent stay of the proceedings.

## D. RESPONSIBILITY WITHIN THE MEANING OF ARTICLE 25(3)(D) (ACCESSORYSHIP)

1596. The Chamber must now consider whether Germain Katanga has incurred criminal responsibility on the basis of article 25(3)(d) of the Statute. To this end, it will first define the applicable law, and having rehearsed the submissions of the parties and participants, it will determine whether the constituent elements of the mode of liability are met in the case at bar.

### 1. Applicable law under article 25(3)(d)

#### a) Submissions of the parties and participants

##### i. Prosecution

1597. The Prosecution viewed article 25(3)(d) of the Statute as a residual form of liability,<sup>3515</sup> for which individual responsibility may be accrued by a person who contributes “in any other way” to the commission of a crime.<sup>3516</sup> In its words, *any* contribution to the crime is sufficient,<sup>3517</sup> although it is pointed out that an *actual* or a *real* contribution must be construed as a sufficiently significant or considerable contribution.<sup>3518</sup>

1598. To the Prosecution, article 25(3)(d) does not ordain that the contribution be provided directly to the physical perpetrators of the crimes;<sup>3519</sup> it suffices, in its view, for it to be provided to any member of the group acting with a common purpose, regardless of whether that member is the physical perpetrator of one of

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<sup>3515</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 11.

<sup>3516</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 11.

<sup>3517</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 11 and 13.

<sup>3518</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 12.

<sup>3519</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 13.

the crimes.<sup>3520</sup> The contribution, it is submitted, may also be linked to the material elements of the crimes or equally to their subjective elements, for example the boosting of troop morale.<sup>3521</sup>

1599. The Prosecution further contended that although the language of article 25(3)(d) does not so provide, the accused may belong to the group acting with a common purpose.<sup>3522</sup>

1600. As to the common purpose requirement, the Prosecution considered that the concept of “common plan” affirmed by the jurisprudence of the Court in relation to article 25(3)(a) of the Statute is functionally identical to the statutory requirement of article 25(3)(d).<sup>3523</sup> Thus, to its mind, the common purpose must include an element of criminality<sup>3524</sup> and its existence can be inferred from the concerted action of a group of persons.<sup>3525</sup> By analogy with joint criminal enterprise, the Prosecution submits that the group acting with a common purpose need not be organised in a military, political or administrative structure.<sup>3526</sup>

1601. For the Prosecution, the intent laid down in article 25(3)(d) of the Statute applies only with respect to the conduct that constitutes such contribution and not to the consequences of the contribution,<sup>3527</sup> and such intent must be defined by reference to article 30(2)(a). Lastly, in its view, the accused need not satisfy the subjective elements of the crimes.<sup>3528</sup>

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<sup>3520</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 13.

<sup>3521</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 13.

<sup>3522</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 9, citing the [Decision on the confirmation of charges in Mbarushimana](#).

<sup>3523</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 7.

<sup>3524</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 7.

<sup>3525</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 8.

<sup>3526</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 10.

<sup>3527</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 15-16.

<sup>3528</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 17.

## ii. Defence for Germain Katanga

1602. To the Defence, article 25(3)(d) is the most controversial mode of liability in the Statute,<sup>3529</sup> and it underscores the ambiguity of its terminology.<sup>3530</sup> Underlining that publicists guard against the vagueness of the provision<sup>3531</sup> and the ill-defined nature of the mode of liability, the Defence maintained that application of article 22(2) of the Statute is wholly warranted: article 25(3)(d) must be interpreted in favour of the Accused.<sup>3532</sup>

1603. It drew attention to the tortuous drafting negotiations on this provision,<sup>3533</sup> which resulted in a compromise solution, *viz.* a form of accessoryship which lays down responsibility founded on a group of persons acting with a common purpose.<sup>3534</sup> The Defence further emphasised that the drafters of the Statute rejected criminalisation of mere membership of a group<sup>3535</sup> and that the Chamber must ensure that statutory provisions do not degenerate into a form of collective guilt.<sup>3536</sup> Such an interpretation, in the Defence opinion, would infringe the gravity threshold under article 17(1)(d) of the Statute and the Preamble, since the aim is not to criminalise “very indirect and remote contributions to crimes”.<sup>3537</sup>

1604. As to the nature of the contribution, the Defence argued that what is required is a *real* contribution in the sense that what was done must have been capable of making a tangible difference to the successful commission of the crimes.<sup>3538</sup> In its submission, the Court’s mandate to try only the most serious crimes requires that the Chamber discard what would amount to criminalisation of any contribution

<sup>3529</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 31 and 37.

<sup>3530</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 34.

<sup>3531</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 37.

<sup>3532</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 39.

<sup>3533</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 31.

<sup>3534</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 31.

<sup>3535</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3536</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3537</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3538</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 44.

to the crime, irrespective of its significance.<sup>3539</sup> Thus, the Defence contended, for liability to accrue under article 25(3)(d) of the Statute, the evidence must evince a substantial contribution on the part of an accused.<sup>3540</sup> The Defence underlined the similarity between paragraphs (c) and (d) of article 25(3) of the Statute<sup>3541</sup> and argued that there is no reason to distinguish the level of contribution required by each of these forms of accessoryship.<sup>3542</sup> In its view, implementation of article 25(3)(d) therefore requires the establishment of the typical characteristics of accessorial liability, *viz.* that the person's act had a substantial effect on the commission of the crime by someone else.<sup>3543</sup> In this regard, the Defence suggested that the word "substantial" be defined with reference to its definition in *Tadić*: "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed".<sup>3544</sup> It recalled that according to such jurisprudence, easily exchangeable contributions may not be considered substantial.<sup>3545</sup>

1605. Lastly, the Defence recalled Pre-Trial Chamber I's holdings in *Mbarushimana* that the contribution to the crime must at least be significant.<sup>3546</sup> If the Chamber were not to require a "substantial" contribution, it should, in its view, require at least a "significant" contribution and adopt the factors in the *Mbarushimana* ruling.<sup>3547</sup>

1606. As to the common purpose, the Defence submitted that its similarity to joint criminal enterprise could allow the Chamber to draw on the jurisprudence of the

<sup>3539</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 44.

<sup>3540</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 47.

<sup>3541</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 48.

<sup>3542</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 48.

<sup>3543</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 47.

<sup>3544</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 49. See also [ICTY, Tadić Trial Judgement](#), para. 688.

<sup>3545</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 49.

<sup>3546</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 45.

<sup>3547</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 50.

ad hoc tribunals and adopt a similar interpretative *modus operandi*.<sup>3548</sup> To its mind, the group's common purpose must be criminal in the sense of containing at least an element of criminality.<sup>3549</sup> Further still, the purpose must be aimed at committing crimes within the jurisdiction of the Court.<sup>3550</sup>

1607. In the Defence view, the crimes charged must have been committed by the members of a group acting with a common purpose.<sup>3551</sup> It further contended that the crimes must fall within the common purpose and cannot arise from opportunistic acts on the part of group's members.<sup>3552</sup>

1608. The Defence is of the further opinion that an accused who contributes to commission by the group must be an outsider to the group,<sup>3553</sup> since the responsibility of the group members for the crimes, to its mind, must be examined as direct and not accessorial liability.<sup>3554</sup>

1609. Regarding intentionality of the contribution, the Defence argued that the Prosecution must establish that the accused intended to engage in the conduct and that he personally knew that the group planned to commit a crime within the jurisdiction of the Court.<sup>3555</sup> In that sense, it took the view that there is a double intent requirement under article 25(3)(d): the accused must have directed his contribution toward the group, intending that the group commit a crime and the accused must presuppose that the group will carry out the activity in the state of mind required by the Statute.<sup>3556</sup>

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<sup>3548</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 95.

<sup>3549</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 104.

<sup>3550</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 106.

<sup>3551</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 90 and 96.

<sup>3552</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 90.

<sup>3553</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 115.

<sup>3554</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 115.

<sup>3555</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 120.

<sup>3556</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 121.

1610. Lastly, knowledge, taken as a constituent element of article 25(3)(d)(ii) of the Statute, must be very explicit.<sup>3557</sup> It also presupposes that the contribution be provided to the commission of crimes within the jurisdiction of the Court which were specifically contemplated by the criminal group.<sup>3558</sup> For the Defence, knowledge of the group's intention rules out liability for contribution to an unplanned but foreseeable crime.<sup>3559</sup> Accordingly, it invited the Chamber not to apply article 30 of the Statute, particularly the criterion of the occurrence "in the ordinary course of events", since article 25(3)(d) proposes alternative, more stringent criteria, namely those stated explicitly at paragraphs (i) and (ii).<sup>3560</sup>

### iii. Common Legal Representative of the main group of victims

1611. The Legal Representative first recalled that in discussions on the embryonic provisions of article 25(3)(d) of the Statute, States deliberately excluded the concept of "accessoryship".<sup>3561</sup> Underscoring the *sui generis* nature of the provision, he noted that it has no equivalent in the instruments or jurisprudence of other international criminal courts and tribunals.<sup>3562</sup> He then contended that in the case at bar the Chamber need not be bound by two other benches' interpretations of article 25(3)(d) of the Statute at the pre-trial stage.<sup>3563</sup>

1612. For the Legal Representative, the form of participation foreseen under article 25(3)(d) of the Statute constitutes a residual form of liability.<sup>3564</sup> From a plain reading of the text, he maintained, the concept of "group of persons acting with a

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<sup>3557</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 126.

<sup>3558</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 123 and 126.

<sup>3559</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 126.

<sup>3560</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 126 and 127.

<sup>3561</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 8.

<sup>3562</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 8.

<sup>3563</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 9.

