



**Summary of Trial Chamber II's Judgment of 7 March 2014,
pursuant to article 74 of the Statute
in the case of *The Prosecutor v. Germain Katanga***

1. Trial Chamber II (“the Chamber”) of the International Criminal Court (“the Court”) hereby publishes a summary of today’s judgment pursuant to article 74 of the Statute as to whether the Prosecution has proved beyond reasonable doubt that the Accused, Germain Katanga, is guilty of the crimes alleged to have been committed on 24 February 2003 during the attack on the village of Bogoro, district of Ituri, Democratic Republic of the Congo (“DRC”). The Chamber must underscore that only the written judgment is authoritative.

I. Charges against the Accused

2. On 26 September 2008, Pre-Trial Chamber I was unanimous in confirming that there was sufficient evidence to establish substantial grounds to believe that during the attack of 24 February 2003 on the village of Bogoro, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes with intent:

- wilful killing as a war crime under article 8(2)(a)(i) of the Statute;
- murder as a crime against humanity under article 7(1)(a) of the Statute;
- directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under article 8(2)(b)(i) of the Statute;
- destruction of property as a war crime under article 8(2)(b)(xiii) of the Statute; and

- pillaging as a war crime under article 8(2)(b)(xvi) of the Statute, in the knowledge that this crime would occur in the ordinary course of events; and
- jointly committed, within the meaning of article 25(3)(a) of the Statute, the war crime of using children under the age of fifteen years to participate actively in the hostilities, under article 8(2)(b)(xxvi) of the Statute.

3. The Pre-Trial Chamber also confirmed, albeit by majority, that there was sufficient evidence to establish substantial grounds to believe that during the aforementioned attack, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes in the knowledge that they would occur in the ordinary course of events:

- sexual slavery as a war crime under article 8(2)(b)(xxii) of the Statute;
- sexual slavery as a crime against humanity under article 7(1)(g) of the Statute;
- rape as a war crime under article 8(2)(b)(xxii) of the Statute; and
- rape as a crime against humanity under article 7(1)(g) of the Statute.

II. Brief case history

4. The Chamber will confine the present overview to the key phases of the proceedings and the events which had a significant impact on the conduct thereof. However, the Chamber recalls at this juncture that it severed the case against Mathieu Ngudjolo from that of Germain Katanga by a majority decision on 21 November 2012, and notified the parties and participants that the mode of liability under which Germain Katanga initially stood charged, as a principal, may be recharacterised in accordance with regulation 55 of the Regulations of the Court, so as ultimately to consider his responsibility as an accessory. By judgment of 18 December 2012, Mathieu Ngudjolo was acquitted of all charges.

That judgment is currently before the Appeals Chamber. Prior to the decision to sever the cases, the proceedings were conducted against both accused persons and all the hearings were held in both their presence.

5. The Chamber was constituted on 24 October 2008 and has since issued 409 written decisions and orders and 168 oral decisions. On commencement of the trial, the parties and participants made their opening statements and both accused restated their plea of “not guilty”.

6. The presentation of evidence commenced on 25 November 2009 and concluded on 11 November 2011. On 18 and 19 January 2012, the Chamber conducted an *inter partes* site visit to the DRC, accompanied by the parties and participants and representatives of the Registry of the Court. The presentation of evidence was officially declared closed on 7 February 2012.

7. The Chamber sat for 265 days. 54 witnesses were heard at trial. The Prosecution called 24 witnesses who testified between 26 November 2009 and 8 December 2010. The Defence for Germain Katanga called 17 witnesses who appeared between 24 March and 12 July 2011. The Defence for Mathieu Ngudjolo called 11 witnesses who testified between 15 August and 16 September 2011. Three of the Defence witnesses were common to both teams. The Legal Representative of the main group of victims called two victims who gave evidence between 21 and 25 February 2011. The Chamber itself called two witnesses.

8. Once all the testimonies were concluded, both accused persons chose to testify as witnesses under oath. Germain Katanga gave evidence in twelve hearings held between 27 September and 19 October 2011. The parties and participants submitted their closing briefs and made their closing statements, and the last hearings were held between 15 and 23 May 2012.

9. The Prosecution tendered 261 items of evidence into the record of the case; the Defence for the Accused, 240; and the Defence for Mathieu

Ngudjolo, 132. The Chamber tendered five items of evidence and authorised the legal representatives of victims to also tender five, bringing the total to 643. In accordance with article 68(3) of the Statute, 366 victims, including 11 child soldiers, were authorised to participate in the trial through their legal representatives. Here, the Chamber wishes to commend the contribution made by the legal representatives and their teams throughout the proceedings. In the Chamber's view, they were able to find their rightful place during the trial and in their own way, by, at times, taking a different stance to the Prosecution, they made a meaningful contribution to establishing the truth in relation to certain aspects of the case. The Chamber extends its gratitude for their contribution.

10. Once apprised on 27 March 2013 of the judgment on the appeal against the aforementioned decision of 21 November 2012 giving notice of the possible recharacterisation of the mode of liability applied to the Accused, in the first two weeks of April 2013, the parties and the participants filed submissions on the proposed recharacterisation, in regard to points both of law and of fact. Thenceforth and until 11 December 2013, when the Defence for Germain Katanga (hereinafter "the Defence") requested a permanent stay of the proceedings against him, the Chamber ensured compliance with the requirements of regulation 55(3) of the Regulations of the Court, which safeguards the rights of the Defence. There was much exchange of written submissions on that issue, particularly with the Defence, on a continuous basis throughout that period. The decisions of 15 May, 26 June, 2 October and 19 November 2013 are of particular importance in that connection.

