Minority Opinion of Judge Christine Van den

I. INTRODUCTION

1. Today, 444 days after the date on which the accused was acquitted, Germain Kata is now also to be acquitted of the only charges that were levelled a by the Prosecutor. Although I think this decision com unjustifiably late, I do concur with the Majority's conclu under article 25(3)(a) of the Statute that have not been p reasonable doubt. However, this is as far as our unanimity g concerns the rest of the Majority's opinion, in my disagreement with almost every aspect of it. Not only do I believe tha manner in which the recharacterisation has been implemented fundamentally unfair and has violated several of the a fundamental rights, I am also of the view that the evide simply does not support the charges against him.

2. For the reasons set out in my Minority Opinion, I do not believe that it was open to the Majority to recharacterise the charges as confirmed by the Trial Chamber and to enter a conviction article 25(3)(d)(ii) of the Statute. The new charges exc circumstances of the case, contrary to article 74. In recharacterisation was made in repeated violation of th trial rights under article 67 of the Statute and regulatio the Regulations of the Court. I believe that it was impossible the Majority to adjudicate the case on the basis of the charges.

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

[1] Article 74(5) provides: The Trial Chamber shall issue one decision. Whe Trial Chamber's decision shall contain the views of the majority and th constitutes the Minority Opinion and a part of the Trial Chamber II's judgment o charges pursuant to article 74.

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

4. There is no doubt that the village of Bogoro was attacke
2003 and that innocent people died and suffered as a result
However, the crucial factual allegation in this case is th
directed against the civilian population of Bogoro.
Prosecutor's case is that the attack's objective for Bogoro was to
wipe out the village and its civilian population.[2] While it is not
contested that civilians were killed during the attack it
been established to the necessary threshold that the ci
were targeted as such in the attack. Bogoro was a UPC
a military base, which occupied a strategic position o
connects Bunia with Kasenyi and, by extension, Uganda
satisfy the evidentiary standard, the Prosecutor must establish that the
aimed at the civilian population should be the only poss
the evidence produced at trial. Whereas I do not cl
unreasonable to think, from a first look at some of the
what happened in Bogoro, the attackers made no distinct
between UPC combatants and civilians, I strongly rejec
only reasonable interpretation of the evidence.

[2] See Office of the Prosecutor, Prosecutor v. Germain Katanga and Mathieu Ngudjolo
Document Containing the Charges Pursuant to Article 61(3)(a) and 61(7)(a), 6 April 2007,
01/04-01/07-Anx1, paras 63 and 93; Office of the Prosecutor, Prosecutor v. Germain Katanga
Mathieu Ngudjolo Chui, Corrigendum of the Prosecution's Closing Brief, 24 February 2010,
(Prosecution Closing Brief), para. 38; Pre-Trial Chamber I, Prosecutor v. Germain Katanga and
Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008
(Confirmation Decision), para. 33.

5. In my view, an objective and dispassionate reading of th
to the conclusion that the attack, as such, was intended to dislo
UPC camp and that the harm inflicted on the civilian p
incidental to this objective. It may well be that among t
was a sizeable group of persons who held instate strong gru
Hema people and who used the opportunity of the atta
scores. However, I do not believe the evidence shows
was conceived and planned with this purpose in mind. I
that it is entirely plausible that, as the military position
Bogoro had still been held by the UPDF and if no Hema
been present in the village, the Ngiti fighters would of Walen
still have participated in the attack if they thought that
could win control over Bogoro and the strategically impo
Kasenyi road.[3] Several witnesses testified that persons othe
combatants who attacked the UPC positions committe
Bogoro. Whether these people were motivated by ethnic
for revenge or purely opportunistic reasons, it is clear that their condu
cannot be relied upon to draw any inferences whatsoe
purpose of the attackers under article 25(3)(d)(ii) of the
be acknowledged that trained combatants, especially in si
such as the one at hand, do not behave as organised monolithic
and highly disciplined unit. On the contrary, I think the
clearly shows that the aftermath of the attack was the UP
rather chaotic and that combatants and others alike ha
engage in whatever conduct they wanted. I think it imp
much, if anything, about the purpose of the attackers pr

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

from how some of the men behaved afterwards, either alone in collaboration with others with whom they had no pri about the attack.

6. None of the above is intended to diminish the gravity of took place in Bogoro on 24 February 2003, civilians by acc were killed and otherwise harmed during the attack. Ho view that the infliction of harm on civilians was not the attack, the real purpose of which was to chase the UP Bogoro.[4] As there is reliable evidence that Germain Katanga p any role in the execution of the attack of 24 February 2003 in any of the crimes that were committed in Bogoro,[5] he cannot be held criminally responsible under article 25(3)(d)(ii) for the activity he may have done in support of the attack that took place. However, in orde to assess Germain Katanga's responsibility under arti whatever he may or may not have done in the months, w leading up to the attack on Bogoro must be analysed in light of w knew the purpose of the attackers to be. As I do not b been demonstrated that the purpose of the attackers civilians, it cannot be sustainably argued, in my view, Katanga made a criminal contribution to the crimes that w against civilians in Bogoro.

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

[4] It is, of course, possible under article 25(3)(d) that the common purp achieving a legitimate objective and only the reasonably foreseeable consequence of th direct (2nd degree). I note, in this regard, that the Majority does not argue t against civilians were a consequence of the attack on the UPC. Instead civilian population was targeted as such (1st degree). See, for example, Maj Opinion, paras 1155, 1665.

[5] See Majority Opinion, para. 752.

the only question that a Trial Chamber must address is evidence adduced at trial, the charges as confirmed by the Trial Chamber (or, in appropriate cases, as modified by the under regulation 55) have been established beyond a rea do not consider this has been the case, either in relati the original charges under article 25(3)(a) or the new charges of th article 25(3)(d)(ii), for the reasons explained below (se Opinion). But, first and foremost, I do not think it wa Majority to reach the facts and to enter a verdict based o 25(3)(d)(ii) (see part II of this Opinion). I am therefore i with the Majority Opinion.

8. Instead, I would have acquitted the accused because t failed to prove German Katanga's responsibility as initially charge as an indirect co-perpetrator to the Bogoro attack under artic of the Statute. I would have decided this acquittal a lo within a reasonable time after the Chamber had retired, in accordance with Rule 142 of the Rules of the Court.

II. THE RECHARACTERISATION OF THE FACTS VIOLATES ARTICLES 74 AND 64 OF THE STATUTE

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

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

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[6] Regulation 55 of the Regulations provides:

1. In its decision under article 74, the Chamber may change the legal characterisation of fa with the crimes under articles 6, 7 or 8, or to accord with the form o articles 25 and 28, without exceeding the facts and circumstances amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that th be subject to change, the Chamber shall give notice to the participa heard the evidence, shall, at an appropriate stage of the proceedings, giv to make oral or written submissions. The Chamber may suspend t participants have adequate time and facilities for the effective preparation of his or her may hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure

a) Have adequate time and facilities for the effective preparation of his or he accordance with article 67, paragraph 1 (b); and

b) If necessary, be given the opportunity to examine again, previous witness, to call a new witness or to present other admissible evidence under article 69 of the Statute in accordance with article 67, paragraph 1 (e).

[7] Han-Peter Kaul, Construction Site for More Justice: The International C Years, American Journal of International Law (2005), p. 379, at p. 377.

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

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

12. Through the invocation of regulation 55 at this late sta has mould[ed] the case against the accused[15] in order to reach a conviction on the basis of a form of criminal responsibili charged by the Prosecution. In doing so, and contrary to articl

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

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

[10] Lubanga Regulation 55 Appeals Judgment, para. 85; Appeals Chamber, Prosecutor v. Germain Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation Court and severing the charges against the accused persons", 27 March ICC-01/04-01/07-3363, (Katanga Regulation 55 Appeals Decision), para. 95.

[11] Katanga Regulation 55 Appeals Decision, para. 100. See also article 67(l)(a) of the Statu

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

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

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

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

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

13. Even if there were no concerns regarding the ambit of
charges, I still believe that a series of Germain Katanga
fundamentally violated, on the one hand, the mere fact of activating regula
55 at this late stage may not, in itself, have given rise t
bias, I believe that the manner in which the ensuing pr
been handled infringe upon the accused's right to a fai
hearing. I believe there has been a serious misapprehe
Katanga's right to remain silent pursuant to article 67(1
consider that the Majority's determined refusal to provi
with clear and precise notice of the altered charges was in flagr
violation of article 67(1)(a). This, in itself, has made th
under regulation 55 unfair and, moreover, caused unne
Potentially the most troublesome denial of Germain Kat
the failure to afford the Defence a reasonable opportu
further investigations to respond to the new form
responsibility, instead restricting the Defence to provid
on article 25(3)(d)(ii) on the basis of the evidence. This was hardly
a meaningful alternative to fresh investigations, particu
that the Defence was afforded no insight into how the
formulate its case under article 25(3)(d)(ii). Accordin
could do little more than proffer general denials. Given tha
never had any reasonable opportunity to conduct
investigations under the prevailing conditions of insecu
Democratic Republic of the Congo ("DRC"), I consider th

was not afforded a fair chance to defend himself agai
under article 25(3)(d)(ii), which constitutes a clear vi
67(1)(b) and (e) instead.[16][17]

14. Finally, I strongly believe that the length of these proce
incompatible with the Chamber's obligation under art
conduct the trial expeditiously and with the accused's
without undue delay under article 67(1)(c). The delay has been
yet almost entirely avoidable and, most importantly,
exclusively to the Majority. We must not lose sight o
German Katanga, who has endured these delays whilst
awaiting verdict, has in no way contributed to t

15. Any one of these infringements alone would suffice t
doubts upon the validity of today's judgment. In vi
cumulative effect, they present a case of such an overwhelming
the legality and legitimacy of this judgment.

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

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

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

Trial Chamber is thus bound to the factual allegations in any application of regulation 55 must be confined to[18] Crucially, the Appeals Chamber stated that the text of re refers to a change in the legal characterisation of facts, but change in the statement of the facts[19]

17. The question then arises as to whether the facts upon w has relied for the conviction of Germain Katanga u 25(3)(d)(ii), are indeed part of the facts and circumstances described in the charges. As I see it, there are two aspects to this Majority can only rely on allegations which are specifica the Confirmation Decision as part of the factual narrativ legal elements of the crimes charged, or which can be[20] necessary implication. Accordingly, references to evide by the Prosecutor in support of the factual allegations part of the facts and circumstances is also impermissible to introduce entirely new facts (see infra, II.A.1). Second, the Majority may not change the narrative of the facts underlying the fundamentally that it leaves the facts and circumstances describe the charges in question (see infra, II.A.2). I consider the Majority erred on points, which I will address in turn.

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

18. Whereas regulation 55 allows for a change in the legal c the factual allegations, such a change should be confine

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

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

19. The Majority has, since the Notice Decision[21], with the crucial legal question of how to interpret the concept of facts a circumstances. Indeed, it makes no effort to explain c considers that the passages from the Confirmation Decis on were actually part of the facts and circumstances or wheth merely contained part of the Pre-Trial Chamber's reasoning about t evidence. Instead, my colleagues seem to maintain the single sentence of the Confirmation Decision, includ containing references to evidence, qualifies for recharac seems unassailable that not every word, sentence or ph contained in the Confirmation Decision qualifies as circumstances. More importantly, as the Majority has introduced totally new factual elements into the charges under article 2 prominent example is the Majority's crucial allegation t

[21] Décision relative à la mise en oeuvre de la norme 55 du Règlement d disjonction des charges postérieure au 21 November 2011, ICC-01/04-01/07-3319, 21 November 2011 (Notice Decision).

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

20. In an effort to read this new allegation into the Confirm the Majority mentions, first, that the Pre-Trial Chamber confirmed that the physical perpetrators committed their alleged crime requisite intent (see, inter alia, A.1.a) and, second, that the Confirmati Decision mentioned that both FRPI and FNI fighters su lyrics prior to the attack (see, inter alia, A.1.b).[24] Another 'new fact', in

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[22] Majority Opinion, paras 715-717, 1143

[23] I note that none of the footnotes of the Confirmation Decision to whi paragraph 1463 mentions ethnic hatred or anti-Hema ideology as a motive: 275 ('[the attac intended to target the civilian population or individual civilians not takin [&] as a way to secure control over the village and to be a reprisal ag there'), 279 ('the attacks [sic] on Bogoro were not aimed at military tar and/or expulsion of the Hema population, the destruction of the villa Lendu/Ngiti assumption of control over the village'), 403 ('the attack was not only directe the military target but also against the predominantly Hema civilian pop was intended to 'wipe out' or 'raze' Bogoro village by killing the predo population and destroying the homes of civilian inhabitants during and in attack') and 431 ('the violent acts which occurred in Bogoro village on 24 F random acts of violence against the civilian population but were committ policy and an organised common plan, which was part of a larger campaign of re directed against the predominantly Hema civilians living in villages in means to 'wipe out' the village of Bogoro so as to ensure FNI/FRPI control over t and to facilitate the transit of goods along Lake Albert to Bunia')

[24] Majority Opinion, para. 1463.

my assessment, is the Majority's allegation that Germa
knowledge of the group's common purpose (see infra, A b)). In the following paragraphs, I will explain why I am not persuad
arguments.

a) The mens rea of the physical perpetrators

21. In paragraph 1412 of the Majority Opinion, it is argued tha
intention of the Ngiti fighters of Walendu-Bindi was implicitly confirmed by the Pre-Trial Chamber, because the latter found t
physical perpetrators of the crimes in Bogoro acted wi
mens rea.

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

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

On the contrary, given the Trial Chamber's strong emphasis on complete control which each accused allegedly exercised over members of their respective[26] groups and militias, in my view, to assume that the Trial Chamber somehow implicitly confirme the individual physical perpetrators acted with the requis

23. Even if the Trial Chamber had made a finding about the mens rea of the physical perpetrators, I consider the Majority's argu as a matter of law, because it confuses a finding tha individuals acted with intent and knowledge without finding tha had a common plan to commit crimes, which is a requireme newly charged mode of criminal responsibility (article 2 not to say that, in certain circumstances, it may not be p existence of a group acting on purpose from the fact that a number of people simultaneously committed crimes at a c location. However, it does not follow from this knowledge such an inference that the Trial Chamber actually did so. I certai note believe that the Majority is allowed to make any assu regard. Moreover, even if it were possible in this case fact that a number of Ngiti fighters intentionally comm Bogoro on 24 February 2003 and that they were acting with a common purpose, such an inference could only result in those specific individuals formed a group acting with purpose. However, it would not be possible to infer any criminal purpose (or else) of other members of the Ngiti fig

[26] See Confirmation Decision, para. 547: because the soldiers were young military training regime and had allegiance to the military leaders of the likely to comply with the orders of those leaders almost automatically, witho questions.

Walen-Bundi, who were not present at the scene(s) of t
More importantly, such an inference could only warrant
there was a common purpose among the perpetrators of
question at the time when the crimes were committed. It is not p
infer from the mere fact that physical perpetrators acted
the day the crimes were committed that they shared a co
to commit these crimes before the crimes.

24. As it is required by article 25(3)(d)(ii) that it must be e
accused's contribution was made in the knowledge of t
the group to commit the crime,[27] this can only mean that the comm
purpose of the group must pre-exist the accused's contribution. Fr
my reading of the Confirmation Decision, there is nothi
permit one to infer from the mere fact that the alleged physical perpetrators
that there already existed a criminal common purpose a
Germain Katanga made his alleged contribution[28] but nonetheless the gro
that he knew about it.

b) Germain Katanga's alleged knowledge of th
common purpose

25. With regard to the crucial question as to whether the
Decision contained any allegations regarding Germain Katanga's
knowledge of the group's common purpose (a question w
relevant under the newly charged mode of liability (article 2
colleagues refer in general to their earlier decisions, whic
number of references to the Confirmation Decision,[29] I do not

[27] See infra, fn. 1411 (GT: the law on article 25(3)(d)(ii))
[28] I.e. as from December 2002, see Majority Opinion, para. 1410 (GT: Germain Katanga's alleged contribution to the crimes)
[29] See Majority Opinion, para. 1473.

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

[30] I note, in this regard, that the specific paragraphs of the Confirmation Decision r Majority in their previous decision cited in paragraph 1473 are exclusively from chapters dealing with the substantive crimes or the contextual elements. There is to any paragraph of the Confirmation Decision dealing with Germain Kata Neither the Majority Opinion, nor the procedural decisions to which paragraph 1 explanation about how the paragraphs from the Confirmation Decision establish that Germain Katanga could have known about the alleged common purpose of the Ngiti fighters Bindi by December 2002, as claimed by the Majority. See Majority Opinio

[31] Confirmation Decision, paras 527-532.

[32] Confirmation Decision, paras 533-537.

[33] Confirmation Decision, paras 538-539.

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

26. Accordingly, I think it is perfectly clear that the introdu
Katanga s alleged knowledge of the alleged criminal com
the Ngiti fighters of Walendu Bindi is a completely new fact. This
even if it were based on an inference from facts and ci
were contained in the Confirmation Decision. Indeed,
possible to propose quite a number of different bases of inferenc
the raw facts of the Confirmation Decision. However,
formulating charges is precisely to make clear which infe
alleged, so that the accused knows against what he has
It cannot reasonably be argued that an accused is put on notice
possible inference that can be made from the raw
Confirmation Decision. Such a position would render
unfocused and the charges would be nothing more than a
for the accused. It follows that the allegation about Ger
alleged knowledge of the alleged criminal common purpo
fighters of Walendu Bindi is new and falls squarely outside the
the facts and circumstances as confirmed by the Pre-Trial
Chamber. At the very least it fundamentally changes the
charges, which is also impermissible under regulation
discussed next.

2. The Judgment changes the narrative of the charges so fu
exceeds the facts and circumstances described in the ch

27. Even assuming that the Majority Opinion had not formally exce
facts and circumstances of the Confirmation Decision,
that the charges under article 25(3)(d) involve such a fundamental
change in the narrative that this violates the requireme
and regulation 55.

28. Whether or not the narrative has changed impermiss
ascertained on the basis of two considerations. First, w
would have (had) to significantly adjust his or her line
address the changed narrative. Second, when certain
that were part of the original narrative play a significan
in the new narrative.

a) Prohibition to change the narrative to such an
that the accused has to adjust his or her lin

29. As the Majority rightly observes, it is not prohibited for
change in the narrative.[35] Whether or not there is a violation of ar
is, as Judge Fulford has observed, a question of fact.[36]
Nevertheless, it is beyond dispute that it is impe
fundamentally change the narrative of the charges in o
conviction on the basis of a crime or form of criminal re
was not originally charged by the prosecution.

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

> [TRANSLATION] Instead it is a matter of bringing
> commission of by some of the physical perpetrators id
> Decision on the confirmation of charges (such as the
> Ngiti combatants) and to undertake only an analysis o
> the Accused, and his contribution to the crimes,

[35] Majority Opinion, para. 1472.
[36] Trial Chamber, Prosecutor v. Thomas Lubanga Dyilo, Majority Opinion on the "Decision g
notice to the parties and participants that the legal characterisation of
in accordance with Regulation 55(2) of the Regulations of the Court", 01/09-01/11-466, 17 July 200
2054, (Dissenting Opinion of Judge Fulford), para. 19.

such contribution no longer being essential but signifi[37]

31. However, a closer look at the way in which the Majority this bringing to the fore exercise shows that the nar changed to such a material extent that the narrative of the charges substantially altered, in violation of article 74 of the St the following examples demonstrate:

a. The single common plan between Germain Katan and Mathieu Ngudjolo (situated in Bedu-Ezeke which encompassed a combination of goals (i.e. to over Bogoro, open the Kavumu-Aru route, to exact reprisal, etc.) no longer exists. Instead, there separate plans: (a) a coalition between the Ngiti Walendu-Bindi and the Integrated Operational Militia (Etat-Major Opérationnel Intégré, EMOI) or (situated in Beni and comprising APC, the DRC central government groups, including the Ngiti fighters of Walendu-Bindi) to reconquer Ituria and (b) on purpose of the Ngiti fight of Walendu-Bindi alone to commit crimes against the civilian population. The two new plans are said to and independent of each other.

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

[37] See Majority Opinion, para. 1476 (« il s'agit plutôt de mettre en relief la commission une partie des faits identifiés dans la Décision relative à la confirma les membres de la FRPI / combattants ngiti) et de se livrer seulement contribution de l'accusé, et de lui seul, à la commission de ces derniers, sa contribution qui ne serait plus essentielle mais significative (footnote o

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

c. Whereas the Ngiti fighters in Bindi were originally said to have been mere gears[39] in a dysfunctional machine to have been merely fungible[40] individuals, said to have collectively decided, of their own volitio Bogoro for the sole purpose of committing crimes Hema civilians present there.

d. Germain Katanga is no longer the authority who commanded blind obedience[41] as he stood, FRPLI is now the autorité de référence of the militia of Bindi and the person other commanders would re order to settle important matters. Rather than Germain Katanga s alleged exercise of effective the commanders and combatants in Bindi, Walendu 25(3)(d)(ii) charges now focus on Germain Katan authority in matters relating to the distribution and ammunition[42].

e. Germain Katanga is no longer a legal entity capable of the (co

[38] Confirmation Decision, para. 545 et seq.
[39] Confirmation Decision, para. 515
[40] Confirmation Decision, para. 516.
[41] Majority Opinion, para. 1363 [TRANSLATION] the Chamber is unable to conclud reasonable doubt that Germain Katanga wielded, in every aspect of milita Walendu Bindi collectively, [...] exercised the effective authority or that he issued orde operational nature which were then executed (la Chambre ne se trouve pas en mesure de au-delà de tout doute raisonnable, que Germain Katanga avait, dans tou militaire et à l égard de l ensemble des combattants de Walendu Bindi, des pouvoirs de commandement et de contrôle).
[42] Majority Opinion, para. 1279 et seq.

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

32. As already indicated, charges are more than a list of at
corresponding list of legal elements. Instead, charges a
of specific relations between different facts and const
narrative on this basis, would cover all the legal e
of the charges with which it corresponds. Like with a Ta
set, it would, in theory, be possible to combine the indiv
are contained in the narrative in many different ways s
shapes appear. However, I am of the view that it is n
under regulation 55(1) to rearrange the pieces of the ch
a different shape or to take away certain pieces when t
original shape becomes unrecognisable. In other words, charge
merely a loose collection of names, places and events
ordered and reordered at will. Instead, charges mus
coherent description of how certain individuals are lin
events, defining what role they played in them and how t
and were influenced by, a particular context. Char
constitute a narrative in which each fact belonging to
circumstances has a particular place, on the basis of which facts are
included in the facts and circumstances is precisely be
are relevant to the narrative in a particular way. Takin
and fundamentally changing its relevance by using it
different narrative would therefore amount to a "change in the

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

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

33. It is crucial to note that it is insufficient to simply co order to see to what extent they contain some of the same eleme equally important to analyse the legal significance of ea framework of each narrative, because this determines h would defend him or herself against the charges as f matters a great deal, in this respect, how important cer story are within each narrative. A similar fact may be one narrative, but constitute the linchpin of another. defendant may have to devote most scarce resources to such because it could not be expected to have any tangibl outcome of the case, whereas he or she would in a concentrate all his or her investigative efforts on that sa were to perform a different function in an alternative n same is true for trial time spent on such issues, the nu questions posed during cross-examination, the evidence called to the allegation, or indeed the facts read out or admitted. Crucially, it may affect the accused's decision whether or not to tes later in the trial.

