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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 Document

Defence Observations on Article 25(3)(d)

Source: **Defence for Mr Germain Katanga**

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

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Other

1. The defence for Germain Katanga ("defence") hereby submits observations regarding a requalification of the mode of liability, from article 25(3)(a) to article 25(3)(d) in response to the Chamber's invitation to file observations pursuant to regulation 55(3) of the Regulations of the Court ("RoC"), set out in the Chamber's *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons* ("Notice Decision").[1]

2. The defence appealed the making of that Notice Decision[2] and on 27 March 2013, the Appeals Chamber dismissed the defence appeal finding that "Notice of a possible modification of the legal characterisation of facts under regulation 55 (2) of the Regulations of the Court may be given at the deliberations stage of the trial proceedings. However, the Trial Chamber must ensure that the trial remains fair."[3]

3. The Appeals Chamber necessarily confined its analysis to the legality of the Notice Decision, finding that the plain wording in Regulation 55 that notice of a possible re-characterisation may be given "at any time during the trial", together with the fact that the case is still in trial, rendered the timing of the Notice compatible with the Regulation. The Appeal Chamber essentially declined to consider ancillary defence arguments, considering them premature.[4]

4. The defence has taken due note of the observations of the Appeal Chamber and in particular the relevant finding that the giving of notice under Regulation 55 is not *per se* unlawful at this late stage of the proceedings. In fact, it was not the defence submission that Regulation 55 could never be invoked at this stage of the proceedings but rather that invoking it at this time in the particular circumstances of this case was inappropriate and wrong. Essentially, the Appeals Chamber did not address the particular arguments relating to that submission raised by the defence other than to say that it was too early to say whether such a submission could be sustained and that these were matters that would

[1] ICC-01/04-01/07-3319-tENG/FRA, 17 December 2012 (original French decision issued on 21 November 2011), para. 57 and disposition.
[2] ICC-01/04-01/07-3323, Defence Request for Leave to Appeal the Decision 3319, 21 December 2012, and 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, 10 January 2013.
[3] ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 o the Regulations of the Court and severing the charges against the accused persons" ("Appeals Chamber's Judgment"), 27 March 2013, p. 1.
[4] *Id.*, paras 46-47, 58, 91-92, 95-96, 99, 102.

have to be considered by the Trial Chamber and only then be subject to possible review on appeal. The key determinate as to the appropriateness of effecting such a change will rest largely on whether the trial as a whole remains fair. The issue is one of fairness - of extent and degree. The defence maintains that, looked at as a whole, invoking Regulation 55 to the extent of changing the charge in this manner at this stage is unfair to the accused.

Submissions from parties and participants

5. The Prosecutor and the legal representatives make a number of legal and factual submissions. The defence deals with the legal and factual submissions both of the Prosecutor, and the victim representative of the Bogoro victims in its legal sections below (i.e. under **Article 25(3)(d): Legal and Factual Observations**). It addresses at the conclusion the submissions made by the Representative of Child Soldier Victims.

Inadequate notice of the facts and circumstances relating to 25(3)(d)

6. As a preliminary observation, the defence has insufficient knowledge of the facts and evidence the Chamber intends to rely on in the event it decides to alter the mode of liability. The Decision on the confirmation of charges ("confirmation decision") focuses on the alleged agreement between Mathieu Ngudjolo and Germain Katanga to wipe out Bogoro. Each co-defendant was charged under article 25(3)(a) as an indirect co-perpetrator of a common plan to 'wipe out' Bogoro and commit the crimes charged. They were charged as co-perpetrators in the sense that they were inter-dependent. Both of them allegedly made essential and coordinated contributions to the common plan of wiping out Bogoro. Allegedly, if not for their contributions, the plan to wipe out Bogoro would not have been carried out.[5]

[5] ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges, 26 September 2008, paras. 548 (" (…) Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to "wipe out" Bogoro (…) »), 560 ("(…) FRPI soldiers would obey only orders issued by FRPI commanders and that, similarly, FNI soldiers would obey only orders issued by FNI commanders. Therefore, the fact that Germain Katanga and Mathieu Ngudjolo Chui were the highest commanders of the Ngiti and Lendu combatants, respectively, corroborates the finding that without their agreement on the common plan and their participation in its the implementation, the crimes would not have been committed as planned. »), 561 (« (…) Germain Katanga and Mathieu Ngudjolo Chui implemented the common plan in a coordinated manner and that Germain Katanga and Mathieu Ngudjolo Chui had joint control over the implementation of the plan, insofar as their essential overall coordinating roles gave to them, and only to them, the power to frustrate the implementation of the plan. »), 563 (« (…) Germain Katanga and Mathieu Ngudjolo Chui: (…) iii. were aware of the essential nature of their coordinating role in the implementation of the common plan and their ability to frustrate the implementation of the plan by refusing to