11. One member of the Trial Bench, Judge Christine Van den Wyngaert, appended a dissenting opinion to the 21 November 2012 decision on possible recharacterisation, as she did in respect of the four decisions aforesaid. This judgment is also the subject of a dissent pertaining to the majority of its factual findings and its holdings. The thrust of this dissent will be set out further on in

the Summary. During this reading, references to “the Chamber” shall therefore denote the Majority.

III. The Chamber’s main findings

12. The Chamber wishes to bring to the fore certain findings in the judgment which merit particular attention today; each such finding will be analysed in detail. These findings concern the attack on Bogoro; the organisation, in February 2003, of the commanders and combatants of Walendu-Bindi *collectivité*, who included Germain Katanga; their objectives; the characterisation of the crimes charged; and the duties performed and the powers held by the Accused within the Ngiti militia of the *collectivité*. This overview will culminate in a summary of the Chamber’s main factual findings concerning Germain Katanga’s criminal responsibility as a principal (article 25(3)(a)) and as an accessory (article 25(3)(d)).

13. From the outset it is expedient to recapitulate briefly the arguments of the parties. In the Prosecution’s view, Germain Katanga must be held responsible for the crimes committed in Bogoro on the basis of article 25(3)(a) of the Statute, that is to say, as a principal. Throughout the trial, the Prosecution argued that after September 2002, the Accused became the leader of the Ngiti combatants of Walendu-Bindi *collectivité*, then, once the combatants had assumed the name “FRPI” (*Force de résistance patriotique en Ituri* [Patriotic Force of Resistance in Ituri]), he became commander-in-chief and President of that group. According to the Prosecution, the FRPI was a structured military group with a hierarchical chain of command, that command being centralised. In its view, Germain Katanga, the supreme leader, exercised authority over the *collectivité* in respect of both civilian and military matters. The Prosecution contended that in February 2003, the Accused effectively exercised his authority over the Ngiti militia which at the time constituted an apparatus of power, thus

enabling him to exercise control over the crimes committed by the militia members.

14. In the view of the Defence, the key witnesses relied upon by the Prosecution to support its case are neither credible nor reliable. In Aveba, Germain Katanga's control extended only to 60 men quartered in Atele Nga and he exercised no authority over the local commanders of other sectors of Walendu-Bindi *collectivité*. Furthermore, according to the Defence, the attack on Bogoro was planned, ordered and directed by the *Etat major opérationnel intégré* (EMOI [Integrated Operational General Staff]), "set up by the Kinshasa Government", and the armed wings of other political and military groups, notably the APC based in Beni, North Kivu. Lastly, it argues that the 24 February 2003 attack on Bogoro was not directed against the civilian population of the village but the military camp of the UPC, a predominantly Hema political and military group based there. The objective of the attack was therefore military and strategic.

A. The 24 February 2003 attack on Bogoro

15. The Chamber concluded that prior to the 24 February 2003 attack on Bogoro, at least 800 predominantly Hema civilians were living in Bogoro and that they clearly outnumbered the UPC soldiers. The latter were quartered in a camp, set up in and around Bogoro Institute and often referred to by that name by various witnesses. While Bogoro was undoubtedly a strategic military position, it must be borne in mind that its inhabitants continued to lead civilian lives there.

16. On 24 February 2003, Bogoro was attacked by the Ngiti combatants of Walendu-Bindi *collectivité* and the Lendu combatants of Bedu-Ezekere *groupement*, with reinforcements from the APC, which principally provided support early on, when the attack was being conceived and prepared. They came by various routes from Bedu-Ezekere *groupement* and Walendu-Bindi

collectivité, encircling the village. The Chamber has not, however, been able to affirm that Germain Katanga was present on 24 February 2003 and that he participated in the fighting. Neither has it been able to establish whether or not he took part in the victory celebrations in the village or whether he claimed responsibility for that victory.

B. Organisation of the commanders and combatants of Walendu-Bindi *collectivité*

17. The Chamber summarises here its main factual findings in this regard. It established that in early 2003 there were scores of combatants in Walendu-Bindi, mustering in the thousands, and that they were organised in a network of camps which could be moved throughout the *collectivité*. It also found that military training and parades were held in some camps, demonstrating the existence of a certain degree of discipline in the various camps. It further established that in the months leading up to the 24 February 2003 attack, deliveries of weapons and ammunition from the town of Beni began arriving in preparation for an imminent attack on Bogoro. Moreover it noted the importance of Aveba to Walendu-Bindi *collectivité* as the site where the weapons and ammunition supplies were centralised and also where the commanders of the *collectivité* regularly went to this end.

18. The Chamber established that certain religious, civilian and military authorities of the *collectivité* turned to a common authority – whose name varied but who was always located in Aveba – between 29 January and 6 March 2003. They did so, for instance, to impart information or secure proper execution of an order issued. There was thus a focal point for the various commanders to whom they would turn when weight needed to be given to a decision which was considered important.

19. Ultimately, the Chamber established that on the eve of the battle of Bogoro, the local commanders and combatants constituted an organised armed

militia. They had the ability to communicate with each other and did so effectively through a well-established network. It also appears that they had united in pursuit of a common struggle as part of a movement or under the newly formed force called the FRPI. The commanders and combatants were thus part of a single entity able to come together and organise itself to achieve its objectives.