34. If the accused could reasonably believe that he was mou meaningful defence against the charges as a whole by particular allegation or set of allegations from the ori requires little explanation as to why a recharacterisatio takes into consideration these allegations radically alte circumstances' as to alter the position of the accused. I str

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

last point because it would be grossly unfair to ignore t
the accused in this regard. Moreover, doing so would h
and undesirable consequence that all accused before th
henceforth have to defend themselves against all possib
could be construed on the basis of the raw factual alleg
in the charges.

35. In sum, the key factor in evaluating whether the narrati
fundamentally is the question of whether a reasonably dilige
would have conducted substantially the same line of d
both the old and the new charge. If this is not the
constitutes a clear indication that the narrative of the
charges has changed so much that it goes beyond th
circumstances as confirmed.

36. The Majority seems to recognise that, in this case, t
Germain Katanga focused its efforts during the trial on
central element of the charges under article 25(3)(a) bu
irrelevant for the charges under 25(3)(d)(ii), namely, the
plan between Mathieu Ngudjolo and himself.[45] However, the Majority
brushes off any concerns in relation to the change in n
had by stating that the original charges
alleged essential contribution to the common plan, in pa
Katanga's role in obtaining weapons and ammunition fro
de facto control over commanders and combatants of Wale
Bindi.[46] Indeed, as already indicated, the Majority believes
was to bring to the fore (mettre en relief) the commissi

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

by some physical perpetrators and to analyse which the contr
the accused made to the commission of these crimes.[47] However, what
the Majority fails to acknowledge is that the facts brou
were never the subject of much attention during the tri
was perfectly normal, because relatively insignificant unde
article 25(3)(a).

37. By concentrating its efforts on disproving the common pl
Bogoro (in the sense of article 25(3)(a)), the Katanga
primarily to refute the Prosecution's allegation that Ge
had organisational control over the FRPI and that he
contributions to the implementation of a common plan be
and Mathieu Ngudjolo that would result in the commissi[48]
The Defence only summarily addressed why and to what extent commission of the
charged crime was foreseeable, and did so only in r
alternative common plan that it advanced, namely tha
objective of retaking control over Ituri, of which the att
military base at Bogoro was an important part.[49] Had the Katanga
Defence been able to reasonably foresee the possibility
would be recharacterised under article 25(3)(d)(ii), it
adopted a different strategy.

38. This brings me to a crucial determinative factor of whether or not
the Majority has fundamentally changed the narrative o
charges. Under Trial Chamber theory, article 25(3)(a) re

[47] See supra, para 30.
[48] Prosecutor's Consolidated Corrigendum to the Defe
Closing Brief, 29 June 2011, ICC-01/04-01/07-2726-Corr-2-Red ("Defence Closing Brief"), paras 1130,
1320.
[49] Defence Closing Brief, paras 1320, 1328.

contribution to the commission of the crime[50], article 25(3)(d)(ii) requir
contribution to a specific crime[51]. The Majority brushes over this
problem by making the obvious point that if essential c
proven, the non-essential contributions are proven as well[52]. However,
what the Majority fails to recognise is that the concept of
contribution to a plan (article 25(3)(a)) does not necessarily mea
a non-essential contribution to a specific crime (article 25(3)(d)(ii)).
Accordingly, article 25(3)(a) liability can be proven w
article 25(3)(d)(ii) liability; the latter provision is therefore n
included form of criminal responsibility.

39. I note, in this regard, that the Majority of Trial construes
Chamber I said in paragraphs 524 and 525 of the
Decision[53]. Read in context, these paragraphs explain that unde
Trial Chamber's interpretation of the indirect co-perpetration
accused must exercise control over the crime by maki
essential contributions to the common plan, which
they know will result in the realisation of the objective elements
crime. It can hardly be disputed that there is a fundam
between making a contribution (essential or otherwise)
plan, which may have broad objectives, and the commission of crime
(such as defeating the UPC and opening the road betw
Kasenyi), and contributing directly to the commission of

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

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

[52] Majority Opinion, para. 1176.

[53] Majority Opinion, para. 1470.

In fact, under the Trial Chamber's interpretation of article 2
German Katanga was considered responsible for the crime
committed by the troops of Mathieu Ngudjolo (and vice versa, as co-perpetrators), which clearly demonstrates that his contribution under the original charges was directly tailored to to the commission of specific crimes by the Ngiti fighte Bindi.

40. In any event, even if the charges under article 25(3)
considered as lesser included offences under article 25(
in convicting someone of a lesser included offence funda
depends on the defence having had sufficient certa
possibilities.[54] The defence only needs to respond to the elem
offences charged to secure an acquittal. Unless the d
clear notice that the lesser included offence is in play, i
for concentrating its efforts on rebutting the allega
charged.[55] As such, by springing article 25(3)(d)(ii) at the e
the Katanga Defence may have endeavoured less vigorously contes
certain points of fact that it might have contested differ
properly informed. There is nothing "lesser" about an
nothing short of the Chamber altering a valid defence and turning
against the accused.

b) Prohibition to take facts out of context

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

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

collection of unrelated facts. All references to particul
persons must be seen in the context of the narrative tha
the narrative of the facts and circumstances. Accor
permissible, in my view, to simply lift out a particular fact
and use this as part of a significantly different factu
prominent examples in the Majority Opinion clearly illustrate the
problem: Beni and Nyankunde, two important places in the
Majority's reasoning, but which were all but irrelevant u
charges.

(1) Beni

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

43. Accordingly, any reference to meetings held in Beni in t
creation of the FRPI or, more importantly, to the opera
called EMOI and its plan to reconquer which took place in Beni

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

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

(2) Nyankunde

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

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

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

[58] See Majority Opinion, para. 561.
[59] Confirmation Decision, para. 409.
[60] Confirmation Decision, para. 415.
[61] Confirmation Decision, para. 578.

part of an argument showing that Germain Katanga a
Ngudjolo knew each other and had worked together since
the FNI and FRPI.[61] It is to be noted, in this regard, that the
Chamber considered that there were substantial grounds to believe tha
co-accused were each involved in some way in the attac
village of Nyankunde, a claim which turned out to
unsubstantiated during the trial.

47. It will be noted that the Trial Chamber did not even hint at the
possibility that evidence of the events in Nyankunde de
the Ngiti fighters of Bavi who were driven by Hema anti
ideology or otherwise affected those who carried out the
attack on Bogoro.[62] This is a crucial finding in the Majority Op

48. For this reason, I believe it is inappropriate for the Majo
Nyankunde a central pillar of its case under article 2
particularly telling, in this regard, that [63] of the Majority
Opinion, dealing with the question of whether or not the
article 25(3)(d)(ii) exceed the scope of the facts and
makes no mention of Nyankunde.[64] Considering the centrality of
Nyankunde to the charges, it is unlikely that this om
due to an oversight. It may therefore safely be conc
Majority has implicitly conceded that Nyankunde was n
facts and circumstances of the Confirmation Decision.

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

[62] Confirmation Decision, para. 552.
[63] See Majority Opinion, paras 1115-1144.
[64] See Majority Opinion, para. 1445 et seq

narrative are permissible to a certain extent, there are
what is appropriate under regulation 55. This case is
textbook example of the kind of drastic change the
against even in cases where all forms of criminal resp
charged.[65] Indeed, one struggles to think of how the f
circumstances could be more in favour of the accused.

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

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

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

51. It bears repeating that, on 29 November 2013, the Prosecutor
indirect co-perpetration under article 25(3)(a) were rea
Germain Katanga and he pleaded not guilty thereto.

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[65] See ICTY, Appeals Chamber, Prosecutor v. Kupreškić et al., Judgment, 23 October 2001, IT-95-16-A, paras 93-121, 151.5

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

52. It seems a fairly basic and uncontroversial requiremen accused waives his right to remain silent, he must do so with full understanding of what this waiver implies. If the accu misapprehends the consequences of his waiver of the right silent, the evidence thus obtained cannot be used agains

53. It is therefore important to assess the scope of Germain Katanga s of his right to remain silent in this case. It is notewort that the Chamber reminded Germain Katanga before he s of the terms of the Chamber's Decision of 13 Septe[67] According to this Decision, once an accused voluntarily oath, he waives his right to remain silent and must ans questions even if the answers are incriminating.[68] However, this reminder was clearly qualified, in that it limited the permissible scope of questioning to which Germain Katanga could be exposed the present case.[69] The Chamber emphasised this point by s unambiguously, that [q]uestions relevant to the case examining party must strictly be related to the charges and that such questions should not merely be aimed at incriminating relation to facts and circumstances falling outside the scope of the case.[70] To avoid any confusion in this regard, the Chamb that, if the Prosecutor intended to ask questions that we contextual circumstances of the case, he should stat behind the question and explain how the evidence sough

[67] ICC-01/04-01/07-T-314-ENG CT2, pp. 10

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

[69] Ngudjolo Self-incrimination Decision, para. 8.

[70] Ngudjolo Self-incrimination Decision (emphasis added), para. 11.

the confirmed charges.[71]

54. To my mind, the terms of this Decision indicated unambigu German Katanga waived his right to remain silent on the confirmed charges under article 25(3)(a) and that ques beyond the scope of these charges were. As the Majority lea, the decision clearly indicate that, by choosing to tes accused exposed himself to the risk of conviction under a different form of criminal responsibility. Under these c least I was under the impression that Germain Katanga s tes could only ever be used against him as an alleged perpetrator. And if I was under this impression, I think to assume that the accused and his Defence Team also the situation and did not contemplate the possibility Katanga s testimony could ever be used to convict him 25(3)(d)(ii). Accordingly, I believe that Germain Kat knowingly and freely waive his right to remain silent in 25(3)(d)(ii).

55. It is worth noting, in this regard, that the Chamber had clear, in its decision of 18 September 2011, that it expected Ger Katanga to answer all permissible questions.[72] It also said that would draw adverse inferences if he declined to answer.[73] Indeed, Germain Katanga was compelled to answer all of the Chamber s q as they were permissible. It seems that there was a fun misunderstanding between the Majority and Germain Katanga as to which questions the Majority deemed permissible

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

emphasising this regard, that the Chamber, far from p
accused on notice that his testimony could be used to c
different forms of criminal responsibility, took pains to stress th
only role it saw for itself was to determine whether o
Katanga was guilty of the charges[74], which can only be interpreted a
referring to his alleged criminal responsibility under a[75].
Had Germain Katanga known that the Majority deemed it
to force him to answer questions that could incriminat
different form of criminal responsibility, he might well h
remain silent.

56. The argument that Germain Katanga must have been aware of t
existence of regulation 55 cannot be used against him
Indeed, if it is argued that Germain Katanga should h
possibility of a recharacterisation into consideration when
give testimony under oath, this begs the question why the C
not think of this possibility itself at the time and, if it
not find it necessary to inform the accused of the fact t
would consider Germain Katanga's evidence admissible for
recharacterisation. Again, I did not for a moment conte
possibility when the Chamber questioned Germain Katang
length. Otherwise, it would certainly not have agreed to a nu
questions the bench posed and would have insisted tha
was given the option to invoke his right to remain silen
questions that might incriminate him under a different form
criminal responsibility. In my view, this is the only wa

[74] ICC-01/04-01/07-T-324-ENG ET, p 64-65.
[75] Note that under regulation 52 of the Regulations, the Document Containing the Charges includes both a st
the facts (regulation 52(b)) and a legal characterisation of the facts (reg

Chamber could have proceeded as it did without runnin
obligation under article 64(2) to ensure that the trial is
with full respect for the rights of the accused.

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

58. However, now the Majority relies heavily on Germain Katan coordinator for its finding that he made a significant co sense of article 25(3)(d). In other words, the Majority has turn perfectly legitimate defence against the confirmed char point of self-incrimination under a different form of cr responsibility.

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

[76] Transcripts T-324, p. 78, 4-8, 82, 1-9; T-325, p. 3, 1-22, 18, 21

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

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

60. I turn now to two related further Defence rights that I co
have been infringed: article 67(1)(a) and (b). Article 67(1)(a) provides for
the accused's right to be informed promptly and in deta
cause and content of the charge. Accordingly, there mus
amount of detail in the facts and circumstances described in the charges
in order for Germain Katanga's right under article 67(1
respected. As acknowledged by the Majority in the Notic
the European and Inter-American Courts of Human Rights hold tha
right incorporates being informed of the legal qualification of th
charges.[78] In addition, the accused must be given adequate
facilities for the preparation of the defence, a right so p
guaranteed both by the Statute (article 67(1)(b)) and
(Regulation 55(2)(b)).

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

[77] As I will discuss later in this Opinion, Germain Katanga's evidence is the one most relied u
the Majority Opinion. See infra II.B.1. Right not to be compelled to testify (article 67(1)(
[78] Notice Decision, para. 22, citing ECHR, Kamasinski v. Austria, Application no. 9783/8
19 December 1989, para. 79; ECHR (Grand Chamber), Pélissier and Sassi v. France, no.
Judgement, 25 March 1999, para. 51; Inter-American Court of Human Rights, Barreto Leiva v.
Venezuela, (Merits, Reparations and Costs), series C No. 206, 17 November 2009, para. 28

the accused s right to adequately prepare his defence
(infra, II.B.2.(c)).

a) Timing of notice under regulation 55

62. I fail to see how the Majority s Notice Decision could be
Germain Katanga being "promptly" informed of the
accordance with article 67(1)(a). Notice under regulation
given "[a]t any time during trial, it appears to the Chamber that
legal characterisation of facts may be subject to change
this language means that, although the Chamber's decision
under regulation 55(2) is discretionary, the Chamber is
obligation to remain vigilant in considering whether to
55.

63. The Majority would have a half years of trial during which the
have provided Germain Katanga with reasonable notice that
may be subject to change. I do not believe that the timing
the Notice Decision can be reconciled with the duty of
rests upon the Chamber. This is particularly so in light
the Defence on several occasions with requests and additional
clarifications of the Document Containing the Charges
regarding the alleged contradictors of Germain Katanga,

[79] (Emphasis added). In this regard, the Appeals Chamber has clearly inte
regulation 55 in light of article 67(1)(a) of the Statute (see Regulation 55 Appeals Decisio
para. 100.

[80] Defence Motion seeking the Amendment of the Document containing th
ICC-01/04-01/07-974; Defence Reply to Prosecution's Consolidated Respons
Motions Regarding the Document Containing the Charges, ICC-01/04-01/07-1020, 1 June 200
Defence Application for an Amended Document Containing the Charges, 20 March 2009, ICC-
01/04-01/07-954; Renewed Application by the Defence for Germain Katanga
Document Containing the Charges, ICC-01/04-01/07-1732, 10 December 2009, Defence Observations o
'Summary Document Reflecting the Charges', ICC-01/04-01/07-1509, 2 October 2009, Décision
relative au dépôt d'un résumé des charges par la Défense, 21 October 2009, ICC-01/04-01/07-1547;

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

64. Despite limited precedent before this Court, notice
recharacterisation has consistently been provided at a far earlier sta
the trial proceedings, permitting the accused to appropri

Defence Observations on the Summary of Charges and Request for Clari of time, 5 November 2009, ICC-01/04-01/07-1601; Defence Observations on the Do Summarising the Charges, 9 November 2009, ICC-01/04-01/07-1653; Defence Request for Leav Appeal the Trial Chamber's Oral Decision of 23 November 2009 on t Clarification of the Charges, 30 November 2009, ICC-01/04-01/07-1692; Décision relative à l demande d'autorisation d'appel contre la décision orale de la Chambre de novembre 2009 relative à la notification des charges, 23 June 2010, ICC-01/04-01/07-2213.

[81] It was even clearer by 7 March 2011, more than one year and a half before the Notice Decisio through the disclosure of the Summaries of Defence witnesses (ICC-01/04-01/07-2760 and Annexes), which showed that the Defence intended to argue, inter alia, that Germain Katanga was not President of the FRPI at the time of the Bogoro attack; there was no hierarchy time of the Bogoro attack; Germain Katanga did not at the time have eff fighters and did not attend the Bogoro attack; Yuda and Dark group a EMOI attended the Bogoro attack; Germain Katanga went to Beni to colle were sent from Beni to Aveba, etc. Further details were given by the dis Defence witnesses between March and June 2011.

[82] Much procedural energy was indeed devoted to the law on article 25(3 crime theory. See: my Dissenting Opinion of 21 November 2012 to the Notice Decision, para. 38 54 which state: Both defence teams asked the Chamber to reject the Pre-Trial Chamber's interpretation of Article 25(3)(a). Prosecutor v. Katanga and Ngudjolo, Defence for Germain Katanga's Trial Brief on the Interpretation of Article 25(3)(a) of th October 2009, ICC-01/04-01/07-1578-Corr; Prosecutor v. Katanga and Ngudjolo, Defence Mémoire de la Défense de Mathieu Ngudjolo sur l'interprétation de l'ar Rome, 28 October 2009, ICC-01/04-01/07-1569. Though the prosecution adhered to the control over the crime theory, it asked the Chamber to "revisit or closely examine" two Trial Chamber's interpretations. Prosecutor v. Katanga and Ngudjolo, Prosecution's Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, ICC-01/04-01/07-1541. The final submission of the Defence for Germain Katanga again challenged the validity of the and reiterated its arguments raised in October 2009. Prosecutor v. Katanga and Ngudjolo, Defence Public Redacted Version Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Corr-Red, paras 1111-1121; Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, 21 May 2012, ICC-01/04-01/07-T-338-RED-ENG WT, p. 18-19; 51 et seq

defence to the charges.[83] For example, the Trial Chamber V(A) deci
Prosecutor v. Ruto and Sang was rendered three months after the
hearings started on 10 September 2013.[84] Even at this relatively early
stage, the Chamber felt it prudent to justify why notice
earlier still, stating:

> The Chamber acknowledges that Regulation 55(2) Not
> given at an earlier point during the trial proceeding
> However, this is the first extended break in the pr
> Prosecution Additional Submission was filed and the
> additional time to deliberate on the legal and factual
> the relief sought.[85]

65. Trial Chamber V(A) emphasised that, despite an additio
time which comes from giving regulation 55(2) Notice
provide such notice increases the chances of prejudice to th
further stated that:

> [t]he remediation of this prejudice may involve pressu
> case in certain respects, recall witnesses that have a

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[83] In *Prosecutor v. Thomas Lubanga*, Regulation 55 notice characterisation of the nature
the armed conflict given thirteen months prior to the start of trial. No
regarding sexual violence given the day the Prosecution closed its case. S
Decision on the status before the Trial Chamber of Trial Chamber I and b
the decisions of Trial Chamber in trial proceedings, and the manner in wh
be submitted, 13 December 2007, ICC-01/04-01/06-1084-tEN; Decision giving notice to the par
participants that the legal characterisation of the facts may be subject
Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/07-2635-tEN. In *Prosecutor v.*
Jean-Pierre Bemba, Trial Chamber III gave notice at the close of the Prosecution case: D
notice to the parties and participants that the legal characterisation of
change in accordance with Regulation 55(2) of the Regulations of the Co
01/05-01/08-3324, para. 5.

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

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

respect for the rights of the accused, to forego legal might otherwise have been in the interests of justice pressures are highly undesirable, and if earlier notice avoidable.[86]

66. Contrary to all other Chambers of the Court, the Major appears to be unconcerned by any of these considerations and c that the accused should have anticipated the poss requalification. My firm view remains that a recharact article 25(3)(a) to article 25(3)(d)(ii) was, to the co unforeseeable to the Defence and rendered at a point in the when the Defence was unable to effectively respond to above.[87] Even if the Majority can argue that the Defence should h to foresee an article 25(3)(d)(ii) recharacterisation, the Majority seems equally reasonable that the Majority should have been able t possibility as well and given notice at a point that would the rights to have adequate time and facilities for the p defence pursuant to article 67(1)(b) and regulation 55(3)(a), witnesses examined pursuant to article 67(1)(d) and regu

67. Considering how late the notification was given, it was utmost importance that, when it became apparent that the detailed as possible. In this case, however, the Majority f Indeed, it was only after being admonished by the Appeals[88]

[86] Ruto and Sang Decision, para. 27.

[87] See supra, para. 56.

[88] Katanga Regulation 55 Appeals Decision, para. 102. Judge Tarfusser wishes to found in the Impugned Decision fell largely short of providing an adequate amo accused. Judge Tarfusser noted that the Majority on Appeal had itself explici it neither knows the precise nature of the recharacterisation that may b

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

b) Need to provide detailed information

68. It is beyond dispute that article 67(1)(a) requires that the Defence is given detailed information about the charges. The ... providing detail of the relevant charges has also been r... Chamber. On 13 March 2009, more than eight months be... the trial, the Trial Chamber required the Prosecutor to subm... depth analysis chart (IDAC) to the Defence prior to th... detailing how each piece of the Prosecution evidence re... the charges levelled against the accused. The reaso... instruction was that such information was necessary to ... the right of the accused to prepare a defence. The Cha... the need to ensure that there is no ambiguity whatsoev... facts underpinning the charges confirmed by the Pre-Trial Chamber and that such a table was necessary for a fair and effectiv... the evidence on which the Prosecution intends to rely.[90] ... worth citing in full what the Chamber saw the table would...

> [It would] ensure that the accused have adequate time ... preparation of their defence, to which they are entitle...

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

[89] Decision transmitting additional legal and factual material (regulatio... Regulations of the Court), 15 May 2013, ICC-01/04-01/07-3371-tENG (Further Notice Decision), para. 9. See also the discussion in my Dissent to that Decision, Dissent... Van den Wyngaert, 20 May 2013, ICC-01/04-01/07-3371-Anx (Dissenting Opinion of 20 May 2... paras 1-20.

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

of the Statute, by providing them with a clear and co
of all incriminating evidence and indeed each item of evidence rela
charges against them. [&.] The Chamber further agre
that it is entitled to be sufficiently informed in advance of t
commencement of the trial of the precise evidentiary basis
Prosecution case. Indeed, although the Prosecution ri
level of discretion in choosing which evidence to in
Defence must be placed in a position to adequately
select evidence or challenge the relevance, admissibility an
authenticity of the incriminating evidence. This is c
evidentiary basis of the Prosecution case is clearly
advance of trial.[91]

69. In light of this high standard applicable to the duty under article 25(3)(a), one can only wonder why the Majority has ma effort to inform Germain Katanga of the precise nature against him under article 25(3)(d)(ii). Indeed, I think it the Majority's negative attitude with regard to the accused requests for more detailed information violates the lette the very principles which the Chamber pronounced befo the trial.

70. This situation stands in which no counterpart regulation 55 has been applied by other Trial Chambers. For example, Trial C Prosecutor v. Ruto and Sang emphasised the importance of detailed notice i its decision of 12 December 2013 providing notice that, Mr Ruto, there is a possibility that the legal characterisat

[91] Idem, para. 6.

may be subject to change to accord with article 25(3)(b[92]. On 9 July 2012, the Chamber had already directed the Prose pre-trial brief explaining this case and the evidence i intends to rely on at trial[93]. In the Notice Decision, Trial Cham V(A) directed the Prosecution to file an addendum to th the Prosecution was to explain its case, with accompa under each of the proposed legal characterisations[94].