7. They were charged as indirect perpetrators in the sense that both of them were alleged to have perpetrated the crimes through others. As the professed leader of the FNI composed of Lendu-North combatants, Mathieu Ngudjolo was alleged to have perpetrated the crimes through his Lendu subordinates. As the purported leader of the FRPI composed of Ngiti combatants, Germain Katanga is said to have perpetrated the crimes through his Ngiti subordinates. These fighters, allegedly under the control of Ngudjolo and Katanga, purportedly jointly attacked Bogoro with the intention, not only to chase the UPC army away from its Bogoro base, but also 'to wipe out' Bogoro by targeting its civilians.[6]

8. Mathieu Ngudjolo has been acquitted.[7] The Prosecutor failed to establish that Ngudjolo was the leader of the FNI or of the Lendu fighters at the time of the Bogoro attack.[8] Having cut out one of the two partners of the agreement to 'wipe out' Bogoro, Germain Katanga's role, defined by that specific agreement, also falls away. It is unclear to the defence upon what factual basis the Chamber now intends to rely. These defence submissions are made on the defence's understanding that 25(3)(d)(ii) is not regarded by the Chamber as a direct alternative to the present basis of the charge, but is being contemplated because the evidence does not support a conviction on the charges as they currently stand. If the change was viewed as a direct alternative to a conviction on the present charge – that is to say that a conviction on the present charges would otherwise result - then the defence would not be in the position of making these submissions. It is a token of the defence's difficulty at this stage in assessing the viewpoint of the Chamber on the facts that such an observation is made.

9. The Majority contemplates charging Germain Katanga under 25(3)(d) for his alleged contribution to a group with a common purpose intending to commit the crimes charged.[9] From the Chamber's Notice Decision, it would appear that the group with a common purpose consists of Ngiti combatants and commanders.[10] However, the defence has little

activate a mechanism leading to the soldiers' almost automatic compliance with the orders. »), disposition, pp. 211-213 (Emphasis added).

[6] Confirmation decision, paras. 406-407, 413, 548-549, 555-557, 560-563, 575-576, 579, 580.

[7] *Le Procureur c. Mathieu Ngudjolo*, ICC-01/04-02/12-3, Jugement rendu en application de l'article 74 du Statut, 18 décembre 2012 ("Ngudjolo Judgment").

[8] *Ibid*, paras. 496-503.

[9] *Supra* note 1, paras. 23, 27.

[10] *Supra* note 1, para. 27 : "[…] Elle conduirait également à analyser le rôle joué par le groupe de combattants ngiti implantés dans la collectivité de Walendu-Bindi, tel qu'il est identifié dans ladite Décision. Cette requalification devrait aussi s'intéresser aux commandants locaux, membres de ce groupe, tels que les décrit la

detail who, among the Ngiti combatants and commanders, belongs to the 'group with a common purpose'.

10. The Majority refers to the prosecution's closing brief, which itself does not identify any members of this group, but only: "[…] *les commandants militaires ont conservé le contrôle qu'ils exerçaient sur leurs propres zones militaires*."[11]

11. The defence submits that the confirmation decision does not clearly identify this 'group with a common purpose'. The Majority relies on the section of the confirmation decision entitled, "Both organisations – FNI and FRPI – were hierarchically organised," and relies presumably on footnote 709 for the identity of the group in question.[12] However, it is only the following statement by P-28 that is cited in this footnote, without more, or indeed, without specifying that these, are in fact, members of the group allegedly acting with a common purpose: *"Suite à la réunion, les commandants présents sont retournés dans leur camp militaire respectif. Cobra MATATA est retournée à son camp de Bavi, YUDA à Kagaba, BEBY à Bukiringi, ANDROZO à Gethy, ANGULUMA à Alimo, OUDO à Bavi."* This is particularly unhelpful given the Chamber's observations as to the unreliability of P-28 and its rejection of significant parts of his testimony.[13] The defence do not know what, if any, remaining parts of his testimony are or could be relied upon by the Chamber. There are no other sections in the confirmation decision that identify the Ngiti 'group with a common purpose'.