20. As regards the backdrop to the development of this militia in 2002, the Chamber concluded that the ethnic dimension of the conflict pitting the Ngiti militia against the Hema-affiliated UPC was indisputable. In the case at bar, this conflict was presented as being polarised between two main ethnic groups, the Hema and the Lendu, this ethnic dimension being interwoven with geopolitical considerations. The conflict cannot, therefore, be reduced to merely an ordinary dispute between villages or a local conflict. In the Chamber's view, the patriotic and ethnic dimensions of the conflict combined and became mutually reinforcing.

21. Having specific regard to the mindset of the members of the Ngiti militia of Walendu-Bindi *collectivité*, the Chamber considered that in 2002, over and above the UPC, the Ngiti combatants considered the Hema and their allies to be their enemies, as an ethnic group which repeatedly attacked and threatened their territory. It is evident from the testimony of witnesses who lived in or near Walendu-Bindi *collectivité* that the UPC was considered synonymous with the Hema, that the local combatants were engaged in resistance against this enemy, whom they regarded as an invader – resistance which also involved counter-offensives such as that in Nyakunde in early September 2002. Therefore, it is against this backdrop that the Ngiti combatants of Walendu-Bindi attacked Bogoro.

C. The nature of the armed conflict which occurred in Ituri between August 2002 and May 2003

22. The Chamber found that the evidence on record demonstrated beyond reasonable doubt that during this period Uganda exercised authority over the territory of this district as an occupying power. Finding that both the law of international armed conflict and of non-international armed conflict was applicable to the various actors in hostilities occurring on occupied territory, the Chamber considered it necessary to determine the nature of the armed conflict which encompassed the attack on Bogoro. It found that the protracted hostilities between organised armed groups in Ituri constituted an armed conflict not of an international character from January 2003, that is to say from the time of Uganda's rapprochement with the DRC in order to combat the UPC forces, which had recently become allied to Rwanda.

D. The crimes committed during the attack

23. As regards murder as a crime against humanity and a war crime and attack against civilians as a war crime, the available evidence showed that Bogoro was attacked in the very early morning, when it was still dark and its inhabitants were still at home asleep. The UPC combatants, meanwhile, were in their camp, located centrally in the village. The witnesses who were present, whether ordinary inhabitants, UPC soldiers or a Ngiti combatant from Walendu-Bindi *collectivité* who participated in the attack, all stated that there were scores of attackers, armed with guns and machetes, that they came from all directions and encircled the village, and that the gunfire was intense.

24. The Chamber found that, from the outset of the attack, the combatants pursued and killed the inhabitants of the village – elderly people, men, women and children – with machetes and firearms, even though they had no part in the fighting and were fleeing towards Bogoro Institute, where they had the habit of

taking refuge, or into the bush or towards a hill located on the edge of Bogoro commonly known as Mount Waka.

25. The evidence also demonstrated that when the attackers took the camp and surrounded the Institute's premises, many who had taken refuge there and had been unable to flee with the UPC soldiers were injured or killed, again by machete or by shooting.

26. The Chamber further noted that during the fighting or after the village was taken, the attackers entered houses in the area to seek out and kill villagers who were hiding inside.

27. It also noted that on 24 February 2003, once the camp had fallen and the fighting was over, the attackers continued to hunt down inhabitants hiding in the bush, raped some women, captured people whom they found hiding and killed others.

28. Several witnesses further stated that they had heard the attackers' threats and the pleas of their victims, who wailed and begged for mercy. Various witnesses stated that the attackers asked their victims their ethnic origin, and several inhabitants passed themselves off as non-Hema in order to save their lives. The attackers also mutilated some victims with bladed weapons before dispatching them by shooting or by machete.

29. The Chamber arrived at a death toll of at least 60 in the attack, including 30 civilians victims of murder, within the meaning of articles 7(1)(a) and 8(2)(c)(i) of the Statute, committed by Ngiti combatants. These victims included at least 13 children and a significant number of women and elderly persons. However, the Chamber wishes to emphasise that it found beyond reasonable doubt that a far greater number of people were victims of murder and attack against the civilian population on 24 February 2003 but that the lack of precision of the evidence before it did not allow accurate identification of these victims.

30. Thus, the timing of the attack and the means and method used – encirclement of the village whilst its inhabitants were still asleep; use of machetes to attack them directly and at close range; shooting indiscriminately or, further still, directly at the villagers, whether during or after the fighting, in their homes, as they fled or when they had taken shelter in the Institute or in the bush; the sheer number of civilian victims, including 13 children, many women and elderly people – led the Chamber to find beyond reasonable doubt that Ngiti combatants intended to directly target the predominantly Hema civilian population of Bogoro on 24 February 2003, thereby committing murder as a crime against humanity and a war crime under articles 7(1)(a), 8(2)(c)(i) and 8(2)(e)(i) of the Rome Statute.

31. As to the war crimes of destroying the enemy's property and pillaging, the Chamber concluded that houses belonging to the predominantly Hema population of Bogoro were destroyed, set on fire or had their roofs removed by the Ngiti combatants on 24 February 2003. It also considered that on that day Bogoro was extensively pillaged.

32. Property belonging to the predominantly Hema civilian population of Bogoro which was essential to its daily life, including roofing sheets, furniture and various other personal effects, food, and livestock and animals were taken away to Ngiti areas by the attackers as well as by women and children, some of them armed, who had come to assist. The combatants also compelled those captured in Bogoro, women in particular, including Witness P-353, to carry the stolen property for them.

33. Whilst the Chamber found that the CECA 20 church in Bogoro, located within the Diguna mission, was destroyed and pillaged by removal of its roof, it did not find the Accused responsible for these acts, since it was unable to attribute them to Ngiti combatants.