71. It would of course have been difficult for the Majorit Prosecutor to submit a new document containing the c article 25(3)(d)(ii) at the end of the trial. Doing so wou Prosecutor an unfair advantage. I therefore submit that, a trial, it is only appropriate to apply regulation 55 in re technical matters, such as the nature of the armed confl not necessary to provide any notice concerning the underly factual basis of the recharacterisation.

72. I stress, in addition, that it is not appropriate to argue that, be accused is aware of everything that was presented at therefore has never been any notice[95]. As already noted, charges are mo

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[92] Ruto and Sang Decision, para. 45. See also discussion of the issue prior to the comme ICC-01/09-01/11-T-15-ENG ET page 25 line 16 to page 30, line 18; Order schedul conference, 14 May 2012, ICC-01/09-01/11-T-18-ENG, para. 5; Order setting the deadline for on Regulation 55 and Article 25(3)(d), 19 June 2012, ICC-01/09-01/11-1126.

[93] Trial Chamber V(A), Prosecutor v. William Ruto and Joshua Sang, Decision on the schedule leadi up to trial, 9 July 2012, ICC-01/09-01/11-1140. See also Prosecution's Updated Trial Brief, 9 September 2013, ICC-01/09-01/11-1612-Anx-Red.

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

[95] See, for example, Majority Opinion, para. 150: "[T]he Appeals Chamber considers it expedient not only to refe to information provided by the Chamber following the Decision, but also to information which, given the course and the content thereof, was evident Defence's possession already." Voir également non seulement de se référer aux infor Chambre a données à la suite de la Décision du 21 novembre 2012 mai

than a list of isolated facts and a list of legal elements are allegations about the existence of specific relations between and factual propositions on the one hand, and several factual propositions on the other. Taken together, they a demonstrate a particular narrative which, if true, would legal elements of the charges with which it corresponds.

73. Having a general idea about how the case is to be argued is simply inadequate. As any lawyer knows, the devil is in detail and this is why the Defence is entitled to know t much detail as possible. Whereas it may be difficult to obtain information about how the charges will be proved at the comm of a trial, once the trial has run its course, there is n giving the accused exhaustively detailed information abo recharacterisation so that he or she may defend himself or herself effectively as possible.

c) Inadequate notice

74. The Majority Opinion states that, because the facts rel recharacterisation under article 25(3)(d)(ii) are the same relied upon by the Prosecutor under article 25(3)(a), the only inquiries that need to be asked in relation to article 67(1)(a) charges under article 25(3)(a) were sufficiently notified Defence received adequate notice about those facts th different significance under article 25(3)(d)(ii).[95] I do not agree with my colleagues that the facts underlying the article 25(3)

compte tenu de la manière dont se sont déroulés les débats et de leur teneur, en possession de la Défense.).

[96] Majority Opinion, supra, paras 1488.

the same as those that were initially charged under artic[97] also not in agreement with this suggestion.

75. Moreover, the Majority s argument that it did not hav detailed notice of the new charges under article 25(3)(d are based on the same facts and circumstances as the ch article 25(3)(a) fails. This is because application of any legislative regulation 55 must, by definition, be limited to the sa circumstances as contained in the Confirmation Decisio if the Majority s reasoning were accepted, it would neve provide further clarity.

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

> [t]he Defence is invited to refer to the existing evide case, which shows that certain crimes were committed

[97] See supra, n. 1. A. The Judgment relies on facts that clearly fall outside the scope of the Confirmation Decision.

[98] Majority Opinion, paras 1483-1488

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

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

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

the Defence should not have confined itself to a pure the common purpose by seeking proof of planning or a the group's ambitions and/or the promulgation of a decision it may have formally taken.[100]

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

79. After this unhelpful comment, the Majority Opinion goes that, even assuming evidence of specific meetings was essential prove the common purpose, it was incumbent upon the D to those meetings that had already been discussed duri gives as an example a meeting mentioned in the Confirmation Dec

[99] Further Notice Decision, para. 19.
[100] Majority Opinion, para. 1516: « La Défense ne devait pas se limiter à une conception purem formelle du dessein commun en recherchant la preuve d'une planification ou d explicite des ambitions du groupe et/ou de la communication d'une déc prise », referring to Décision relative aux requêtes présentées par la Défense dan 3379 et 3386 des 3 et 17 juin 2013, ICC-01/04-01/07-3388 (Décision du 26 juin 2013), paras 27, 28.
[101] Décision du 26 juin 2013, para. 28.

paragraph 548 (vii).[102] First, it is entirely inappropriate to be so a
about the importance of certain specific meetings. Second, it i
inappropriate to formulate charges on such a central is
examples. Third, it is hard to see how the Defence should have guessed
that this particular meeting was relevant to the new
Majority had only made reference to paragraph 548 twice
relation to the elements of article 25(3)(d), i.e. Germain
alleged contribution and particularly his overall coordinati[103]
and once in relation to the allegation that on the eve
several commanders took up positions with their troops
Kagaba in order to launch the Bogoro attack[104] and, to
the question of the genesis of the alleged criminal comm

80. Last but not least, and insofar as the relevance of this particu
reference, as it relates to a meeting which allegedly to
before the attack on Bogoro between Germain Katanga, Mathi
Ngudjolo and other commanders in the camp of Cobra Ma
Not only is there no evidence for this meeting (as is evi
that the Majority makes no reference to this meeting i
under article 25(3)(d)(ii)), it also allegedly involved Mathieu
and Cobra Matata, two persons of whom it has not been
took part in the attack on Bogoro. In other words, the M
be arguing that the Defence had sufficient notice because the
Confirmation Decision mentioned a meeting that never t
which, even if it did, would have been irrelevant to the
common purpose of the Ngiti fighters of Walendu Bindi.

[102] Majority Opinion, para. 516.
[103] Notice Decision, para. 28.
[104] Further Notice Decision, para. 30.

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

> as to the list of evidence to which it will refer, the Ch this juncture, the Defence could not have been unawar therefore the Bench had no need to provide it.[106]

82. The Majority also rejected the Defence's request to be infor evaluate the credibility of the evidence by stating that the D no right to know what the Chamber thought about the ev the judgment was pronounced.[107]

83. Whether or not one agrees with this from a formal point of view, help but notice how artificial these arguments sound in context. Of course, the Defence was aware of the evid However, the Defence was also aware of the fact that the Ma did not believe a considerable portion of this evidenc would not have taken the step to recharacterise the cl

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[105] Although regulation 52 of the Regulations of the Court does not spe Containing the Charges should include references to the supporting e Chambers in all cases have required the Prosecutor to provide the Defenc a table indicating precisely upon which evidence she relies in order to requirement has been applied also when the charges were amended (see, Trial Chamber, Prosecutor v. Laurent Gbagbo, Decision adjourning the hearing on the confi charges pursuant to article 61(7)(c)(i) of the Rome Statute, 03 June 2013 ICC-02/11-01/11-432, para. 3 (xiv) the operative part). I can think of no good reason why the accused should not in cases when the charges are recharacterised, especially at the end Chamber knows exactly which evidence is available in the case record.

[106] Majority Opinion, para. 152. [Traduction] En ce qui concerne la liste des preuves auxquelles la Chambre a l'intention de se référer, celle-ci estime qu'à ce stade, la Défense ne pouvait les ignorer et à les lui adresser.

[107] Majority Opinion, para. 152.

with Accordingly, as the Defence was not informed abou
of the Prosecutor s the Majority was still considering rel
upon, the Defence was left guessing about which evid
challenge in order to defeat the article 25(3)(d)(ii)
importantly, the Defence could not possibly have fore
Majority would use its own evidence, as well as that of the
which was presented in support of the charges under article 25(3)(a)
order to prove the charges under article 25(3)(d)(ii). The sig
this point can be seen from the fact that the Majority relied heavily on
several Defence witnesses and ex-FPLC, such as D02
Lettre de dol, as well as Germain Katanga s[108] own testim
Had the accused been given adequate notice of how
planned on using the evidence against him, the Defence may well
decided to recall some of these witnesses to clarify a nu

84. The issue of notice perfectly illustrates, in my view, how
when chambers (re)formulate charges, especially when this happens at
the end of a trial. By doing so, the entire balance and
proceedings was upset. For example, the whole purpo
closing arguments is to give the Prosecutor an opportun
last time and in great detail, how the evidence proves h
allegations. The reason why the Defence is never requi
final observations at the same time as the Prosecutor is
fundamental right to respond to the latter s claims. What the Major
done here, however, is similar to compelling the accu
himself before he learns about the precise nature of the allega
him.

[108] See infra, para 1667.

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

3. Failure to afford a reasonable opportunity to investigat and (e))

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

a) Serious investigation was necessary

87. Contrary to what my colleagues assert, an additional inv number of key factual issues was more than necessary point to the example of Nyankunde and what is alleg

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[109] Majority Opinion, para. 1583: [TRANSLATION] further investigations or search for new do not constitute the only possible (« la conduite de nouvelles enquêtes ou la recherche de nouveaux éléments de preuve ne constitue pas la seule voie

[110] Majority Opinion, para. 1574. See infra, III.B.3.(b) There were no meaningful alternatives, fresh investigation.

[111] Majority Opinon, para. 1568 et seq.

happened there on 5 September 2002 to illustrate the point very little reliable evidence was presented on this point during which can be explained at least by the fact that this allegation was all b immaterial under the initial article 25(3)(a) charges how extremely weak the evidential basis is on which the for its findings in this regard, I think it is difficult to ma investigations were anything other than a bare necessit accepted as much on 26 June 2013:

> 17. As previously stated in the 15 May 2013 Decision, that, although addressed at trial, some aspects of the c analysis of Germain Katanga s liability under article Statute. The Chamber considers this to hold particul attack on Nyankunde and/or other attacks predating t (2) the identification of the perpetrators of the crimes; and (3 between the weapons supplied to the Ngiti combatan committed in Bogoro.
>
> 18. In principle, therefore, the Chamber is agreeable t by the Defence for the purposes of those witnesses w intends to recall or call for the first time [&].[112]

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

> [the Majority] has never taken the view that further D in situ were indispensable to meet the fair trial req refrained from objecting to the Defence s possible

[112] Decision on the Defence Requests set forth in observations 3379 and 26 June 2013, ICC-01/04-01/07-3738-ENG, para. 18, as 17

investigations[113].

89. While I agree with the Majority that regulation 55 does not entitle the Defence as a matter of right to conduct unlimited investigations, I th that in this particular case it was absolutely clear that maintain some level of fairness and balance in the pr Defence had to be able to conduct a meaningful inves noteworthy, in this regard, that prior to the new charge 25(3)(d)(ii), there was no need for the Defence to in resources in the investigation of questions such as wh Nyankunde or who inflicted the numerous attacks on the civilian population o Bogoro. As previously noted, the Defence was perfectly itself to challenging other aspects of the Prosecutor s 25(3)(a), and it therefore had no need to investigate the

90. The mere existence of regulation 55 cannot impose a bur Defence investigate all possible facts and circumstances cont the Confirmation Decision, just in order to be prepared f eventuality that the Chamber might at some point recharacterise the charges. Such a suggestion would ru avowed purpose of why we have regulation 55, i.e. to al more focused, trials. Accordingly, I am of the view tha can identify particular issues of fact which it did not previously investigate without having been negligent and in this regard that these issues have a particular significance in the recharacterised charges, then the Defence should, a

[113] Majority Opinion, para. 153 : « Il n'a donc jamais été question, pour elle, de c l'accomplissement de nouvelles enquêtes effectuées in situ par la Défe satisfaire à l'exigence de diligence qui lui est due est bornée à ne pas s'opposer à ce poursuive éventuellement ses enquêtes »

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

91. I therefore fundamentally disagree with my colleagues w that it was somehow incumbent upon the Defence to dem further investigations were necessary.[114] To the extent that the Defence had to demonstrate a need for further investig did so by identifying those areas which it had not previou investigated through no fault of its own. The require Defence should somehow have proved that additional investiga would have yielded new information that would have been its case is plainly incongruous. It amounts to demar Defence prejudice, even what the results of the investigation be. However, common-sense dictates that it is simply impossi foresee what the evidence one may or may not discover therefore wonders what more the Defence could have do stating that it hoped that the witnesses it interviewed would contradict the allegations contained in the new charges.[115]

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[114] Majority Opinion, para. 1582 [TRANSLATION] The Defence shied away from demonstrating specifically that further investigations were necessary [&], moreover had expressly requested the Defence (la Défense s'est abstenue de démontrer, de manière enquêtes complémentaires étaient pour elles nécessaires [&] alors mêm expressément demandé).

[115] The Majority suggests, at paragraph 1582, that the Defence should have indicated evidence it hoped to obtain from the witnesses it had already met, would have been answered by similarly aspirational statements from the Defence. It is questionable whether the Majority would have been satisfied with this requested extension of time for further investigations: [TRANSLATION] the Defence to continue interviews with certain persons whom it met for the summer of 2013, it would have been at liberty to request additional time indicated to the Defence, it justified its request. Accordingly, however, this De possibility, which it had been expressly given by the Chamber, if only additional time to continue its investigations without any further clarifica significance of any to its case or its relevance within the context of the

92. The fundamental flaw in the Majority s reasoning lies in
seem to argue that further investigations are only ne
regulation 55(3) where the party will learn new information that may h
an impact on the outcome of the proceedings. However,
misconception of what this provision means. The necess
not to be measured on the basis of what impact further invest
may have on the outcome of the case. Rather, necessity
fairness of the proceedings. Accordingly, even if the in
no useful new evidence whatsoever, this does not mea
hindsight that they were not necessary. Assuming otherwise would
imply that Defence investigations are always a waste of
accused is convicted.[116] The point of defence investigation
to give the accused a fair opportunity to challenge the
evidence against him or her. Even if in the end the accused
the defence s investigatory efforts will still have made
contribution to the trial process, namely by showin
incriminating evidence was so strong that it could not be refuted by
whatever evidence the defence could, particularly, find to
contradict the charges. In other words, defence investi
no significant result play a very important role in confir

(s il avait été important pour la Défense de poursuivre ses entretiens av
qu elle a pu rencontrer pour la première fois aucun témoin le 20 décembre 2013, elle
de sa part un délai supplémentaire, à condition, comme la Chambre le l
une telle demande. Or, là encore, la Défense n a pas usé de cette poss
expressément invitée la Chambre sauf à demander, de manière générale, un
pour poursuivre ses enquêtes sans autre précision ou justification sur
témoignage pour sa cause ainsi que sur sa pertinence dans le cadre de la

[116] For this reason I find the Majority s statement at paragraph 158, that the Defence has
investigations that yield favourable results entirely by its own choice, to be very misleading when
Majority s mindset as far as the defence rights are concerned. [TRANSL
defence has no acquired right to obtain from its investigations results th
case(Il n existe aucun droit acquis, pour une Défense, d obtenir de se
toujours favorables à sa cause.).

of the convict. However, if no investigation takes place a always remains the reasonable possibility that evidence found that could contradict the available incriminating ev[117]

93. As I noted in my initial dissent, appended to the Notice of 2 Novem Decision, the Majority's application of regulation 55 understood as a consequence of a fundamental miscons adversarial process. While article 64(8)(b) of the Sta Chambers considerable flexibility to conduct trial proceedings, has been a deliberate choice of this Trial Chamber t proceedings in an adversarial manner.[118] Although the Chamber reserved the right to order the production of all evidence that necessary for the determination of the truth,[119] (the scope of which is however as stipulated in article 69(3)), the trial was essentially adversarial manner.[120]

94. In inquisitorial systems, the main responsibility for centralised in the hands of the trier of fact and the evidence largely collected before the start of the actual trial. Th different legal recharacterisation in that kind of system give rise to the same concerns as those voiced in this Opinion in such a procedural model, the entire evidence of the c in a shared dossier, the contents of which are known to the pa participants right from the start of the proceedings. The

[117] See infra, Annex 1, Missing evidence.

[118] Directions for the conduct of the proceedings and testimony, 4 Dec 20 December 2009, ICC-01/04-01/07-1665-Corr (Rule 140 Decision).

[119] Rule 140 Decision, para. 3.

[120] The fact that paragraph 7 of the Rule 140 Decision foresaw the possibility o witnesses after the defence teams had concluded their cases did not fundamentally change t adversarial nature of the trial. In any event, the Chamber did not avail itself of further evidence was called after the defence cases.

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

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

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

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

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

[122] See Majority Opinion, para. 55: « Il n'a donc jamais été question, pour elle, de c l'accomplissement de nouvelles enquêtes par la Défense était indispensable satisfaire à l'exigence d'équité du procès. Elle s'est bornée à permettre que la Dé poursuive éventuellement ses enquêtes.

However, considering the dearth of evidence on so many of the points in question, I believe such a claim would be entir On the contrary, I submit that if, for example, the Defe single credible witness who would have testified that troops were responsible for the large majority of civilia Nyankunde, this would have undermined the entire ed Majority's theory about this case.[123]

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

b) There were no meaningful alternatives, sho investigation

99. Throughout the Majority Opinion on regulation 55, there is a str reproach to the Defence, accusing it of not having made full u of the alternative means to defend the accused, short that were available.[124] However, upon closer inspection, it turn that the alternative opportunities in the case were far less meaningful.

100. For example, the Majority seems to make much of the fac the Defence to make submissions based on the existing evid case record. As I have noted, I was under the impre Majority had as a matter of principle accepted the need for new

[123] See infra, III.B.2 Missing evidence.
[124] Majority Opinion, para. 157: [TRANSLATION] Focusing on the investigations the Defe somewhat lost sight of the procedural possibility favoured by regulatio sur les enquêtes, la Défense a perdu quelque peu de vue la possibilité procédurale pour privilégiée par la norme 55 (footnote omitted).

investigations on 26 June 2013,[125] the Majority changed its previous posit by compelling the Defence to submit a brief on the basis of evidence.[126] This to me seems like it was an attempt by the put the Defence's argument (i.e. that no meaningful defence without further investigations) belatedly to the test. H Defence had no precise idea about how the Majority wou conclusions under article 25(3)(d)(ii),[127] could be expected from the accused was for him to formulate a general den called opportunity for the accused to defend himself on existing record therefore amounted to little more than a not guilty as to the charges under 25(3)(d)(ii) the Majori mind.[128] Accordingly, on 25 October 2013, the Defence was reiterating its inability to provide an adequate respons respect of the altered mode of liability in the absence investigations.[129] I still cannot understand how this exercise c proven whether or not the Defence was able to meanin itself without additional investigations, because we cannot tel more persuasive the Defence would have been had additional evidence.[130]

[131]

[125] Décision du 26 juin 2013, para. 13.

[126] The Majority Decision was couched as an invitation but it was cle paragraph 8 of the 2 October 2013 Decision that this was the Defence's relative aux observations de la Défense (ICC-01/04-01/07-3406, Decision of 2 October 2013).

[127] See supra para. 87.

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

[129] Idem.

[130] Defence Observations on Article 25(3)(d) Room for Status, 25 October 2013, ICC-01/04-01/07-3417, para. 1.

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

101 The Majority also seems to suggest that the Defence did not h
opportunity to recall witnesses who had already testified i
before.[132] With respect, I do not think it was appropriate
Defence to select which existing witnesses to recall bef
finalised its investigation. However, the Defence was ne
opportunity to have a meaningful discussion before this
whether or not it was essential for the Defence to be able to be
further investigations, or present other fresh evidence
article 25(3)(d)(ii). My recommendation for a status
exhaustively litigate whether it was fair to recharacteris
these circumstances was invested.[133]

102 Therefore, although I am not in a position to determine
the Defence has been able to usefully explore the possi
old witnesses, I can only conclude that the Majority put the D
very awkward position in requiring it to give a provisional list of w
before being able to conduct any further investigation.
understand that any party would be reluctant to commit
witnesses, even provisionally, before it has had the time to
available evidence. This reluctance is understandable more
the witnesses in question have already testified. I the
suggestion or innuendo according to which the fact that
refrained for fourteen months from calling some of the old witnesses would so
be indicative of the fact that the Defence has not be

[132] Majority Opinion, para. 155. La Défense a fait le choix de ne pas demander à entendre les témoins qu'elle avait elle-même initialement cités

[133] Annex to Ordonnance relative aux Observations de la Défense sur les C Procureur et des Représentants légaux des victimes (ICC-01/04-01/07-3414), dated 10 octobre 2013, Dissenting Opinion of Judge Christine van den Wyngaert, 10 October 2013, ICC-01/04-01/07-3414-Anx, (Dissenting Opinion of 10 October 2013

exploring this option or that none of these witnesses
exonerating to say. Indeed, it is very well possible that
were interviewed simply had no knowledge of the facts of
interest or that the Defence had other valid reasons fo
call them (assuming the witnesses were willing to cooper

c) The Defence did not have a meaningful opp investigate

103 By far the most disturbing part of the Majority's treatme
defence investigations is how my colleagues deal with th
whether the Defence had a meaningful opportunity to inv
the Majority's consistent unwillingness to acknowledge
difficulties encountered by the Defence and by the unreason
of the criticisms that are hurled at it. I entirely disagre
unreasonable suggestion that the Defence somehow
and squandered supposedly ample opportunities[134] to investi
Prior to and during the trial, the Defence was able to
Walendu Bindi and Beni and was able to address the
originally framed. Had notice been given during trial, or
even for much of 2012, the Defence would have had
opportunity to carry out further investigations. However
did not authorise the Defence to conduct further investi
June 2013.[135] A Registry Report attested to the fact that invest
could have been undertaken up until August 2013, but c
Defence's contention that the security situation prevent

[134] See supra para. 99.
[135] See also, Décision portant rappel des termes de la décision n° 3406 du
l'Ordonnance n° 3412 du 10 octobre 2013, 4 novembre 2013, ICC-01/04-01/07-3419, Décision du 19
novembre 2013, p. 3.

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

104. Despite all this, the Majority attaches particular importance Defence's decision to postpone a planned mission at t August 2013.[138] In doing so, the Majority completely ignores t given by the Defence for its decision, which was that it to travel to the locations in question with a MONUSCO and that past experience had shown that potential wi extremely reluctant to talk to the Defence under such That this is a very plausible explanation is demonstrated by the systematic use of intermediaries by the Prosecutor thro investigations in Ituri. The Defence therefore conside potential benefit of conducting the mission under such preferred to wait a while in the hope that the security si which, by all accounts, was extremely volatile at that improve, so that it would be possible for the Defence to the places of interest without a military escort. The De be reproached for not having foreseen that the security worsen rather than improve. Similarly, it cannot be h

[136] Observations of the Government of the Democratic Republic of the Congo pursuant to Trial Chamber I's decision of 23 September 2013, ICC-01/04-01/07-3740-Conf.

[137] It is worth noting in this respect the latest Defence filing as of 27 J Chamber that the the situation has improved to the extent where the defence investigations are viable. Indeed in respect of Beni the situation has Walendu Bindi remains too insecure for investigations: Defence Furth Situation in Eastern DRC, ICC-01/04-01/07-3427, 2 January 2014, para.

