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TRIAL CHAMBER II

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

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

Public

Defence Observations on Article 25(3)(d) of the Rome Statute

Source: Defence for Mr Germain Katanga

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to:

The Office of the Prosecutor

Ms Fatouma Bensouda, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain

Katanga
Mr David Hooper Q.C.
Mr Andreas O'Shea

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. On the 2nd of October 2013, the Trial Chamber invited the defence for Mr Germain Katanga (“defence”) to submit complementary observations on the new mode of liability, on the totality of themes elaborated upon in the Chamber’s decision of 26 June 2013, and in particular on the topics of (1) the attack on Nyankunde and/or other attacks pre-dating the attack on Bogoro, (2) the identification of the perpetrators of the crimes, and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.¹ The defence hereby submits these observations while observing that it has done its utmost in its previous and extensive filings to address such issues, albeit within the limits of the material then available to the defence and without the benefit of further investigations to meet the new charge. The defence position has not materially altered since those submissions were made, other than in its inability to investigate the new suggested form of participation.

A. Preliminary Observations

2. Pursuant to Regulation 55(3) of the Regulations of the Court,

“the Chamber shall, in particular, ensure that the accused shall:

 - (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
 - (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).”
3. Following the Trial Chamber’s notice that it may requalify the mode of liability against Mr Katanga, from article 25(3)(a) to article 25(3)(d) of the Rome Statute,² the defence has consistently indicated that it could not present

¹ ICC-01/04-01/07-3406, Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013), 2 October 2013, para. 18 and page 11.

² ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012.

an adequate response or defence in respect to the altered mode of liability without conducting additional investigations.³

4. By its *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*,⁴ the Chamber appeared to agree:

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

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

5. However, in the Chamber's *Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013)*,⁵ it states:

17. La Chambre entend cependant rappeler qu'en cas de mise en oeuvre de la norme 55 du Règlement de la Cour, la conduite de nouvelles enquêtes ou la recherche de nouveaux éléments de preuve ne constitue pas la seule voie de défense possible. La Défense bénéficie en effet également de la possibilité de faire valoir son point de vue sur l'ensemble des éléments de preuve existant au dossier, ce qui est de nature à lui permettre d'adapter sa ligne de défense à la nouvelle qualification juridique envisagée. Elle doit donc avoir la possibilité de préciser, compléter, nuancer les conclusions écrites et orales qu'elle a précédemment développées dans le cadre du mode de responsabilité initialement retenu par la Chambre préliminaire. Or, il semble, en l'espèce, qu'en raison du choix que la Défense a fait d'emblée de demander aussitôt la reprise ou la poursuite de ses enquêtes, ces possibilités procédurales alternatives aient été perdues de vue ou, en tous cas, très insuffisamment exploitées et ce, même si

³ ICC-01/04-01/07-3323, Defence Request for Leave to Appeal the Decision 3319, 21 December 2012, para. 54 ; ICC-01/04-01/07-3339, Defence's Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, para. 87 ; ICC-01/04-01/07-3350, Defence Reply to the Legal Representatives' Observations on the Defence's Document in Support of Appeal against the Decision on the Implementation of Regulation 55, 30 January 2013, paras 30-31; ICC-01/04-01/07-3369, Defence Observations on Article 25(3)(d), 15 April 2013 ("Defence Observations on Article 25(3)(d)"), para. 51, 177, 181-189, 194; ICC-01/04-01/07-3379-Conf-Corr, Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 4 June 2013 ("Defence Observations on the additional material"), para. 48-57, 59; ICC-01/04-01/07-3386-Conf, Defence Reply to 'Réplique de l'Accusation aux "Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)"', 17 June 2013, para. 21; ICC-01/04-01/07-3394-Conf, Defence Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, 5 August 2013, paras 16-17 ; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, 17 September 2013, paras 2, 45; ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives' Observations, 4 October 2013, para. 43.

⁴ ICC-01/04-01/07-3388-tENG, 26 June 2013.

⁵ ICC-01/04-01/07-3406, 2 October 2013.

quelques aspects factuels ont été abordés dans ses premières Observations.

18. C'est la raison pour laquelle, soucieuse, comme la Défense, de veiller à ce qu'il puisse être mis un terme à la présente affaire, la Chambre entend, dès à présent, inviter la Défense à déposer, si elle le souhaite et en se fondant sur la preuve existant au dossier, des observations complémentaires sur l'ensemble des thèmes qu'elle a retenus dans sa Décision du 26 juin 2013, en particulier sur les trois thèmes qu'elle avait tenu à distinguer, soit : « 1) l'attaque de Nyankunde et ou [l]es autres attaques antérieures à celle de Bogoro, 2) l'identification des auteurs des crimes ainsi que [...] 3) le lien existant entre les armes livrées aux combattants ngiti et les crimes commis à Bogoro». [...]

6. In the light of those observations it appears that the Chamber has now taken the view that, given the significant difficulties confronting the defence in conducting effective investigations, an alternative course is to be taken. This alternative, according to the Chamber, is for the defence to make observations on how the existing evidence must be viewed for the purposes of the application of article 25(3)(d).
7. While seeking to comply with the order of the Chamber, the defence must express its deep concern with respect to this course. There are serious limitations on the utility of the exercise, and it is important that the Chamber fully takes into account those limitations which permeate the discussion which follows. The defence takes issue with the idea that these submissions, meant to be observations on the existing evidence, represent *an alternative* to further investigations. The two are mutually exclusive and one does not cure the other.
8. Further, and as has been previously submitted, the defence must emphasise that while permitting further time for investigations remains an option available to the Chamber and constitutes, in the defence submission, an essential step prior to consideration of recharacterisation - on grounds of fairness to the accused – any further delay will unnecessarily delay the conclusion of the trial. The length of these proceedings has been such that the right of the accused to an expeditious trial is endangered by further delay. The Chamber has acknowledged that difficulty. That such delay, given the unsettled circumstances subsisting in the DRC, will be for an uncertain but lengthy period of time, compels in the defence submission to only one

reasonable and fair option, which is for the Chamber to say that enough is enough, and to move to judgement. The lack of reasonable opportunity to investigate the elements of the proposed recharacterisation requires that judgement to be in respect of the original mode of liability. Given that submission, the defence must emphasise that any reference to further investigations made below must be seen in that light.