34. This aside, the Chamber found beyond reasonable doubt that on 24 February 2003 Ngiti combatants committed the war crimes of destroying the enemy's property under article 8(2)(e)(xii) of the Statute and pillaging under article 8(2)(e)(v) of the Statute.

35. Turning now to the crimes of rape and sexual slavery as crimes against humanity and war crimes, the Chamber also found that they had been committed by Ngiti combatants on 24 February 2003. It did so by relying primarily on the evidence of three witnesses, P-132, P-249 and P-353, who testified as direct victims of rape and sexual slavery. All three were raped on the day of the attack after being driven out of their hiding places in the bush or inside a house by armed combatants and after claiming to be of an ethnicity other than Hema. They were all taken to Ngiti military camps, where they were held captive for several weeks, repeatedly raped and allocated to combatants quartered in the camps.

36. The Chamber found that the evidence establishes beyond reasonable doubt that sexual slavery as a war crime and a crime against humanity under articles 8(2)(e)(vi) and 7(1)(g) were intentionally committed, in the aftermath of the battle of Bogoro on 24 February 2003, by combatants from camps belonging to the Ngiti militia of Walendu-Bindi and by others in the camps.

37. In light of all of the foregoing, the Chamber concluded that on 24 February 2003 an attack was directed against the civilian population of the village of Bogoro within the meaning of article 7(2)(a) of the Statute. It is apparent, principally in view of the multiple acts of violence perpetrated directly against the Hema inhabitants of the area, the nature of the victims and the fact that in the aftermath of the attack the village was cleared of its Hema population, that the Ngiti combatants regarded the UPC and the Hema, as an ethnic group, as their enemy.

38. The Chamber is also of the opinion that the preparations in the *collectivité* prior to the attack and the manner in which the attack was ultimately executed attest to the fact that the operation against Bogoro ensued from a design, specific to the Ngiti militia, to target the predominantly Hema civilian population in the area. Thus, the victims perished according to the plan devised by the Ngiti combatants of Walendu-Bindi to “wipe out” the predominantly Hema civilian population of Bogoro.

39. The Chamber thus found that the civilian population of Bogoro was the prime target of the attack and the operation itself was systematic in nature.

40. Finally, concerning the war crime of using children under the age of 15 years to participate actively in hostilities, it bears noting that, in contrast to the other crimes, for which the Pre-Trial Chamber ruled that there were substantial grounds to believe that the members of the FRPI had committed them intentionally, this crime was alleged to have been committed only by Germain Katanga himself, and not by the militia members.

41. On the basis of the evidence on record, the Chamber concluded that children were present in the armed forces operating in Ituri, including in the ranks of the Ngiti militia, from 2002 onwards and during the period of hostilities in which the battle on 24 February 2003 took place. It was able to establish that children, who were referred to locally as *kadogos* and who, in some cases, were assessed to be under the age of 15 years, were among the Ngiti combatants in Bogoro and participated not only in the fighting but also in acts of violence meted out to the local population and its property. The Chamber further concluded that, shortly after 24 February 2003, children were present among the militia members at the camp where P-132 was held captive, although it was impossible to determine whether or not they were under the age of 15 years. They took part in military parades and guarded the camp and its prison, thereby providing the Ngiti militia with logistical support during hostilities.

42. However, the Chamber was unable to identify a direct nexus indicating that the Accused used these children to participate in the hostilities.

43. Hence, whilst it cannot rule out the possibility that Ngiti commanders of Walendu-Bindi *collectivité* used children under the age of 15 years in the hostilities connected to the battle of Bogoro, it cannot find that Germain Katanga committed the crime of using child soldiers under article 8(2)(e)(vii) and, consequently, cannot find him responsible under article 25(3)(a) of the Statute.

E. Germain Katanga's duties and powers in the Ngiti militia of Walendu-Bindi *collectivité*

44. The Chamber considered that the evidence on record demonstrates that at the material time, and in Walendu-Bindi *collectivité*, Germain Katanga – who bore the title Commander or Chief of Aveba – was a seasoned and well-known soldier with close ties to the fetish priests [*féticheurs*] in the *collectivité*, who respected him.

45. He had undeniable military authority over the *collectivité*. Similarly, administration, oversight, security and public order were considered to rest with him. That authority crystallised in late 2002 and became increasingly established after the battle of Bogoro, as the body of evidence covering the period after the attack shows. As early as November 2002, Germain Katanga led a delegation of combatants and prominent persons to Beni. Indeed not only was he the focal point for the various commanders of the Ngiti militia, but he also represented the militia vis-à-vis the authorities in Beni. In that capacity he could attend high-level meetings and take military decisions.

46. Therefore, at least from early February 2003, Germain Katanga bore the title of “President” of the Ngiti militia which, as the Chamber has noted, gradually adopted the name FRPI in the run-up to the attack on Bogoro.

47. Regarding the powers which the Accused actually wielded, the Chamber found that, in Aveba, he facilitated the receipt and storage of weapons and ammunition from Beni and had the power not only to allot them to the Walendu-Bindi commanders but also to decide the quantity of ammunition allocated, as his instructions in this regard were followed.

48. However, apart from his powers to receive, store and distribute weapons and ammunition, the Chamber was unable to find beyond reasonable doubt that Germain Katanga wielded, in all areas of military life and over all commanders and combatants in Walendu-Bindi *collectivité*, powers of command and control.

49. In actual fact, whereas he moved around the Ngiti camps in the *collectivité* and was received as a figure of authority, and whereas he could issue orders to commanders and combatants within that *collectivité*, it was impossible to ascertain the exact nature of the orders or whether they were obeyed.