<sup>3564</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 19.

common purpose” does not, to his mind, permit reliance on the existence of a common plan as a material element of article 25(3)(d),<sup>3565</sup> even where existence of such a plan could establish the pursuance of a common purpose. He further noted that the chapeau of article 25(3)(d) adverts only to a “[TRANSLATION] common objective”, with no mention of any criminal character whatsoever.<sup>3566</sup> In his view, responsibility under article 25(3)(d)(ii) of the Statute does not, therefore, mandate that the intention to commit a crime be the sole objective of the group.<sup>3567</sup>

1613. Turning to the position held by the contributor to the group, and with reference to the stance espoused by Pre-Trial Chamber I in *Mbarushimana*, the Legal Representative argued that it is entirely possible for an accused to belong to the group of persons acting with a common purpose within the meaning of article 25(3)(d).<sup>3568</sup>

1614. In the Legal Representative’s opinion, the requisite threshold for incurring liability under article 25(3)(d) is lower than that required to establish the assistance envisioned under article 25(3)(c) of the Statute.<sup>3569</sup> He took the further view that the contribution need not be unlawful or substantial.<sup>3570</sup> Drawing on the dissent of Judge Fernández to the Appeals Chamber judgment in *Mbarushimana*, the Legal Representative contended that reliance on a constituent element requiring a minimal contribution is unnecessary.<sup>3571</sup> To him, the matter must instead be viewed in terms of causal nexus between the contribution and the

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<sup>3565</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 13, 14 and 17.

<sup>3566</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 14-16.

<sup>3567</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 15.

<sup>3568</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 18.

<sup>3569</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 19.

<sup>3570</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 21.

<sup>3571</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 22.

crime,<sup>3572</sup> since a minimal contribution under this mode of liability would not be required.<sup>3573</sup> In this regard, the Legal Representative underlined that the approach advocated is akin to that of Pre-Trial Chamber II in the decision on the confirmation of charges in *Ruto et al.* in respect of the Accused Sang.<sup>3574</sup>

1615. As to the volitional element, the Legal Representative considered that the accused is not required to share the intention of the group. The person must intend to engage in the conduct which contributes to the crime and at least have awareness that such conduct contributes to the group's activities.<sup>3575</sup> He further submitted that knowledge of the group's criminal intentions suffices to satisfy article 25(3)(d)(ii) and that such knowledge must be defined with reference to article 30(3) of the Statute.<sup>3576</sup> Lastly, he recalled that the accused need not meet the conditions of the subjective elements of the crimes charged.<sup>3577</sup>

## b) Analysis

1616. Article 25(3)(d) of the Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim 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; or

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<sup>3572</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), para. 21.](#)

<sup>3573</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), para. 21.](#)

<sup>3574</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), para. 22.](#)

<sup>3575</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), para. 26.](#)

<sup>3576</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), paras. 27-28.](#) See also *Decision on the confirmation of charges in Mbarushimana*, para. 289.

<sup>3577</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\), para. 28.](#)

(ii) Be made in the knowledge of the intention of the group to commit the crime.

1617. Here, and relying further on the method of interpretation which it saw fit to adopt, the Chamber refers to the analysis undertaken by various pre-trial benches of the Court before whom the application of article 25(3)(d) lay for determination.<sup>3578</sup> In this respect, in issuing summonses to appear,<sup>3579</sup> warrants of arrest<sup>3580</sup> or decisions on the confirmation of charges,<sup>3581</sup> Pre-Trial Chambers I and II held that for the purpose of implementation of article 25(3)(d) of the Statute, five constituent elements must be met: three objective and two subjective.

1618. Under article 25(3)(d), liability accrues for contribution “in any other way” to a crime within the jurisdiction of the Court. Clearly, therefore, provision is made for a residual form of accessoryship, included in the Statute to vest the Court with jurisdiction over accessories whose conduct does not constitute aiding or abetting the commission of a crime within the meaning of article 25(3)(c).

1619. The language of article 25(3)(d) of the Statute adverts to a species of accessoryship founded on a contribution to the commission of one or more crimes within the jurisdiction of the Court. In this regard, the Chamber notes that this mode of liability differs from joint criminal enterprise as defined by the ad hoc

<sup>3578</sup> Statute, article 21(2). See also “Section (III)(A) Applicable law under article 21 of the Statute”.

<sup>3579</sup> [The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang](#), 8 March 2011, ICC-01/09-01/11-1, para. 51; [The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali](#), 8 March 2011, ICC-01/09-02/11-1, para. 47.

<sup>3580</sup> [The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Pre-Trial Chamber I, Decision on the Prosecution Application under article 58\(7\) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr](#), paras. 80-89 and 105-107; [The Prosecutor v. Callixte Mbarushimana, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana](#), 28 September 2010, ICC-01/04-01/10-1, para. 39.

<sup>3581</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 269; [Decision on the Confirmation of Charges in Kenyatta et al.](#), para. 421; [Decision on the Confirmation of Charges in Ruto et al.](#), para. 351. See also [Judge Silvia Fernández de Gurmendi’s dissent to the Appeals Chamber judgment in 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 2012, ICC-01/04-01/10-514, paras. 7-15.

international criminal tribunals,<sup>3582</sup> inasmuch as the accused will not be considered responsible for all of the crimes which form part of the common purpose, but only for those to whose commission he or she contributed. Accordingly, a person who stands charged pursuant to article 25(3)(d) will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute.

1620. As noted in the 15 May 2013 Decision, implementation in the instant case of article 25(3)(d)(ii) presupposes that:<sup>3583</sup>

- a crime within the jurisdiction of the Court was committed;
- the persons who committed the crime belonged to a group acting with a common purpose;
- the accused made a significant contribution to the commission of the crime;
- the contribution was intentional; and
- the accused's contribution was made in the knowledge of the intention of the group to commit the crime.

1621. For a person to be found criminally responsible for a crime within the jurisdiction of the Court on the basis of article 25(3)(d)(ii) of the Statute, these five constituent elements must, therefore, in the Chamber's view, be established beyond reasonable doubt. Moreover, in the present judgment, the Chamber will interpret article 25(3)(d) of the Statute only in the light of the contribution to the *commission* of a crime as such. By reason of the peculiarities of the case at bench, it will not entertain contributions to any *attempted* commission of crimes.

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<sup>3582</sup> [ICTY, Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007 \("Brdanin Appeal Judgement"\)](#), para. 431; [Tadić Appeal Judgement](#), para. 227(iii); [Decision on the confirmation of charges in Mbarushimana](#), para. 282.

<sup>3583</sup> [15 May 2013 Decision](#), para. 16.

**i. A crime within the jurisdiction of the Court was committed**

1622. First, the Chamber must satisfy itself that it has been proven beyond reasonable doubt that the crimes confirmed by the Pre-Trial Chamber were actually committed. To this end, both the objective and subjective elements specific to the crime(s) and their contextual elements must be established.

1623. To this must be added that for all of the crimes which arise before the Chamber for determination, principal liability<sup>3584</sup> of natural “persons” and not of the group as such must be established. Otherwise put, each crime must have been intentionally committed by one or more persons, whether directly or indirectly.

**ii. The persons who committed the crime belonged to a group acting with a common purpose**

1624. It must first be underscored that it is a *sine qua non* of the application of article 25(3)(d) of the Statute that the existence of a group of persons driven by and acting with a common purpose be established. Further, the persons who committed the crime must belong to the group, whether they form all or part of it.

1625. In defining the concerted action of the group acting with a common purpose, the Chamber will make reference to the jurisprudence of the ad hoc tribunals on joint criminal enterprise. This mode of liability, defined by the ICTY to address grave breaches of international humanitarian law,<sup>3585</sup> also relies on the concept of “common purpose” and is therefore of the utmost pertinence to the present analysis. The Chamber considers that it may draw on certain criteria from that jurisprudence, particularly so as to best ascertain the meaning of a statutory phrase or expression, such as the phraseology “common purpose”, and in so

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<sup>3584</sup> Indeed, accessorial liability always hinges on the liability of a principal. See in this regard, “Section X(B)(1)(b)(i) Concept of “commission” within the meaning of article 25(3)(a) of the Statute”, para. 1385.

<sup>3585</sup> [Tadić, Appeal Judgement](#), paras. 189-191.

doing, recourse to the systemic method of interpretation may be had.<sup>3586</sup> Whereas modes of liability may vary from one international tribunal to another and whereas, in that sense, the Statute of the Court is an innovation whose meaning and coherence must be preserved, nothing precludes reliance in the main on the definition of the expression “common purpose” adopted by the ad hoc tribunals since, moreover, their definition is based on an analysis of customary international law.<sup>3587</sup>

1626. It is the Chamber’s view that definition of the criminal purpose of the group presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of group, although each person need not be identified by name.<sup>3588</sup> To its mind, the group of persons acting with a common purpose may be evinced without necessarily establishing the existence of an organisation incorporated into a military, political or administrative structure.<sup>3589</sup> Proof that the common purpose was previously arranged or formulated is not required. It may materialise extemporaneously and be inferred from the subsequent concerted action of the group of persons.<sup>3590</sup>

1627. As to the criminality of such purpose, the Chamber considers that the purpose must be to commit the crime or must encompass its execution. It need not be specifically directed at the commission of a crime within the jurisdiction of the Court.<sup>3591</sup> Nor must the group pursue a purely criminal purpose or must its ultimate purpose be criminal. Hence, a group with a political and strategic goal which also entails criminality or the execution of a crime may constitute a group

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<sup>3586</sup> See “Section III(B) Method of interpretation”.

<sup>3587</sup> See, in particular, [Tadić, Appeal Judgement](#), paras. 185-226.

<sup>3588</sup> See, in particular, [ICTY, Brđanin Appeal Judgement](#), para. 430.

<sup>3589</sup> [Tadić, Appeal Judgement](#), para. 227(i); [ICTY, Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Judgement, 29 May 2013, Volume 1](#), para. 212.

<sup>3590</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 271; [Tadić, Appeal Judgement](#), para. 227(ii); [ICTY, Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003](#), para. 31.

<sup>3591</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 271.

acting with a common purpose within the meaning of article 25(3)(d). It is the Chamber's view that the participants in the common purpose must harbour the same intent: they must mean to cause that consequence which constitutes the crime or be aware that the crime will occur in the ordinary course of events.<sup>3592</sup> Such shared intent may be established by, *inter alia*, the group's collective decisions and action, or its omissions.