9. The defence respectfully submits that the Chamber erred in requesting it, on October 2nd, to submit further submissions in respect to article 25(3)(d) on the basis of the existing transcripts, without first waiting to consider the imminent observations by the defence on the Registry report on defence investigations, a report which also addressed the critical observations of the Prosecutor and the Victims Representatives and was filed on October 4th⁶. It was unfair for the Chamber to have the Registry, Prosecution and Victims observations without waiting to hear from the defence before asking for final submissions. It is submitted that those observations would have been of assistance to the Chamber in deciding what should be the next step.

10. Plainly the observations of the parties were capable of influencing the Chamber in its assessment of the importance of the investigations. Inevitably, the impression given was that the defence observations on the critical and erroneous comments made in the other filings was of little weight in the Chamber's consideration as to whether the defence acted with due diligence. It also provoked the following questions: did it mean that it was irrelevant to the Chamber whether or not the defence acted with due diligence, or had the Chamber already taken a view on the issue of investigations without considering the defence further observations on this issue? Is the defence to understand that the Chamber appears to have changed its view as to the necessity of investigations? Is it now the position of the Chamber that it can re-qualify the mode of liability irrespective of whether the defence had a proper opportunity to investigate?

⁶ ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives' Observations, 4 October 2013.

11. The need for expedition in bringing an end to this continuing procedural debacle rendered it unhelpful for the accused to seek leave to appeal the Chamber's decision of 2nd October.
12. It is unclear to the defence whether these further observations, made at the invitation of the Chamber, will be treated as the final submission in respect to article 25(3)(d) and whether the next step will be for the Chamber to consider whether to render judgment under article 74 on the basis of article 25(3)(d) as part of the Article 74 decision. If this is how matters should be understood, then the defence submits that the Chamber cannot render judgment on the basis of article 25(3)(d) without first ruling on the defence's pending request that it not re-qualify but render judgment on the basis of article 25(3)(a) instead. That request directly concerns the question whether it has been able to investigate the proposed new mode of liability and whether Regulation 55(3) has been satisfied.
13. The defence made an alternative request (although with the caveat outlined above at paragraph 8), that is, that additional time be given to permit the defence to conduct its investigations.⁷ The defence submits that the Chamber should make a ruling on both requests before it renders its final decision on whether it is appropriate to re-qualify the mode of liability with which Mr. Katanga is charged. This submission finds support in the observations of the dissenting judge.⁸
14. Another preliminary observation in respect of the appropriateness of this exercise and the consequent limitations on the defence is the following. It is the Chamber which has set out the law and facts to assist the defence in confronting the application of this new mode of liability. However, it is the prosecution which bears the burden of proof. The Chamber must be assumed to make its propositions from a neutral stance. The defence is being asked to comment on the application of a mode of liability without the prosecution

⁷ ICC-01/04-01/07-3397-Conf, paras 2, 45.

⁸ ICC-01/04-01/07-3406-Anx, Dissenting opinion of Judge Christine Van den Wyngaert, 2 October 2013.

having first been asked to set out its detailed position on how it believes the accused is to be found guilty on the existing evidence. Nor is this a mere technical change but one that alters the narrative of the case. In these circumstances, the defence will not speculate as to how the prosecution would formulate its position at this stage. It can only highlight the lacunae in the evidence. The defence must have the last word. The prosecution must not be permitted to have the advantage of these final observations for the purpose of constructing its new case. That would be tantamount to a reversal of the burden of proof.

15. Also, the defence still has insufficient detail as to the evidentiary basis the Chamber intends to rely on in the event it decides to alter the mode of liability. The details provided by the Chamber remain insufficient to put the accused on adequate notice of the case against him under article 25(3)(d) as required under article 67(1) of the ICC Statute.⁹
16. In addition, the defence reiterates that it would not be possible for the Chamber to alter the mode of liability without extending or distorting the facts and circumstances as set out in the Decision on the confirmation of charges. In these circumstances, it is submitted that the only proper conclusion is that it would not be fair to re-qualify the charges. The defence relies on its submissions made previously on this issue.
17. It is submitted that applying article 64(2) in conjunction with article 69(4), the Chamber has the power to exclude or not rely on evidence where its effect is highly prejudicial to the accused and it would not be fair to rely upon it. The accused has the right to choose whether to give evidence. This decision is made by reference to the charges he is facing. In this case, information was extracted from the accused through questions from the bench, which the Chamber now may seek to rely upon for the purpose of applying a new and unanticipated mode of liability. At the time that these questions were put to Mr Katanga he was not put on notice that the charges may be requalified in a

⁹ Defence Observations on Article 25(3)(d), para. 6.

manner which could affect his right not to incriminate himself. In these circumstances, it is submitted that the Chamber should either exclude or not rely on those parts of his evidence which it has itself provoked through its questions and which related to his alleged contribution to the Bogoro attack.

B. Impact of the lack of opportunity to conduct investigations

18. Of primary significance is the fact that the defence has not had a proper opportunity to investigate, prepare and confront the application of this new mode of liability. In these circumstances, given the length of these proceedings, it is the defence submission that the only reasonable and fair alternative would be to proceed to judgment on the mode of liability originally charged. Ultimately, there is a balance to be struck and there comes a time when it must weigh in favour of the accused.
19. The Chamber accorded an opportunity to the defence to carry out further investigations but, through no fault of the defence and despite its best efforts, investigations were blocked due to the heightened insecurity of the region and military activity. All observations on the application of the new mode of liability to the existing evidence is therefore done without the accused having been given the opportunity to supplement or challenge the evidence through further investigations. The evidence on record is the product of the parties' efforts to shed light on another mode of liability. While it sheds light on the facts, it does so from a particular perspective. Every witness chosen, every question asked and every submission made during the course of the proceedings was with that different perspective in view.
20. In light of the fact that the defence has been unable to conduct investigations, it can do no more than reiterate the observations already made. The defence here elaborates on, and fully incorporates its observations of 5 August 2013, 17 September 2013, and 4 October 2013, stressing the incomplete character of the investigations led by the defence since the notice of eventual

requalification of the mode of liability.¹⁰ It also relies on all earlier submissions in respect of the proposed change of the mode of liability.¹¹ The defence pays particular attention to the three areas identified by the Majority: (1) the Nyankunde attack and other attacks prior to Bogoro; (2) the identification of the perpetrators of the crimes committed at Bogoro; and (3) the link between the weapons delivered to the Ngiti combatants and the crimes committed at Bogoro. The defence will further highlight, as done in previous filings, the evidentiary gaps in respect to all elements of the 25(3)(d) mode of liability.