50. His titles Commander or Chief of Aveba and “President” of the Ngiti militia, at times called “FRPI”, the effectiveness of his authority over the supply and distribution of weapons and ammunition to the militia, his duties as facilitator and negotiator did not, however, allow the Chamber to find beyond reasonable doubt that Germain Katanga was vested, as the Prosecutor alleged, with effective hierarchical power over all the commanders and combatants of the Ngiti militia in Walendu-Bindi *collectivité*.

51. Accordingly, the Chamber relied on these factual findings as a whole in determining Germain Katanga’s responsibility within the meaning of article 25(3)(a) of the Statute, *viz.* as a principal. In this respect the Chamber considered that the Prosecutor failed to prove beyond reasonable doubt, and having regard to the evidence found credible, that:

- in February 2003, the Ngiti militia was an organised apparatus of power;
and

- Germain Katanga, at that time, wielded control over the militia such as to exercise control over the crimes within the meaning of article 25(3)(a) of the Statute.

52. The militia, as already established, had a President who lived in Aveba, and who, in the view of the Chamber, acted as a “focal point” with oversight over the community and who also exercised military authority vis-à-vis the *collectivité*. In this respect, whereas it is apparent that he had powers to receive, store and distribute weapons and ammunition, the Chamber was unable to rely on the evidence available to find that the President of that militia had the powers of a superior. It has not been proven, in light of the evidence found credible, that vis-à-vis that *collectivité*, he had the material ability to issue and ensure compliance with orders or, furthermore, that he had the power to punish commanders from various camps. The Chamber therefore found that it could not make a determination on the existence of a centralised command within the Ngiti militia of Walendu-Bindi *collectivité*.

53. Consequently, the Chamber considered that it need not determine whether the other constituent elements of commission within the meaning of article 25(3)(a) of the Statute were established, thus impelling the finding that the Prosecutor failed to establish that Germain Katanga had committed the alleged crimes within the meaning of article 25(3)(a) of the Statute. Judge Van den Wyngaert concurs with this finding.

54. However, as previously stated, she has issued a dissenting opinion whose main conclusions I shall read from the excerpt provided to the Majority, and I quote:

“Although Judge Van den Wyngaert concurs with the Majority in the acquittal of Germain Katanga for the charges under article 25(3)(a) of the Statute, she distances herself entirely from the recharacterisation of the charges under

article 25(3)(d)(ii) of the Statute. She also sees no grounds for changing the legal characterisation of the nature of the armed conflict.

55. For reasons explained in the Minority Opinion, Judge Van den Wyngaert is of the view that it is not possible to recharacterise the charges in this case from article 25(3)(a) to 25(3)(d)(ii) without fundamentally changing the "facts and circumstances" of the Confirmation Decision. She is of the view that the narrative of the charges has been substantially amended contrary to article 74 of the Statute, an alteration that could not have been reasonably foreseen by the Defence.

56. Moreover, Judge Van den Wyngaert is of the view that the recharacterisation has rendered this trial unfair by infringing a series of Germain Katanga's rights. In particular, the Judge believes the accused did not receive adequate notice of the new charges under article 25(3)(d)(ii) and was not afforded a reasonable opportunity to conduct a meaningful investigation in response to those new charges. For these reasons, the Judge is of the opinion that Germain Katanga has been prevented from defending himself appropriately.

57. In addition, Judge Van den Wyngaert is of the view that Germain Katanga's testimony cannot be used against him as evidence for the charges under article 25(3)(d)(ii). Although the Judge accepts that Germain Katanga was not forced to testify against himself, she believes that he was misled about the scope of the permissible use of his testimony. Accordingly, Judge Van den Wyngaert thinks that the accused's waiver of his right to remain silent cannot be considered to have been made freely.

58. As regards the actual charges under article 25(3)(d)(ii), Judge Van den Wyngaert believes that the evidence does not permit the making of any findings beyond reasonable doubt that would lead to a conviction of Germain Katanga. In particular, Judge Van den Wyngaert is concerned about the quality and

reliability of much of the evidence in this case. She is also of the view that essential evidence is missing from the case record. Both these factors make it impossible, in her view, to enter findings beyond reasonable doubt.

59. In particular, apart from finding that the elements of crimes against humanity are not fulfilled, Judge Van den Wyngaert also does not believe that the evidence shows beyond reasonable doubt that the Ngiti fighters of Walendu-Bindi constituted a group acting with a common purpose to attack the Hema civilian population of Bogoro. She also does not believe that there were separate plans at the level of EMOI in Beni and at the level of the Ngiti fighters of Walendu-Bindi. Judge Van den Wyngaert furthermore thinks that the evidence does not show that Germain Katanga intentionally contributed to the commission of any crimes committed in Bogoro. On the contrary, she believes that it cannot be excluded that he made his contribution to a legitimate military plan, which would exclude his criminal responsibility under article 25(3)(d)(ii).

60. Finally, Judge Van den Wyngaert is of the opinion that the proceedings in this case have gone on for too long, in violation of Germain Katanga's right to be tried without undue delay as well as the Chamber's duty to conduct the proceedings expeditiously and to pronounce the judgment within a reasonable period of time after the Trial Chamber has retired to deliberate. Judge Van den Wyngaert would have acquitted Germain Katanga alongside Mathieu Ngudjolo Chui on 18 December 2012." End of quote.

F. Legal recharacterisation of the mode of liability under regulation 55 of the Regulations of the Court

61. Having found that Germain Katanga had not incurred criminal responsibility on the basis of article 25(3)(a) of the Statute, the Chamber considered whether in law and in fact the mode of liability could then be recharacterised to accord with article 25(3)(d), which is definitive of

accessoryship through contribution “[i]n any other way ... to the commission [...] of a crime by a group of persons acting with a common purpose.”