1628. It is the Chamber's opinion that since article 25(3)(d) of the Statute provides for individual responsibility as an accessory to a crime which ensued from the concerted action of a group of persons, it must be established that the persons who committed the crime, in any of the manners enumerated in article 25(3)(a), belonged to the group. To such end and by way of example, it rests, therefore, with the Prosecution to lead evidence that the physical perpetrators of the material elements of the crime and/or its indirect perpetrators shared the common purpose.<sup>3593</sup>

1629. The Chamber notes that the existence of a "common plan", as defined by various benches of the Court and viewed as an objective element of joint commission within the meaning of article 25(3)(a) of the Statute,<sup>3594</sup> may establish pursuance of a common purpose, without it being necessary to prove the existence of such a "common plan" among the members of the group, or, thereby arrive at a mutual attribution of their acts.

1630. To be satisfied that the perpetrator's acts were encompassed by the common purpose, it will also be necessary to show that the crime at hand formed part of the common purpose. Crimes ensuing solely from opportunistic acts by members

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<sup>3592</sup> In this respect, the Chamber considers that it must construe the concept of "common purpose" with reference to article 30(2)(b) of the Statute.

<sup>3593</sup> See, in particular, [Judge Mmasenono Monageng's dissent to the Decision on the confirmation of charges in Mbarushimana](#), para. 55.

<sup>3594</sup> See, in particular, [Lubanga Judgment](#), paras. 981-984; [Decision on the confirmation of charges in Lubanga](#), paras. 368-382; [Decision on the confirmation of charges](#), paras. 522-523; [Decision on the Confirmation of Charges in Ruto et al.](#), paras. 301-304; [Decision on the Confirmation of Charges in Kenyatta et al.](#), paras. 399-400. See also [ICTY, Brđanin Appeal Judgement](#), paras. 416-417.

of the group and which fall outwith the common purpose cannot be attributed to the group's concerted action. Only those crimes which the group harboured the intention to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can therefore be attributed to the said group and incur the accused's liability under article 25(3)(d).

1631. Lastly, the Chamber does not view an accused's membership of the group of persons acting with a common purpose as a decisive ingredient for ascertaining and establishing that person's individual responsibility for the purposes of article 25(3)(d). In its view, the language of the article criminalises contribution to the commission of a crime within the jurisdiction of the Court, irrespective of an accused's membership of the group. In this respect, the Chamber recalls that the group does not exclusively consist of those whose criminal responsibility as a principal to the crimes is established or even simply under consideration. To confine application of article 25(3)(d) to outsiders to the group who contribute to the commission of crimes would unduly circumscribe its reach, in contravention of a plain reading of the provision.<sup>3595</sup>

**iii. The accused made a significant contribution to the commission of the crime**

1632. For the Chamber, it is paramount that the accused's contribution be connected to the commission of the crime and not solely to the activities of the group in a general sense. Indeed, a significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt. By significant contribution, the Chamber wishes to lay stress on a contribution which may influence the commission of the crime. Conduct inconsequential and immaterial to the commission of the crime cannot, therefore, be considered sufficient and constitute a contribution within the meaning of article 25(3)(d) of the Statute.

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<sup>3595</sup> [Decision on the confirmation of charges in Mbarushimana](#), paras. 272-275.

1633. It stands to reason that the commission of the crime is not necessarily contingent on or even determined by such contribution.<sup>3596</sup> The contribution will be considered significant where it had a bearing on the occurrence of the crime and/or the manner of its commission.

1634. A case-by-case analysis is therefore expedient. Only scrutiny of a person's conduct in the context in which he or she acted or failed to act allows a determination as to whether the conduct had a bearing on the commission of the crime and, if so, to what extent.<sup>3597</sup>

1635. The contribution to the crime may be made through the physical perpetrators themselves or through other members of the group acting with a common purpose. Otherwise put, a *direct* nexus between the conduct of the accessory and that of the physical perpetrator need not be established. The Chamber takes the view that it is the effect of the conduct on the realisation of the crime which counts – irrespective of whether the contribution is provided to a person who is or is not the perpetrator of the crime – and that the contribution may be connected to either the material elements of the crimes (it may then, for instance, take the form of provision of resources such as weapons) or to their subjective elements (it may involve encouragement).<sup>3598</sup>

1636. As regards the Defence argument concerning remoteness of the Accused to the crimes committed, proximity to the crime is not, in the Chamber's opinion, a relevant criterion. Indeed, in international criminal law the prime focus of investigations and prosecutions is those who, whilst physically, structurally or

<sup>3596</sup> [ICTY, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Appeal Judgement](#), 9 May 2007, para. 134; [ICTY, Prosecutor v. Simić, Case No. IT-95-9-A, Appeal Judgement](#), 28 November 2006, para. 85; [ICTY, Blaškić Appeal Judgement](#), para. 48; [ICTR, Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgement and Sentence](#), 22 January 2004, para. 597.

<sup>3597</sup> [Decision on the confirmation of charges in Mbarushimana](#), paras. 284-285.

<sup>3598</sup> Such encouragement may be tacit or explicit. See, in particular, [Decision on the confirmation of charges in Mbarushimana](#), paras. 330 and 339; [Judge Mmasenono Monageng's dissent to the Decision on the confirmation of charges in Mbarushimana](#), paras. 82, 97, and 99-101. See also ICTR, [Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgement \(Reasons\)](#), 1 June 2001, para. 201; [ICTY, Brđanin Appeal Judgement](#), para. 273; [ICTR, Semanza Trial Judgement](#), para. 386.

causally remote from the physical perpetrators of the crimes, indirectly committed them or facilitated their commission by virtue of the position they held, however remote.<sup>3599</sup>

#### iv. The contribution was intentional

1637. The Chamber notes that article 25(3)(d), at paragraphs (i) and (ii) in particular, lays down a different mental element to that for which article 30 of the Statute makes provision. Article 25(3)(d), to its mind, is encompassed by the “otherwise provided” of article 30, and departs from the general rule laid down by the latter provision. When considered on the basis of article 25(3)(d), the Accused’s individual criminal responsibility may therefore be evinced absent establishment of all the requirements of article 30 of the Statute.<sup>3600</sup> It remains the case that although the mental element of article 30 does not find application here, the Chamber may nonetheless refer to and on draw the definitions of the provision in construing the terms “intention” and “knowledge” which appear in article 25(3)(d).

1638. Faithfulness to the text of the provision demands that the contribution necessary to establishing the mode of liability under article 25(3)(d) be “intentional”, in addition to including one of the specific mental elements stipulated at paragraphs (i) and (ii). In construing this volitional element, the Chamber must therefore afford consideration to the two sub-paragraphs of article 25(3)(d): the meaning given to the intentionality of the contribution must not overlap with paragraph (i) or paragraph (ii) of the article, lest one or both paragraphs be rendered redundant.<sup>3601</sup> Accordingly, the Chamber sees the

<sup>3599</sup> See, in particular, [ICTY, Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgement, 17 March 2009](#), paras. 662-666; [ICTY, Brđanin Appeal Judgement](#), para. 424.

<sup>3600</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 289. See also Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, 5 *Journal of International Criminal Justice* (2007), p. 971.

<sup>3601</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 288.

intentionality prescribed by article 25(3)(d) of the Statute as applying only to the *conduct* which constitutes the contribution and not to the activity, purpose or criminal intention mentioned at paragraphs (i) and (ii) of the article, respectively. In this regard, the Chamber takes the view that in accordance with the criterion which article 30(2)(a) lays down, the accused must intend to engage in the conduct – otherwise put, his or her actions must have been deliberate and made with awareness. It need not be proven, therefore, that the accused shared the group’s intention to commit the crime.

1639. Lastly, in the view of the Chamber, it must be shown that the accused intended to engage in the conduct which constitutes a contribution and also that he or she was aware that such conduct contributed to the activities of the group of persons acting with a common purpose.<sup>3602</sup>

**v. The accused’s contribution was made in the knowledge of the intention of the group to commit the crime**

1640. The Chamber underlines that as regards this constituent element, the Statute proposes an alternative: the contribution must “be made with the aim of furthering the criminal activity or criminal purpose of the group” or “be made in the knowledge of the intention of the group to commit the crime”. It further recalls that, in the case at bar, it decided to rely on the second alternative provided for by article 25(3)(d)(ii).<sup>3603</sup>

1641. The Chamber underlines its holding that the group of persons acting with a common purpose must have harboured the intention to commit the crime; such interpretation references article 30(2)(b) of the Statute. In its view, and as put by article 30, “in relation to [the] consequence” which constitutes the crime, the group must “mea[n] to cause that consequence” or know that the crime “will occur in the ordinary course of events”. The Chamber takes the view that the

<sup>3602</sup> [Decision on the confirmation of charges in Mbarushimana](#), para. 288.

<sup>3603</sup> [21 November 2012 Decision](#), paras. 23 and 30; [15 May 2013 Decision](#), paras. 11 and 16.

accused's knowledge of the intention of the group must be defined with reference to article 30(3) of the Statute: the accused must be aware that the intention existed when engaging in the conduct which constituted his or her contribution.

1642. Knowledge of such circumstance must be established for each specific crime and knowledge of a general criminal intention will not suffice to prove, as article 25(3)(d)(ii) mandates, that the accused knew of the group's intention to commit each of the crimes forming part of the common purpose. To incur liability as an accessory, the accused's knowledge must be inferred from the relevant facts and circumstances<sup>3604</sup> and be connected to the group's intention, as defined in article 30(2)(b) of the Statute, to commit the specific crimes.