C. Submissions on the Evidence

21. In order to find Mr. Katanga guilty of the alleged crimes under article 25(3)(d), the following elements must be established beyond a reasonable doubt:

- (i) One or more of the crimes charged have been attempted or committed;
- (ii) Mr. Katanga made a significant/substantial contribution;
- (iii) Mr. Katanga made a contribution to the commission of the crimes charged;
- (iv) The crimes charged were committed by a group of persons acting with a common purpose;
- (v) The common purpose of the group was criminal, e.g. to commit crimes under the Rome Statute;
- (vi) Katanga was not part of the group with a common purpose;
- (vii) Katanga made an intentional contribution; and
- (viii) The contribution was made in either of the following ways:
 - With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court;
 - or
 - Be made in the knowledge of the intention of the group to commit the crime.

¹⁰ ICC-01/04-01/07-3394-Conf, Defence Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013, 5 August 2013; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013, 17 September 2013; ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives' Observations, 4 October 2013.

¹¹ See, in particular, Defence Observations on Article 25(3)(d), and Defence Observations on the additional material.

22. The defence incorporates the legal submissions made previously¹² and does not repeat them here. Nor does it have more to add on that aspect. As for the submissions of fact, the defence relies on its previous submissions but will summarize here its most relevant observations made earlier in relation to the most significant elements, which are: (1) whether Mr. Katanga made a significant contribution to the crimes charged; (2) whether this contribution was made to a group of persons acting with a common purpose; (3) whether this common purpose was to wipe out Bogoro; (4) whether Mr. Katanga's contribution was intentional and made in the knowledge of the intention of the group to commit the crime; (5) whether the crimes committed at Bogoro can be imputed to this group with a common purpose.

(1) Role of Germain Katanga

23. The Chamber articulates the role of Germain Katanga in this new framework as follows:

‘Germain Katanga intentionally made a significant contribution to the commission of the crimes’.¹³

24. It is still unclear what sort of role Mr. Katanga is alleged to have played. Is it the view that he participated in meetings with group members to organize and plan the Bogoro attack? If so, when would such meetings have taken place, and who attended? Without more precision, it is hard for the defence to say anything useful on this matter. It cannot, for instance, explore a different narrative in respect to his alleged presence at specific locations and at specific dates, unless it is informed of these locations and dates. These details can also not be found in the evidence presented in this case.

25. Mr. Katanga's testimony that he was a coordinator appears to be the focal point of the Chamber's considerations. Having been unable to conduct adequate investigations the defence is unable to provide the Chamber with

¹² Cf. Defence Observations on Article 25(3)(d).

¹³ ICC-01/04-01/07-3371-t-ENG, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court) (“Decision transmitting additional material”), 15 May 2013, para. 22.

further narrative or more details on the nature of this function and must rest on those stated in previous filings. The defence has not been able to meet with others in his community and to further explore the practical extent of this role.¹⁴

26. As previously submitted the term ‘coordinator’ was a word used only by Mr. Katanga and used in the context of preventing conflicts and problems arising as between the locals and the APC. In answer to the Judge’s question, Mr. Katanga explained his role as ‘coordinator’: “My function only enabled me to facilitate rapprochement” (T-317, p. 31). The entire discussion on Mr. Katanga’s role as a coordinator was elicited by the Presiding Judge and is repeated at paragraphs 63-68 of the *Defence Observations on Article 25(3)(d)*.¹⁵ The term ‘coordinator’ stood for a non-military function and was distinct from Mr. Katanga’s limited role of command over approximately 60 Atele-2 fighters, none of whom participated in the Bogoro attack.¹⁶ As the defence has indicated previously, Mr. Katanga’s authority was limited to this group.¹⁷

27. Furthermore, as noted by the defence in June 2013,

24. There is no evidence to support Katanga’s authority over or close relationship with Yuda and Dark who featured prominently in the Bogoro attack. The same can be said for all the commanders cited by the Chamber. The geographical proximity to Garimbaya has no bearing on the issue because the evidence demonstrates that he operated independently from Katanga and only answerable to the APC.³³ No evidence has been produced to show the nature and extent of Garimbaya’s involvement at Bogoro or the conduct of himself or his men at other attacks.¹⁸

28. Mr. Katanga lacked authority and control over the dispersed militia groups. At the time he lacked power to command, nor was his authority established. Nor did he have any significant relationship with commanders or combatants, except for the few combatants at Atele. The limited conciliatory influence he possesses was limited in light of the many conflicts between different

¹⁴ See further Defence Observations on Article 25(3)(d), para. 187.

¹⁵ Defence Observations on Article 25(3)(d), pp. 28-30.

¹⁶ Defence Observations on Article 25(3)(d), paras 57-58.

¹⁷ Defence Observations on Article 25(3)(d), paras 54, 58, 74, 83.

¹⁸ Defence Observations on the additional material, para. 24.

combatants and groups. The defence has elaborated on multiple feuds and battles among the many self-proclaimed commanders scattered throughout the Walendu-Bindi *collectivité*, including attacks on Aveba.¹⁹ This was not an area that was much developed in the course of the case and would have benefited from further investigation. It is of particular significance if viewed from the perspective of the new mode of liability. It is insufficient for the defence to merely rummage in the existing evidence.

29. Mr Katanga's authority was much reduced by his youth, his being a newcomer to Aveba (having been brought up by his mother's brother in a distant Province), his inability to speak the local language, and the social and traditional religious structure in which he was placed. Power lay with elders and with the Sages and Mystics. Their influence on the community was relatively unexplored in the case and again would benefit from closer study and investigation. Katanga was effectively living within a structure that was rapidly formed and sustained under the authority of the APC. Its commander in Ituri, Blaise Koka, was himself under the authority of the DRC Government and military.²⁰ Katanga was not under his command but neither did he constitute a parallel and independent command. At the time of the Bogoro attack, Mr. Katanga lacked decision-making power and had no say or control over the seriousness and scope of the crimes committed.

30. In respect to Mr. Katanga's alleged contribution to the crimes committed by a group of Ngiti commanders and combatants acting with a common purpose, the question of who was in control of the supply of guns is of greater significance with the new mode of liability. The defence wished to investigate this issue with the objective of better clarifying the situation, particularly in and around Aveba where the arms were received and dispatched. Instead, the defence instead finds itself in the position of merely repeating its previous observations on this and indeed the other issues.

¹⁹ ICC-01/04-01/07-3266-Conf-Corr2, Second Corrigendum to the Defence Closing Brief, 23 April 2012 ("Defence Closing Brief"), paras. 663-664, 666, 668, 682-686.

²⁰ Defence Observations on Article 25(3)(d), paras 54, 74-75.