62. The Chamber first ensured that the recharacterisation contemplated did not exceed the facts and circumstances described in the charges. In that respect the Chamber satisfied itself that the factual considerations on which it was to rely and which concerned the existence and composition of the Ngiti militia of Walendu-Bindi *collectivité* and Germain Katanga’s role, were substantially the same as those set out in the decision confirming the charges, which founded the Chamber’s holdings under article 25(3)(a). The Chamber concluded therefrom that the proposed recharacterisation was, in this regard, consistent with the requirements of regulation 55 and articles 67(1) and 74(2) of the Statute. It however found that the recharacterisation could not apply to the crime of using child soldiers, as the charge of direct co-perpetration against the Accused could not be modified to accessoryship within the meaning of article 25(3)(d) without violating the aforecited provisions.

63. The Chamber then sought to satisfy itself that Germain Katanga had been informed promptly and in detail of the nature, cause and content of the charges against him. To this end, it recalled and examined all the information which had been imparted to the Accused, including by the Pre-Trial Chamber, as well as the notice furnished to him before commencement of the trial – which at the time was being conducted on basis of the mode of liability under article 25(3)(a) – during the pre-trial phase and then provided as part of the procedure specific to regulation 55. The Chamber concluded that he had been sufficiently informed and in detail of the nature, cause and content of the charges.

64. Responding to certain Defence observations, the Chamber first considered that the Accused had not been forced to incriminate himself. Indeed, it noted that he had waived his right to remain silent and that, he willingly made an informed decision, with the guidance of counsel, to testify and take the initiative to raise or dwell on various topics which he deemed significant to the

charges against him. The Chamber then concluded that Germain Katanga's case had been given a fair hearing, even though regulation 55 was triggered only at the deliberations stage.

65. Then, with the utmost circumspection, the Chamber examined whether the Accused had been given adequate time and facilities for the preparation of his defence. In this respect, the Chamber acknowledged that in the instant case, recourse to the provisions of regulation 55 at an advanced stage in the proceedings had, to a certain extent, and without overestimating the difficulty, compelled the Accused to redirect, and perhaps complement his defence, which required special preparation on his part within a short space of time. Thus, in particular to alleviate the situation, the Chamber implemented various measures to ease the Defence's preparation and enable it to respond more efficiently to the new mode of liability.

66. The Chamber therefore considered whether with respect to the existing evidence, the Defence, availing itself of the necessary human and financial resources, had been able to present its case on the new recharacterisation. It satisfied itself that such had been the case and that the Defence, composed of an entirely new team since late November 2012, had succeeded in submitting all the analyses and observations which it deemed necessary. The Chamber underscored that to achieve this, the Defence had recourse to the Bench's assessment of the credibility of some key prosecution witnesses and to the law on the new characterisation envisaged. The Chamber further noted that subsequently and in the course of its rulings, it had brought to the attention of the Defence, numerous references to the relevant parts of the *Decision on the Confirmation of charges* and had specified how it thought some of the issues raised by the Defence could be tackled and understood.

67. Thereafter, the Chamber noted that ultimately the Defence was able to effect part of the further investigations it had desired to conduct, whereas such investigations were not indispensable to the fairness of trial. The Chamber

noted that to carry out its investigations the Defence again availed itself of the necessary human and financial resources, the Registry having been duly approached in that connection long before July 2013. The Chamber noted as well, that having been apprised, as from the decision of 21 November 2012, of the possibility of a legal recharacterisation of the mode of liability, the Defence was able to start developing its strategy for further investigation and promptly take all the necessary measures.

68. Subsequently, the Chamber meticulously examined the Defence's *modus operandi*. It noted that the Defence had ultimately chosen not to recall those prosecution witnesses whom it considered relevant and whom it had met in the DRC in July 2013, and that it had equally decided not to recall witnesses who had testified in support of its case and whose names it had mentioned. The Chamber also endeavoured to assess the difficulties faced by the Defence in reaching some locations to meet potential witnesses, owing to the prevailing security situation in Ituri between June and September 2013. The Chamber consulted the Registry of the Court on the matter. Whereas it does not downplay some of the difficulties which it has duly noted, it equally noted that the Defence had specifically chosen not to act on the alternative solutions suggested by the Chamber and the Registrar and had postponed some trips which would have been possible at the time concerned.

69. Ultimately, the Chamber was compelled to note that it could not assess the relevance of any information which might have been provided by most of the potential witnesses living in areas inaccessible to the Defence. In actual fact, the documents submitted by the Defence make clear that part of its planned investigations consisted of seeking information which sometimes concerned solely the person's whereabouts – no information of a temporal nature or alluding to the experience of the potential witness was provided. Failure by the Defence to demonstrate with specificity the need for further investigations

therefore prevented the Chamber from assessing the relevance of information, which possible new witnesses might have brought.

70. On the basis of all its findings, the Chamber concluded that in the instant case the provisions of articles 67(1)(b) and 67(1)(e) of the Statute had not been violated.

71. Lastly, the Chamber considered whether the Accused had been tried within a reasonable time. It recalled that in its decision of 21 November 2012, it had ruled on how the right to be tried without undue delay must be construed and how, in that respect, the phase preceding the implementation of regulation 55 must be appraised. Regarding the conduct of the phase concerning said implementation, the Chamber pointed out that the perfect regularity in the sequence of written submissions, which were produced at its behest, and the decisions it rendered since 21 November 2012 shows, if proof were needed, that the Bench was ever mindful of the need for the procedure for the implementation of regulation 55 to be expeditious. The Chamber recalled that faced with the need to achieve a delicate balance, it ensured that the Defence could play its part under the fairest possible conditions. It did so by providing exhaustive responses to each of the Defence's written submissions and offering guidance to the Defence, while steering the recharacterisation procedure within a strict timeframe. The Chamber therefore found that the requirements of article 67(1)(c) had been fully respected.