[138] Majority Opinion, para. 1587.

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

105. More fundamentally, it is extremely unreasonable to su the Defence conducted the planned missions, it would ha satisfy its evidentiary needs. It is clear that these mi have been a first step in a necessarily much more protra identifying and interviewing a large number of potential

106. Moreover, it is not disputed that the Defence did n opportunity to go to Bemba, including [redacted]. The Majority brushes aside this highly significant factor by accusing the De having no idea about what evidence it was going to find goes so far as to accuse the Defence of merely intend fishing expedition[139]. With respect, I find this suggestion enti baseless. Indeed, one can hardly reproach the Defence in advance who it would be able to find in these remote l precise information they could have provided.

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

[139] Majority Opinion, para. 158 ([redacted] [TRANSLATION] it is clear from the First Annex th Defence investigations consisted purely and simply in conducting fishing expeditions based on scarce information, pertaining at times solely to the location of the perso indication or indication as to the expected witness's experience (la Premi annexe que une partie des enquêtes de la Défense consistait purement et sim « fishing expedition » sur la base d'informations plus que succinctes, localisation de la personne et sans que soit prise en considération une quelconque indication à que pouvait être l'expérience du témoin présumé).

case of relatively limited dimensions on the basis of a l
evidence[140] that had been, for the most part, known to it for
now find it fitting to criticise the Defence for not being able to conduct
complex investigation with limited resources and under
circumstances in less than two months. As the Majority
the Defence for Germain Katanga has always demons
professionalism and integrity throughout the proceedings. I
find it unseemly that the Majority now attempts to lay re
the fact that Germain Katanga did not have a meaningful
defend himself against the charges (mid-)[redacted] under the
doorstep of his Defence. This suggestion, which is ent
can only add insult to the injury already caused by the
under regulation 55. I note, in this regard, that if th
provided the Defence with the requested information about the new cha
from the start, and had immediately granted them permis
additional investigations on 21 November 2012, most o
investigations might well have been completed by the ti
situation worsened.

108. As it eventuated, it was simply not possible, under t
conditions of precipitation and insecurity, for the Defen
meaningful investigation. Whereas the Majority could no
the security problems, it should have known that any meaning
investigation would require a considerable amount of time.
giving the Defence an adequate amount of time from
regulation 55 Notice Decision, the Majority has effecti
accused's right to defend himself against the new charges unc

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

25(3)(d)(ii).

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

109. I am of the view that the Majority consistently failed
Defence s concerns about the Majority s course of actio
exaggeration to say that the Majority has systematicall
eye towards the Defence s repeated requests to termina
55 proceedings, or at least to rule on the inherent unfairness of the
proceedings before moving to judgment.

a) Order of 10 October 2013

110. On 4 October 2013, the Defence requested that, in light
to preserve a fair and expeditious trial, the Chambe
discretion not to recharacterise, lamenting [141] Though is enou
Majority simply dismissed this request, stating it wil
relevance of all of the Defence s filings on the investiga
conduct in the DRC only in the judgment pursuant to
article 74 of the Statute.[142] In my dissent, I expressed my concern th
status conference was necessary in the sense of regula
not all matters relevant to the proposed change had b
considered. The Majority disagreed and proceeded in the fac
Defence requests for additional time and resources t

[141] Defence Observations on the Registry, Prosecution and Victims Representations of 4 October 2013, ICC-01/04-01/07-3407-Conf, para. 7.
[142] Ordonnance du 10 octobre 2013, para. 5. [TRANSLATION] will rule on the relevance of a the Defence s filings on the investigations it sought to admit into the DR delivered pursuant to article 74 of the Statute. ne se prononcera sur la pertinence de des écritures de la Défense relatives aux investigations qu'elle entendait jugement qu'elle rendra conformément à l'article 74 du Statut
[143] Dissenting Opinion of 10 October 2013, para.

adequate defence under article 25(3)(d). The matters w
exhaustively litigated.

b) Non-decision of 19 November 2013

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

> […] having regard to the obligation cast on the Bench in its forthcoming judgment pursuant to article 74 of Chamber will adjudge the difficulties which the De encountered in effecting those investigations whi indispensable and, more generally, the consistency of the recharacterisation procedure with the rights of the Accused. Accordingly confirm that at this juncture it does not envision fu Should it consider that the procedure for recharacte does not safeguard the rights of the Accused, it will de recharacterisation and then rule solely on the basis liability, namely under article 25(3)(a) of the Statute. […][145]

112. In my Dissent, I reiterated my view that the Majority's approach was

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

[145] Décision du 19 novembre 2013:

12. […] eu égard à l'obligation qui lui est faite de statuer, dans le jugement qu'e rendra en application de l'article 74 du Statut qu'elle se pronon rencontrer la Défense pour accomplir les enquêtes qu'elle estimait généralement, sur la compatibilité de la procédure de requalification ave Chambre ne peut dès lors que confirmer qu'elle n'envisage pas, à nouvelles enquêtes. S'il lui apparaissait que la procédure de requalification ne garanti les droits de l'accusé, elle s'abstiendra d'y procéder et elle statuer de responsabilité initiale, c'est-à-dire de l'article 25-3-a du Statut. […]

14. Enfin, c'est également dans le jugement que la Chambre statuera sur la demand tendant à ce que soit exclues certaines parties du témoignage fait e

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

c) Dismissal of the Defence stay motion

113. The most recent example of the Majority's disregard for the arguments of the Defence is the dismissal of the Defence's stay mot[147] December 2013, the Defence filed a request for a per proceedings in which it submitted that for the Majorit judgment under article 74 of the Statute of requalified charges wit providing the accused with a further opportunity to m investigations would constitute a manifest unfairness to[148] The Defence stated that, in the event that the Chamber to requalify the charges and to render a decision, other th in respect of all those charges, the defence requests a s Such a stay should, given the circumstances of the case stay[149].

114. It is highly significant, in this regard, that none of the parties or participants opposed the stay motion. Althou inappropriate to speculate about the reasons for this con the least that can be inferred from it is that, more than ever, the

[146] Dissenting Opinion, Decision of 19 novembre 2013, ICC-01/04-01/07-3741-Anx, para. 1. See also my previous Dissenting Opinions: ICC-01/04-01/07-3719, ICC-01/04-01/07-3737-Anx, ICC-01/04-01/07-3738-Anx, ICC-01/04-01/07-3740-Anx, ICC-01/04-01/07-3741-Anx.

[147] Majority Opinion, paras. 1593-1595.

[148] Defence Request for a Permanent Stay of Proceedings, ICC-01/04-01/07-3742-Conf, 2 December 2013.

[149] Ibid, para. 1.

Victims Legal Representatives thought it was a matter
them to argue in favour of the prospective recharacter
remarkable, given that they must have realised that, if t
to grant the stay motion, it would, within all likelihood, have led
termination of the proceedings against Germain Katang
they must have been aware that their silence could only
the chances of the stay motion being granted. Indeed
might well have interpreted the fact that none of the othe
participants objected as an indication that they acquie
motion. In light of this, it is all the more surprising th
declined to rule separately on the stay motion. This, in my mind, is
yet another illustration of the fact that the Majority was
force behind the recharacterisation of the charges. It a
the Majority s tenacious determination to persevere w
intention to convict Germain Katanga on the basis of article
despite mounting problems and despite the fact that no
participant supported this course of action.

115. On the basis of today s conviction pursuant to article 2
safely be assumed that, had the Majority been so minded
the stay application before rendering judgment, they
rejected the request. However, at least in doing so, this
a tangible ruling the Defence could have appealed/challenged.

116. One may object that an interlocutory appeal might ha
prolonged the proceedings. However, such arguments ov
that by joining the question of procedural fairness to t
case under article 25(3)(d)(iii), the Majority has denied the accused
opportunity to avoid the stigma of a conviction at all. M
by joining the two questions, the Majority has potentiall

already protracted period of detention of the accuse
Germain Katanga had prevailed in an interlocutory appea
have been acquitted on the charges under article 25(3)(a
been able to contest the appeal on the merits in freedom

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

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

118. Without the Notice Decision, Germain Katanga would h
judgment on 18 December 2012 and, as can be seen
judgment, he would have been acquitted together wi
Ngudjolo on the confirmed charges. The decision to activ
55 has therefore had a significant impact on the exped
proceedings. In this respect the Majority acknowledged
2012 that giving notice under regulation 55 may lengthen the proceedings, but considered this would not inevitably e
of the right to be tried without undue delay.[150]

119. The length of the post-notice proceedings (21 November 2012 to date; 7 March 2014) has shown the Majority to be wrong. The Majority can justify having prolonged Germain Katanga's detent
year while engaging in lengthy deliberations following the N
Decision. Accordingly, the Notice Decision venture
reasonable application of article 64(2) and cannot be reconciled with

[150] Notice Decision, para. 52.

Chamber s obligation under rule 142(1), to pronounce within a reasonable period of time after retiring to delibe

a) General principle

120 The right to be tried without undue delay is clearly lai international human rights[151] instruments, from the fundamental basis that prolonged proceedings can put strain accused persons potentially exacerbating existing concerns such as uncertainty as to the future, fear of the conviction a sanction of an unknown[152] severity.

121 Before this Court, while affirming[153] Article 64(2) Chambers discretio in determining what constitutes a fair trial, the task re fairness, expeditiousness, and respect for the rights of the accused, alongside regard for the protection of witnesses and victims[154] expeditious reappears in the Rules, which require that regard to the need to facilitate fair and expeditious pr that those participating proceedings endeavour to act

[151] Article 14(3)(c) International Covenant on Civil and Political Rights gran entitlement [t]o be tried without undue delay. Article 6(1) of the Europ Rights provides everyone is entitled to a fair and public hearing within 8(1) of the American Convention on Human Rights provides the right reasonable time. Article 7(1)(d) of the African Charter on Human and Peoples Rights grant right to be tried within a reasonable time.

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

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

[154] According to Judge Pikis, the standard of expeditiousness set out in ar than the one imported by the requirement of trial being held without incorporated in the notion of fair trial; a standard that the Court is duty boun Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of the Prosecutor against Trial Chamber I entitled Decision on the release of Thomas Lubanga Dyilo, Separate opinion of Judge Georghios Pikis, 21 October 2008, ICC-01/04-01/06-1487-Anx2, para. 15.

expeditiously as possible.[155] Similarly, article 67(1)(c) provides for t
right of the accused to be tried without undue delay. A
case, from the time the suspect is informed that the auth
steps towards prosecution until the definitive decision
judgment or dismissal of the proceedings, including app
without undue delay.[156] In assessing whether delay has indeed
undue, international human rights bodies have followed the
approach taken by the European Court of Human Right
Greece (No. 2) that the:

> reasonableness of the length of the proceedings must
> of the particular circumstances of the case and the
> laid down in the law, in particular the complexity of the c
> conduct of the applicant and of the relevant authori
> among other things to take account of the importance
> the applicant in the litigation.[157]

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

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[155] Rule 101 of the Rules of Procedure and Evidence; see also, article 64(2), 64(3)(c), 67(1)(c), 82(2), 156(4). See, importance of expeditious trials, the Pre-Trial Chamber I Decision on the Requests of the Legal Representative of Applicants on application proce and legal representation, 10 August 2007, ICC-01/04-374, para. 47, note 38: This obligation found through the Statute and Rules as unique investigative opportunity article the Statute, in the procedures for disclosure of evidence in rule 84 of th in article 64 of the Statute and status conference, and in the right of app article 82(1)(d) of the Statute.

[156] General Comment No. 32, Article 14: Right to equality before courts trial, 23 August 2007, UN Doc. CCPR/C/GC/32 (General Comment No. Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 25 m para. 45.

[157] ECtHR, Philis v. Greece (No. 2), Judgment, 27 June 1997, application no. 19773/9 also Rajak v. Croatia, Judgment, 28 June 2001, application no. 49706/99, para. 39; v. Greece, Judgment, 6 April 2000, application no. 34369/97, paras. 60, 62.

[158] See Trechsel, p. 144: Complexity is generally highlighted by reference the number of the accused or witnesses involved (see also: Neumeister v. Austria; Eckle v. Germany; Kemmache (Nos. 1 and 2) v. France; Hozee v. Netherla v. Latvia; Kangasluoma v. Finland).

Court of Human Rights has found violations in cases inv
or even considerable degree of diligence.[159] The second objective element is
thus the conduct of the authorities.[160] The ICTR has similarly assessed
the length of delay; (b) the complexity of proceedings
counts, number of accused, number of witnesses, quant
complexity of facts and the law); (c) the practice and conduct of the
conduct of the authorities involved; and (e) any pre
accused.[161]

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

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[159] See, for example, Eckle v. Germany, Judgment, 15 July 1982, application no. 8130/78, Luxembourg, Judgment, 25 November 2003, application nos. 53286/00 and 53287/00, Quiroga v. Spain, Judgment, 28 October 2003, application no. 57072/00, Judgment, 30 September 2003, application no. 74969/01, Metzger v. Germany, Judgment, 3 June 2003, application no. 52189/99, Pedanek v. Poland, Judgment, 8 January 2004, application no. Kangaluoma v. Finland, Judgment, 20 January 2004, application no. 48339/99, 20 Janu Trechsel suggests that complexity is not a relevant consideration in Eu that: Whether the case is complex or not is in a sense irrelevant; only when eva found when there have been periods during the proceedings where no act something could and should have been done, p. 144.

[160] Trechsel, p. 142.

[161] ICTR, Trial Chamber, Barayagwiza, Judgment and Sentence, 3 December ICTR-99-52-T, para. 73, citing Appeals Chamber, Barayagwiza, Judgement, 28 November 2007, ICTR-99-52-A, para. 107. Appeals Chamber, Prosecutor v. Prosper Mugiran Decision on Prosper Mugiraneza's Interlocutory Appeal Decision of 2 Oct 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Tr Relief, 2 October 2003, ICTR-99-50-AR73, para. 7. Trial Chamber, 27 February 2004, p.

[162] Katanga, Regulation 55 Appeals Decision,

b) Statistics

124. It is also now more than six years since Germain K surrendered to the Court by the DRC. The trial was le beginning on 24 November 2009. The last witness testified 2011, evidence closed on 7 February 2012 and the ar parties and participants closed on 23 May 2012. A del eventuated until the Majority rendered its Notice D 21 November 2012. The Further Notice Decision was not 15 May 2013. The Decision refusing further investigations until 19 November 2013. Today, 444 days after the acqu Ngudjolo, 471 days after the, 653 days after the closing arguments and 759 days after the closing of the evidenc the final judgment. To me, this is an inordinately long de[163]

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

[163] See the Partially Dissenting Opinion of Judge Pikis in Prosecutor v. Justin Mugenzi and Pres Mugiraneza, ICTR Appeals Chamber, 4 February 2004, in which the Judge emphasises that the period of two years and two months for the Judgment was inordinately long and in breach of the Appellants right delay, para. 1.

[164] Trechsel, p. 144

[165] See, for example, Mooren v. Germany [GC], no. 11364/03, Judgment, 9 July 2009, para. 40; Abdoellah v. Netherlands, no. 12728/87, Judgment, 25 November 1992, para. 24.

126. Activating regulation 55 does not stop the clock for re
Otherwise it would suffice to activate the regulation at
during the deliberations to prolong this phase indefi
importantly, the focus for reasonable delay should not be on how
work a Chamber has had[166] and how efficiently the proceedings
been conducted. The significant delays that have eventu
to an insurmountable workload in formulating the Majo
delivered today, but due to the protracted procedural
November 2012 that could have been avoided had the N
been rendered in due time and with sufficient specificity

127. Had the Judges of the Majority provided more precise and detai
21 November 2012 and immediately authorised the Defe
additional investigations, it would not have been nece
almost another half year before providing the Defence
details about the new charges in the Document Ahead[167]. Nor did the
Majority failed to provide sufficient specificity in Nove
Defence was then necessarily placed in a position of
further information, which it did on 15 April 2013, requ
Chamber provide further and better notice of the facts
circumstances that may be relied upon in order for the Chamber
contemplate altering the mode of liability[168]. Unfortunately, as I noted in
May 2013, the Majority's factual exposition in paragraph 25 of the
Further Notice Decision of 15 May 2013 also provided in
in order to allow Germain Katanga an adequate opportu

[166] Majority Opinion, para. 159.
[167] See the Dissenting Opinion of Judge Tarfusser to the Regulation 55 Appeals Decision, emphasising that the Decision did not provide enough detail to a Katanga to prepare his defence vis-à-vis the revised characterisation, paras 24, 27.
[168] Defence Observations on Article 25(3)(d) of the Statute, 9 April 2013, ICC-01/04-01/07-3373-Conf, para. 103.

himself against these allegations formulated[169] under artic
thereby causing further, avoidable, del

128. It cannot be said in the circumstances that the Defence
to contribute to the prolongation of the proceedings nor
any evidence of acting obstructively, on the contrary. Th
cannot reasonably be held responsible, which is entitled to exe
its rights to the fullest extent.[170] In any case, Germain Katanga ha
presented his defence in a diligent manner. The factual
case also does not justify such a delay. The charges r
accused and are based on a single attack on a single location on a si
day, which renders the case factually far less complex t
accused cases before other international courts and tri
circumstances, the delay is not only unjustifiable.

C. Conclusion

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

130. Furthermore, I believe that the Majority failed to res
Katanga s right to remain silent (article 67(1)(g)), to h

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

detailed notice of the new charges (article 67(1)(a)) ar right to have a reasonable opportunity to respond to the conducting a meaningful investigation (article 67(1)(b) a

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

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

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

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

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

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

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

humanity (para. III.D) and I disagree with the Majority's findi
nature of the conflict (para. III.E).

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

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

137. As the Majority agrees that the case under article 25(3
proven, there is no real need for me to develop my own
matter. The Prosecution case was indeed extremely weak. I
keeping in mind, in this three-pronged test, what was alleged at the out
that Germain Katanga and Mathieu Ngudjolo were both
commanders of their respective militias, who together d
to wipe out Bogoro. At the end of the trial, however, n
of these findings is neither Germain Katanga nor Mathieu N
have been proven to have had anything near the level
ascribed to them in the charges and the allegation that
common plan has also totally evaporated. The reason
ourselves in the present position is thus not, as the M
because the facts charged would somehow fit more na
article 25(3)(d)(ii), but because the two key elements
charges under article 25(3)(a) were not established convincingly. The
cause of this complete failure of the Prosecution ca
incriminating evidence did not pass muster.

138. Like in the case against Mathieu Ngudjolo, who was the c

before the cases were severed, and in which Mr Ngudjolo was acquitted[172], there were many deficiencies in the Prosecution s investigations[173]. Key investigations took place more than three years after the facts; a number of witnesses (including Aveba, Zumbe, Nyankunde, Mandro and the camp commanders Lakpa, Bavi Olongba, Mbadu, etc.) were never visited; essential forensic evidence was lacking[174]; and a number of potential witnesses were not interviewed (Aguru, Adirodu, Boba Boba, Kakado/Bayo, Blaise Koka, Cobra Matata, Yuda, Dark, Oudo, Mbadu, Gaston) or not called to testify.

139. Importantly, the accused himself was never interviewed. Had the Prosecution done so, it would have been able to test a number of important elements that were raised in Germain Katanga s defence and to cross-examine the accused on the merits. The Prosecution also failed to follow up on the investigation of its own key witnesses. For example, in the case of P-250, P-279 and P-288, who the Prosecutor alleged were child soldiers who participated in the battle[175], it was the defence who produced school reports and identified P-250, P-279 and P-288 who, at trial, testified that they had never participated in combat.

140. Such lack of due diligence on the part of the Prosecu

[172] See Ngudjolo Judgment.

[173] See Majority Opinion, paras 5-6, 7.

[174] The Prosecution only proceeded to gather forensic evidence in 2009. It found the remains of 18 individuals, some of which bore the signs of violence. Chamber rejected the late addition of the reports, because the limited probative value would outweigh the potential delay and the prejudice. See Trial Chamber II, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the disclosure of evidentiary material relating to the prosecutor s site visit to Bogoro on 28, 29 and 31 March 2011, ICC-01/04-01/07-1515.

[175] In the case of witnesses P-279 and P-288, the Prosecution withdrew their allegation that they were child soldiers in their closing arguments. See Prosecution Closing Brief, paras 1781, 1788.

disappointing. I note, in the Prosecution has shown grea
zeal in the cases before this Court pursuing persons whom
of having suborned testimony by launching a string of
under article 70.[176] However, despite repeated requests and re
by the Chamber in this case, the Prosecutor has still to take a
with regard to witness P-159, whose testimony the Prosecutor h
withdrew.[177]

141. Considering the very serious and seemingly systemic n
problems, I can only welcome that, under the leadership of the new
Prosecutor and Deputy Prosecutor, the Office of the Pro
have acknowledged past shortcomings and has demonstr
willingness to critically assess the strength and weakne
that are brought before the Court.[178] This is highly significant, as I am
the view that the Prosecution has both a legal and ethi
make all reasonable efforts to ensure that the evidenc
reliable and, to the extent possible, to mitigate the effects of the even
Prosecution had in the past complied with this obliga
derives directly from article 54(1)(a) it might never have brought the
charges in this case to begin with.

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

[177] See this Chamber's Decision on the Prosecution's renunciation of the witness P-159, 24 February 2011, ICC-01/04-01/07-2731 and the Prosecutor's response to a request for an update, Prosecution's response regarding its investigations into the alleged witness P-159, 31 January 2014, ICC-01/04-01/07-3425, in which the Prosecutor informed Chamber that, more than two years after the witness had been withdrawn, it has not yet undertaken further investigative steps to pursue the contradiction between witness and other information in its possession and disclosed to the parties. The reason this lethargy was that the Prosecution is of the view that there are no special circumstances action before the final judgment and on balance, it is best to not appear to influence the ongoing proceedings, para. 6.

[178] See Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 2.

142. I fully appreciate that investigating crimes committed in [illegible] is not an easy task. Witness 1 CAR has indeed told the Chamber about numerous difficulties with the investigations in the pre[illegible] does not mean, however, that the Court should lower i[illegible] standard and be more flexible about the evidence it receives. Of course, many witnesses who testify in conflict situations are extreme[illegible] traumatised and vulnerable and in need of protection bef[illegible] giving their evidence. However, this should not detract [illegible] considering the evidence of such witnesses in the same rigo[illegible] the evidence of any witness should be evaluated. Rathe[illegible] the Court to be extremely cautious about their testimony

B. Weakness of the Majority s case under articl[illegible]

143. As the charges under article 25(3)(d)(ii) were formulated b[illegible] instead of the Prosecutor, it is only appropriate to [illegible] Majority s case in this section. In what follows, I will [illegible] of points in relation to the Majority s opinion which I find to be problematic. In light of my conclusion in paragraph 55 above, I proceed on a hypothetical basis only, namely that no[illegible] regarding the recharacterisation of the charges were of [illegible] that the changes under article 25(3)(d)(ii) were properly be[illegible] Chamber.

1. Erroneous application of standard of proof

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

[179] See Majority Opinion, para. 76.

impression that, at various junctures in the judgment, it applied the standard correctly.

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

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

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

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[180] See, for example, para. 209.

[181] See, for example, para. 197.

[182] See Majority Opinion, para. 109.