31. The defence accepts that weapons were delivered to Aveba. Aveba was not under Katanga's control. It is not accepted that weapons were delivered to Germain Katanga himself, as was suggested by P-219, a witness upon whom it is understood the Chamber no longer relies as a witness of truth. The defence maintains that nearly all supplies were initiated and organized by the EMOI - RCD-K/ML - APC alliance in Beni and controlled by the APC.²¹ The weapons came from Beni and went on to other places. The reason Aveba was used was because of the airstrip. The evidence shows that these were not the only weapons of their kind used at Bogoro. Some used machetes and other *armes blanches*. There was also the practice of recovering weapons on the battlefield. Indeed, Mr. Katanga testified that weapons were in the possession of the combatants prior to the deliveries from Beni.²² This decreases any link between the weapons that were delivered from Beni and the commission of the crimes at Bogoro.
32. The evidence does not establish beyond a reasonable doubt that the weapons arriving at Aveba, were used in the Bogoro attack, let alone in the commission of crimes in Bogoro on 24th February 2003. While one can speculate that at least some of the weapons that were delivered from Beni were used at Bogoro, mere speculation, even if it appears reasonable and logical in the circumstances, is insufficient. They may not have been.
33. More importantly, there is insufficient evidence to establish that the weapons Mr. Katanga helped deliver were used in the Bogoro attack. His own testimony raises doubts as to whether any weapons in whose delivery he played a role were used in the Bogoro attack. The evidence suggests that he participated in only one or two of the six or more deliveries from Beni to Aveba, and in any case less than half of the deliveries.²³ His evidence also shows that multiple combatants went off to Beni regularly to buy their own weapons and munitions.²⁴

²¹ Defence Closing Brief, paras 607, 622, 625-630; Defence Observations on Article 25(3)(d), para. 77.

²² D2-300-T-317-pp 45-46, D2-0300-T-318-p. 21.

²³ D2-300-T-317-pp 48-49.

²⁴ D2-300-T-317-pp 12-13.

34. Mr. Katanga testified that he returned from Beni with between 50 and 100 AK47s and ammunition.²⁵ However, the support weapons provided did not function, which led to the “disaster” of a defeat during the 10th February 2003 attack on Bogoro.²⁶ There was a subsequent supply of weapons that provides a more compelling source for the weapons used. Mr. Adirodu returned to Aveba from Beni on 15th February 2003 with 200 support weapons. He supplied them directly to the APC Commander, Blaise Koka, with instructions from EMOI to attack Bogoro again.²⁷ The suggested link between the arms actually used on the 24 February attack to commit crimes is weak.
35. Further investigations were required into other possible sources of weapons, the identity of who precisely was committing the crimes, and the chain of custody of the various weapons which arrived at Aveba.
36. In the absence of this evidence it cannot be established that Katanga’s contribution was significant. Nor can it be established that his contribution was made directly towards the commission of crimes. His contribution was indirect and not direct. It is not even established that he could have prevented the supply of weapons to Aveba or to have interceded in their distribution. Mr. Katanga did not decide on, nor participate in, the distribution of weapons. At best, he served merely to accompany some of the weapons from Beni to Aveba. In that sense, in so far as there was a contribution it is submitted that it could not be described as significant because he did not have either direct control or any say over the disposal of the weapons.²⁸
37. Accordingly, the defence submits that there is insufficient evidence for the Chamber to find that Mr. Katanga made a significant contribution to the commission of crimes allegedly committed at Bogoro.

²⁵ D2-300-T-317-pp 46-47.

²⁶ D2-300-T-318-p. 5, D2-300-T-322-pp 7-8.

²⁷ D2-300-T-317-pp 62-63, D2-300-T-318-pp 3-4, D2-300-T-322-pp 30-34.

²⁸ D2-300-T-317-pp 7-8, 51-52; D2-300-T-325-pp 18-19; Defence Closing Brief, paras. 607, 611-612, 621, 624-627, 654-656, 658, 662, 1207-1209, 1267.

38. Even if the Chamber does not accept this proposition, the defence reiterates its argument that Mr. Katanga cannot be held liable for pillage, destruction, rape and sexual slavery under article 25(3)(d)(ii). The Pre-trial Chamber established that pillage, rape and sexual slavery were not part of the common plan, but rather, would occur in the ordinary course of events:²⁹

550. Although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the agreement or common plan specifically instructed the soldiers to pillage the village of Bogoro, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the pillaging of the Bogoro village.

551. In relation to the crimes of rape and sexual slavery, the majority of the Chamber, Judge Anita Usacka dissenting, also finds that although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the agreement or common plan specifically instructed the soldiers to rape or sexually enslave the civilian women there, the majority of the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the rape or sexual enslavement of civilian women there.

39. The defence reiterates that the criteria of the occurrence in the “ordinary course of events” does not apply to the article 25(3)(d) mode of liability.³⁰ Accordingly, Mr. Katanga cannot be held liable for these alleged crimes. It is irrelevant whether the accused was aware that these crimes would occur in the ordinary course of events. In addition, Mr. Katanga’s alleged contribution - to the delivery of weapons, as coordinator - cannot have led, directly or indirectly, to the crimes of rape, sexual slavery, pillage or the use of child soldiers. Accordingly, the defence requests that Mr. Katanga be acquitted on these counts irrespective of the Chamber’s appreciation of whether Mr. Katanga made a significant contribution.

(2) Group with a common purpose

40. The element of a group with a common purpose was expressed by the Chamber in its Decision transmitting additional material as follows:

²⁹ ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras. 550, 551.

³⁰ Cf. Defence Observations on Article 25(3)(d), paras 110, 126-127.

‘the persons who committed the crime belong to a group with a common purpose which was to commit the crime or involved in its commission, including in the ordinary course of events’.³¹

41. Instead of a joint Zombe/Aveba planned attack headed by Katanga and Ngudjolo, the Chamber envisages a broader group of commanders and combatants with a common criminal purpose, to which Germain Katanga is alleged to have contributed. This is where the Chamber’s new formulation starts to depart radically from the nature of the original charges. The Decision on the Confirmation of Charges adopted a prosecution theory according to which Germain Katanga and Mathieu Ngudjolo acted in concert with a common plan to wipe out Bogoro and executed this plan in coordination with each other. The witnesses called for the prosecution were produced to support this theory, which has not been proved.

42. The lack of reliability and credibility of the witnesses relied on by the prosecution has been sufficiently addressed in the closing brief and has already to a great extent been recognized by the Chamber in its judgment of Ngudjolo.³²

43. Now the Chamber places a new factual scenario before the accused. According to the Chamber, this group aspiring to a common purpose consisted of various commanders from various camps around Walendu-Bindi. More specifically, in its Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), the Chamber identified the group with a common purpose as follows: “The Ngiti combatants who committed the crimes belonged to the Ngiti group of commanders and combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI, which acted with a common purpose.”³³ However, as the defence stated in earlier filings, given that Walendu Bindi

³¹ Decision transmitting additional material, para. 16.

³² ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute, 18 December 2012, paras 137, 157, 159 for P-250; paras 281-283 for P-219; paras 251-254 for P-28, paras. 441 for P-12.

³³ Decision transmitting additional material, para. 20.

covers about 2500 square kilometres of tracks and hills, the geographical designation does not sufficiently identify the group.³⁴

44. The Chambers cites as the relevant camps those:³⁵

‘d’Aveba, de Kagaba, Olongba, Medhu, Lakpa, Nyabiri, Bukiringi, Gety, Mandre, Bavi et de Bulanzabo’

45. It cites as the relevant commanders:³⁶

‘Germain Katanga, Garimbaya, Mbadu, Yuda, Dark, Ngorima, Cobra Matata, Oudo Mbafele, Lobho Tchamangere, Move, Alpha Bebi, Joel Androso, Joel Anguluma et Kisoro’

46. The prosecution evidence as it has been presented is fundamentally inconsistent with this premise precisely because it places Germain Katanga and Mathieu Ngudjolo in the driving seat. The defence has focused its resources on the question whether Germain Katanga controlled troops with a criminal intent in respect of the Bogoro attack.

47. The new theory that Mr. Katanga contributed to a group of Ngiti commanders and combatants with a common purpose to attack Bogoro rather than planned and orchestrated the attack with Mr. Ngudjolo is largely based on information which cannot be found in the confirmation decision and, or which has already been declared unreliable.

48. As the defence pointed out earlier, four of the ten camps mentioned in the Decision transmitting additional legal and factual material are not mentioned in the Decision on the confirmation of charges. The other six are mentioned only in footnotes, often by witnesses who have been declared unreliable in the *Ngudjolo* judgment or otherwise fall within the category of defunct or unreliable witnesses. In June, the defence stated:

“Yet, these camps are now supposed to collaborate closely with one another, so much so that they are all part of the same network of Ngiti commanders

³⁴ Defence Observations on the additional material, para. 20.

³⁵ Decision transmitting additional material, para. 20.

³⁶ *Idem.*

and combatants from the Walendu-Bindi collectivity - a new fact which appears nowhere in the decision confirming the charges. The notion that the group of Ngiti commanders and combatants from Walendu-Bindi collectivity decided, on their own initiative, to attack Bogoro and to commit the crimes finds no basis in the decision confirming the charges.”³⁷

49. In respect to the commanders cited by the Chamber, the defence reiterates that there is no reference as to what any of these commanders are alleged to have done, nor of their relationship or contact with the accused.³⁸ Nonetheless, as was pointed out by the defence in June 2013,

“[m]any of the commanders mentioned do not appear in the Decision on the confirmation of charges, or only in a citation in a footnote of a withdrawn witness or dubious source. Mbadu’s name does not appear in the Decision on the confirmation of charges charges. Garimbaya’s, Move’s and Kisoro’s names appear only once in the Decision on the confirmation of charges. Kisoro was hostile to Katanga and to others and is mentioned only in the context of the incident where Kisoro attacked the plane which arrives from Beni to Aveba with weapons because he did not receive weapons and ammunition. The remainder of the names are scattered throughout the decision and mentioned only sporadically. Their role or function within the Ngiti ‘group’ of commanders and combatants and the common plan is not explained in the Pre-Trial Chamber’s decision.”³⁹

50. In addition, the defence is still in the dark as to how the different groups, allegedly under command of these commanders, cooperated with each other, and in particular, in planning and carrying out the Bogoro attack. As submitted earlier, it is difficult, if not impossible, for the defence to demonstrate “the absence of coordination between various autonomous Ngiti combatant groups, spread throughout an area of the size and nature of Walendu-Bindi, without knowing, more specifically, how the different camps are supposed to have cooperated in carrying out the Bogoro attack and the crimes allegedly committed in carrying out this attack.”⁴⁰

51. In light of the essential vagueness of the new allegations, the defence submits that it is all the more important that it should have been able to conduct fresh investigations into these new allegations.. The defence has been unable to search for further evidence relating to the cooperation, or lack thereof,

³⁷ Defence Observations on the additional material, para. 23.

³⁸ Defence Observations on the additional material, para. 22.

³⁹ Defence Observations on the additional material, para. 21.

⁴⁰ Defence Observations on the additional material, para. 22.

between the various combatants and commanders, as well as the existence, or lack thereof, of camps prior to the Bogoro attack. Such information is crucial to the question of whether there was a group of Ngiti commanders and combatants with a common purpose acting with criminal intent. Lacking such information, the defence is not in a position to say anything useful or new about the group of commanders and combatants or who belonged to this group and the extent to which this group was structured. The defence cannot do more than reiterate its previous submissions on these matters.

52. For the Chamber to find that the Ngiti combatants and commanders qualify as a group with a common purpose under Article 25(3)(d), it must be established that there was a sufficient level of organization and coordination between different combatants. It is not the role of the defence to prove the absence of any such organization and coordination among the Ngiti commanders and combatants. It is for the Prosecutor to prove beyond reasonable doubt that such organization and coordination existed. The defence submits that the evidence shows that there was a clear lack of structure, organization and coordination between the combatants in these various places in Ituri. To support this submission, the defence can only rely on observations already made.

53. In this regard, it is noteworthy that the Chamber advised that, in respect of the group/common plan element, “the Defence would do well, for example, to refer in the first instance to all of the evidence presented in support of the Prosecution allegation of the existence of an organised, hierarchical structure in Walendu-Bindi *collectivité* prior to the attack on Bogoro.”⁴¹ In giving this advice, the Chamber referred to section 7.1 of the prosecution’s final brief in respect of the group element, entitled ‘LA FRPI ETAIT UNE STRUCTURE ORGANISEE ET HIERARCHIQUE’. In its Defence Observations on the additional material, the defence observed that 153 footnotes of the 242 present in section 7.1 of OTP closing brief (pp. 59 to 83) refer to P-28, P-250 or P-

⁴¹ Decision transmitting additional material, para. 21.

219.⁴² P-250 and P-219 have been discredited in the Ngudjolo judgment, and the credibility of P-28 is seriously doubted too.