## 2. Conclusions of fact and legal characterisation

### a) Submissions of the parties and participants

1643. According to the Prosecution, on 24 February 2003, the Ngiti commanders and combatants attacked Bogoro in a concerted manner and with a plan to wipe out the village by targeting the predominantly Hema civilian population, indiscriminately killing the women, children and elderly persons, raping and sexually enslaving the women, and destroying and pillaging the population's property.<sup>3605</sup> The capture of Bogoro was a vital objective for the Ngiti combatants of Walendu-Bindi *collectivité*, owing to the massacres which they had endured and their geographical isolation.<sup>3606</sup> Furthermore, repeated UPC attacks had fuelled their hatred and desire for vengeance.<sup>3607</sup>

1644. As regards Germain Katanga's contribution to the crimes committed, the Prosecution submitted that he helped to coordinate the attack on Bogoro by

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<sup>3604</sup> Elements of Crimes, General introduction.

<sup>3605</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 44 and 45.

<sup>3606</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 46-48.

<sup>3607</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 47. See also paras. 36 and 49.

providing logistical support, which consisted of obtaining and distributing weapons and ammunition in prospect of the attack, and by organising and participating in preparatory meetings.<sup>3608</sup> It is specifically argued that Germain Katanga, the then military leader of the Ngiti combatants of Walendu-Bindi, led the delegation of prominent Lendu and Ngiti persons and Ngiti combatants to Beni<sup>3609</sup> and that he took part in high-level meetings with the Beni authorities.<sup>3610</sup> The Prosecution further alleged that Germain Katanga held meetings in preparation for the attack on Bogoro with various commanders,<sup>3611</sup> that he ensured the supply of weapons and ammunition destined for use in the battle<sup>3612</sup> and their storage at his house or at BCA, his military camp,<sup>3613</sup> and that he oversaw their distribution.<sup>3614</sup>

1645. In the view of the Prosecution, Germain Katanga's contribution to the crimes committed was intentional<sup>3615</sup> and made in the knowledge of the intention of the group to commit the crimes. In its submission, the Accused was not only part of that group but was also one of its leaders and his position as coordinator entailed his interaction with several of its members and the APC.<sup>3616</sup> Germain Katanga was also aware of the avowed ethnic hatred between the Ngiti and the Hema and the vengefulness which drove the Ngiti, who associated the Hema with the UPC.<sup>3617</sup> Lastly, the Prosecution took the view that the Accused was involved in the attack

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<sup>3608</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 50 and 54-55. See also [Prosecution Closing Brief](#), para. 626.

<sup>3609</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 52.

<sup>3610</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 53.

<sup>3611</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 58-60.

<sup>3612</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 56.

<sup>3613</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 51 and 54.

<sup>3614</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 54 and 57.

<sup>3615</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), paras. 62-63.

<sup>3616</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 64.

<sup>3617</sup> [First Prosecution observations on article 25\(3\)\(d\)](#), para. 64.

on Nyakunde<sup>3618</sup> and, even if he did not participate therein, he was aware of it and of the crimes it had entailed.<sup>3619</sup>

1646. According to the Defence, no nexus can be established between the physical perpetrators of the crimes and the group of Ngiti combatants of Walendu-Bindi *collectivité*.<sup>3620</sup> In its opinion, EMOI and the APC, who had a shared political and strategic goal, devised the plan, which was not criminal in nature, to attack Bogoro.<sup>3621</sup> To its mind, that the crimes ensued from implementation of the military plan is insufficient to demonstrate that the members of the group harboured the intention to commit them.<sup>3622</sup> It noted that the evidence tendered into the record does not establish that the Ngiti combatants took part in the attack, or, further, that all of the camps in Walendu-Bindi *collectivité* shared the same criminal purpose, since each camp had its own reason for attacking Bogoro.<sup>3623</sup> It underlined, for example, that it is unproven that all members of the group were driven by hatred towards the Hema.<sup>3624</sup> It is also the Defence position that the combatants who took part in the attack were not all Ngiti,<sup>3625</sup> since the crimes were mainly committed by Bira, Lendu and Ngiti who were not part of the group acting with a common purpose.<sup>3626</sup> The Defence maintained that it was common in the Ngiti community to join in an attack upon hearing the sound of bullets. Therefore, the Defence argued, it is reasonable to consider that Ngiti from neighbouring villages, out of opportunism, may have joined in the fighting and

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<sup>3618</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 14.

<sup>3619</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 15-21.

<sup>3620</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 17.

<sup>3621</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 76; [Third Defence observations on article 25\(3\)\(d\)](#), para. 58.

<sup>3622</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 112.

<sup>3623</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 100; [Second Defence observations on article 25\(3\)\(d\)](#), para. 25.

<sup>3624</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 56-57.

<sup>3625</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 98 and 102.

<sup>3626</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 76-78.

committed the alleged crimes.<sup>3627</sup> In any event, it considers it impossible to assert that all of the Ngiti present in Bogoro belonged to the same group of commanders.<sup>3628</sup>

1647. Furthermore, whereas the Defence acknowledged that Germain Katanga contributed to bringing the attack to pass, it however submitted that such contribution was lawful and legitimate since the purpose of the group was not criminal.<sup>3629</sup> The Defence further underscored that the Accused's participation in the meetings in Beni was lawful<sup>3630</sup> and that the decision to deliver weapons had been taken by the authorities in Beni.<sup>3631</sup> In its opinion, the record does not clearly establish whether, beyond merely receiving weapons, Germain Katanga had a part in supplying them per se.<sup>3632</sup> In any event it considered that the weapons were sent to Aveba for a legitimate purpose.<sup>3633</sup>

1648. The Defence further underscored that the role of coordinator, as claimed by the Accused, was non-military in nature,<sup>3634</sup> that he sought solely to facilitate rapprochement between local combatants and APC soldiers and that such role was distinct from that of Germain Katanga as commander of troops mustering around 60 strong in Aveba.<sup>3635</sup> The Defence thus submitted that there is no evidence to establish that the Accused distributed the weapons which were used to commit the crimes or that the weapons were delivered with the intention of committing the crimes.<sup>3636</sup> In this respect, the Defence considered it reasonable to

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<sup>3627</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 101. See also [Defence Closing Brief](#), paras. 901-902; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 83-84.

<sup>3628</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 83-84.

<sup>3629</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 112; [Second Defence observations on article 25\(3\)\(d\)](#), para. 40. See also [Defence Closing Statements, T. 338](#), p. 57.

<sup>3630</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 82.

<sup>3631</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 77.

<sup>3632</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 82.

<sup>3633</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 82.

<sup>3634</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 57, 63 and 77.

<sup>3635</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 26.

<sup>3636</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 86.

conceive that the weapons came from another source of supply.<sup>3637</sup> It further asserted that, were such contribution to have existed, it cannot extend to crimes which were not committed by firearm.<sup>3638</sup> Lastly, even were the Chamber to find that Germain Katanga made a significant contribution to the commission of the crimes, in the view of the Defence, he cannot be held responsible for the crimes of pillaging, destruction, rape, sexual slavery or the use of child soldiers,<sup>3639</sup> since the Pre-Trial Chamber confirmed those crimes on the basis of *dolus directus* in the second degree (ordinary course of events)<sup>3640</sup> which, for the Defence, does not apply to article 25(3)(d).<sup>3641</sup>

1649. Lastly, the Defence submitted that although Germain Katanga knew that he was taking part in a legitimate plan devised by the APC and EMOI, he did not know that the weapons delivered were to be used to commit crimes.<sup>3642</sup> As to the attack on Nyakunde, it, in and of itself, does not support the inference that Germain Katanga knew of the group's intention to commit the crimes.<sup>3643</sup>

1650. The Legal Representative of the main group of victims argued the existence of concerted action between the Ngiti combatants of Walendu-Bindi *collectivité* aimed at eradicating the UPC forces present in Bogoro by attacking their strategically-positioned camp, but also aimed more widely at attacking the local civilian population, which was predominantly Hema.<sup>3644</sup> In his view, an interethnic conflict was taking place at the material time, and the Ngiti, who

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<sup>3637</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 31-32.

<sup>3638</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 88.

<sup>3639</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 39.

<sup>3640</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 38.

<sup>3641</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 39.

<sup>3642</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 39; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 61-62.

<sup>3643</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 45; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 66-67.

<sup>3644</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 69. See also paras. 61-62.

associated the Hema community with the UPC political movement,<sup>3645</sup> made no distinction between civilians and the military when attacking villages perceived as Hema. Lastly, the Legal Representative was of the view that the manner in which the attack itself proceeded establishes the existence of concerted action for the purposes of article 25(3)(d). Whereas pillaging, destruction and the acts of rape and sexual slavery were not necessarily part of the plan, they were, to his mind, certainly part of the combatants' method of warfare and, in the light of their modus operandi during other attacks against civilian populations, the implementation of the plan necessarily entailed the commission of such acts.<sup>3646</sup>

1651. The Legal Representative of the main group of victims further drew attention to Germain Katanga's *viva voce* evidence, which makes clear that his position at the material time allowed him to play a pivotal role in preparing and bringing about the attack on Bogoro even if, in his words, he was not irreplaceable.<sup>3647</sup> As coordinator, Germain Katanga ensured that weapons were distributed among the Ngiti combatants, by assessing need and allocating them accordingly;<sup>3648</sup> he could, moreover, receive communications since he had a satellite device.<sup>3649</sup> Therefore, in the view of the Legal Representative, the supply of weapons and the coordination among the Ngiti combatants secured by Germain Katanga allowed the crimes to be committed.<sup>3650</sup> It was that contribution from the Accused which secured the fall of Bogoro, the elimination of the civilians there, the pillaging and destruction of

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<sup>3645</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 55-60.

<sup>3646</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 69.

<sup>3647</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 71-74; 80-85.

<sup>3648</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), paras. 73, 75 and 86.

<sup>3649</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 76.