[183] To indicate but one example, in paragraph 127 of the Majority's Opinion the Majority refers to a letter by Cobra Matata that the family of Germain Katanga were the ammunition coming from Beni. Apart from the fact that Mr Matata does not explain who the of Germain Katanga is in this context, it also entirely overlooks the possibility that he may have misunderstood the situation (as might reasonably be inferred from

many occasions I myself was struck by an exculpatory explanation of the evidence than by the incriminating one

2. Missing evidence

148. Another issue that is directly related to the correct ap standard of proof is that of missing evidence. As alread fairly obvious that there are quite a number of potentia could in all likelihood have given the Court highly relev as they ostensibly played key roles in the crimes and the story.[184] Of course, there is nothing to guarantee that they would all have been willing testify or, even if they were, that they would have tol truth. However, the complete absence of evidence from really at the centre of things at the time inevitably crea that essential information is missing from the record. appears to agree with me on this point,[185] but, without explaining why, attaches no consequences to it. It is odd, in my view, important evidence is missing from the record, the Chamber nevertheless proceed to making a string of findings beyond reasona precisely those points on which the missing evidence co significantly different light. This concern is aggrav impression that most of the witnesses who were called by t Prosecution to give evidence about the role of Germain structure of the Ngiti fighters and the events in the relevant time period were persons whose knowledge about these matte

that the reason why Cobra Matata did not receive ammunition as he wante charge in Beni did not sweat Plainte de Cobra Matata, EVD-D02-0243.

[184] See supra, para. 138.

[185] See Majority Opinion, para. 263.

hand or incomplete at best.[186]

149. It is important to consider the significance of so much m

for the standard of proof. Indeed, one may wonder whe

possible to reach the required threshold when so many q

and where it is obvious that having more and better evidence m

well have led to significantly different answers. I am

course, that the Chamber may only base its decision o

was actually submitted and discussed before it at trial.

Chamber becomes aware, during the trial, of the exist

relevant evidence that has the potential to alter the find

evidence in the record, I believe that the failure to sub

may, in certain circumstances, suffice to generate a reasonable d

the sense of article 66(3).[187] Conclusions reached on the basis of

incomplete evidence are inherently fragile and uncerta

suffice for the standard of proof beyond reasonable doub

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[186] For example, the Prosecutor relied heavily on the alleged child soldier, P-28, and P-219, a non-combatant, to demonstrate Germain Katanga's leadership positi P-28 had been part of the militia for a time which has not been established, his position would have been junior that he could not possibly have given a truly informed picture of Germain of power. The Majority, for its part, relies quite heavily on D03-88. However, he even belong to the same community and only spent limited time in Aveba people who could really have confirmed Germain Katanga's level of au Colonel Aguru or any of the other leaders have given evidence in this case.

[187] It is quite clear to me that in several instances in this case, it is h evidence would in all likelihood have shed a significantly different light For example, the Majority acknowledges that concepts of hierarchy and obedience of the case may be quite different from Western notions in this regard. The Majority p special place and role of witchdoctors in this regard (see Majority Opinion, para. 6). The Majority indeed tru that the names of a number of witchdoctors have appeared with constant regularity through case, especially in the context of Walendu-Bindi, but their exact role has never clarified. Given that the Majority itself acknowledged this issue as being signi surprising, to say the least, that my colleagues have nevertheless felt a reasonable doubt about how the leadership of the Ngiti fighters of Walendu-Bindi was organised without receiving adequate evidence regarding the specific role of par organisation of military matters in Walendu-Bindi at the relevant time.

3. Unconvincing credibility analysis

a) General

150. Another major point of disagreement with my colleague relates to the evaluation of the evidence. As this disag wide-ranging and has a significant impact on the outcome considered it useful to elaborate on my reasons for depart colleagues.

151. In essence, I believe that the way in which the evide evaluated is dictated by the standard of proof, which whenever there is reasonable doubt, such doubt should be resolved in favour of the accused. It follows that whenever there doubts about the trustworthiness of a witness or the pre certain document or other exhibit, the Chamber should relying on such evidence. It is important to stress that it is not to disbelieve[188] a witness in order to set aside his or her tes suffices that there is some doubt as to the testimony's accuracy trustworthiness. Whether or not such doubt exists should be determined on a case-by-case basis, in light of the other ava evidence and the Chamber's understanding of the overa circumstances of the case.

152. I am deeply concerned about the Majority's treatmen testimonial evidence. There is a worrying tendency throug Majority Opinion to brush over serious credibility proble

[188] To my mind, there is a clear distinction between disbelieving a witness and believing that the witness has testimony implies an affirmation that the witness ha incorrect information, whereas disbelief simply means that the listener is not sufficiently convinced that the testimony is accurate and trustworthy. However, I firmly believe that wh are cast upon the credibility of evidence, it should lead to its rejection.

the witness's test.[189] Yet, I believe that for many witnesses in this
were many indications of serious potential problems
credibility. All too often, witnesses admitted to glaring
between what they said on the stand and what they ha
previous statements.[190] Although this does not automatically disc
their testimony, there were at times convincing explanations
why the story has changed. However, more often th
explanations offered, if any, were far from adequate,
serious doubt upon the reliability of the testimony. D
Majority sometimes seems eager to explain away contradict
inconsistencies on the basis of the fact that a long time
the events took place.[191] Indeed that witnesses may have suf

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[189] To indicate but one example, the Majority accepts that P considerable
contradicted by that of P. It is thus possible that both their stories can be tru
time. Yet, the Majority Opinion states in [TRANSLATION] that there can be n
question of affording precedence to one testimony over another in the circumstances o
132 s abduction (nil [&] ne saurait être question de faire prévaloir l un des tém
en ce qui concerne les circonstances de l enlèvement, in my view, such a
position is untenable because, at least one of the two must have given false info
contradiction can be resolved by ruling in favour of the credibility of one
not possible to determine which one of them may have used such circumstances,
both testimonies should be discarded.

[190] For example, P's testimony changed almost entirely between her differen
testimony at trial. Indeed, the Majority itself acknowledges that the numero
testimony (see Majority Opinion, para. 253). Surprisingly however, the Majority conclude
could rely on certain parts of this witness's testimony (see Majority Opi
true with respect to P-0161, who previously stated that he had heard a reco
radio intercept (implying that he was not present) but said at trial that h
intervened personally (see Majority Opinion, para. 222). Although th
consequence to this incident, I respectfully disagree. In my view, the forego
indication that the witness has been careless with the truth, to say the
testimony should have been treated with great caution.

[191] For example, such an explanation is offered in relation to P-0358. See Majority Opinion
para. 353. To suggest that the witness would have confused Ugandans
implausible, especially for the Majority, who attach such enormous i
dimension of this case.

trauma from witnessing the events in question.[192] Even if such
trauma can explain why witnesses give incoherent or
evidence, this does not justify reliance thereon. Indee
why someone may be unreliable does not make the
disappear. On the contrary, such reasons should
the evidence in question with extra caution.

153. Of course, it is not the case that if there are reasonable
of a witness testimony, this automatically disqualifies
However, considerable caution should be exercised in this regard.
have to be cogent reasons that convincingly explain w
memory is faulty with regard to one part of her testi
nevertheless still considered reliable in relation to ano
same pipes with even greater force when a witness has b
have lied in relation to part of his or her testimony. Wi
lied especially when under oath should be treated with extreme
prudence. Indeed, I am of the view that the fact that a
witness has given false testimony about a matter that is
to the charges, then the entire testimony should, in
discarded. This is because when a witness has knowing
Court with false information, this shows willingness on his or her
pervert the course of justice, which renders the entire

[192] For example, witness 132 Pan-3153 (see Majority Opinion, para. 382).
[193] For example, the Majority accepts that V-2 lied upon when she claimed
about the impending attack from which she visited the Bogoro market from Beni
her parents, who had in turn allegedly obtained the information even
having been in contact with her parents (see Majority Opinion, para. 351,
39, 401). It is interesting to observe, in this regard, that the Majority rejects parts of
V-2's testimony, particularly her evidence that Ngiti women came to the
before the attack, something which the Majority considers to be the deep
hatred of all Ngiti towards the Hema and the allegation that the former w
by the latter (see Majority Opinion, para. 350).

suspect. Accordingly, it becomes unsafe for any furthe
placed on the testimony, except when the circumstance
about the truthfulness and reliability of those parts of t
are not affected by the insincerity at all.

154. Based on these considerations, I would have refrained
the testimonies of P-160, P-161, P-132, P-249, P-287, P-353 and D
altogether, especially in relation to any incriminating fa
to be misunderstood, I want to make it very clear that I
that all these witnesses have come to lie in the witnes
suggesting that what they said was true. What I am sa
that there are so many serious problems with essentia
testimony that it is simply impossible for me to say with
which parts of their testimony are true and which are not
standard of proof does not tolerate such uncertainty, I h
to refrain from relying on this evidence.

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

b) P-28

156. P-28 was one the two most important witnesses for the P
under article 25(3)(a). In particular, his evidence was
prove that there was a common plan between Mr Lubanga, the Lendu a
well as Germain Katanga's leadership of the latter. In
the credibility of this witness, the Majority accepts that he lied al
the date he arrived in Aveba (beginning of February 2003 ins

[194] See Majority Opinion, para. 141.

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

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

158. Upon inspection of the Majority's Opinion, one can observe, however, that it has not systematically applied the above requirement of corroboration, even where it did look for it.

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[195] See Majority Opinion, para. 1444.

[196] In fact, the Majority concluded that P-28's testimony is to be used only with caution in relation to events and points pertaining to the responsibility of Germain Katanga unless it was corroborated by other witnesses. However, astoundingly, the Majority deemed it unnecessary to impose such a requirement with regard to the remainder of his testimony. See Majority Opinion, para. 1447.

[197] The Majority Opinion contains more than 100 references to P-28.

corroboration and intend to apply this requirement very strictly example, in one instance, the Majority relies on hearsa by witnesses P-28 and P-0012 to establish the identity of the ass of Nyankunde.[198] However, it is quite uncontroversial that in my v one cannot speak of meaningful corroboration when t information for both P-28 and P-0012's statements with respect to attack on Nyankunde are unknown.[199]

159. Another example of faulty corroboration occurs where the on P-28's testimony with respect to the presence in Aveba of a c from Zumbe. The Majority links his testimony about a vi by a delegation from Zumbe to the so-called Savonas Letter (Lettre de savonas).[200] This letter mentions that a delegation from Zumbe had been present in Aveba for three weeks at the beginning of J[201] However, given the fact that the Majority itself could conclude only have arrived in Aveba at the beginning of Februa earlier,[202] I find it hard to understand how the letter, which m event that took place before P-28 arrived in Aveba, could somehow corrobor P-28's testimony on this issue. Even if P was talking about th same delegation, only reasonable conclusion is that it was[203]

[198] See Majority Opinion, para. 553.

[199] This is also true with respect to another instance where the Majority once agai evidence given by P-28 to corroborate testimony of witness P-0012. See Majority Opinion, para. 1003.

[200] Lettre de savonas, CIT-OTP-0002-0025.

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

[202] See Majority Opinion, para. 1144.

[203] P-28 testified that a delegation from Zumbe visited Aveba, for a few days P-28, T-23, pp. 32-33). According to this witness, the delegation, which w approximately 25 (see P-28, T-17, p. 45), came to Aveba on two occasions (see 40). P-28 does not give a specific temporal indication (he only said that t a delivery of ammunitions, however, there were several months in the period between November 2002 and February 2003), it is difficult to k

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

160. What is even more striking with respect to this instan corroboration is the selective manner in which my co chosen to rely on P-298 testimony. Indeed, as the Majority re the composition of the delegation mentioned in the Lettr different from the composition of the delegation mentio[205] P-298. One would assume that this immediately would lead to sug of corroboration. However, the Majority resolves this ob discounting those parts of P-298's testimony that are incompatible the content of the Lettre des savons and simply concl was a delegation from Zumbe.[206] With all due respect, this is lik saying that if one witness states she saw an eagle and states she saw a parrot, then it is safe to conclude tha been a bird.

161. Yet another worrisome issue with regard to the Majority in treats P-298's testimony is that it completely disregards th been in contact with intermediary P-143, proved to be so problem

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certainty whether he referred to the delegation mentioned in the Lettre d P-298 testified to having impressed (see video-tape, T-38, p. 31), this is very unlike

[204] The Majority acknowledges that P-298's testimony is based on hearsay (without specifying that the source is unknown), but attaches no probative value to para. 615. See Majority Opinion,

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

[206] See Majority Opinion, para. 617.

the Lubanga case.[207] Despite the fact that the Chamber has not relevant part of the Lubanga judgment into evidence, I believe it ca ignore this element when assessing the relevant eviden one instance, the Majority alleges corroboration between P-138 and P-132.[208] Given that both witnesses were with intermediary P-143, about whom Trial Chamber I said that it is likely that a contact he persuaded, encouraged or assisted some or a was in touch with] to give false testimony,[209] I find the assertion of corroboration to be highly suspicious.

162. One might argue that it is inappropriate to rely on the judgment that was not admitted into evidence, especially s statutory instruments do not provide for judicial notice facts. Moreover, it may be argued that the Chamber question of admitting the Lubanga judgment and decided that its potential contribution to the manifestation of the tr significant enough to justify the reopening of the case.[210] However, as already noted, missing evidence may be a ground for re if it is likely that this evidence may have an influence o findings.[211] I believe that it is impossible, in this case, to to Lubanga judgment and its potential impact on the evaluation credibility of particular key witnesses, including P-138 and P-132. The evidence is only missing from a formal point of view, not have an EVD number. The fact that the Chamber

[207] See Lubanga Judgment, para. 291.
[208] See Majority Opinion, paras 1344-1345.
[209] See Lubanga Judgment, para. 291.
[210] See Trial Chamber I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Ch Decision on the request by the Defence for Germain Katanga seeking to admit excerpts from the judg in Lubanga, 26 April 2011, ICC-01/04-01/07-3372-ENG, para. 18.
[211] See supra, fn. 203.

anticipated this specific issue when rendering its decis
2012 cannot be a sufficient reason for the Chamber to n
to information that is publicly available and that is clea
relevant to the case. Accordingly, even if the Chamber did not consid
it possible to rely on the judgment on the basis of judicial no
I believe it should have reopened the case and admitt
sections of the judgment into evidence.

163. Be that as it may, in view of the numerous lies that were foun
present-day P-28's account, and the fact that it is impossible to det
with any degree of certainty which parts of the rest of h
based on first-hand observation and truthful recollection,
conclude that it would have been much safer to disregar
in its entirety.

c) P-12

164. As far as P-12's is concerned, I feel unable to rely on large
evidence because it consists mainly of speculation or o
much of it based on anonymous hearsay. The Majority a
the problem,[212] but despite concluding that prudence is call
relation to all his evidence that is not based on personal[213]
references to his testimony of this kind can be strewn t
Majority Opinion.[214]

165. As far as P-12's testimony about Germain Katanga's alleged
about the attack on Bogoro is concerned, I find that the
incongruities in his evidence and that it is therefore not warra

[212] See Majority Opinion, para. 89.
[213] See Majority Opinion, para. 87.
[214] Presumably, these references are intended merely to indicate corrobora
how opinion evidence based on hearsay could ever provide a meaningful

on it as proof beyond reasonable doubt of the fact that
did indeed confide all this information to him. That these
affirmations were true. The Majority seems to agree w
point,[215] but nevertheless relies upon the claim by Germain
Katanga that the attack on Bogoro constituted carn
explanation is given as to why portions of P- 112's testimony
to have insufficient probative value with regard to Germ
alleged admission, is but nevertheless considered reliable
regard to the accused's description of the attack.[216]

d) Improper use of Germain Katanga's testimon

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

167. First, it is noteworthy that Germain Katanga's testimony is by far th
most relied upon source of evidence in the Majority Op
nothing untoward about using the testimony of an accus
or her. However, it is telling that in this case Germ
testimony is the main source of incriminating evidence under
article 25(3)(d)(ii) charges, i.e. the charges ap
recharacterisation. However, if the charges had remaine
by the Trial Chamber (article 25(3)(a)), his evidence wou

[215] See Majority Opinion, para. 754.
[216] See Majority Opinion, para. 836.
[217] See supra, para. 11, Right not to be compelled to testify (article 67(1)(g))

almost entirely exculpatory.[218]

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

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

[219] For example, in paragraph 1290 of the Majority Opinion, the Majority rejects Germain testimony that when Blaise Koka and Mike4 came to Aveba, they were the resp distribution of weapons. The reasons for rejecting his testimony are (a) have mentioned this and (b) that D02-129 and D03-88 failed to mention this, despite being specifically asked about it (see Majority Opinion, para. 1290). Howev references provided in the footnotes to paragraph 1290 reveal that D02-129 was not asked any specific questions in this regard. Moreover, D02-129 was present in Aveba but not involved military, so there is no reason why he should have known about it (D02-129, T. 271, these m pp. 3-33). With regard to D02-148, I note that he did not live in Aveba and simp having heard about Blaise Koka (D02-148, T. 209, p. 19). I find it hard to see how the witness denied knowing a person in any way demonstrates that this perso particular function. As far as the testimony of P-350 is concerned, I simply do not see ho relates to the specific issue of who was in charge of the distribution of 2003 (i.e. immediately before the attack). Finally, I am not persuaded which the Majority relies in paragraphs 1283 to 1286 of their Opinion. In particular, I fail to fact that the accused may have given 1,200 rounds to D03-88 and that he gave the wrong ammu to Kisoro in order to appease him, proves that he was in charge of the distribution of all fo ammunitions coming from Beni. Considering that it is not contested th ammunition were sent during the relevant period, these two small inciden indeed.

[220] For example, in paragraph 1261 of their Opinion, the Majority states that, although Germain Katanga testified explicitly that he was only head of the Aveba combat went to Beni in November 2002, he would have later specified that he was chief of all Ngiti combatants. However, the source for this allegation (i.e. D02-300, T. 312, p. 19) is by no mean conclusive. In particular, the accused never confirmed that he was the head of all the combatants among the delegation. It must be said that the question of the Prosecutor was far from clear in t

that Germain Katanga was not aware of any charges
25(3)(d)(ii) and that it is thus unlikely that he would h
testimony tapes conviction on this basis.

169. It is also important to remember that when the accused g
his defence, this should be evaluated in accordance wit
proof. This means that the mere fact that the Majority
by certain parts of his evidence is not sufficient to ignore the reaso
doubt it creates.[221] On the contrary, unless it is patently implau
has convincingly been shown to be untrustworthy, Germ
own testimony raises a reasonable doubt in his guilt.

170. Third, I believe that the Majority sometimes misrepresen
given by the accused. For example, in one of its cruc
Germain Katanga's responsibility, it seems, primarily
refers to his testimony and to the fact that he himself expla
willingly contributed to the plan to attack Bogoro and its

[221] For example, the Majority considers Germain Katanga's testimony with rega
having knowledge of the contents of Lettre de doléances to be credible (
Opinion, para. 575). However, that conclusion, which the Majority describe
contradictions and his evasive manner of answering the questions by th
may, in certain cases, be appropriate to dismiss out of hand, without esc
on the nature of the testimony, attaches no credibility to them, I do not
is warranted in this case. Even if it was fair to characterise the accuse
issue something would dispute, this would still not prove that Germain Katanga ac
read the document. The mere fact that the Majority thinks it would be
it, even combined with their rejection of his testimony, is not to establish beyon
reasonable doubt that he actually did read the Lettre de doléances or th
its content.
Another example can be found in paragraph 634 of the Majority Opinion,
Germain Katanga's testimony that APC commander Blaise Koka arrived in Av
of February 2003 with 150 soldiers. The reason for rejecting his testimo
to have mentioned this number. I note, in this regard, that the Majority
important findings on the evidence of just one witness. See, for example

conception in November 2002.[222] This explanation is misconstrued as an admission of his knowledge of the a purpose of the group to which he presumably contrib 25(3)(d)(ii)), whereas all the accused did was say that h non-criminal plan of the EMOI to attack Bogoro. He said t to defend himself against the Prosecution that he and Mathieu Ngudjolo had concocted a plan to wipe out the 25(3)(a)). In the same vein, the Majority misconstrues admission of his willingness to participate in the attack, restrained Aveba on 24 February 2003[223] and again in 2 criminal attack about to a legitimate military operation on the side of APC commander Blaise make this admission in order to avert an attack

4. Conclusion

171. In conclusion, considering the weaknesses of the evidence on which this case is based, adding to that the strong suspicion that more evidence could have led to substantially different concl key issues of this case, I am of the view that the charge article 25(3)(d)(ii) have not been proven and the case shoul been dismissed a long time ago.

172. One of my fundamental concerns about this judgment is decision is very short on hard and precise facts and ver and ambiguous findings, and suggestions. Whatever colleagues may believe in this connection, I fear it cannot stand up

[222] See Majority Opinion, para 1682: [TRANSLATION] He explained that he had knowingly made a contribution to the attack Bogoro and had taken part in its design, in Beni [&] Il a-même explique qu'il avait consciemment apporté sa cont d'attaquer Bogoro et qu'il avait participé, à Beni, au mois de novembre 20

[223] See Majority Opinion, para 1683.

against the required standard of proof and the dispass
demands. More specifically, the case record has so m
and presents such an incomplete picture that it is imposs
to come to conclusions beyond reasonable doubt on ma
addition, most of the evidence falls far short of the
reliability that I was accustomed to at the ICTY, in my
view, to base a conviction on such weak evidence. T
proof, which must be the same for everyone no matter h
the circumstances are for the Prosecutor, simply does no

C. Another reasonable interpretation of the evidence is possib

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

174. I do not agree with the Majority's findings on any of thes
do not believe there is enough evidence to say beyond r
that the civilian population was the main target of the a
(infra, III.C.1.). Second, I consider the evidence does no

[224] See Majority Opinion, paras 755, 1159.
[225] See Majority Opinion, paras 1655-1666.
[226] See Majority Opinion, paras 1131-1153.

reasonable doubt that the Ngiti Watchers Bedu constituted a group or an organisation within the meaning of article 7 respectively, and (I.C.2.). Finally, I fully reject the Majority with regard to the alleged ideology and particularly the alleged criminal purpose or organisational policy which derives from that (I.C.3.).

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

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

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

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

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

correctly not considered reliable by the Chamber.[231]

178. On the evidence, the Majority Opinion counts 60 casualt 30[232] were civilians killed by Ngiti fighters, acting alone or Lendu fighters. I note, in this regard, that for many of confirmed killings, the Chamber possesses neither bi certificates, let alone any forensic evidence. In a majority of cases, the Chamber only has the word of one witness. A witnesses are also participating victims in these proce have a direct interest in the outcome of this trial. Mor indicated, many of these witnesses suffered from serious c problems.[233] How it is possible, under such circumstances, t any findings about such serious allegations beyond rea eludes me.

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

180. Moreover, it is only permissible to count victims of cr allegedly committed jointly by Ngiti and Lendu (or ot evidence shows beyond reasonable doubt that there wa

[231] See Majority Opinion, para. 837.

[232] See Majority Opinion, para 869.

[233] See supra, III.B.3 concerning credibility analysis.

[234] See Majority Opinion, para. 869.