72. As to the 11 December 2013 Defence motion to stay the proceedings, having determined that the rights of the Accused had not been violated, the Chamber found no ground to entertain said motion.

G. Germain Katanga's responsibility within the meaning of article 25(3)(d) of the Statute (accessoryship).

73. After satisfying itself that the recharacterisation procedure was consonant with the requirements of regulation 55, the Chamber analysed the

form of accessoryship defined under article 25(3)(d) of the Statute. It first examined the various constituent elements of this mode of responsibility and noted the need to prove beyond reasonable doubt that: 1. a crime falling within the jurisdiction of the court had been committed; 2. the persons who committed the crime formed part of a group acting with a common purpose; 3. the Accused made a significant contribution to the commission of the crimes; 4. his contribution was intentional and 5. that it was made in the knowledge of the intention of the group to commit the crimes.

74. The Chamber then considered whether in the case at bar, the evidence on record satisfied the requirements of article 25(3)(d) and established this mode of responsibility.

75. It is not expedient here, in the instant summary, or at this point in time for the Chamber to reiterate the entirety of its reasoning. Nevertheless it wishes to recall and underscore that:

- Ngiti combatants in Walendu-Bindi *collectivité* committed the above-described crimes;
- those Ngiti combatants were part of a militia which constituted an organisation within the meaning of article 7(2) of the Statute and an organized armed group within the meaning of the law of armed conflict. This militia harboured its own design, which albeit part of a wider design to reconquer territory, was to attack Bogoro and wipe out from that area the UPC soldiers, but also, and first and foremost, to wipe out the Hema civilians who were there. On this point, the Chamber essentially relied on its findings regarding the policy pursued by the Ngiti militia, within the meaning of article 7(2) of the Statute, to establish the existence of an attack against a civilian population. It considered that the conditions under which the attack was launched, then the manner in which it proceeded and the treatment of the civilian population, in

particular women, children and elderly persons, established the existence of a common criminal purpose against the population of Bogoro;

- the crimes of murder, attack against civilians, destruction of property and pillaging which were committed at the time therefore formed part of the common purpose. Regarding the crimes of rape and sexual slavery, the Chamber however found that it could not conclude, on the basis of the evidence laid before it, that the criminal purpose pursued on 24 February 2003 necessarily included their commission or, therefore that such crimes were also part of the common purpose. The Chamber however recalls its finding that these two crimes constitute crimes against humanity as they were part of the operation to wipe out the civilian population of Bogoro; it further determined that the rapes constituted the war crime of attack against civilians.

- lastly, although they were not alone at the *locus in quo*, the physical perpetrators of the crimes were Ngiti combatants and members of the militia of Walendu-Bindi *collectivité* and harboured the common purpose.

76. This finding having thus been made, the Chamber ascertained whether Germain Katanga had made a significant contribution to the commission of the crimes by the Ngiti militia acting with a common purpose. With reference to its factual findings on the duties Germain Katanga performed and the powers he held, the Chamber considered that it has been established that as of November 2002, the Accused helped the Ngiti militia of Walendu-Bindi *collectivité* to mount the operation against Bogoro and which the Ngiti commanders and combatants organised locally.

77. To show in greater detail that the activity engaged in by Germain Katanga from November 2002 to 24 February 2003 had a significant effect or impact on the commission of the crimes, within the meaning of article 25(3)(d)

of the Statute, the Chamber first recalled that in the case at bar both the geographical and temporal scope of the group's common purpose was confined to the 24 February 2003 operation against Bogoro. Indeed, there is perfect concordance between: (1) the attack, *viz.* the operation against Bogoro; (2) the group's common purpose, which specifically was to wipe out from that area the UPC military elements and the Hema civilians there; and (3) the commission of the crimes by the Ngiti combatants. Accordingly, it is the activity which the Accused engaged in respect of the preparation for the attack on Bogoro which may constitute a contribution to the commission of crimes by Ngiti combatants on that date and during that attack.

78. Admittedly, not all assistance lent in preparation of a military operation perforce and as a rule constitutes a contribution to crimes committed by the members of an armed group which take part in the operation. Nonetheless, it must be underscored that the fact that the Accused's conduct constituted a contribution to the military operation which was decided in Beni does not preclude that his conduct may also constitute a contribution to the commission of crimes by the Ngiti militia, within the meaning of article 25(3)(d) of the Statute.

79. It is further established that the weapons which the Beni authorities furnished to the local combatants in order to attack Bogoro were provided in large quantities and that the fighting was extensive, inasmuch as the fire-power was very great, not only taking the UPC troops by surprise but also the population as whole. It has been established that the weapons and ammunition secured the success of the operation and Bogoro fell in just a matter of hours.

80. It is beyond doubt that much criminality was perpetrated directly by machete, but it was the firearms which not only allowed the population to be taken by surprise and the area to be captured, but also to wound and kill Bogoro's inhabitants.

81. Of note is that the manner in which the attack proceeded attests to the strength of the fire-power deployed to secure its success: the UPC was soon routed, the explosions and the crackle of gunfire not only struck fear into the population on account of their volume and intensity, but also compelled it to flee, leaving it vulnerable to shooting and forcing it to abandon its property. The Chamber has already underlined that the attack against the Hema was undertaken both through the elimination of people (men, women and children) and the destruction and pillaging of their property, wholly precluding survival or any return of survivors. Lastly, it emerges from the Chamber's findings that those who attacked Bogoro opened fire directly on scores of inhabitants and that they assaulted them by machete or, further still, directly shot and killed some of them.