<sup>3650</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 94.

their property and, in some instances, the rape of women.<sup>3651</sup> It is further apparent from the evidence given by the Accused and other witnesses that Germain Katanga meant to perform that coordination role as regards supplying weapons and ammunition and coordinating combatants in prospect of the attack on Bogoro.<sup>3652</sup> It is also clear that such contribution was made in the knowledge of the intention of the combatants of Walendu-Bindi *collectivité* to commit the crimes in question insofar as they meant “to eradicate” Bogoro by killing the civilians. Having regard to his position in the group of Ngiti combatants, the Legal Representative considered that Germain Katanga knew of such intention and, further still, was aware that the crimes committed would occur in the ordinary course of events, given the interethnic context, the unrelenting attacks pitting Hema against Lendu and Ngiti, and the methods of warfare deployed on all sides.<sup>3653</sup>

## **b) Analysis**

### **i. Crimes within the jurisdiction of the Court were committed**

1652. The Chamber recalls its finding that, on 24 February 2003, Ngiti combatants from Walendu-Bindi *collectivité* committed the crimes of murder as a crime against humanity<sup>3654</sup> and as a war crime;<sup>3655</sup> attack against civilians as a war crime;<sup>3656</sup> pillaging and destruction as war crimes;<sup>3657</sup> and lastly, rape and, as of

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<sup>3651</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 95.

<sup>3652</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 95.

<sup>3653</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\)](#), para. 96.

<sup>3654</sup> See “Section VIII(B)(3)(a) Conclusions on murder as a crime against humanity and as a war crime”.

<sup>3655</sup> See “Section VIII(B)(3)(a) Conclusions on murder as a crime against humanity and as a war crime”.

<sup>3656</sup> See “Section VIII(B)(3)(b) Conclusions on the crime of attack against civilians”.

<sup>3657</sup> See “Section VIII(C)(3)(a) Conclusions on the crime of destruction of enemy property” and “Section VIII(C)(3)(b) Conclusions on the crime of pillaging”.

24 February 2003, sexual slavery as war crimes and as crimes against humanity.<sup>3658</sup>

**ii. The persons who committed the crimes belonged to a group acting with a common purpose**

1653. The Chamber will first examine whether it is established that the Ngiti militia of Walendu-Bindi *collectivité* constituted, at the material time, a group of persons acting with a common purpose. It will then determine whether each crime charged formed part of the common purpose, before turning to the matter of whether the evidence laid before it establishes the physical perpetrators' membership of the militia.

1654. As to the first point, the Chamber recalls its finding that the Ngiti combatants and commanders of Walendu-Bindi *collectivité* were part of a militia,<sup>3659</sup> which constituted an organisation within the meaning of article 7(2)<sup>3660</sup> of the Statute and an armed group within the meaning of the law of armed conflict.<sup>3661</sup> This militia harboured its own design, which, although part of a wider design to reconquer territory, was to attack the village of Bogoro so as to wipe out from that place not only the UPC troops but also, and, first and foremost, the Hema civilians present.<sup>3662</sup> In this regard, the Chamber refers to the body of its findings on the existence of a policy within the meaning of article 7(1)(a) of the Statute.<sup>3663</sup>

1655. By way of illustration of the objective of reconquering Bogoro through the elimination of its civilian population, it is expedient to recapitulate again briefly

<sup>3658</sup> See "Section VIII(D)(2)(a) Rape", para. 999; "Section VIII(D)(2)(B) Sexual slavery", paras. 1008, 1013, 1019 and 1021".

<sup>3659</sup> See "Section VII Organisation of the combatants of Walendu-Bindi *collectivité* in the immediate run-up to the attack against Bogoro", in particular paras. 628, 635, 640, 651, 661-663, 679 and 681.

<sup>3660</sup> See "Section IX(A)(2)(ii) The Ngiti combatants of Walendu-Bindi constituted an organisation within the meaning of article 7(2) of the Statute", para. 1141.

<sup>3661</sup> See "Section IX(B)(3)(a)(ii) Presence of organised armed groups in Ituri".

<sup>3662</sup> See "Section VII(E) Ethnic motives of the Ngiti commanders and combatants". See also "Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003: Conclusion".

<sup>3663</sup> See "Section IX(A)(2)(a)(iii) The Bogoro attack was carried out pursuant to a policy".

how the 24 February 2003 attack proceeded. The description will also bring to the fore the specific crimes which formed part of the common purpose.

1656. In this respect, the Chamber concluded that the village was attacked from all directions, very early in the morning, whilst it was still dark and the inhabitants were asleep in their homes.<sup>3664</sup> The Chamber found that the villagers were systematically targeted, the attackers committing crimes against the civilians in accordance with a regular pattern and great violence.<sup>3665</sup> It also observed that in the course of the attack, several witnesses testified that they had heard the attackers uttering threats and the pleas of the victims, who were weeping and begging for mercy. The Chamber must further underscore that several witnesses testified that the combatants specifically questioned the inhabitants as to their ethnicity so as to decide their fate and that several inhabitants passed themselves off as non-Hema to save their lives.<sup>3666</sup> Lastly, it is established that the Ngitit attackers did not confine themselves to seizing control of Bogoro by attacking the UPC, but that they also considered it necessary during combat and after overrunning Bogoro, to pursue and kill the population, destroy its houses and steal its property. In the aftermath of the assault, the village of Bogoro was cleared of its predominantly Hema population.<sup>3667</sup>

1657. In the Chamber's view, the manner in which Bogoro was attacked and that Hema civilians, who had no part in combat, were pursued and killed, confirms the existence of a common purpose of a criminal nature vis-à-vis the population of the village.

1658. Thus the Chamber considers it established that the crime of murder as a crime against humanity and as a war crime and attack against civilians as a war crime

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<sup>3664</sup> See "Section VIII(A)(3) How the attack proceeded"

<sup>3665</sup> See "Section IX(A)(2)(b) The attack on Bogoro was of a systematic nature".

<sup>3666</sup> See "Section VIII(B)(2)(h) Objectives of the attackers", para. 853; "Section VIII-B-3-a. Conclusions of law on the crime of attack against civilians as a war crime", para. 876; "Section VIII(D)(2)(a) Rape", paras. 989 and 997; "Section VIII(D)(2)(b) Sexual slavery", paras. 1009 and 1014.

<sup>3667</sup> See "Section VIII(B)(2)(h) Objectives of the attackers".

were part of the common purpose. Further still, and contrary to the Defence's assertion in reference to the attack on Chai,<sup>3668</sup> the conduct in which the Ngiti group habitually engaged before the 24 February 2003 attack and thereafter does confirm that they meant to commit those crimes.<sup>3669</sup>

1659. It must also be remarked that the Ngiti combatants of Walendu-Bindi *collectivité*, together with other attackers, demolished and/or set ablaze houses belonging to and occupied by the predominantly Hema population of Bogoro. The acts of destruction took place throughout the village and throughout the day, including once it had fallen into the grip of the attackers.<sup>3670</sup> The Chamber also found that the village of Bogoro was extensively pillaged during the 24 February 2003 attack, both during and in the aftermath of the battle.<sup>3671</sup>

1660. The property thus destroyed and pillaged – be it the roofing sheets of houses, livestock or any other animal – belonged to the predominantly Hema civilian population of Bogoro and was essential to its daily life.<sup>3672</sup> The destruction and pillaging of that property were therefore an integral part of the operation, which consisted of wiping out Bogoro by attacking its Hema civilian population.

1661. The Chamber further notes that it was common practice in Ituri, particularly among Ngiti combatants, to destroy houses, often by setting them ablaze, and to seize enemy property.<sup>3673</sup> By way of example, it recalls that, during the attack on Nyakunde in September 2002 – *viz.* soon after the common purpose had

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<sup>3668</sup> See [Second Defence observations on article 25\(3\)\(d\)](#), para. 34.

<sup>3669</sup> See "Section V(C) Methods of warfare"; "Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002".

<sup>3670</sup> See "Section VIII(C)(3)(a) Conclusions on the crime of destruction of enemy property"; "Section VIII(C)(3)(b) Conclusions on the crime of pillaging"; "Section IX(A)(2)(a)(i) The assault on the village of Bogoro involved the commission of multiple acts and targeted its civilian population", para. 1137.

<sup>3671</sup> See "Section VIII(C)(3)(b) Conclusions on the crime of pillaging", para. 950.

<sup>3672</sup> See "Section VIII(C)(3)(a) Conclusions on the crime of destruction of enemy property"; "Section VIII(C)(3)(b) Conclusions on the crime of pillaging".

<sup>3673</sup> See "Section VII(E) Ethnic motivations of the Ngiti commanders and combatants"; See also D03-88, T. 306, pp. 15-16 and 24.

crystallised within the group of Ngitu combatants of Walendu-Bindi *collectivité* – they had already engaged in such acts.<sup>3674</sup>

1662. In the light of that evidence and the evidence which establishes the contrivance of a design to attack Bogoro through the elimination of the resident Hema population, it is apparent to the Chamber that the Ngitu combatants of Walendu-Bindi *collectivité* harboured the intention to pillage the property and livestock, and more specifically, that they knew that such acts of pillaging would occur on 24 February 2003 in the ordinary course of events. Accordingly, the Chamber is of the view that the crime of pillaging as a war crime was part of the common purpose. Similarly, the crime of destruction of property as a war crime was also part of the common purpose, which was specific to the militia, namely to eliminate from Bogoro the predominantly Hema civilian population.

1663. Lastly, the Chamber recalls that the attackers raped women on 24 February 2003, that the women claimed to be non-Hema so as to be spared certain death<sup>3675</sup> and that they were sexually enslaved. In this regard, no evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts, even though the acts were entertained by the Chamber in its findings on the crime of attack against civilians as a war crime.<sup>3676</sup> Moreover, the Chamber notes that contrary to the other crimes which formed part of the common purpose, in the case at bar it was not established that the Ngitu combatants of Walendu-Bindi had, prior to the battle of Bogoro, committed crimes of rape or sexual slavery.<sup>3677</sup>

<sup>3674</sup> See “Section VII(A)(2)(c) Participation of Ngitu combatants in the battle of Nyakunde on 5 September 2002”.

<sup>3675</sup> See “Section VIII(B)(2)(h) Objectives of the attackers”, para. 853; “Section VIII(B)(3)(a) Conclusions of law on the crime of attack against civilians as a war crime”, para. 876; “Section VIII(D)(2)(a) Rape”, paras. 989 and 997; “Section VIII(D)(2)(b) Sexual slavery”, paras. 1009 and 1014.