[235] As the Majority Opinion acknowledges in paragraph 839, where it is sta Majority is unable to determine the exact number of victims is [TRANSLA the available evidence .

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

181. However, even if this figure of 30 casualties could be es
reasonable doubt, which I do not accept, I think it casts
the proposition that civilians were the explicit target of
example, even if we accept the Majority's conservative esti
civilian population of Bogoro constituted approximately [238]
and compare this to the proven civilian victim count of [239]
then we arrive at a percentage of [240] considerably below 5%. UPC
casualty ratio of more than 50%, [241] immediately apparent th
the attackers, who according to numbers reported over a
thousand,[242] concentrated their lethal efforts on the UPC con
not on the villagers.

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[236] See infra, para. 284.
[237] Idem.
[238] Majority Opinion, para. 729.
[239] Majority Opinion, para. 869.
[240] It may be noted that the Prosecutor claims there were around 3000 ci
attack. See Prosecution Closing Brief, para. 40. Accordingly, even if w
allegation that there were 150 civilian casualties, this would still amoun
total civilian population.
[241] Although the Majority says it cannot determine the exact number of UPC casualties (see
T-255, p. 40) puts it at around 30. It stated that the UPC contingent counte
on the day of the attack (see T-255, p. 26). The Majority seems to at least endorse (see
Majority Opinion, para. 840).
[242] See T-223, p. 31. The Majority makes no estimate, whereas the P
several hundred (see Prosecution Closing Brief, para. 41).

182. Without wanting to belittle the suffering of the civilians o
way, I fear it is not reasonable to consider those ratios
the civilian population of Bogoro was a prime target o
who, on some accounts, the number killed. However, this is far fro
the only problem with this claim.

183. In relation to the civilians who were killed during the ac
of the view that the Majority is too eager to find that th
aiming to strike at civilians.[243] For example, the Majority finds that
number of civilians were killed when they were trying t
Institut de Bogoro together with the AUPC. Although the Majority[244]
accepts that UPC soldiers constituted a lawful military target,
following unclear argument about this incident:

> [TRANSLATION] [the Majority] considers that the los
> ensuing from the shots fired at the group of fleeing pe
> relation to the military advantage which the attac
> anticipated, specifically given that the UPC soldiers wer
> fleeing. [&] It takes the view that by shooting at fleei
> and Ngiti showed scant regard for the fate of the civ
> their death would occur in the ordinary course of events.[245]

184. I have serious problems with this reasoning. First, the

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

[244] See Majority Opinion, para. 865.

[245] See Majority Opinion, para. 865: [TRANSLATION] [The Majority] considers that the shots fired at
fleeing persons indiscriminately, the Lendu and Ngiti showed only little
civilians mixed with UPC soldiers that their death would result in the ordina
events. (elle estime que les pertes en vies humaines résultant des tirs effec
en fuite ont été excessives par rapport à l avantage militaire attendu de l
que, précisément, les soldats de l UPC étaient en train de s enfuir. [&
personnes prenant la fuite, les Lendu et Ngiti ne faisaient que peu de ca
mort interviendrait dans le cours normal des évènements.)

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

185. Similar questions may be asked in relation to civilians w
during the attack at the site of the Bogoro
towards it. The Majority seems to underestimate the
some of them may have been among those who were tragically
caught in the crossfire. Whether or not one believes t
D02-148 that the majority of inhabitants of Bogoro[247] did not were ar
remains that civilians were in all likelihood present at the scene,
civilians taking part in the defence of their village is
difficult to discount the possibility that a number of civil
caught in the violence as they approached the place
where they were used to seeking refuge in times of a

[246] For example, in paragraph 821, the Majority opinion mentions the death of Matia Bab
recalls P-0106's testimony that this person was running directly in front of
176 as a UPC fighter, it cannot be excluded that the unidentified person
aiming for him, rather than for Mr Babona.
[247] See Majority Opinion, para. 820.

fighting was particularly intense.

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

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

a) The perpetrators of the crimes

187. Another fundamental problem with the Majority's clai nature of the attack is that it is entirely unclear when a civilians were killed, as the Majority acknowledges, bes Ngiti fighters of Walendu Bindi, there were also soldiers from th and Lendu fighters from Erengeti.[250] In addition, there is evidence that Bira also took part in the attack, or at least the co against civilians.[251] Despite its best efforts, the Majority is u convincingly demonstrate which of these different grou responsible for killing civilians in Bogoro. In relation the attackers and to those who committed crimes during and afterward will limit my comments to the following points.

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

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

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[252] See Majority Opinion, para. 1665.

[253] In the same vein, I also disagree with the Majority's finding that there were two
legitimate plan by Kinshasa to reconquer Ituri – EMOI – and a criminal plan by the Ngiti combatan
Walendu Bindi to attack the Hema civilian population. See para. 1221.

[254] See Majority Opinion, para. 1651.

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

[256] See supra, para. 178.

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

[258] Rapport de sécurité, EVD-D02-00231. This document consists of a handwritten report
commander Oudo Mbafele, addressed to several authorities, including the RCD/
CODECO, and explicitly mentions the Neutralisation of the enemy forc
Bogoro, Chay, Makabho, Kombokhabo, Mandro & including the fall of Buni

commanders saw themselves as being part of a joint campaign to neutralise the UPC enemy forces in Bog places.

189. In any event, even if the Lendu took part in the attack there is no reliable evidence of any prior plan between of Walendu Bindi and the Lendu fighters.[259] This creates a legal difficulty which the Majority fails to ful In particular, if it is true that many of the crimes were Ngiti and Lendu acting together, it cannot be the case were part of the alleged original common purpose of the Walendu Bindi.[260] To the extent that a Ngiti/Lendu common pur commit crimes against Hema civilians materialised dur after the attack, must have been a different plan from the o which Germain Katanga is alleged to have contributed significant contributions were already made.[261] well

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

190. Contrary to what the Majority claims, I do not agree tha hold, on the basis of the evidence before the Chamber, fighters of Walendu Bindi formed a group in the sense of article

[259] This is in fact the reason why the initial charges under article 25(3)(established.

[260] Indeed, the Majority strongly emphasises that the common purpose w fighters of Walendu Bindi. I stress, in this regard, that the Majority has never to demonstrate that the common purpose of the Ngiti involved the Walend commission of crimes with individuals from such as the Lendu. Any contribut alleged criminal plan of the Walendu Bindi is therefore limited to crimes co exclusively by Ngiti.

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

[262] See infra, para. 293.

let alone an organisation in the sense of article 7.

191. A group only exists by virtue of the fact that its members share the common purpose. In other words, unless there is evi that every member of a particular existing group adhered to a common criminal purpose, it is not permissible to equate exis groups/organisations with groups acting with a commor the sense of article 25(3)(d). Indeed, it is perfectly c limited number of members of an existing group or organ commit a crime together without the consent (or pe knowledge) of the rest of the group. In such a scenario, with a common purpose is only attributable to those individuals who share the common purpose.

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

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

[263] Another important difference between the two concepts is that article crimes committed pursuant to or in furtherance of a policy can be committed by o members of that organisation. Article 25(3)(d), on the contrary, does committed by members of the group acting jointly (provided that other members) or indirectly through other persons (not members). See I.G.T. The law on article 25(3)(d)(ii)

organisational policy to attack the Hema civilian popula
not automatically prove the existence of a group acting
purpose.

194. It is highly significant, therefore, that the Majority bas
under article 25(3)(d) on exactly the same elements as
finding that there was an organisation with a policy to a
population under article 7.[264] It is thus worthwhile to have a closer
at the organisation identified by the Majority.

195. In terms of numbers, the Majority submits that the fi
network of camps in Bunia numbered in the thousands.[265]
This implies that, according to the Majority, there is evid
beyond reasonable doubt that these thousands of
shared the common purpose. The Majority also makes
number of locations[266] without, however, specifying whether this list is
exhaustive or, indeed, whether and to what extent the camps and
living in those areas can be considered to be part of the organis
Indeed, it is worth pointing out that the Majority relies
on Germain Katanga's own testimony to make this list, but tha
has denied that all these camps were part of an integrate[267]

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[264] See Majority Opinion, para. 1654.

[265] See Majority Opinion, paras 635, 1401. The Majority holds that there were only a lim
number of APC soldiers in Bunia, putting this number at around 30. It is unc
the Majority arrived at this number, especially in light of the remark that Germain Katan
was the only one to mention the presence of 150 soldiers under the command of B
Majority Opinion, para. 634). In making this finding, the Majority seems
that (a) the Defence does not have the burden of proof in these proceedings and
clarify such issues that the Defence should have been allowed to collect

[266] See Majority Opinion, para. 1625, which lists: Aveba, Kagaba, Olongba, Medhu,
Nyabiri, Bukiringi, Getty, Bule, Mandro and Bogoro.

[267] See D-0020, T.324, p. 60: "No one had authority over anyone else on his turf. I
area and others were chiefs in their areas."

196. In terms of what the Majority relies upon to find that the were part of one organisation, one sees a clear division of labour within the different camps,[268] the fact that Aveba was the cent place for the supply of weapons,[269] the fact that certain letters were copied to different camps,[270] the language used,[271] the fighters referred to themselves as being part of the movement,[272] and, finally, the necessity to fight together common enemy.[273]

197. Before addressing these issues, I want to state my conc that the Majority makes the important remark that it adheres to the Defence's thesis according to which the different ca autonomous.[274] The Defence has no burden to prove anything fact that none of the witnesses have mentioned that the of combat units acted in isolation and were completely indepen here the Majority caricatures the Defence's most positive[275] the opposite.

198. Be that as it may, I am of the view that the available e allow one to conclude beyond a reasonable doubt that at the relevant time the Ngiti fighters of Bavi formed either an organisation

[268] See Majority Opinion, paras. 672.
[269] See Majority Opinion, para. 675.
[270] See Majority Opinion, para. 686.
[271] See Majority Opinion, para. 706.
[272] See Majority Opinion, para. 679.
[273] See Majority Opinion, para. 806.
[274] See Majority Opinion, para. 806.
[275] See Defence's Closing Brief, paras. 574-575. It is not contested by the Defence that the camps acted with each other on occasion, but this is something quite di different groups were integrated into a single structure.

the sense of article 7 of the Statute,[276] or even a single m

199. First, the argument that the different camps were all similar manner, with functions attributed according to sta nomenclature (i.e. S1, S2, S3, etc.) is not conclusive.[277] Indeed, such nomenclature is common among many a throughout the world and no one would argue that, for Belgian and Dutch armies are part of the same organisa because they use the same the same nomenclature to de staff functions.

200. Second, I believe that the Majority places excessive we of documents[278] which it considers proof of the allegation that the was a so-called common authority based on ideology.[279] Several others addressed themselves in relation to matters administrative or military nature.[280] These documents provide the evidentiary basis for two sets of crucial findings by the Majority, being the organisation of the camps in Bisie and Walendu,[281] second being the role of Germain Katanga as the pre movement of the combatants in Bisie and Walendu.[282]

201. It is crucial to point in this regard that the authors of the documents in question testified. Given the opaque natu

[276] See Majority Opinion, para. 679. I note, in this regard, that the Major was a well-established network, but that no details about this network are p
[277] Majority Opinion, para. 672.
[278] In particular, see Lettre EVD-T-OTP-00025; Lettre Évangile, EVD-T-OTP-00238; Lettre Perception, EVD-T-OTP-00239; Lettre Défense de brandir des armes, EVD-T-OTP-00278; Rapport de, EVD-T-OTP-00231; Plainte de Cobra Matata, EVD-T-OTP-00243.
[279] See Majority Opinion, para. 678.
[280] See Majority Opinion, para. 676.
[281] See Majority Opinion, paras 676, 736.
[282] See Majority Opinion, paras 831-1331.

of some of the documents, and the difficulty to unders
addressed by the many unidentified individuals who are mentioned as
addressees or as copied for information, I believe it is v
impossible, to fully understand the content and signifi
documents. Under these circumstances, one may wonde
Chamber adhered to its own criteria of admissibility in relation to
documents.[283] Indeed, I think it quite likely that many of the
drawn by the Majority from these documents could easily
by the testimony of the authors of the letters. I am ther
view that the probative value of these documents is limi
permit making any findings beyond reasonable doubt.

202. In particular, I have strong doubts with regard to the M
that these documents show that the Ngiti fighters of Walendu-Bindi
constituted a single militia or an organisation in the se
the Statute.[284] Although it is **perhaps** possible to read these documents in
this manner, it is certainly not the only way to read the
of the six documents in question, three seem to have been
persons who were not members of the organisation.[285] The subjects
broached in the letters are completely haphazard and i
how one can infer anything about the operational struct
fighters of Walendu-Bindi from this.

203. More importantly, among the different addressees there
than one Chef d'Etat-Major Suprême based in Olongba;[286]

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[283] See Decision on the Prosecutor's Bar Table Motions, 01/04-01/07-2635, 17 December 2010
[284] See Majority Opinion, paras 671 et seq.
[285] Lettre de savoir, EVD-OTP-00025; Lettre Évangélisation, EVD-OTP-00238; Lettre Défense de brandir les armes, EVD-OTP-00208.
[286] Lettre Perception taxes to Dor, EVD-OTP-00239.

Commandant Suprême des FRPI also based in Olo[287]

Commandant de Major de Nyakabiri, President du Mouvement based in Aveba[288]; President de FRPI in Aveba[289]; Commandant auditeur des FRPI based in Aveba[290]; Chargé de front base in Aveba[291]; Commandant des FRPI based in Beni[292]; Comité de Gestion de CODECO based in Tseyi[293]; PDG de CODECO also based in Tseyi[294], there are a number of unnamed commanders based in different locat[295] there is no consistency in this regard between the doc[296] respect to the vagues of the Majority, I fail to see how i concluded from this muddle that there was a single mili Bindi. On the contrary, it seems to me that there were supreme leaders and headquarters of Mbom Moreover, it shoul that no less than six different names of organisations different documents[297]. Finally, it is important to bear in mind th two of the six documents have any clear relation to mili[298]

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[287] Rapport de service, EVD-D02-00231.

[288] Lettre Perception des taxes, OTP-0239; Lettre Défense de brand, OTP-0278; Les armes 00278.

[289] Lettre Défense de brand, EVD-OTP-00278,

[290] Lettre Perception des taxes, OTP-0239.

[291] Rapport de service, EVD-D02-00231.

[292] Rapport de service, EVD-D02-00231 and Lettre Défense de brand, OTP-0278; Les armes, E In Rapport de service, there is mention of a Chargé de guerre de la FRPI des possible that this refers to the same position.

[293] Rapport de service, EVD-D02-00231.

[294] Rapport de service, EVD-D02-00231.

[295] Lettre Défense de brand, EVD-OTP-00278,

[296] I.e. it is not the case that the same positions consistently reappea documents.

[297] To wit: RVCLD, FRPI, Mouvement de Libération Lendu, Front Patriotique Résistance Patriotique en Ituri.

[298] These are the Cobra Mat, EVD-D02-00243 and Rapport de service, EVD-D02-00231. The others deal with such disparate issues as the provision of soap (s OTP-00025); an evangelisation campaign (see Lettre Défense de brand, OTP-0278; Evangélisation,

Of these two documents, one seems to be internal to Cobra Matata
group[299], whereas the other is addressed to three different g
ML, CODECO and FRPI[300]. It is noteworthy that the latter docu
mentions a Directeur de Communication du R.C.D./ML à G
Avebja as well as a Comité des FRPI des Walendu à Ben
the confusion about the geographical situation of the res

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

205. In any event, even with the help of speculation and the many points of uncertainty, the Majority is unable to ex level of precision how and when the militia of the Ngiti Walendu-Bindi was structured or how it supposedly operate the Majority is forced to admit that there is no evidenc the Ngiti militia was under a centralised command[302], that Germain Katanga (or, for that matter) possessed any

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prohibition to carry arms at a cattle market (see Lettre Défense de bra
00278); and the collection of taxes on gold trade (see Lettre Perception
299 Plainte de Cobra Matata, EVD-T-00243.
300 Rapport de service, EVD-T-00231.
301 For example, in paragraph 677 the Majority states that Germain Katanga is men
different documents, in reference to Lettre Défense de porter des armes
and Lettre Perception, EVD-T-00239, I cannot fail to note that Germain
name does not appear and that the accused has never recognised that he
he was indeed the addressee. I further note that, although reference is
family Plainte de Cobra Matata, EVD-T-00243, this is in the body of the text and
information about any alleged affiliation.
302 See Majority Opinion, para. 675

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

206. Accordingly, I am strongly of the view that there is no e
that, at the relevant time, the Bindi were free from any
more than a loose coalition of largely autonomous units. In
extent that it is possible to conclude anything from
evidence, I believe it is that whatever federative imp
have been originated from EMOI in Bunia. The fact that
the central logistics base and that Germain Katanga tri
matters from there on behalf of EMOI does not show th
Walendu Bindi were integrated in a single structure. U
circumstances it is thus difficult to speak of a consolidated organisation in the se
of article 7 of the Statute, regardless of which definition
one adheres to.

207. Theoretically speaking, this conclusion does not exclud
that there might still have been a group acting with a common purpose
in the sense of article 25(3)(d). However, the Majority
make an attempt to explain how and when the thousands
members of the Ngiti fighters of Bindi would have adopted the
alleged common purpose to attack the Hema civilian populatio
there is no independent evidence of the formation of a g
shared intent to commit crimes against the Hema civilia
must be concluded that this aspect of the Majority's
under article 25(3)(d)(ii) is not substantiated.

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

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

a) There was only one plan

208 Even assuming that there was a group acting with a co
(article 25(3)(d)) or an organisation (article 7), I do no
enough evidence showing the existence of a common pu
the Hema civilian population or an organisational policy
As the Majority is unable to identify the alleged organisation of
the Ngiti fighters of Walendu-Bindi operated, it is also unable to po
any direct evidence about how this organisation or grou
adopted the alleged policy/common purpose to attack the
population. Yet, the Majority maintains that the Ngiti f
Walendu-Bindi had their own plan, which consisted of:

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

209 Viewed in isolation, the alleged common purpose appe
simple and straightforward. However, it is essential to
broader context.

210 First, the Majority asserts that the common purpose of t
of Walendu-Bindi was integrated within the framework of
military offensive conducted in Ituri against the UPC, w
from the authorities.[305] This broader plan originated from Be
where a coalition of forces, including the Congolese government, the

[304] See Majority Opinion, paras 1154, 1655 : « attaquer [le village de Bogoro] pour en
seulement les éléments militaires de l UPC mais aussi, et à titre principa
[305] See Majority Opinion, paras 1148, 1654.

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

211. Indeed, there is a lot of evidence in this case that the Walendu-Bindi were operating in conjunction with EMOI and that EMOI's objective was political, i.e. the restoration of government's authority over Ituri.[306] The Majority is aware of this evidence, but puts it to one side by arguing that the pol EMOI to reclaim Ituri was compatible with the desire t exterminate the entire Hema population of Bogoro on t Ngiti fighters of Walendu-Bindi.[307]

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

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

[306] See supra, para. 188.

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

[308] See Majority Opinion, para. 584: « [L]a situation ainsi créée avait eu un double effe ... le RCD-ML avait ainsi pu renforcer ses troupes et ... reconquérir l'Ituri en s'appuyant sur

Later, we read in paragraph 1144 that

> [TRANSLATION] the ties established between the Beni
> local combatants were, in the circumstances, the resu
> for both parties: the former relied on the local combatants to reconquer Itu
> then in the grip of UPC military forces, and the local
> Beni's support in bolstering their chances in their s
> Hema and the UPC and in breaking the encirclement w[309]

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

214. First, my colleagues place a great deal of importance o
that, between August and November 2002, the collectivité of Walendu
Bindi and the group of men of Bedu Ezekere were surrounded by the UPC
and found themselves under constant attacks by UPC mi

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combattants Lendu, opposés, sur le plan ethnique, aux Hema; les combattants locaux, de leur côté
donc « accompagnés » [...] étaient ainsi trouvés en mesure de donner à leur combat une dimens
et d'éviter une annexion de leur territoire par les puissances étrangère
RCD-ML contre l'UPC sécessionniste et alors devenue l'alliée du Rwanda.

[309] See Majority Opinion, para. 1147: les liens mis en place entre les autorités de Beni et les
locaux procédaient, en l'occurrence, d'un échange des avantages pour les deux parties: les premières s'appuya
sur les combattants locaux pour reconquérir l'Ituri alors aux mains de ... Ceux-ci
combattants locaux bénéficiant de l'appui de Beni pour augmenter leur
contre les Hema et l'UPC et pour briser la situation d'encerclement dans

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

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

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

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

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[311] See Majority Opinion, paras 570-571, 1144, 1147.
[312] See, for example, D03-88, T-299, pp. 64-65. See also D03-66, T-295, p. 22; T-297, p. 11.
[313] See Majority Opinion, para. 570. None of the witnesses referred to by the Major
Walendu-Bindi was encircled by the UPC.
[314] See, among others, D02-148, T-279, pp. 6-7.
[315] See infra, paras 234-240.

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

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

> [TRANSLATION] The planning as such of the attack
> involved several local and regional actors and the
> planning took place in Beni.[319]

218. Moreover, the Majority accepts that, by the end of Jan
sent several APC men to Walendu-Bindi in order to reorganise the FR

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[316] See Majority Opinion, para. 1149.

[317] See Majority Opinion, para. 582.

[318] I note, in this regard, that the Letter of the Lendu, EVD-D03-00098, makes no mention of Bogor
at all, let alone of any offensive operations against this location.

[319] Majority Opinion, para. 1145: « la planification en tant que telle de l attaque de Bogoro a
plusieurs acteurs locaux et régionaux et que ces premières étapes ont été posées à B

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

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

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

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

Bogoro and other locations.

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

b) The content of the policy/common purpose

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

(1) The policy/common purpose had legitima

223. In particular, according to the Majority, the policy/com
focused on the elimination of the Hema civilian population of [323]
However, as the quotes above show, the Majority also co
Ngiti fighters of Walendu-Bindi were fighting the UPC as such, be
they wanted to prevent them from crossing Lake Lamatuta so
empire and because they wanted to break the encircl
UPC.[324] In other words, by the Majority's own acknowledgem
the Ngiti's alleged policy/common purpose was aimed a
target, i.e. the UPC.

224. The Majority's own view on this crucial element and simply states

> [TRANSLATION] to the Ngiti combatants the UPC, and
> ethnic group, were the enemy, these two were of one ilk.[325]

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

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[323] See Majority Opinion, paras 1615, 1655, where it is emphasised that the killi
civilians was first and foremost objective of the Ngiti fighters of Walendu-Bindi.
[324] See supra paras 214-215.
[325] See Majority Opinion, para. 1144, les combattants ngiti considéraient l'UPC et les
groupe ethnique, comme étant leur ennemi, ces deux entités étant pour e

therefore not criminal and, significantly, overlapped er
EMOI pla[326]n. As will be seen, this conclusion is of great rele
evaluation of Germain Katanga s contribution to the al
purpos[327]e.