54. This further supports the defence submission that the Prosecutor failed to establish that the Ngiti commanders and combatants are structured (be it horizontal or vertical), organized and hierarchical. Instead, the defence submits, the evidence shows that there were numerous young men who operated autonomously and independently as semi-commanders in their own area. Mr. Katanga stated that there was no hierarchy such that the Aveba commander had authority over any other local commanders: ‘[...] it was a matter of interest. No one had authority over anyone else on his turf. I was chief in my area and others were chiefs in their areas.’⁴³

(3) Common purpose of the group

55. The common purpose of the Ngiti group of commanders and combatants is alleged to be to ‘wipe out’ Bogoro. It is, however, unclear who among the Ngiti commanders and combatants were involved in devising the plan to ‘wipe out’ Bogoro, and what role they played therein. There is no credible evidence about preparatory meetings or other activities to prepare for an attack on Bogoro. Nor is there any evidence on how the information was passed on to the remainder of the group of the common plan or how the different groups coordinated together to attack Bogoro.⁴⁴

56. The evidence to support the allegation that there was a common purpose to ‘wipe out Bogoro’ and a policy of reprisals against Hema has been found in the Ngudjolo judgment not to be credible. Hatred of the Hema population is assigned to the ‘group’ in a generalized manner. The evidence fails to establish that the various commanders and camps cited by the Chamber as being part of the group with a common purpose, shared this common purpose.

⁴² Defence Observations on the additional material, para. 31.

⁴³ D2-300-T-324, pp. 74-75.

⁴⁴ Defence Observations on the additional material, para. 30.

57. Whilst it cannot be excluded that some Ngiti individuals hated the Hema, that is an insufficient basis for asserting that the entire group or a specific subgroup of Ngiti commanders and combatants felt hatred towards the Hema. There is also no evidence that Katanga felt any such hatred. Quite the contrary, evidence in the case suggests he had compassion for the Hema civilian population.⁴⁵
58. Accordingly, the Prosecutor failed to establish that this alleged group of Ngiti commanders and combatants had a common purpose of wiping out Bogoro. Rather, the defence submits that the evidence, which has been discussed extensively in the defence closing brief, demonstrates (even though all that is required is to raise a reasonable possibility) that the plan was in fact formulated by EMOI and the *Maison Militaire* with its detailed planification and execution being the work of the RCD-KML through its APC troops. This was not a criminal plan or purpose but one of military strategy and political advantage: that is the recovery of Ituri from the UPC.⁴⁶ While it is possible to conceive of a criminal purpose attached to such a legitimate purpose, no evidence has been produced to demonstrate that these planners had any such intention.

(4) Full knowledge of criminal intent

59. The Chamber proposes as an assertion that:

‘Germain Katanga’s contribution was made in the knowledge of the intention of the Ngiti commanders and combatants from Walendu-Bindi collectivité to commit the crimes confirmed by the Pre-Trial Chamber’⁴⁷

60. As to Mr. Katanga’s knowledge of previous behaviour of members of the group of Ngiti commanders and combatants so as to establish that Mr. Katanga was aware of their criminal intention, the defence can only rely on

⁴⁵ Defence Observations on the additional material, para. 35, with reference to Defence Closing brief, paras 1006 and 1317.

⁴⁶ Defence Closing Brief, para. 16, 606, 620-624, 634-635 with reference to EVD-D02-00148/DRC-D02-0001-0937 and EVD-D02-00203/DRC-D02-0001-0940, 639, 697.

⁴⁷ Decision transmitting additional material, para. 24.

submissions made previously. Due to the inability to conduct fresh investigations, the defence has had no opportunity to explore this further.

61. Without further evidence, the defence is also not in a position to provide additional observations on the relationship between Mr. Katanga and members of the group of Ngiti commanders and combatants so as to explore his specific relationship and particular knowledge of their criminal intention. The defence submits that there is no evidence of any such specific relationship and knowledge of the criminal intention of the group of Ngiti commanders and combatants. As previously indicated, Mr. Katanga merely coordinated the relationship between the APC and the combatants. He was unaware of any criminal intent on the part of the combatants. To Mr. Katanga's knowledge, he assisted the EMOI and APC in carrying out a legitimate plan to eject the UPC from Ituri and re-establish legitimate Government.⁴⁸

62. There is no evidence to establish that Katanga had any knowledge of an intention to use the weapons received from Beni in the commission of crimes at Bogoro. There is no evidence that he knew which precise individuals or groups would be at Bogoro or who would be holding the weapons passing through Aveba.

63. The defence evidence raises, in a reliable manner, the reasonable possibility that there was a military and political strategy with absolutely no preconceived criminal intent. Mr. Katanga was of the belief that Bogoro was an attack against UPC soldiers rather than civilians.⁴⁹ There is no evidence that Mr. Katanga was aware of a specific criminal intent of the Ngiti combatants and commanders at the time of the Bogoro attack.⁵⁰

64. The defence intended to carry out further investigations into the actual intention and knowledge of other commanders and groups at other camps and the extent to which there was communication between these various camps.

⁴⁸ Defence Closing Brief, para. 1161; Defence Observations on Article 25(3)(d), paras 55, 76, 89, 112, 122, 129.

⁴⁹ Defence Observations on Article 25(3)(d), para. 69.

⁵⁰ Defence Observations on Article 25(3)(d), para. 70.

The defence has been deprived of this opportunity because of the inability to conduct further investigations.

65. In particular, the defence intended to visit Nyakunde to explore further what had occurred there in September 2002 and how widely known it was that civilians were killed there. It is a feature of the case that the evidence of prior attacks to establish method, system or knowledge is limited entirely to the one attack on Nyakunde. During the trial, the Nyakunde attack was not the focus point of the defence case. However, in relation to the proposed new mode of liability, this attack must necessarily be a focus point. Indeed, the Chamber highlighted that “the Accused’s alleged involvement in, inter alia, the battle of Nyakunde and his knowledge of it” constitutes one of the essential points of Mr. Katanga’s knowledge of the intentions of the group of Ngiti with a common purpose.⁵¹ No other attack prior to Bogoro has been identified.⁵² The Nyakunde attack on its own, in the circumstances known and previously referred to by the defence, is insufficient to establish a compelling inference of foreknowledge.

66. The defence has been unable to further investigate and secure additional evidence and witnesses to testify that most of the victims in the Nyakunde attack were Bira and not Hema, and that the anger of the attackers was directed against the Bira. In its Closing Brief, the defence provided a brief overview of the difficult relationship between the Bira and the Ngiti, particularly as the entire Ngiti population in Nyakunde was chased out by the Bira.⁵³ The defence would have preferred to be able to give further details on this, but failing to be able to visit the region, the defence is not in a position to do so.