12. Prior to the confirmation hearing, the defence sought additional information regarding the identities, role and contributions of other combatants and commanders in the alleged common plan.[14] The Single Judge of Pre-Trial Chamber I dismissed this request, noting that Germain Katanga and Mathieu Ngudjolo "are the only co-perpetrators of the crimes in the Prosecution's Amended Charging Document, insofar as they were the only members of the common plan "whose role and contribution give them control over the

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Décision de la Chambre préliminaire et à la contribution que Germain Katanga a apportée et qui a abouti à la réalisation des éléments objectifs des crimes. »

[11] Majority Decision, para. 27 and fn. 44, referring to *Prosecutor v. Katanga and Ngudjolo*, Mémoire final, ICC-01/04-01/07-3251-Conf, 24 February 2012, para. 137.

[12] Majority Decision, para. 27 and fn. 45, referring to *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-716-Conf, *Decision on the confirmation of charges*, 26 September 2008, para. 543.

[13] *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3, *Jugement rendu en application de l'article 74 du Statut,* 18 December 2012 (« Ngudjolo Judgment »), paras. 251-254.

[14] ICC-01/04-01/07-574, Defence Motion seeking the Amendment of the Document containing the Charges, 9 June 2008.

commission of the crime[s]”."[15]

13. With the proposed change of liability, the identity of the commanders and combatants who were part of the ‘group with a common purpose’ becomes both relevant and material. Indeed, Katanga has a right to know to whose enterprise he is purported to have made a contribution. If no further details are provided, any Ngiti fighter could be considered as part of this ‘group with a common purpose’. In this regard, it is noteworthy that the Chamber in Kenya I ordered the Prosecutor to provide details in the amended DCC regarding the identities of three commanders in the group with a common purpose.[16] In addition, unlike under article 25(3)(a), the Prosecutor must demonstrate that the accused was aware that the members of the group with a common purpose had the requisite intent to commit the crimes charged. If the identities of the members of the group are unknown, it is impossible to determine that they had criminal intent. A similar argument was made by the defence for Gbagbo during the confirmation hearing.[17]

14. As regards the ‘common purpose’, should the defence simply assume that the ‘common purpose’ is the common plan to ‘wipe out Bogoro’? This is not a foregone conclusion. The confirmation decision explicitly links the common plan described as to ‘wipe out Bogoro’ to Germain Katanga and Mathieu Ngudjolo. According to the confirmation decision, they are central to the formulation and implementation of this plan in all aspects. The decision states that Ngudjolo sent Boba Boba to Aveba to meet with Katanga and jointly formulate the plan to ‘wipe out Bogoro’ by attacking its civilian population.[18] Although others attended this meeting and assisted in implementing the plan, only Katanga and Ngudjolo were considered as co-perpetrators involved in this plan, as was confirmed by the Single Judge of Pre-Trial Chamber I.[19] In the new narrative, neither Katanga nor Ngudjolo appears as a co-perpetrator. Who then

[15] Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, ICC-01/04-01/07-648, para. 23. Also see ICC-01/04-01/07-692, Prosecution's Observations Addressing Matters that Were Discussed at the Confirmation Hearing, para. 40. *See also*, ICC-01/04-01/07-1653, Defence Observations on the Document Summarising the Charges, 19 November 2009, paras. 29, 32, as well as footnote 22 of the Dissenting Opinion of Judge Christine Van Den Wyngaert (“Dissent”).
[16] *Prosecutor v. Ruto & Sang,* ICC-01/09-01/11-522, Decision on the content of the updated docunent containing the charges, 28 December 2012, para. 35, and ICC-01/09-01/11-522-Anx, Modifications of the text of the Docunent Containing the Charges, p. 3.
[17] ICC-02/11-01/11-T-14-ENG, Confirmation of Charges Hearing (Open Session) ICC-02/11-01/11, 19.02.2013, pages 20-21; ICC-02/11-01/11-T-20-Red-ENG, 27-02-2013, Confirmation of Charges Hearing (Open Session) ICC-02/11-01/11, pages 41-44).
[18] Confirmation Decision, paras. 417, 548, 555.
[19] *Supra* Note 7 (Confirmation decision, paras. 548, 560, 561, 563, disposition, pp. 211-213.)

formulated, planned, and orchestrated this common plan?[20] Who were the planners associated with it? Did they have meetings, and if so, with whom, when and where? Was Katanga allegedly present at any of these meetings? Are these meetings at Beni or elsewhere? What evidence remains that supports such meetings taking place?