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

226. Turning now to the alleged illegitimate aspect of the
purpose, there is not a single piece of evidence to corroborate the Majority s
allegation that the Ngiti fighters of Walendu-Bindi had a common
purpose to attack Bogoro in order to eliminate the H
population there. In fact, it is not an easy task to d
evidentiary basis for the Majority s findings in this regard, bec
are scattered over several different places throughou
Opinion[328]. From what I have been able to ascertain, I
understand that the Majority relies on the following
evidence.

(a) Way in which the attack was carried ou

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

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

[327] See infra, I. Germain Katanga s responsibility under article 25(3)(d)(ii) has

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

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

228. First, the Majority attaches considerable importance t that Bogoro was attacked from all sides, very early in the mornin when it was still night and when the inhabitants were asleep.[330] It is not possible to extrapolate from the fact th position at the Institut de Bogoro came under attack from severa directions that the entire village was systematically approach sides in order to trap the civilian population. In fact, it likely that the attackers quickly penetrated the village the UPC position and concentrated their efforts on this. As regards the timing of the attack, I think it is perfectly attackers wanted to use the element of surprise agains Majority's suggestion that the early hour of the attack related to the attacker's alleged intention to harm civilians speculative and has no evidentiary basis.

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

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

civilians, may have carried out the pillaging and destruc
Second, there simply is not evidence that civilian houses of Bogo
were pillaged and/or destroyed in an organised manne
noted, in this regard, that the Majority acknowledges tha
have been carried out after the attack. The Majority do
indication of the time-frame involved, but I believe that it can
excluded that Bogoro was gradually pillaged and destroy
from surrounding areas, such as Bwalen-Bundi, who came to scaveng
once the fighting was over.

(b) Prior and posterior conduct

230. The Majority also invokes the Ngiti's alleged prior an
behaviour during other attacks, including against Nyankunde.[332] I will
back at length to the only example of prior[333] conduct, i.e
however, I want to express my reasons why, in fact, I believe that the
Majority relies on events after the attack took place in Bogoro.

231. First, I am of the view that the available evidence doe
Chamber to make any findings about what may have hap
posterior events beyond reasonable doubt. As these alleged eve
not been substantiated, it is not permissible to rely on
inferences beyond reasonable doubt.

232. Second, I do not see how what is alleged to have hap
subsequent events can inform what the Ngiti fighters
Walen-Bundi intended to do in Bogoro on 24 February 2
entirely unclear whether these subsequent operations

[332] See Majority Opinion, para. 1658 and references to Section E of the Majority Opinion, in which I do not find any substantive treatment of subsequent Ngiti fighters of Walen-Bundi are alleged to have committed crimes against Hema
[333] See infra, Ill.C.3.b) The attack on Nyankunde

planned before the attack on Bogoro and it certainl
maintained that it was able at the time what would hap
during these operations. Even if it were possible to re
something from a pattern of conduct, it cannot reasonabl
those involved in the preparations of the attack on Bog
about what was going to happen in Bogoro on the basis
that were yet to take place and which were not part of th
purpose.[334]

233. The two main remaining elements in the Majority s reas
policy/common purpose called the Lettre de doléances and t
evidence about what happened during the attack on N
5 September 2002.[335]

(c) Lettre de doléances

234. The so-called Grievances Letter (Lettre de doléances)[336] is
piece of evidence in the Majority s reasoning to the conclusion
that the Ngiti fighters - Blo Iwa were motivated by ethnic hatre
towards the Hema.[337]

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

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[334] See Majority Opinion, para. 1672.

[335] It is interesting to note that the Lettre de doléances was submitted by the
Defence for Mathieu Ngudjolo and that almost all of the evidence in relation to the attack
Nyankunde was delivered by witnesses for the Defence of Germain Katan
himself. If ever one needed proof that the alleged involvement of the Ngiti fighters - Blo Iwa
did not form an important part of the Prosecutor s case under article 25(
Prosecution presented almost no evidence on it is very telling in this reg

[336] Lettre de doléances, EVD-D03-00098. This document, which is dated 15 November 2002 and
signed by 18 representatives of the Communauté Lendu de Base , conta
by the Lendu community and lists a number of alleged attacks carried ou
against Lendu villages.

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

Nations and the African Union, the President and Chief
RCD-KisML as well as [337] MONUC. attention to this point beca
it seems rather unlikely that anyone would have addre
authorities and exposed it to the criminal plan to eliminate th
Hema civilian population. It is important to bear this in
when considering the Majority s interpretation of this do

236. A second general observation pertains to the fact that
doléances was written in the name of the Communauté
Base . Moreover, although the letter was drafted in A
involvement of members of the Union from Zumbe during its
visit to Aveba in November 2002, [338] the commanders of the
called Ngiti fighters of Walendu Bindi signed the document.
Whatever the content of the document may be, it seem
difficult to conclude anything from this beyond reasonab
the mental state of the Ngiti fighters or of Walendu Bindi, were
aware of its existence and content.

237. With regard to the content of the Lettre de doléances ,
see how this document constitutes proof of the alleg
exterminate the Hema civilian population. [339] In this order t
argument nevertheless, the Majority relies on a number
assumptions.

238. First, the Majority posits that, in the eyes of the drafter
doléances , UPC/RP and the Hema civilian population we
same. [340] In order to come to this conclusion, the Majority

[338] Lettre de doléances, EVD-D-03-00098 at DRC-OTP-0194-0348.
[339] See Majority Opinion, para. 574.
[340] See Majority Opinion, para. 718.

assume that the drafters made the mistake of assuming UPC/RP members were Hema, this necessarily meant that also UPC/RP. This is of course not correct, as is illus that there were other Hema political and administrative organisations, su as PUSIC, and it is entirely possible that some Hema w affiliated with any political/military groups. Accordingly may be able to infer from the Lettre de doléances about the attitu the Lendu based on his UPC, this cannot be extrapolated wider Hema civilian population.

239. Second, the Majority ignores the fact that the documen mentions the UPC/RP's alliances. According to the Lettre de doléances[341], these allies are none other than the Uganda and document even claims that all important decisions by t taken only with the approval of Kampala[342]. Indeed, the very fact that the letter[s] that the alleged ultimate goal of the UPC/ allies was to establish an independent Empire Hema (which was supposed to have encompassed, apart from Ituri, both t provinces of Uganda, as well as Rwanda and Burundi), that the true concern of the drafters of the Lettre de d transcended any rivalry with the local Hema civilian popu

240. Finally, it needs to be said that the Majority is unable document, statement or witness from which it clearly transpires th the Lendu, much less the Ngiti fighters of Walendu animated by a desire to harm Hema civilians. In fact,

[341] This is even mentioned in the subtitle of the Rapport Circonstancié de la Dénonciation de la planification de l extermination des résistants de base de l Ituri par L U et le Rwanda. See Lettre de doléances, 30 E 98 at DRC-D18-0004349.

[342] See Lettre de doléances, 30 E 98 at DRC-D18-0004352.

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

(d) The attack on Nyankunde

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

[343] This is demonstrated quite clearly in the final part called Suggestions restoring the power of the RCD-K/ML, reopening schools, hospitals and infrastructu fact, the only request in relation to the UPC/RP that is made is that the in condemn them and their allies for deploying. See Lettre de doléances, EV D03-00098 at DRC-OTP-1019-4353.

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

[345] See Majority Opinion, para. 559.

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

242. One particularly important question with regard to Nyan killed most of the civilians. As the Majority acknowled was carried out by a coalition of forces. This coalition b an APC battalion under the command of Major Faustin ar local Ngiti militia. With regard to the latter, the Major Ngiti fighters were all under the control of Kandro,[351] this is

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[346] See Majority Opinion, para. 556.

[347] See, in particular, the vague and general testimony of several hears footnote to paragraph 558 of the Majority Opinion.

[348] For example, the findings in relation to the attack on Bogoro. See Unit Special report on the events in Ituri, January 2002-December 2003, EVD-OTP-00206 (UN Special Report), paras 64-67.

[349] (Emphasis added). See UN Special Report, EVD-OTP-00206, para. 58.

[350] This point is reinforced by the fact that the Chamber did not allow all r UN Special Report, EVD-OTP-00206 about what happened in Nyankunde. In particular, evidenc paragraphs 553-559 were not admitted, even though they contain pote information about events at Nyankunde. This illustrates, once again, tha an issue throughout the trial. See UN Special Report, EVD-OTP-00206, paras 553-559.

[351] See Majority Opinion, para. 555.

clearly not the Cobra.[352] Matata was there as well with his
Considering the evidence concerning the disagreement b
and Cobra, who both bore the rank of colonel, and the
former by the latter after the attack on Nyankunde, I thi
hard to sustain that Cobra's men were somehow und
authority.[353] This point is important, because Cobra did not t
the attack on Bogoro. Accordingly, if it were mainly Co
killed civilians in Nyankunde, it is difficult to infer any
about the mental state of those who attacked Bogoro
later.

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

> The aim was to attack soldiers in their camp, and civi
> be injured, but the aim was not to attack them or kil[355]

244. Accordingly, it is not at all clear who did most of t
Nyankunde. I note in passing that there is simply no r
about the scale of the massacre at Nyankunde. The Ma

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[352] D02148-2779, p. [the] most important commanders were Kandro and Cobra.
[353] After Nyankunde, Kandro was killed by Cobra and fighting ensued betw
Cobra's troops. See D02148-2779, p. 11 and 13.
[354] D02148-2779, p. 34
[355] D02148-2779, p. 55.

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

245. One particularly salient point about Nyankunde is that t of civilian casualties were not of Hema ethnicity. Instea acknowledges, most civilian victims at Nyankunde belon ethnic group.[357] This conclusion would seem detrimental t argument that Nyankunde could somehow be conside precedent for what happened in Bogoro and, therefore, of the criminal state of mind of the Ngiti fighters of Wal

246. However, the Majority appears undaunted by the fact tha group of victims at Nyankunde belonged to a different et the one who appears to have borne the brunt at Bogor Majority even states that:

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[356] I note, in passing, that the UN Special Report, which did not apply the standard, has proved less than reliable in connection with the Bogoro case. Compare, in regard, the alleged number of 260 victims with the findings beyond reaso See UN Special Report, 2006, para. 65.

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

[TRANSLATION] One design to wipe out the Hema civilian p
Bogoro is in sequel to another operation, which was
carried out several months earlier against Nyakunde.[358]

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

[TRANSLATION] The civilian population, for the most part
Nyakunde, was attacked on 5 September 2002 because of its stat
UPC/Hema alliance.[359]

248. There are several fundamental problems with this stater
supposed alliance between the Hema and the Bira
importantly, the alleged equation of the two by the Ngiti,
that was never litigated during the trial. In my view, this Accordingly
come as much of a surprise to the Defence as it did to
say, it is fundamentally unfair when a Chamber bases
findings on an alleged fact against which the Defence h
opportunity to rebut it.[360] Moreover, in order to meaningfull
respond to this surprising allegation, the Defence would
able to investigate the matter further. As noted, the Ma
Defence a meaningful opportunity in this regard.[361]

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

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[358] See Majority Opinion, para. 1155: [TRANSLATION] Le projet d effacer la population civile hema de B
continuité d une autre opération, ayant eu lieu quelques mois plus tôt contre N
[359] See Majority Opinion, para. 706: [TRANSLATION] Nyankunde a été attaquée le 5
population civile, essentiellement Bira de Nyankunde, en raison de son alliété de l UPC/Hema que
[360] I note, in this regard, that the testimony of Germain Katanga upon which
for this finding relates to the Lendu and Ngiti from Nyankunde in Aug
one year earlier), by the Bira and the UPDF.
[361] See supra, I, B. 3. c) The Defence did not have a meaningful opportunity to investigate

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

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

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

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

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

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

commanders were involved in both operations.[364] However, the only one of them who actually testified, Witness 1413, did not say that he was motivated o ethnic grounds. There simply is no information about th the other two. Although there is no doubt that there we fighters from Wabahindu who did participate in both events, nothing to suggest that the same is true for the majority of significant minority of Nyiti fighters who fought at Bogoro. I there is not even clear evidence that those who attacked Bo even knew what had exactly happened in Nyankunde or w that they approved of it.

253. Second, even assuming that the majority of the Walendu who took part in Bogoro were also present in Nyanku good evidence to show that they were the ones who com against the Bira in Nyankunde. As already indicate unreasonable to think that most atrocities against c committed by Cobra Matata soldiers, who participated in the attack on Bogoro. It cannot be assumed that those who we Nyankunde and witnessed crimes being committed ther criminal intent with the perpetrators or approved of their

254. Third, even assuming that the fighters from Walendu perpetrated most of the crimes against Bira in Nyanku would not warrant one to infer beyond reasonable dou attacked Bogoro with the intention to kill Hema civilian One incident is statistically insignificant. In order to tendency to commit crimes on the basis of prior behavio my view, be necessary to show there was a series of sim

[364] See Majority Opinion, para. 1151.

which the same individuals behaved according to a c
Whatever one may believe about Nyankunde, it can neve
the Ngiti always acted in the same manner.

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

255. The Majority's position is that the principal parties of the Hema and the Lendu (including the Ngiti) and that groups simply allied themselves with them.[365] With respect, this way of presenting things grossly oversimplifies a v situation. It may well be that many Ngiti from Walendu held deep grudges against the Hema population, at whose believed to have suffered.[366] However, hating ones enemy for being the enemy is not the same as denying their Indeed, the wish to dominate over ones enemy cannot simply be e with intent to erase them from the face of the earth, as t the Majority seem to suggest.[367]

256. It is on this point that my disagreement with the Majorit most pronounced. I am, in particular, to come to the conclusio

[365] See Majority Opinion, para. 702.

[366] The UN Special Report of 2006 mentions, in paragraph 12, 18 different ethni which the Alur were supposed to be the biggest group. It must be pointe not explain the position of all the other ethnic groups who lived in Ituri. If the Hema population indeed intent on establishing hegemony over Ituri, this would quite natu other ethnic groups. Although the evidence in the case is insufficient in that the UN Special Report mentions that the UPC adopted an ethnic cleansing p empty the town of its Lendu and Bira population, as well as some non-Hema. See UN Special Report of 2006, para. 5. There is no reliable information a this regard.

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

the Ngiti fighters of Bivabaleviewed the entire Hema ethn
group as a whole (i.e. including civilians) as their targe
the Majority seems to adopt the following line of argum
seen as the enemy; as the UPC is a predominantly Hema
Ngiti identified the Hema with the enemy; as the Ngiti wa
their enemy, they wanted to destroy the entire Hema pop

257. I note with concern, in this regard, that the Majority selective
reading of the evidence and sometimes misstates the
evidence. For example, in paragraph 585, the Major
comments made on a video recording by commander Dark
is said to have spoken of an ethnic war and to have linked this
patriotic motives. However, when the transcript of Dark
the video is read in its entirety, a rather different pict
fact, Dark was responding to a question by a journalist,
the journalist was talking of ethnic war, but that this w
was doing.[368] On the contrary, Dark emphasises that his tro
were occupying Bogoro at the time, had opened the mai
Bogoro for all, including the Hema. This example which
clearly illustrates a wider problem, namely that the Ma
systematically ignore or downplay those parts of the ev
not fit within its ethnicity-centric view on the case, while routi
amplifying those parts of the evidence that confirm it.

258. Be that as it may, one should be extremely careful not t
significance of motives like ethnic hatred or desire
Whereas ethnicity sometimes does play an important rol
conflict that took place in Ituri, it is essential not to fall i

[368] Transcript, T, p. 18.

oversimplification. There is a real danger in treating en
or vast categories within a population, as abstract entiti
their own. Whatever sociologists and anthropologists may be able
teach us about the collective characteristics of social an
is not permissible in a judicial context to extrapolate fro
traits any firm conclusions about how individual members of a group
acted or behaved in a particular context. Even thoug
criminal law deals with what is sometimes described a
mass criminality , its ultimate concern is with specific
their personal criminal behaviour. It is therefore inappropriate to lump
together entire populations and attribute collective crim
all their members. Individuals are not predetermined to
particular way simply because they belong to a certain
group, even if a considerable majority of the group does
way. Accordingly, without very solid and sufficiently sp
showing that particular members of a certain social or
actually shared the intentions, it is not possible to speak
a group acting with a common purpose in the sense of a

c) There is a more plausible interpretation of t

259 Based on the above considerations, I think it is fair to s
Majority s interpretation of the available evidence is highly pr
Indeed, the wholly artificial segregation of the EMOI
alleged policy/common purpose of the Ngiti fighters of W
forces the Majority adopt a narrative which is, in my
implausible. In particular, if we are to believe the Majo
accept that the Ngiti fighters of Walendu Bindi were so afraid of the
impending rise of the Tutsi Hema empire that they developed
anti-Hema ideology which was not their own but which they wanted to eliminate

all Hema from Bogoro.[369] In order to achieve this goal, they were to act as confederates for the APC in the fight against the UP they did for the sole purpose of obtaining weapons and t from them so that they would be able to satisfy their blood the Hema.

260. Apart from the fact that there is simply no good evid proposition, it is a lot more plausible that the initiative UPC from Ituri by military intelligence from the authorities i Kinshasa and Beni, who enlisted several Ngiti command Germain Katanga and some former APC officers, for that planning and preparation was carried out under the au EMOI, which provided the necessary logistical, tactical an support including weapons and ammunitions. The EMOI legitimate and did not involve the commission of crime Hema civilian population. However, an indeterminate nu fighters (together with others), deeply resented the Hem a lack of proper military discipline and adequate comma structures, were able to go on a rampage in Bogoro. spontaneously joined in this by Bira and Lendu as well as civilians (including women and children), from areas Bogoro.

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

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

realistic interpretation of the evidence. At the very reasonable reading of the evidence, which raises a seriou theory of the Majority.

4. Conclusion

262 Based on the above considerations, I conclude that the Majority s c under article 25(3)(d)(ii) fails to persuade. Apart from simply is not enough reliable evidence to sustain it, I c impression that the Majority Opinion on several occas betray a certain tendency to accept evidence supportin theory of the case and reject anything else. In any cas that the evidence leaves room for other interpretations open. On the contra am strongly of the view that there are other, more conv interpreting the evidence. Accordingly, it is not possibl the Majority s case under article 25(3)(d)(ii) has been e reasonable doubt.

D. There is insufficient evidence of crimes agai

263 Given my views on the evidence in general and more p relation to the Majority s charges under article 25(3)(d)[370] real need for me to comment on the contextual elements in this c However, I wish to make the following few observations I am of the view that the conditions for the contextual article 7 have not been established.

1. No multiple commission

264 As far as the Multiple Commission Requirement (article concerned, I respectfully disagree with my colleagues

[370] See supra, n. 1. Weakness of the Majority s case under article 25(3)(d)(ii)

count of 33[371] satisfies the minimum threshold. Without wis

minimise the seriousness of even a single death, I do believe that

such a relatively small number rises to the level of a

humanity.

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

266. Of course, it would have been theoretically possible th another organisation had fulfilled the Multiple C Requirement, in which case it would only have been nec that the crimes committed by the Ngiti fighters of Wale

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[371] This number is based on the Majority's count of 30 cases of killing and 3 slavery. As already indicated, I fundamentally object to the Majority's v the number of victims of killing went beyond 30 (see Majority Opinion, para. 866). In any event, the Majority Opinion provides no order of magnitude, and this claim testimony of one witness (P-353). It is probably safe to conclude that whatever add casualties the Majority has in mind would not fundamentally affect my argument.

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

[373] See Majority Opinion, para. 1138. It may well be that in certain circumstances amount to the crime of humanity of forcible transfer. However, such a fi this case. Moreover, it was never charged and evidence the Chamber never under regulation 55.

committed as part of the widespread or systematic att
the Majority only relies on what it sees as the course o
Ngiti in order to find that such an attack was committed.

2. Directed against any civilian population

267. In relation to the requirement that the attack must hav
primarily against a civilian population, I refer to my opi
existence of a criminal purpose[374] I am of the view that the evidence
does not show beyond reasonable doubt that the He
population of Bogoro was the primary target of the attac

3. No organisational policy

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

4. No organisation

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

[374] See supra, paras 2007.

[375] See supra, J.C.T. The Ngiti fighters of Walendu Bindi did not constitute a group acting
common purpose (article 25(3)(d)) or an organisation. There is indeed no evidence of
a common purpose or organisational policy to attack the Hema civilian po

5. Not systematic

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

271. First, I would simply like to observe that the Majority s strategy of the attackers made it very difficult for the c to free[376] is not borne out by the victim[377] of the Majority is correct that the civilian population was consciously trapped i would stand to reason that there would be a much high victims, especially in light of the alleged high numb attackers.[378] I recall, in this regard, that I do not accept t shows that Bogoro as such was indeed attacked from all[379]

272. Second, I disagree that the alleged fact that the atta distinction between combatants and civilians is an ind systematicity in the sense of article 7(1) of the Statut regard that the so-called Lendu[380] allegation which I do not consider proven, considering the inconsistencies in witness[381] not proof of systematicity either. It is quite plausible were searching Bogoro for hiding UPC soldiers.

273. Third, as already noted, I object to my colleagues refe of pillaging and destruction of property, which are charge under article 8 (war crimes). Contrary to these two crimes is liste

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

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

274. Fourth, so little is known, or known, about when and by whom most of t
crimes against civilians were actually carried out tha
impossible to form any opinion about the systematic natu

275. Finally, I want to stress that the fact that the military
been planned and carried out in an organised and coordina
at least as far as the APC and the Ng-Bwenyi fighters of Wal
concerned can hardly constitute evidence for the allegati
crimes against the civilians were also planned in an
organised and coordinated manner. As the participation
of Lendu and Bira fighters in the commission of crimes
contradicts such a claim. As there is no good evide
coordination between the Ngiti fighters and the Lendu or the Bira
only be assumed that their arrival at the scene disrupte
the former might have planned (but for which there is a
evidence).

E. The nature of the armed conflict

276. The Majority Opinion concludes that the nature of the arme non-international.[382] I do not wish to take a firm position o law is far from settled and, in my view, the facts of this case are par complex on this point. Suffice it to say that, if I am of the view that, he the evidence is not sufficient to arrive at any conclusio doubt, as is required by the Appeals Chamber,[383] I am unable agree with my colleagues in this regard.

F. Germain Katanga's responsibility under article has not been established

277. I agree with the Majority that Germain Katanga's respo article 25(3)(a) has not been established. I will therefo some observations in relation to the Majority's analysis.

278. It follows from the acquittal of Mathieu Ngudjolo[384] that the Majority's concept of indirect co-perpetration has been rejected. The Majority the not develop its views as to this form of responsibility. A want to remind what I said in my Concurring Opinion in Ngudjolo Judgment. I believe that the concept of indirect co-perpetration has no place unde

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[382] For example, the Majority Opinion relies on the overall control c jurisprudence. Whereas, as the International Court of Justice has applied the Convention on the Prevention and Punishment of the Crime of Genocide (Montenegro Judgment, 26 February 2007, ICJ Reports 2007, p. 43, para. 406), may well be the appropriate criterion for determining the nature of an armed conflict, justification, as the ICJ has clearly rejected the rationale based on the also Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmshurst (ed.), International Law and the Classification of Conflicts (Oxford University Press, 201 pp. 32-79.

[383] Appeals Chamber, Prosecutor v. Uhuru Muigai Kenyatta and Francis Kirimi Muthaura, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the confirma Article 61(7)(a) and (b) of the Rome Statute', 24 May 2012, ICC-01/09-02/11-96 OA, para. 33.