82. In that context, therefore, it is apparent that Germain Katanga's contribution proved to be particularly suited for the commission of the crimes which form part of the common purpose, since that contribution had considerable influence on their occurrence and the manner of their commission. His involvement allowed the militia to avail itself of logistical means which it did not possess and which, however, were of paramount importance to attacking Bogoro. His involvement, therefore, had a truly significant part in bringing the crimes to pass. Germain Katanga's contribution secured the military superiority of the Ngiti combatants over their adversary, the UPC, and allowed them to see through their purpose of eliminating from Bogoro the predominantly Hema civilian population.

83. In the case at bar, the Chamber noted, *inter alia*, that:

- Germain Katanga, in the run-up to the attack, and as a key protagonist in the alliances which the militia had forged, contributed to reinforcing the strike capability of the Ngiti militia which carried out the crimes committed in Bogoro on 24 February 2003. He also contributed, by virtue of his position in Aveba – the only area in the *collectivité* with an airport

which could accommodate aircraft transporting weapons – to equipping the militia and enabling it to operate in an organised and efficient manner.

- Throughout the preparatory period of the attack, in Aveba he was the intermediary of choice between the suppliers of weapons and ammunition and the physical perpetrators of the crimes who were to deploy such weaponry in Bogoro.

- Absent that considerable supply of weapons to the Ngiti community, and absent the Accused's contribution which entailed organising and facilitating the supply of weapons at a local level, the commanders and combatants of Walendu-Bindi *collectivité* would not have had the same advantages or have been able to commit with as much efficiency the crimes which were perpetrated in Bogoro against the Hema civilian population.

84. In the Chamber's view, it was, therefore, his activities as a whole and the various forms which his contribution took, that, in the circumstances, had a significant influence on the commission of those crimes.

85. Ultimately, the Chamber established that the Accused meant to make his contribution, which, he, moreover, has not contested. It further established that he knew of the intention of the group to commit the crimes which formed the common purpose since:

- he knew that the Ngiti militia was preparing an operation against Bogoro with the support of the authorities in Beni;

- he knew that the weapons and ammunition whose receipt and distribution he facilitated would be used by the combatants during the attack;

- he was fully aware of how war was waged in Ituri and of the ensuing suffering which the civilian population endured;

- he knew that a massacre of civilians had occurred in early September 2002, during the attack by, *inter alia*, Ngiti combatants against Nyakunde and the resident Bira population, which was then allied to the Hema; and
- he knew, therefore, that the Ngiti combatants from Walendu-Bindi had already violently attacked the civilian population and were driven by an ideology inimical to the Hema.

86. Accordingly, the Chamber considered that these findings as a whole established beyond reasonable doubt that Germain Katanga's contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.

Would the Accused please rise.

For all the reasons given today, and relying, in pursuance of the provisions of article 74(2) of the Statute, on the evidence tendered and examined at trial and on the entire proceedings, the Chamber

BY MAJORITY,

MODIFIES, pursuant to regulation 55 of the Regulations of the Court, the legal characterisation of the facts such that the armed conflict connected to the charges was not of an international character between August 2002 and May 2003;

BY MAJORITY,

MODIFIES, pursuant to regulation 55 of the Regulations of the Court, and with the exception of the crime of using children under the age of 15 years to participate actively in hostilities (article 8(2)(e)(vii)), the legal characterisation of the mode of liability initially applied to Germain Katanga under article 25(3)(a) of the Statute (indirect co-perpetration) so as to apply to him article 25(3)(d) (accessoryship through a contribution made in any other way to the commission of a crime by a group of persons acting with a common purpose);

REJECTS the application for a permanent stay of proceedings;

FINDS GERMAIN KATANGA,

GUILTY, within the meaning of article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003 of:

- Murder as a crime against humanity under article 7(1)(a) of the Statute;
- Murder as a war crime under article 8(2)(c)(i) of the Statute;
- Attack against a civilian population as such or against individual

civilians not taking direct part in hostilities, as a war crime under article 8(2)(e)(i) of the Statute;

- Destroying the enemy's property as a war crime under article 8(2)(e)(xii) of the Statute; and
- Pillaging as a war crime under article 8(2)(e)(v) of the Statute;

UNANIMOUSLY,

FINDS THE ACCUSED NOT GUILTY, within the meaning of article 25(3)(d) of the Statute, as an accessory to the crimes of:

- Rape and sexual slavery as crimes against humanity under article 7(1)(g) of the Statute;
- Rape and sexual slavery as war crimes under article 8(2)(e)(vi) of the Statute; and
- **ACQUITS** him of those charges;

NOT GUILTY, within the meaning of article 25(3)(a) of the Statute, of the crime of:

- Using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute; and

ACQUITS him of that charge;

Consequently, the Chamber:

BY MAJORITY

DECIDES that Germain Katanga shall remain in detention until such time as sentence is passed; and

ORDERS the Victims and Witnesses Unit to take all necessary measures to

ensure the protection of the witnesses pursuant to article 68 of the Statute.

Judge Van den Wyngaert appends a partially dissenting opinion to this judgment.

87. Today the Chamber also issues an order concerning the sentencing procedure. Such procedure entails a time frame to which the Chamber specifically draws the attention of the parties and participants.

88. The reparations procedure will then be implemented.