<sup>3676</sup> See “Section VIII(B)(3)(b) Conclusions on the crime of attack against civilians”, para. 876.

<sup>3677</sup> See in this regard, [Defence Closing Brief](#), paras. 996-1001. [Defence Closing Statements](#), T. 338, pp. 64-68.

Lastly, it must also be noted that the lives of those women who were raped, abducted and enslaved were specifically “spared” and they evaded certain death by claiming to be other than of Hema ethnicity.<sup>3678</sup>

1664. Hence, although the acts of rape and enslavement formed an integral part of the militia’s design to attack the predominantly Hema civilian population of Bogoro, the Chamber cannot, however, find, on the basis of the evidence put before it, that the criminal purpose pursued on 24 February 2003 necessarily encompassed the commission of the specific crimes proscribed by articles 7(1)(g) and 8(2)(e)(vi) of the Statute. Accordingly, and for all of these reasons, the Chamber cannot find that rape and sexual slavery fell within the common purpose.

1665. The Chamber is therefore in a position to find that, as of November 2002, the Ngiti militia took part in the plan to attack Bogoro, which, from the standpoint of the militia, entailed wiping out from Bogoro not only the UPC troops but also, and first and foremost, the Hema population which was there.<sup>3679</sup> Contrary to the Defence assertion,<sup>3680</sup> the Chamber considers that by taking part in the implementation of the design, the Ngiti militia’s objective was to drive the civilian population from Bogoro by killing it, destroying its homes and by pillaging the property and the livestock essential to its survival. The Chamber underscores that it is of little consequence that the planning per se of the attack on Bogoro involved a number of local and regional protagonists, since the evidence on record establishes that the Ngiti militia did indeed harbour its own design to attack Bogoro by eliminating its predominantly Hema civilian population, such

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<sup>3678</sup> See “Section VIII(B)(2)(h) Objectives of the attackers”, para. 853 ; “Section VIII(B)(3)(a) Conclusions on the crime of attack against civilians as a war crime”, para. 876; “Section VIII(D)(2)(a) Rape”, paras. 989 and 997; “Section VIII(D)(2)(b) Sexual slavery”, paras. 1009 and 1014.

<sup>3679</sup> See “Section VII(B)(2)(c) Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003”, para. 600; “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>3680</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 100; [Second Defence observations on article 25\(3\)\(d\)](#), para. 25; [Third Defence observations on article 25\(3\)\(d\)](#), para. 57.

design being readily incorporated into a wider military offensive waged throughout Ituri against the UPC.<sup>3681</sup>

1666. Lastly, the Defence contended that, out of opportunism, Ngiti from neighbouring villages may have joined in the fighting and committed the alleged crimes.<sup>3682</sup> In this regard, the Chamber recalls that it was specifically the Ngiti militia which attacked Bogoro on 24 February 2003 with troop support from the Lendu of Bedu-Ezekere *groupement* and the APC.<sup>3683</sup>

1667. Moreover, the evidence placed before the Chamber clearly establishes that at the time there was only one Ngiti armed group in the vicinity of Bogoro. Indeed, Irumu territory, where Walendu-Bindi *collectivité* is located, comprises 12 *collectivités*, of which Walendu-Bindi is the sole Ngiti *collectivité*, the others being Hema or inhabited by other ethnic groups.<sup>3684</sup>

1668. Ultimately, the Chamber finds that there is no evidence on record to substantiate the existence of opportunistic Ngiti participation in the combat in Bogoro on 24 February 2003. Accordingly, it cannot be reasonably argued that the Ngiti combatants who were in Bogoro and committed crimes did not belong to the group of Ngiti commanders and combatants from Walendu-Bindi *collectivité*. The Defence argument therefore casts no doubt on this point.

1669. Accordingly, the Chamber finds that the physical perpetrators whom it identified as “Ngiti combatants” in the section of the present judgment entitled “Crimes committed during the attack on Bogoro on 24 February 2003” belonged to the Ngiti militia of Walendu-Bindi and that they therefore harboured the common purpose described above.

<sup>3681</sup> See “Section VIII(A)(2) Findings of fact and legal characterisation”

<sup>3682</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 101 (relying on the testimony of D02-228, T.250, p. 10). See also [Defence Closing Brief](#), paras. 901-902; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 82-84.

<sup>3683</sup> See “Section VII(A)(3) How the attack proceeded”, para. 748.

<sup>3684</sup> EVD-OTP-00285: MONUC report on the events in Ituri (DRC-OTP-0129-0336 to DRC-OTP-0129-0337, para. 13).

**iii. Germain Katanga made a significant contribution to the commission of the crimes**

1670. In its closing statements, the Defence, as aforementioned, acknowledged that Germain Katanga had contributed to bringing about the attack. It argued, however, that such contribution was lawful and legitimate<sup>3685</sup> in that it was furnished for the implementation of the plan to capture the military bulwark that was Bogoro.<sup>3686</sup> The Chamber has already set out its views on the significance which the attack on Bogoro held for the combatants of the Ngiti militia and on the existence of the criminal purpose which they pursued. The Chamber will now analyse the precise extent of the Accused's contribution and whether such contribution, in the circumstances, bore any influence on the commission of the crimes which formed part of the common purpose.

1671. In this regard, the Chamber refers to the body of its conclusions of fact on Germain Katanga's role and powers.<sup>3687</sup> It emerges therefrom, that ultimately as of November 2002, the Accused helped the Ngiti militia of Walendu-Bindi *collectivité*, a militia of which he was the President, to mount the operation against Bogoro. The operation was organised locally by the Ngiti combatants, who regarded it as aimed at eliminating from the area the Hema civilian population. In furtherance of that objective, Germain Katanga lent his assistance:

- by travelling to Beni, by forging, on behalf of the militia, alliances with the military authorities there and by taking part, as the figure of choice, in the definition of a military strategy in conjunction with such authorities;<sup>3688</sup>
- thereby helping the militia as a group, by making the case to the military

<sup>3685</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3686</sup> [Defence Closing Statements, T. 338](#), p. 57.

<sup>3687</sup> See "Section X(A) Role and powers of Germain Katanga within the Ngiti militia of Walendu-Bindi *collectivité*", in particular paras. 1359-1365.

<sup>3688</sup> See "Section X(B)(4) Delegation leader and the Beni authorities' figure of choice from November 2002". See also "Section VII(B)(2)(a) Delegation to Beni and inception of cooperation between EMOI and local combatants".

authorities in Beni for its interest in the struggle against the “Hema” enemy, seen as synonymous with the UPC;

- by assuming, in Aveba, upon return from his first trip to Beni, and, by virtue of his position of authority, the role of facilitator so as to establish smooth communication between the local commanders, the authorities in Beni and the APC soldiers; by also settling any disputes between, amongst others, local commanders and the APC;<sup>3689</sup>
- by facilitating, and at times personally ensuring that the weapons and ammunition from Beni were received, securely stored and distributed in an organised manner among the various commanders of the *collectivité*, who came to take delivery of their allotted share in preparation for the attack on Bogoro.<sup>3690</sup>

1672. In appraising whether Germain Katanga’s activity from November 2002 to 24 February 2003 had a significant effect or impact on the commission of the crimes, for the purposes of article 25(3)(d) of the Statute, the Chamber must first recall that in the case at bar, both the geographical and temporal scope of the group’s common purpose was confined to the 24 February 2003 operation against Bogoro. Indeed, there is perfect concordance between: (1) the attack, that is, the operation against Bogoro; (2) the group’s common purpose, which in this instance was to wipe out from that area the UPC military elements and the Hema civilians there; and (3) the commission of the crimes by the Ngiti combatants. Accordingly, it is the activity in which the Accused engaged in respect of preparations for the attack on Bogoro which may constitute a contribution to the commission of crimes by Ngiti combatants on that date and during that attack.

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<sup>3689</sup> See “Section X(A)(7)(b)(i) Germain Katanga: facilitator for the local commanders and the APC”. See also “Section X(A)(8) Role and powers of Germain Katanga: Conclusion”.

<sup>3690</sup> See “Section X(A)(5) Role of Germain Katanga in the receipt, storage and distribution of weapons and ammunition”.

1673. Admittedly, not all assistance lent in preparation of a military operation perforce and as a rule constitutes a contribution to crimes committed by the members of an armed group taking part in the operation. Nonetheless, it must be underscored that the fact that the Accused's conduct constituted a contribution to the military operation which was decided in Beni does not preclude that his conduct may also constitute a contribution to the commission of crimes by the Ngiti militia, within the meaning of article 25(3)(d) of the Statute.

1674. The Chamber recalls and underlines that there is no dispute that in February 2003, Bogoro constituted a bulwark in the eyes of the Ngiti combatants. Indeed, a large UPC camp was located at its very centre. It was entrenched and thus well fortified, it was well equipped and the troops quartered there were organised and well armed.<sup>3691</sup> Further, it is established that at the material time, the Ngiti combatants did not possess the means to launch an attack and pursue their criminal purpose of wiping out Bogoro without logistical reinforcements in weapons and ammunition. In fact, most of the men had limited experience of firearms and the Chamber has already found that they primarily bore bladed weapons – machetes, arrows and spears – and, to a limited extent, guns found during earlier battles.<sup>3692</sup>

1675. The Chamber considers it also established that the prime objective of delivering the equipment to Aveba was success in the operation against Bogoro, which for the Ngiti combatants meant its capture through elimination of its Hema population. The weapons and ammunition which were sent by the authorities in Beni to Aveba and distributed to the other camps in Walendu-Bindi *collectivité* were used during the attack. In fact, the witnesses did not testify as to any other source of weaponry in court.

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<sup>3691</sup> See "Section VIII(A)(2) Bogoro village", para. 726.

<sup>3692</sup> See "Section VII(A)(1) Creation of self-defence groups", para 530.