67. The defence also intended to explore fully the role of the APC in this attack, and in particular its role in pillaging the hospital. The defence has information that this occurred predominantly under auspices of APC Major Faustin and

⁵¹ Decision transmitting additional material, para. 25.

⁵² Defence Observations on the additional material, para. 50.

⁵³ Defence Closing brief, paras 558, 565.

was transported to the hospital in Oicha, North Kivu, close to Beni. Unfortunately, the defence had no opportunity to visit this hospital or to visit the Beni area at all. Accordingly, the defence can only make similar observations as in previous filings. As indicated in its closing brief, Nyakunde involved a very different attack, different combatants and different reasons for attacking than Bogoro. Thus, the Nyakunde attack cannot be used as a basis for establishing any state of knowledge of Mr. Katanga.

68. Indeed, as the defence has submitted previously, the Nyakunde attack was launched by Major Faustin, who was in charge of the retreating 11th battalion of the APC, and Kandro, one of the Ngiti commanders who was killed soon after this attack. The preponderance of the evidence shows that Katanga was not there during that attack, was not a commander, and was in fact at Nyabiri.⁵⁴ As the defence submitted in its closing brief, the commanders were Faustin, Cobra and Kandro, none of whom were at Bogoro. The local population were predominantly Bira. Most of the victims were Bira; the Hema had largely left the area. The number of casualties at Nyakunde is still unknown. Reports on these casualties are generally unreliable without giving the source of their information and without reference to any forensic evidence.⁵⁵

69. As for the participants there would have been very little contact between them and Katanga given their movements. They went to Talolo, Singo, Songolo, Avenyuma and Beni.⁵⁶ The defence has not been able to access any of these places for investigations. There is therefore little evidence on the record to raise a compelling inference that Katanga knew of the details of who did the killings or pillage and destruction at Nyankunde, let alone that there would be repeated acts at Bogoro. This is quite apart from the very specific context of the battle being in 2002 and immediately following the ruthless ejection and

⁵⁴ Defence Closing Brief, paras. 567-569.

⁵⁵ Defence Closing Brief, para. 564.

⁵⁶ Defence Closing Brief, paras 565, 572.

subsequent attack at Songolo by the UPC, in which the UPC was assisted by the Bira on the 31 August 2002.⁵⁷

70. Accordingly, the defence repeats: “The Nyakunde attack in which Katanga took no part cannot be relied on to demonstrate Katanga’s foreknowledge of the criminality of an entirely different group, more than five months later, against an entirely different group of civilians. Nor would a suspicion that such conduct could occur or would occur in the ordinary course of events be sufficient.”⁵⁸ The defence refers to its closing brief for further details explaining how the Nyakunde attack differed from the Bogoro attack.⁵⁹

71. Apart from Nyakunde, there have been few battles prior to Bogoro which engaged any Ngiti combatants. None have been identified by the Chamber. There was one battle against the UPC in Chai and another at Ofai, near Beni, in December 2002. Mr. Katanga testified that he participated in these battles. However, neither of these attacks led to civilian casualties, nor were there any civilians to be seen.⁶⁰

72. Katanga has also testified that he was involved in the reconnaissance mission with Blaise Koka a few weeks before the 24th of February attack. The UPC resistance was highly effective and the attackers lost ten men. They withdrew without having seen civilians.⁶¹

73. There is insufficient credible evidence that Mr. Katanga was present at the Bogoro attack. It is the defence submission that he stayed in Aveba that day, at a significant distance from the attack.⁶²

74. The Prosecutor also failed to establish, on the basis of reliable evidence, that Katanga participated in the subsequent attacks on Mandro and Bunia.⁶³ This is

⁵⁷ Defence Closing Brief, paras. 564-566.

⁵⁸ Defence Observations on Article 25(3)(d), para. 70.

⁵⁹ Defence Closing Brief, paras. 564-569.

⁶⁰ Defence Closing Brief, paras 579, 815.

⁶¹ Defence Closing Brief, paras 579, 693, 815.

⁶² Defence Closing Brief, 679-686, 702-705, 707.

⁶³ Defence Closing Brief, paras. 720-726.

relevant to the extent that it shows that he did not later acquire knowledge of the criminality of the group's common purpose, or indeed, that he had the knowledge of the group's intention to commit the crimes charged during, or shortly after they were committed.

75. Accordingly, Katanga had no reason to know that the group of Ngiti combatants and commanders who attacked Bogoro had a criminal common purpose. The Prosecutor failed to prove otherwise. Throughout the trial, the Prosecutor failed to establish that Katanga was involved in, or had knowledge of any attacks prior to Bogoro in which Hema civilians were targeted. Accordingly, as the defence submitted earlier, no "clear and unambiguous pattern sufficient to support a compelling inference that Katanga must have known that the crimes would be committed in the ordinary course of events."⁶⁴ In these circumstances, the Chamber cannot find that Katanga had the requisite knowledge of the alleged criminal intent of the Ngiti group of commanders and combatants.

(5) The crimes cannot be imputed on a Ngiti group with a common purpose

76. There is a crucial absence of information on the issue of who committed the alleged crimes at Bogoro. The defence would have wanted to demonstrate that, to the extent that the crimes were committed, they were committed by rogue individuals – be it of Bira, Lendu or Ngiti ethnicity – not part of any Ngiti group with a common purpose.

77. The defence also intended to show to the court that most, if not all, of the excesses were committed by the Lendu from the *Montagne Bleue* or other groups. In particular, the defence was hoping to demonstrate, on the basis of fresh evidence, that the killings at the school were carried out by people coming from the direction of the *Montagne Bleue*, whether combatants or civilians, who were the first to arrive in the school. This is not speculative on the part of the defence but founded on information that required further

⁶⁴ Defence Observations on the additional material, para. 45.

investigation before being presented in an appropriate manner to the Chamber. This required investigations in Zombe and the surrounding villages as well as seeking out others who participated, from whichever community or group.

78. The defence also intended as part of its investigations to visit Tchomia and Kasenyi to explore the identity of the attackers and victims in the attacks on those places in May and June, in order to show a pattern of conduct on the part of the Lendu. It is the position of the defence that the Tchomia and Kasenyi attacks were carried out solely by Lendu attackers. It is also understood that among the Lendu combatants at the time there was a prevailing acceptance of sexual assault and abduction of females, an attitude rarely found among the Ngiti. The defence also sought to demonstrate that the two groups, though generally treated as one and the same in the course of the trial, bear considerable differences in their culture and behaviour.