[384] See Ngudjolo Judgment.

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

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

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

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[385] See Ngudjolo Judgment, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4 (Concurring Opinion of Judge Van den Wyngaert), para. 2.

[386] The Majority also rejects the so-called Organisationsherrschaft doctrine as a constitutive element of indirect perpetration in the sense of article 25(3)(a) (see para. 1406). While I agree with my colleagues not to adopt the Organisationsherrschaft doctrine with their suggested Organisationsherrschaft can be used to assign individual criminal responsibility to perpetrators because control over an organisation provides them with control. As I have explained in my Concurring Opinion of 18 December 2012, I can imagine that control over an organisation can be an important factor to demonstrate that an accused is responsible for the crimes of certain individuals who were part of this organisation. However, in such circumstances, however, the control over the organisation is used to demonstrate control by the indirect perpetrator over the direct perpetrator (i.e. the individual person(s)) and not control over the crime. See, Concurring Opinion of Judge Van den Wyngaert, paras 4-5.

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

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

281. The new approach of the Majority may lack consistenc theory was initially adopted in the jurisprudence of this Co best way to separate principals and accessories to[389] The methodology behind this separation was seen as particu so as to assign the masterminds or intellectual international crimes the label of committers under artic Statute.[390] The notion of hierarchy is thus inherent in the co However, if there is no hierarchical arrangement betwee principals can be just as responsible as accessories. If this is true, why go to such theoretical lengths to divide principals a all? Instead of the control theory, why not just adopt meaning of the language of article 25(3) of the Statute i and purpose, which is the interpretive standard for every in the Statute?[391] Even if it were conceded that the control th available when interpreting the Statute, on the Majority s

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

[389] See Pre-Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 403.

[390] See Pre-Trial Chamber I, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 410; Pre-Trial Chamber I, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 134(a); Confirmation Decision, para. 515.

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

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

G. Germain Katanga s responsibility under artic has not been established

282. Under this heading I will discuss Germain Katanga s r article 25(3)(d)(ii). I will first offer a few comments on how I s interpretation of this article. After that I will comm Majority s conclusions and present my own views of the e

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

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

284. First, any interpretation of article 25(3)(d) and the interpretation of common purpose group in article 25(3)(d), because th common purpose has to either commit or attempt the com crimes for 25(3)(d) liability.[394] As a matter of logic, a group that must commit or attempt to commit crimes, there must, by definition, be join as defined in article 25(3)(a).[395] Accordingly, the group committing crimes for 25(3)(d) liability must contain persons w

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[392] See Majority Opinion, para. 1611-1642.

[393] See Mbarushimana Confirmation Decision, para. 268-288.

[394] Article 25(3)(d) of the Statute provides, in relevant part, that a p responsible and liable for punishment for a crime within the jurisdiction o [&] [i]n any other way contributes to the commission or attempted commi group of persons acting with a common purpose .

[395] Article 25(3)(a) of the Statute provides, in relevant part, that a pers responsible and liable for punishment for a crime within the jurisdiction [&] [c]ommits such a crime, whether as an individual, jointly with another pers [&] .

considered as jointly perpetrating the crimes under art 25(3)(a).[396]

285. In accordance with my conclusions above, this means that common purpose groups must fulfil the material elements of th include those who made direct contributions to bringin material elements, either personally or through other group members.[397] A group consisting solely of persons who other Chambers woul indirect perpetrators is insufficient for 25(3)(d) liability as I do not consider this theory of commission to form 25(3)(a) of the Statute.[398]

286. Second, I read article 25(3)(d) in such a way that the co the group acting with a common purpose. The group's common purpose must be such that the group members aware that crimes will be committed in the ordinary course of events.[399] The Majority's analysis confirms this point, discusses how the group's common purpose need not be specifically c commission of a crime.[400] I agree that the relevant group for 25 purposes may simultaneously have criminal and non-criminal purposes. However, the criminal component must be such an inher common plan (i.e. with the intent in the ordinary course of ev (article 30)) that nothing is added by remaining within the enlab

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[396] See Mbarushimana Confirmation Decision, para. 271 (also linking the commo under article 25(3)(d) with the notion of joint perpetration under article 2

[397] Concurring Opinion of Judge Van Wyngaerten, para. 44.

[398] Concurring Opinion of Judge Van den Wyngaert, paras 58-64.

[399] See article 30(2)(b) of the Statute (definition of intent in relation to a co person means to cause that consequence or is aware that it will occur in the ordinary course of events).

[400] See Majority Opinion, para. 277.

[401] Idem.

describing the common purpose are consequence, and on[402] As
the subjective elements side of 25(3)(d) liability, I als
person s intentional contribution must be at least awar
contributing to the criminal activities of the group.

287. Third, the assessment of a significant contribution can
which go above and beyond the original list in[403] Mbarushimana
In particular, I note the recent jurisprudence of the
regarding the specific direction requirement in the aiding a
context.[404] Just like with aiding and abetting liability at
knowledge is a sufficient mental liability under article 25(3)(d)(i
the Statute.[405] Without taking any position as to whether
customary international law has anything to say on aidi
and, if so, whether or not it supports a requirement
direction , I do consider that, when assessing the s
someone s contribution, there are good reasons for analysing w
someone s assistance is specifically directed to the c
criminal part of a group s activities. Indeed, this may
useful to determine whether particular generic contri

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

[403] See Mbarushimana Confirmation Decision, para. 284, where the Pre-Trial Chamber found that following factors can assist in the assessment of a suspect s contributio nature of the participation after acquiring knowledge of the criminality purpose; (ii) the efforts made to oppose the group s criminality or to impede the efficient functi group s crimes; (iii) whether the person created or merely executes the c of the suspect in the group or relative to the group; (v) vis-à-vis the role the s seriousness of the crimes committed .

[404] ICTY, Appeals Chamber, Prosecutor v. Tadić, Judgment, 15 July 1999, IT paras 116-171; ICTY, Appeals Chamber, Prosecutor v. Perišić, Judgement , 28 February 2013, IT-04-81-A, paras 74-75; ICTY, Trial Chamber, Prosecutor v. Jovica Stanišić and Frank Judgement (Volume II of II), IT-03-69-T, 30 May 2013, paras 1641-1655; ICTY, Appeals Chamber Prosecutor v. Charles Ghankay Taylor, Judgment, 26 September 2013, SCSL-03-01-A, paras 470-484

[405] Article 25(3)(d) of the Statute provides, in relevant part, that [s]u intentional and shall either: [&] or (ii) [b]e made in the knowledge of th commit the crime .

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

288. Fourth, and finally, the relationship between the requir the particulars of the accused s understanding of the changes across article 25(3)(d)(i) and 25(3)(d)(ii). A speaks of furthering criminal activity or criminal purpose group, where such activity or purpose involves the co crime within the jurisdiction of the Court. By contrast, article 25(3)(d)(ii) speaks of more general understanding of the group s criminal purp liability.[407] By contrast, article 25(3)(d)(ii) speaks of contribution in the knowledge of the intention of the gr the crime . By referencing the crime , the accused must h

[406] I believe this is what Judge Fernández de Gurmendi called neutral cont Opinion to the Appeals Chamber s Judgment on the appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled Decision on confirmation of charges , 30 May 2014, (Separate Opinion of Judge Fer de Gurmendi), para. 12.

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

of the specific crimes the group intends to commit, as to more generalised knowledge of a criminal purpose would be in

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

289. As will be clear from the analysis above, I am of the essential ingredients for criminal responsibility under article 25(3)(d)(ii) have not been established. The Bogoro attack of 24 Fe not an attack directed against a civilian population a existence of a group of Ngiti commanders/combatants a criminal purpose to attack the Bogoro which Germain Katanga allegedly contributed is not sustained by the e believe that Germain Katanga's alleged knowledge in the article 25(3)(d) has not been established (infra, III.G.2 that it has been established that Germain Katanga contribu acting with a common purpose rather than to a legiti operation (infra, III.G.2.b).

a) Germain Katanga's alleged knowledge of the purpose

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

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

and that they were going to take part in that attack on B[410]. Fourth, that Germain Katanga knew that the UPC was considered a Hem and that several members of his community harboured b of the Hema.[411] Fifth, that Germain Katanga knew about the anti-Hema ideology and its origin, the perceived threat of the in Hema-Tutsi empire.[412] Sixth, that Germain Katanga was aware t authorities in Beni used the ethnic argument to mob combatants.[413] Finally, the Majority claims that Germain Kata shared the anti-Hema ideology.[414]

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

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

[411] See Majority Opinion, para. 1685.

[412] Idem.

[413] Idem..

[414] Idem.

[415] Interestingly, to illustrate this point, the Majority refers, among others, to Germain knowledge about the violence employed by the UPDF. Accordingly, we Majority believes that the phenomenon of killing of civilians was univer Ngiti fighters of Walendu-Bindi. I observe, in this regard, that if the killing of ci

knowledge about what happened in Nyankunde prove
reasonable doubt that the same was inevitably going to happen
Bogoro.[416] The argument that many Ngiti identified the UPC
Hema more generally is equally unconvincing. Indeed
Second World War many allies probably referred to t
Germans, but that does not mean that they were incap
distinguishing the armed forces from the civilians. Fina
not believe there is any solid evidence showing that ther
Hema ideology, which involved the indiscriminate killing
civilians. The fact that some may have manipulated fea
Hema-Tutsi empire to enlist the Ngiti for their own politi
does not prove that the Hema civilian population as such
crimes. I therefore reject the suggestion that Germain Kat
knowledge about concerns over the UPC's alleged
tendencies somehow shows that he was filled with a hat
Hema civilian population in general that was so strong th
eradicate them all. I stress, in this regard, that there
reliable item of evidence in this case which refers to a s
Germain Katanga that could be interpreted as anti-Hema.

292. In the end, one wonders whether the Majority of the Opinion
developments about an all-based ideology and the way in
which tribal warfare was conducted in Ituri are not in
horse for an argument that does not need to be resolved, when
reading the Majority's Opinion as a whole, one cannot escape t
impression that what Germain Katanga really stands acc
he made a contribution to an operation which he knew i

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inevitable corollary of conducting military operations in Ituri, including
seems unnecessary to show any specific ethnic motivation.

[416] See supra, I.C.3.b)(i)(a) The attack on Nyankunde.

that certain individuals, who lacked the necessary traini

and who held grudges against the Hema, might harm Hema

they had the opportunity. However, as the Majority righ[417]

the Statute, for better or for worse, does not include[418] It

is therefore inappropriate to rely on such arguments, even if they are

dressed up under a different guise.

b) Germain Katanga s alleged contribution to th

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

(a) His role in establishing a coalition with the autho in devising a military strategy with them;

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

(c) His role in facilitating good communications b commanders, the authorities in Beni and the sold including the settling of disputes between local co

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

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

[417] See Majority Opinion, para. 777.

[418] Concurring Opinion of Judge Christine Van den Wyngaert, paras 3-38.

[419] See Majority Opinion, para. 1671.

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

295. However, there are two more fundamental underlying pr
the Majority Opinion in relation to the alleged role of, a
made by, Germain Katanga.

(1) The evidence does not show Germain Ka
president

296. To begin with, the Majority Opinion misrepresents the evi
there is no proof beyond reasonable doubt that Germain
president of the Ngiti fighters in Bogoro[420] and any meaningful
sense of that term. I have already addressed the commentary on
evidence on which the Majority grounds its findings and
view, cannot sustain any of the findings beyond reason
the Majority makes.[421]

297. First, I note that the Majority relies heavily on the test
this regard. I have already explained why I think this wi
and I consider it wholly inappropriate to rely on his test
to the position held by the accused. The Majority al

[420] See Majority, Section X.6.c Germain Katanga: autorité de référence à Aveba.
[421] See supra, Section II.C.2.b The existence of a group with a common purpose or an organisa

testimony of D038 even though this was from Ezekiel Bin
and it is entirely unclear what the basis for his knowl
organisation of the Ngiti fighters was. Bin Kawa Walendu
In any event, I
stress that the witness denied having knowledge over th
power in Mur and never confirmed that Germain Katanga
authority beyond Aveba.[422] As regards D028, a witness considered to
be particularly trustworthy by the Majority,[423] I cannot conclude that
the Majority's reading of the transcript is correct. Moreover,
extremely s
specifically, the Majority affirms that D028 stated the general principl
that if one is responsible for the combatants then o
responsible for all the combatants in Bunia.[424] However, a closer
inspection of the transcript shows that the witness actually said:

> Question: [...] What is the area in which he exercised tha
> being challenged by some, if I understood you correctl
>
> Answer: Thank you. I spoke about Kakado. Kakado wanted to put [Ge
> Katanga] in charge of the combatants, but he was faced with
> were against him; and when you are in charge of comb
> have to be in charge of all the combatants of the Wa
> words the whole administrative hierarchy of Walendu Bindi
> unacceptable because you had to be in a position t
> respected by Cobra Matata and others and those
> unacceptable, especially because Germain had just a
> entered into the combatant and to give him all these privi
> at such an early stage was not acceptable. So in Avel

[422] D038, T05, p. 31. In fact, it seems that the Majority is relying on the question in this instance, rather than on the testimony of the witness.
[423] See Majority Opinion, para. 1264.
[424] See Majority Opinion, para. 1266.

could do so, but could name him to that position elsewhere.[425]

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

[425] D02-228, T-152, pp. 36-62.
[426] See supra, para. 200 et seq.
[427] Lettre Défense de brandir les armes, EVD-OTP-00278.
[428] Lettre Perception taxes, EVD-OTP-00239.
[429] It should be noted, in this regard, that Lettre Défense de brandir les armes was apparently written by Kasaki, the number two of Kakado, who, according to D02-228, wanted Germain Katanga have the position of president. It may thus well be that the title used measure of wishful thinking on his part. This is of course speculation Majority s assumption that the mere fact that a particular letter uses pa means that they reflect reality.
[430] Plainte de Cobra Matata, EVD-D02-00243.

service[431], neither of which mentions the presence of a pr
Aveba and which could not be used to support the proposition that C
Matata recognised Germain Katanga as his superior befo
Bogoro.

299. Finally, the Majority attaches considerable importance t
by Germain Katanga in events that took place in the s
March 2003[432]. However, these events are only significant to
that the Majority rejects the Defence's argument that G
was nominated president of the combatants of Walen
Bantu on 3 March 2003. As I already noted, in that respect the Majority
discards this version of events a little too easily. For
share my colleagues' view that it is surprising that s
have mentioned this event[433]. On the contrary, I note that the tw
witnesses who mentioned it, i.e. D-02028 and D-01082, were two
ranking officers, whereas the other witnesses who did n
were never asked about it and (b) were ranking civilians
Moreover, I recall that it is not sufficient for the Majo
they are not convinced by the Defence's argument. I
reasons must be given for why the Defence's claim cann
true. I am afraid that I am not persuaded by the Majorit
regard.

300. In any case, I believe the evidence shows beyond rea
doubt that Germain Katanga was recognised as the lead
when he participated in the delegation to Beni in Novem
he was the President of the movement of local combata

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

Bindi in any meaningful sense of this term before the at

(2) The evidence does not show that Germai Katanga s contribution was made to a cr plan

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

302. In my view there is more evidence to suggest that Ger acted as the middle man between Beni and the local Ng and that he did so in the first place on behalf and for th Indeed, the way in which I read the evidence in this case is

[434] I note, in this regard, that Germain Katanga went to Beni in November 2 Opinion states that he only knew about the alleged common purpose of the N Walendu-Bindi as of December 2002. See Majority Opinion, para. 1690.
[435] See Majority Opinion, para. 1674.
[436] See Majority Opinion, para. 1671.

used the local Ngiti fighters for its goal to reconquer It[...]
way around.[437] In this sense I see Germain Katanga's role mo[...] 'Beni's man in Walendu-Bindi' rather than as 'Walendu-Bindi's man in Beni'. At least I believe this is an entirely reasonable i[...] evidence, which colours everything in a significantly diff[...]

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

304. There is no evidence showing that any of the contrib[...] Germain Katanga is alleged to have made were specifica[...] commission of crimes in Bogoro. On the contrary, all of the alle[...] contributions could just as easily have been made to th[...] reconquer Bogoro. In fact, I think a reasonable inter[...] evidence shows precisely this. The Majority acknowled[...] but turns it upside down, when it states that the fact that [...] the accused constituted a contribution to the military op[...]

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[437] As I have already noted earlier, I do not believe the Ngiti fighters of Walendu-Bindi had a criminal purpose to attack the civilian Hema population. See supra II.C.2 The existence of a group acting with a common purpose or an organisation.
[438] See my critique of this ruling, supra II.C.3 There was only one plan.
[439] See supra II.C.3 There was only one plan.
[440] See supra para. 287.

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

305. In other words, the Majority Opinion alleges that the N
Walendu-Bindi were simultaneously executing two differen
overlapping plans and that a contribution to one plan aut
constituted a contribution to the other. However, even
that there were two different plans, and that Germain
have made a contribution to a group acting with a crim
purpose by contributing to the plan of the group, I am
strongly of the view that Germain Katanga's contributio
removed from the actual commission of crimes and the
reach the threshold of article 25(3)(d)(ii) for lack of
normative link.[442]

306. The only way in which Germain Katanga's contributions
plan could be construed as having furthered the Ngi
common purpose is by arguing that the attack on the
necessary first step in order to enable FNI/FRPI to
attack the civilian population. In other words, in this in
success of the legitimate plan by FNI/FRPI was a success
of the alleged criminal plan of the Ngiti fighters of Wa
Therefore, if Germain Katanga made a contribution to the legit

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[441] See Majority Opinion, para. 1673.

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

[443] The Majority seems to make this argument in para. 1679 of their Opinion, where it is stated that the Ngiti combatants did not have the means to launch an attack a objective to erase Bogoro without the logistical support in weapons [TRANSLATION] "significantly influenced their occurrence and the manner committed" (« elle a influé de manière importante sur la manière dont les crimes ont été commis »).

attack on the UPC, he also indirectly contributed to the
against the Hema civilian population by taking away a m
the UPC which prevented a lawful attack on the civilians.

307. However, such an argument would, it seems to me, be put
before the Chamber. Even if it were true that the Ngiti fighters o
Bindi assimilated the UPC with the Hema population, the
be the case that the UPC was not the actual target.[444] The
suggest that the UPC was simply a hindrance that had to
order to allow the commission of crimes against the
population is not sustained by any evidence and, in my
implausible.

308. In short, the Majority cannot have it both ways; either it m
point to evidence that EMOI was complicit in the crimina
Ngiti fighters of Bavi, or, if there were indeed two comp
distinct plans, the Majority must point to evidence proving
beyond reasonable doubt that Germain Katanga significa
to the Ngiti's criminal plan and not EMOI's objective. H
no reliable evidence for either proposition and for this
but also to complete from the Majority's case against Ger
Katanga under article 25(3)(d)(ii).

[444] I am aware that, according to the Majority Opinion (para. 1665), the al
primarily (à titre principal) to erase the Hema civilian population fr
have explained in detail above (see supra, I.C.3), there is no evidence of a common purpose or o
policy to attack the Hema civilian population. This proposition is therefore not based on
evidentiary basis.

IV. CONCLUSION

309. As will be clear from the above, the divergence of opin
Majority and myself is wide and profound. Not only do I
strongly disagree with the alteration of the form of
responsibility, particularly at this very late stage in the
also firmly believe that the evidence adduced in this cas
to warrant a finding of guilt beyond a reasonable doubt against the
accused, be it on the basis of the original charges unde
the recharacterised charges under Article 25(3)(d) of the Statute.
believe the evidence meets the criteria for crimes again
am unable to agree with the arguments for recharacterisin
the armed conflict.

310. While it is not for me to speculate about the reasons wh
take such a different view on so many issues, I do want
my own reflections. Trials like these are difficult and complex
both from a legal and evidentiary point of view, but they are
challenging on the human level. My sympathy for the victims plight a
an urgent awareness that this Court is called upon to en
powerful stimuli. In the end, the Court s success or failure cannot be
just in terms of bad guys being convicted and inno
receiving reparations. Success or failure is determined first and
by whether or not these proceedings, as a whole, have been fair and ju

311. This raises the question by which standard fairness and
evaluated. My view is that the trial must be first and for
towards the accused. Considerations about procedural fairness
Prosecutor and the victims and their Legal Represen

certainly relevant, cannot trump the rights of the accu
when all is said and done, it is only the accused
stands trial and risks losing his freedom or
court of law to have the legal and moral authority to
moral judgment on someone, especially when it relates
allegations as international crimes, it is essential, i
scrupulously observe the fairness of the proceedings and to a
standard of proof consistently sustained throughout
most of the trial has been unfair.

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

313. First and foremost, I believe it is wholly inappropriate to
change the legal characterisation of the charges after t
course. It bears repeating that these proceedings were co
1,969 days without anyone ever invoking article 25(3)(d)(ii).
more, when the Defence finally challenged the Majority
recharacterise the charges, none of the other parties
Prosecutor, stood up in support of it. It is thus quite clear that the cha
against Germain Katanga under article 25(3)(d)(ii) are a cre
Majority alone, presumably in order to arrive at a ground
because none was available under article 25(3)(a).

314. It is important to be clear in this regard: in order to
stop the invocation of such impunity gap, in the sense th
allows Chambers to avoid technical acquittals, it is

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

315. Moreover, even if it were permissible to entirely reshap
the end of the trial, this can only ever be done fairly
receives a genuine and meaningful opportunity to defend himself against
the new charges. This presupposes that the accused should be
with the same level of precision and detail about the fa
including the evidence that is said to support them,
charges. In addition, the Defence must have a reasonable o
conduct a meaningful investigation. None of these conditions was m
in this case.

316. I am furthermore of the view that the decision to activat
such a late point in the trial has needlessly prolonged the length
proceedings and has therefore violated Germain Katang
expeditious trial in direct violation of articles 64(2) an
Statute. Indeed, the tardiness of the 25(3)(d), (ii) Notice
combined with the lengthy and infelicitously handled pr
followed, have resulted in unjustifiable delays that co
almost entirely avoided if the Majority had provided
regulation 55(2). Moreover, I also find that these delays are
incompatible with the Chamber's obligation under rule
Rules of the Court to render its judgment within a reaso
time after the Chamber has retired to deliberate.

317. Be that as it may, even if the articles 25(3)(d)(ii) were
properly before this Chamber, I would still not have ag
Germain Katanga. The reason for this is very simple: the evi

insufficient to meet the standards of proof. More specifically, I find that a lot of potentially relevant evidence is missing from the ca that quite a lot of the available evidence suffers from s problems. Under these circumstances, it is simply not poss opinion, to come to any meaningful conclusion beyond reasonable doubt. In fact, I am firmly of the view that a different int the evidence is possible, if not more plausible.

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

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

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

320. Based on these considerations, I hold the view that this Chamber should have rendered its verdict under article time ago and that Germain Katanga should have bee alongside Mathieu Ngudjolo Chui on 18 December 2012 distance myself from the very long delay that has happened between then a now.

Judge Christine Van den Wyngaert

Dated this 7th day of March 2014

At The Hague, The Netherlands