1676. It is further established that the weapons which the Beni authorities furnished to the local combatants in order to attack Bogoro were provided in large quantities and that the fighting was extensive, inasmuch as the fire-power was very great, not only taking the UPC troops by surprise but also the population as a whole. It has been established that the weapons and ammunition secured the success of the operation and Bogoro fell in just a matter of hours.

1677. It is beyond doubt that many crimes were perpetrated directly by machete and bladed weapon, but it was the firearms which not only allowed the population to be taken by surprise and Bogoro to be captured, but also to wound and kill its inhabitants. In this regard, the Chamber recalls that the light weapons and the ammunition were transported specifically to Kagaba camp for maintenance in advance of the battle,<sup>3693</sup> and that they could only have been used by the local combatants during the battle of Bogoro.

1678. Of note is that the manner in which the attack proceeded attests to the strength of the fire-power deployed to secure its success: the UPC was soon routed, the explosions and the crackle of gunfire not only struck fear into the population on account of their volume and intensity, but also compelled it to flee, leaving it vulnerable to shooting and forcing it to abandon its property. The Chamber has already underlined that the attack against the Hema was undertaken both through the elimination of people (men, women and children) and the destruction and pillaging of their property, wholly precluding survival or any return of survivors. Lastly, from the Chamber's findings it appears that those who attacked Bogoro opened fire directly on scores of inhabitants and that they assaulted them by machete or, further still, directly shot and killed some of them.<sup>3694</sup>

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<sup>3693</sup> See "Section VII(C)(4) Supply of weapons and ammunition for the battle of Bogoro", para. 649; "Section VII(D) Preparations for the attack on Bogoro in Walendu-Bindi *collectivité*".

<sup>3694</sup> See "Section VIII(B)(3)(a) Conclusions on murder as a crime against humanity and as a war crime"; "Section VIII(B)(3)(b) Conclusions on the crime of attack against civilians as a war crime".

1679. In that context, it is apparent, therefore, that Germain Katanga's contribution proved to be of particular relevance to the commission of the crimes which form part of the common purpose, since that contribution had considerable influence on their *occurrence* and the *manner* of their commission. His involvement allowed the militia to avail itself of logistical means which it did not possess and which, however, were of paramount importance in attacking Bogoro. His involvement, therefore, had a truly significant part in bringing about the crimes. Germain Katanga's contribution secured the military superiority of the Ngiti combatants over their adversary, the UPC, and allowed them to see through their purpose of eliminating from Bogoro the predominantly Hema civilian population.

1680. In the case at bar:

- Germain Katanga, in the run-up to the attack, and as a key protagonist in the alliances which the militia had forged, contributed to reinforcing the strike capability of the Ngiti militia which carried out the crimes committed in Bogoro on 24 February 2003. He also contributed, by virtue of his position in Aveba – the only place in the *collectivité* with an airport which could accommodate aircraft transporting weapons – to equipping the militia and enabling it to operate in an organised and efficient manner.
- Throughout the preparatory period of the attack, he was the intermediary of choice in Aveba between the suppliers of weapons and ammunition and the physical perpetrators of the crimes who were to deploy such weaponry in Bogoro.<sup>3695</sup>
- Absent that considerable supply of weapons to the Ngiti community, and absent the Accused's contribution which entailed organising and facilitating the supply of weapons at a local level, the commanders and combatants of

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<sup>3695</sup> See "Section X(A)(4) Germain Katanga: delegation leader and the Beni authorities' figure of choice from November 2002; "Section X(A)(5) Role of Germain Katanga in the receipt, storage and distribution of weapons and ammunition".

Walendu-Bindi *collectivité* would not have had the same advantages or have been able to commit so effectively the crimes which were perpetrated in Bogoro against the Hema civilian population.

1681. In the Chamber's view, in that particular context, it is apparent that the influence of all of the Accused's actions – which brought to pass the crimes of attack against civilians, murder (as a war crime and as a crime against humanity), pillaging and destruction of property – proved important. It was indeed his activities as a whole and the various forms which his contribution took, that, in the circumstances, had a significant influence on the commission of those crimes.

**iv. Germain Katanga meant to make his contribution**

1682. In this respect the Chamber must point out that the Accused's entire *viva voce* evidence shows that he acted deliberately, in Aveba and in *Walendu-Bindi collectivité*, throughout the period of preparation for the attack, specifically between November 2002 and February 2003. He himself explained that his contribution to the design to attack Bogoro was made with awareness and that he had a part in its conception in Beni in November 2002 and thereafter during subsequent trips to the area.

1683. Germain Katanga further testified that had he not been forced to remain in Aveba during the assault on Bogoro, he would, moreover, have taken part in the attack. He even specified that he saw it as his duty to take part in the operation alongside Commander Blaise Koka of the APC.<sup>3696</sup> Hence the Accused acted deliberately and was fully aware that his conduct contributed to the activities of the Ngiti militia.

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<sup>3696</sup> D02-300, T. 318, p. 13.

**v. Germain Katanga knew of the intention of the group to commit the crimes which formed the common purpose**

1684. The Chamber first recalls that it has been shown that the Accused knew, as early as November 2002, that the Ngiti militia was preparing an operation against Bogoro with the support of the authorities in Beni.<sup>3697</sup> The evidence on record further establishes that he knew that the weapons and ammunition, whose delivery and distribution he facilitated as of December 2002, were intended for the attack on that area and that the combatants would use them to that end.<sup>3698</sup> Indeed, it should be recalled that the delivery of weapons and ammunition to Aveba was effected in prospect of the attack on Bogoro.<sup>3699</sup>

1685. Furthermore, Germain Katanga was fully aware of how war was being waged in Ituri at the material time and of the ensuing suffering which the civilian population endured.<sup>3700</sup> In fact throughout his testimony, he made a number of references to the violence which the Ugandans<sup>3701</sup> meted out to the population.<sup>3702</sup> Adverting more specifically to January 2003, that is, only one month before the attack on Bogoro, the Accused described the war which held Walendu-Bindi in its grip:

[TRANSLATION] [...] listen, Mr Prosecutor, in our part of the world, war is not waged the way it is in Europe. In Europe people take cover in their homes. In our part of the world, it's the opposite. In our part of the world, it's the opposite. If you stay at home, your home will be set on fire and then you ... you'll burn inside it.<sup>3703</sup>

<sup>3697</sup> The Chamber recalls that as of November 2002, he took part in strategic meetings concerning the preparation of the attack on Beni. See, in particular, "Section X(A)(4) Germain Katanga: delegation leader and the Beni authorities' figure of choice from November 2002", paras. 1268 and 1269; "Section VII(B)(2)(a) Delegation to Beni and inception of cooperation between EMOI and local combatants".

<sup>3698</sup> D02-300, T. 317, pp. 49 and 55.

<sup>3699</sup> See "Section X(A)(4) Germain Katanga: delegation leader and the Beni authorities' figure of choice from November 2002", paras. 1268 and 1269; "Section VII(C)(4) Supply of weapons and ammunition for the battle of Bogoro".

<sup>3700</sup> D02-300, T. 322, pp. 61-62.

<sup>3701</sup> D02-300, T. 314, pp. 40-41.

<sup>3702</sup> D02-300, T. 320, p. 32.

<sup>3703</sup> D02-300, T. 320, p. 33.

1686. Further still, he knew of the massacre of civilians in Nyakunde, an event on which he expounded at length.<sup>3704</sup> He knew that the attack had been directed at the predominantly Bira population in the area and that the Bira were allied with the Hema at the time.<sup>3705</sup> He knew that Ngiti combatants from Walendu-Bindi *collectivité* had taken part in the fighting.<sup>3706</sup> This was particularly so for Commander Yuda who, given his position on the frontline, then came regularly to Aveba<sup>3707</sup> to stock up on weapons and ammunition for the battle of Bogoro. This also held true for Commander Garimbaya, who reported to Germain Katanga<sup>3708</sup> and with whom, in Germain Katanga's own words, he was on very good terms, since they were fighting for the same cause.<sup>3709</sup> Both Yuda and Garimbaya had to flee Songolo<sup>3710</sup> on account of the massacres perpetrated there against Ngiti civilians and which prompted the attack against Nyakunde launched shortly thereafter out of vengeance.<sup>3711</sup> Yet, it must be recalled that at the time of the weapons deliveries to Aveba, the Accused knew that Yuda and Garimbaya – who, according to him, had fought in Songolo and Nyakunde – would take part in the attack on Bogoro.

1687. As regards the crimes committed in Nyakunde, Germain Katanga said that he had heard mention, on the radio, of a death toll of 1000 to 1200 for that attack.<sup>3712</sup> He testified that he went in person to Nyakunde in October 2002<sup>3713</sup> and saw that the evangelical medical centre or the hospital had been “[TRANSLATION] taken

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<sup>3704</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”.

<sup>3705</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”; “Section VII(E) Ethnic motivations of the Ngiti commanders and combatants”.

<sup>3706</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”.

<sup>3707</sup> See “Section X(A)(5)(b) Distribution of weapons and ammunition”.

<sup>3708</sup> See “Section X(A)(6)(b) Military powers wielded in Aveba”.

<sup>3709</sup> D02-300, T. 317, p. 25.

<sup>3710</sup> D02-300, T. 315, p. 28.

<sup>3711</sup> See “Section VII(A)(2)(c) Participation of Ngiti combatants in the battle of Nyakunde on 5 September 2002”.

<sup>3712</sup> D02-300, T. 315, p. 40.

<sup>3713</sup> D02-300, T. 315, p. 40.

away”<sup>3714</sup> and “[TRANSLATION] looted”.<sup>3715</sup> He was apprised of the serious consequences<sup>3716</sup> of the attack, even describing the operation as a “[TRANSLATION] disaster”<sup>3717</sup> and a “[TRANSLATION] massacre”,<sup>3718</sup> adding that “[TRANSLATION] the people [...] struggled to grow vegetables in Nyakunde because of the human skulls”.<sup>3719</sup> He also confirmed that civilians, including women and children, had been killed.<sup>3720</sup> He knew, therefore, that most of the combatants and Ngitu combatants of Walendu-Bindi who were preparing for the battle of Bogoro had already killed, attacked the civilian population, destroyed and pillaged.