79. During the trial it was not relevant to distinguish crimes allegedly committed by the Lendu from those committed by the Ngiti, as Katanga and Ngudjolo were alleged to have attacked jointly. Under the 25(3)(a) mode of liability, crimes committed by the group under the authority of one could be attributed to the other.⁶⁵ This was particularly so in the context of a joint trial where a lack of relevance of an issue made it less likely that such an issue would be advanced at the expense of a co-accused.

80. Unfortunately, the over-whelming problems met on the mission investigations prevented the defence from submitting further evidence on those aspects. Also, in order to demonstrate such issues effectively it is necessary to speak to combatants present at Bogoro. Even those known to the defence pose difficulties as many have now joined the army and are no longer available to speak to the defence because of either threats from the authorities not to speak to the defence on such issues or because of missions in the fields. Despite the

⁶⁵ The Katanga defence has, however, objected to such an interpretation of article 25(3)(a). See ICC-01/04-01/07-1578, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, 30 October 2009. Until today, the Chamber did not rule on this issue.

defence's best efforts, the latest investigations were unfruitful in this regard, a situation not met at the time of trial.⁶⁶

81. The defence has, of course, no burden to demonstrate that the crimes were not committed by a group of Ngiti commanders and combatants. It is for the Prosecutor to demonstrate beyond reasonable doubt that the crimes were committed by a group of Ngiti commanders and combatants to whom Mr. Katanga allegedly made a contribution. The defence submits that the evidence is clearly lacking in this regard.
82. There is no evidence that the crimes charged were committed by anyone under Yuda's or Dark's command or under the command of any other Ngiti commander who is allegedly part of the group of Ngiti commanders and combatants acting with a common purpose.
83. As previously stated, the defence maintains that it cannot simply be assumed that anyone of Ngiti ethnicity present at Bogoro belonged to a group of Ngiti commanders and combatants acting with a common purpose. Nor can it simply be assumed that, because Ngiti combatants were present at Bogoro, they were involved in the commission of the crimes charged. Nor can it be dismissed that Ngiti civilians were present or others from neighbouring villages. The conflict in Ituri involved everyone, including the old and the young. Villagers fought with whatever tool they could find to defend their territory.
84. Even if it can be demonstrated beyond a reasonable doubt that Ngiti combatants were involved in the commission of crimes at Bogoro, that still does not without more suggest that they were part of the group of Ngiti commanders and combatants. As stated above, mere speculation, even if it appears reasonable and logical in the circumstances, is insufficient.

⁶⁶ See ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, paras 11, 23-24, 26-27, 34.

85. Also, given the lack of cooperation between the different Ngiti camps, it is possible that a rogue Ngiti group not belonging to the group of Ngiti commanders and combatants as identified by the Chamber was involved in the commission of crimes at Bogoro.

86. In this regard, the defence reiterates its earlier submission that no link has been established between the alleged Ngiti perpetrators of crimes at Bogoro and the Ngiti commanders and combatants alleged to be part of a group with a common purpose. As stated previously and strongly maintained here:⁶⁷

17. [...] The fact that some Ngiti people have been identified as having committed crimes at Bogoro does not provide evidence of any link between them and any of the alleged planners of the Bogoro attack. Unless it is suggested that any Ngiti person belongs to the alleged Ngiti group acting with a common purpose, their mere speaking of the Ngiti language does not link the alleged Ngiti perpetrators to this group. The defence refers to its earlier submissions with regard to the diverse elements who may have participated in the commission of crimes at Bogoro. The issue is not whether Ngiti individuals were involved in crimes at Bogoro, as the prosecution appears to suggest, but whether these Ngiti individuals belonged to the group of Ngiti commanders and combatants acting with a common purpose. It is not sufficient for this purpose that crimes have been committed against civilians. It must be demonstrated beyond a reasonable doubt not just that this happened but that the circumstances are such that the only reasonable explanation is that this resulted from a formulation of a purpose common to the group identified in the charges.

87. In addition, evidence has been provided as to the involvement of Bira and APC soldiers in the Bogoro attack. The defence would have wanted to explore whether the Bira and, or the APC soldiers could have committed the crimes alleged against Mr. Katanga. It did not have such an opportunity. However, since the burden is on the prosecution to establish that the crimes were committed to the Ngiti group of commanders and combatants, the defence relies on previous submissions demonstrating a plausible case that at least a significant part of the alleged crimes were committed by the Bira, APC or other groups.⁶⁸

⁶⁷ Defence Observations on the additional material, para. 17.

⁶⁸ Defence Observations on Article 25(3)(d), para. 102.

88. In conclusion, it is submitted that the existing evidence does not establish Mr Katanga's guilt applying article 25(3)(d).
89. This notwithstanding, it is not accepted that conducting this analysis represents a reasonable alternative to further investigations. While the burden rests on the prosecution to prove its case, such investigations would enable the defence to address the gaps in the evidence and provide significant exculpatory evidence in order to refute the application of this new mode of liability.
90. In the circumstances, further extensions of time would, however, in the defence submission, violate the accused right to an expeditious trial. It is for this reason that the Chamber is urged to proceed to judgment on the basis of the original formulation of the charges.
91. If, however, the Chamber is adamant that it should proceed with an analysis applying article 25(3)(d), then before it does so the defence maintains that it is still entitled to a reasonable opportunity to further its investigations into the application of this new mode of liability to Mr Katanga. Caught between a rock and a hard place the accused would prefer to be accorded this additional time, despite the effects on the expeditiousness of the trial, than to be placed at an unfair disadvantage on the evidence and face a wrongful conviction.
92. It is further submitted that the Chamber should as a matter of fairness refrain from relying on those parts of Mr Katanga's evidence which relate to his role as coordinator with a view to incriminating him on an application of article 25(3)(d), since the Chamber elicited these answers without indicating to the accused that they might be used against him in a subsequent requalification of the charges.

Conclusion

93. (i) Based on the foregoing, the defence requests that the Chamber renders judgment on the basis of article 25(3)(a) and acquits Mr. Katanga on that basis.
- (ii) In the alternative, the defence requests that:
- (a) it be given additional time and resources to conduct further investigations to prepare an adequate defence under article 25(3)(d);
 - (b) the testimony of Mr. Katanga be excluded from the Chamber's deliberation under article 25(3)(d);
- (iii) In the alternative, the defence requests that:
- (c) Mr. Katanga be acquitted under article 25(3)(d) for failure to prove his guilt beyond a reasonable doubt.

Respectfully submitted,



David Hooper Q.C.

Dated this 25th October 2013

The Hague.