1688. Germain Katanga knew that the UPC was perceived as a Hema militia<sup>3721</sup> and that some in his community harboured “[TRANSLATION] bad memories of the Hema”.<sup>3722</sup> The Accused knew of the anti-Hema ideology which, in February 2003, drove and mobilised the Ngitu commanders and combatants of Walendu-Bindi. In fact, he explained that the threat of a Hima-Tutsi empire was discussed among the commanders in Aveba.<sup>3723</sup> He was, moreover, aware that the authorities in Beni were playing the ethnicity card to rally local combatants.<sup>3724</sup> When questioned on this point, the Accused replied: “[TRANSLATION] it was brainwashing which was common currency. So it was repeated time and time again and said you ‘watch out’ because the day will come when the Hema will set upon you, they will grab your land, they will lord it over you and establish their empire. So, that was the policy which was always a sort of slogan”.<sup>3725</sup> Moreover,

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<sup>3714</sup> D02-300, T. 315, p. 40.

<sup>3715</sup> D02-300, T. 315, p. 40.

<sup>3716</sup> D02-300, T. 315, p. 40; T. 320, p. 25.

<sup>3717</sup> D02-300, T. 315, p. 39.

<sup>3718</sup> D02-300, T. 320, p. 26. See also T. 321, p. 60.

<sup>3719</sup> D02-300, T. 320, p. 26.

<sup>3720</sup> D02-300. T. 320, p. 27. See also, more generally, “Section VII(A)(2)(c) Participation of Ngitu combatants in the battle of Nyakunde on 5 September 2002”.

<sup>3721</sup> D02-300, T. 321, p. 49.

<sup>3722</sup> D02-300, T. 319, p. 24.

<sup>3723</sup> D02-300, T. 325, p. 11. See “Section VII(E) Ethnic motivations of the Ngitu commanders and combatants”, paras. 713-717.

<sup>3724</sup> D02-300, T. 316, pp. 63-64.

<sup>3725</sup> D02-300, T. 325, p. 54.

contrary to the Defence contention, the Accused's testimony shows in no uncertain terms that he wholeheartedly espoused that ideology.<sup>3726</sup>

1689. In conclusion, Germain Katanga, in his capacity as President of the Ngiti militia of Walendu-Bindi *collectivité*,<sup>3727</sup> knew that a military attack against Bogoro was being prepared and that the weapons supplies were intended for that battle. He also knew that the methods of warfare generally deployed in Ituri, and in Walendu-Bindi specifically, by all of the armed groups entailed acts of violence against the civilian population. More specifically, he knew that Ngiti combatants from Walendu-Bindi had already violently attacked the civilian population and were driven by an ideology inimical to the Hema and that certain commanders of that militia had already fought in Nyakunde in September 2002. Accordingly, the Chamber must find that Germain Katanga knew that the attack on Bogoro would proceed as it did and that the Ngiti militia would commit the crimes of murder, attack against civilians, destruction of property and pillaging.

1690. The Chamber takes the view that as of December 2002, Germain Katanga knew of the intention of the Ngiti militia, as a group, to commit, during the 24 February 2003 attack, each of the aforementioned crimes, which formed part of the said group's common purpose.

1691. The Chamber considers that all these findings establish beyond reasonable doubt that Germain Katanga's intentional contribution to the crimes of murder (as a war crime and as a crime against humanity), attack against civilians, destruction of property and pillaging (as war crimes) was significant and made in the knowledge of the intention of the group to commit the crimes.

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<sup>3726</sup> See D02-300, T. 325, pp. 9-12; "Section VI Ethnic motivations of the Ngiti commanders and combatants", paras. 707-709.

<sup>3727</sup> See "Section X(A)(7)(a)(ii) Germain Katanga: President of the Ngiti militia of Walendu-Bindi *collectivité* in February 2003" para. 1334.

## XI. CUMULATIVE CONVICTIONS

1692. Lastly, the Chamber notes that, in the case at bar, the Defence raised the issue of cumulative convictions for the crimes of rape and sexual slavery. The Defence contended that two convictions cannot be entered in respect of each one of these offences – that is to say, Germain Katanga cannot be convicted of the offence as both a war crime and a crime against humanity.<sup>3728</sup> In this connection, the Defence submitted that the Court should not follow the jurisprudence of the ad hoc tribunals and suggested that the Chamber adopt criteria focusing more on the conduct and intent of the Accused himself.<sup>3729</sup> In the Defence view, should the crimes be accordingly established, the Chamber should enter convictions only in respect of rape and sexual slavery constituting crimes against humanity and not in respect of the same offences if they also constitute war crimes.

1693. The Chamber recalls its finding that the crimes of rape and sexual slavery were not part of the common purpose;<sup>3730</sup> hence, it will not find the Accused guilty of any of the four corresponding charges. However, whilst not specifically raised by the parties, the issue of whether, in the case at bar, cumulative convictions could be entered for the offences of murder constituting crimes against humanity and war crimes, for which the Chamber considers that all the article 25(3)(d) constituent elements are established, merits examination.

1694. In this regard, the Chamber is not satisfied by the Defence submissions advocating that it distance itself from the jurisprudence of the ad hoc tribunals. It notes that article 20 of the Statute enshrines the principle of *ne bis in idem* and stipulates that no person shall be prosecuted by the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. Accordingly, it is the Chamber's view that the Accused

<sup>3728</sup> [Defence Closing Brief](#), paras. 1321-1332.

<sup>3729</sup> [Defence Closing Statements, T. 338](#), pp. 69-70.

<sup>3730</sup> See "Section X(D)(2)(b)(ii) The persons who committed the crimes belonged to a group of persons acting with a common purpose", para. 1664.

may only be found guilty of the same course of conduct in respect of distinct offences.

1695. Since it is appropriate to employ criteria similar to those developed in the jurisprudence of the ad hoc tribunals, the Chamber will permit cumulative convictions only where the conduct in question clearly violates two distinct provisions of the Statute, each demanding proof of a “materially distinct” element not required by the other. An element will be considered distinct if it requires proof of a fact not required by the others.<sup>3731</sup>

1696. The Chamber notes, first, that the crime against humanity of murder contains a materially distinct element which is not required for the establishment of the crime of murder as a war crime: A crime against humanity requires the existence of a widespread or systematic attack against a civilian population, and the demonstration of a nexus between the perpetrator’s conduct and the attack, in respect of both the objective and the subjective elements.<sup>3732</sup> Second, the Chamber notes that the war crime of murder also contains at least one materially distinct element absent from the crime against humanity of murder: the former requires demonstration that the person killed was “*hors de combat*” or was not actively participating in hostilities and establishment that the conduct in question was connected to an armed conflict.<sup>3733</sup> Accordingly, in the Chamber’s opinion, multiple convictions may be entered for the crimes of murder constituting crimes against humanity (article 7(1)(a)) and war crimes (article 8(2)(c)(i)).

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<sup>3731</sup> [ICTY, Prosecutor v. Delalić, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001](#), paras. 412-413. See also [ICTY, Kordić and Čerkez Appeal Judgement](#), para. 1032; [ICTY, Kunarac et al. Appeal Judgement](#), para. 173.

<sup>3732</sup> See “Section VIII(B)(1)(a) Murder as a crime against humanity”.

<sup>3733</sup> See “Section VIII(B)(1)(b) Murder as a war crime”.

## **XII. DISPOSITION**

For all the reasons set out above, and relying, pursuant to the provisions of article 74(2) of the Statute, on the evidence tendered and examined at trial and on the entire proceedings, the Chamber,

**UNANIMOUSLY,**

**MODIFIES**, pursuant to regulation 55 of the Regulations of the Court, the legal characterisation of the facts such that the armed conflict connected to the charges was not of an international character between August 2002 and May 2003;

**BY MAJORITY,**

**MODIFIES**, pursuant to regulation 55 of the Regulations of the Court, and with the exception of the crime of using children under the age of 15 years to participate actively in hostilities (article 8(2)(e)(vii)), the legal characterisation of the mode of liability initially applied to Germain Katanga under article 25(3)(a) of the Statute (indirect co-perpetration) so as to apply to him article 25(3)(d) (accessoryship through a contribution made “in any other way to the commission of a crime by a group of persons acting with a common purpose”);

**REJECTS** the application for a permanent stay of proceedings;

**FINDS GERMAIN KATANGA**

**GUILTY**, under article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003 of:

- Murder as a crime against humanity under article 7(1)(a) of the Statute;
- Murder as a war crime under article 8(2)(c)(i) of the Statute;

- Attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under article 8(2)(e)(i) of the Statute;
- Destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute; and
- Pillaging as a war crime under article 8(2)(e)(v) of the Statute;

**UNANIMOUSLY,**

**NOT GUILTY,** under article 25(3)(d) of the Statute, as an accessory to the crimes of:

- Rape and sexual slavery as crimes against humanity under article 7(1)(g) of the Statute;
- Rape and sexual slavery as war crimes under article 8(2)(e)(vi) of the Statute; and

**ACQUITS** him of those charges;

**NOT GUILTY,** under article 25(3)(a) of the Statute, of the crime of:

- Using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute; and

**ACQUITS** him of that charge;

Consequently, the Chamber,

**BY MAJORITY,**

**DECIDES** that Germain Katanga shall remain in detention until such time as sentence is passed; and

**ORDERS** the Victims and Witnesses Unit to take the measures necessary to ensure the protection of the witnesses pursuant to article 68 of the Statute.

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

Judge Van den Wyngaert appends a partially dissenting opinion to this Judgment.

Judge Diarra and Judge Cotte append a concurring opinion to this Judgment.

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

[signed]

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**Judge Bruno Cotte**  
**Presiding Judge**

[signed]

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**Judge Fatoumata Dembele Diarra**

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**Judge Christine Van den Wyngaert**

Dated this 7 March 2014

At The Hague, The Netherlands