15. For the purpose of requalification, it is submitted that the defence is entitled to know the identity of the group or groups of individuals coming from Walendu Bindi, where they were located prior to the attack and who were their commanders at the time of the attack, as well as who it is alleged planned the attack. This information is essential to the defence in order to defend effectively against a charge of contribution to the crimes of a group or groups with a common purpose.

16. Without sufficient details as to the factual basis on which the case will proceed, who was involved in formulating the common purpose, how it was planned and put into action, and the role Germain Katanga played, it is difficult for the defence to respond to the suggested new mode of liability and inappropriate that in those circumstances it be required to do so. The change of modes of liability necessarily modifies the narrative. Details regarding the precise nature and scope of that new narrative as well as the evidence it is based upon are lacking. Without these details, the defence can only speculate as to what the Chamber has in mind. The defence is now invited to present a defence to a new mode of liability without knowledge of the factual basis and supporting evidence. No accused should be placed in such a situation and the Statute and Rules go far in guaranteeing that it does not happen. This is a difficult area and renders the defence on behalf of the accused, once again, vulnerable to self-incrimination, in violation of the accused's right not to be compelled to confess guilt, under article 67(1)(g). Indeed, any submissions the defence will make in response to the vague new allegations can be used against Germain Katanga in a finding of guilt on the basis of article 25(3)(a) or (d).

17. Had Katanga been charged under article 25(3)(d) from the outset, the Prosecutor would have had to provide sufficient details about Katanga's alleged liability in respect to each of the ingredients of article 25(3)(d). The Prosecutor would have had to give specific information about the group, the nature of the group's common purpose, Katanga's relationship with this group and the alleged role he performed in contributing to the crimes committed by this group as part of its common purpose. The Pre-Trial Chamber

[20] See also Dissent, para. 22.

would have assessed the evidence in light of the allegations and defence responses. It would then have confirmed, in part or in whole or not at all, the allegations and provided significant details about the law and facts under article 25(3)(d). For over a year before the commencement of the trial, Katanga would thus have been in possession of a detailed document setting out both the legal ingredients of the mode of liability and the factual allegations that are matched with the ingredients. In the present situation, instead, the accused merely received five paragraphs, with vague references, in a decision issued over a year after the end of the presentation of the evidence.[21] By contrast, 98 pages of the confirmation decision dealt specifically with the particulars of the charges under article 25(3)(a).

18. That the Notice Decision is imprecise in indicating the evidentiary basis for the proposed altered mode of liability is also apparent from the Appeals Chamber's Decision on Regulation 55, in which the majority indicates that it "neither knows the precise nature of the recharacterisation that may be made nor the evidence on which the Trial Chamber may rely in relation thereto".[22] The majority further notes that the Trial Chamber's Decision "does not provide much detail, for instance, in relation to the "group of persons acting with a common purpose".[23]

19. The dissenting Appeals Chamber opinion emphasises the lack of clarity in the Trial Chamber's Notice Decision, stating it should have led to a reversal of the decision. Amongst other things: "A decision giving notice of a possible legal re-characterisation must be as specific and precise as feasible as to both the legal and factual boundaries of the envisaged change, including by reference to all relevant evidence. In the absence of such specific and precise information, it is not clear what meaningful submissions could now be made by Mr Katanga."[24]

20. The facts and circumstances on which the Chamber intends to rely in assessing Katanga's criminal liability under article 25(3)(d) appear also to be unclear to the prosecution and the victim representatives. In their responses to the defence appeal, both the prosecution and the victim representatives argued that the defence submissions in respect to the altered facts and circumstances are premature because "at this stage it is impossible to

[21] *Supra* note 1, paras. 26-30.
[22] Appeals Chamber's Judgment, para. 95.
[23] Appeals Chamber's Judgment, para. 102.
[24] ICC-01/04-01/07-3363, Dissenting Opinion of Judge Cuno Tarfusser to Appeals Chamber's Judgment, para. 25; see also para. 74.

discern whether the proposed re-characterisation exceeds the facts and circumstances included in the charges".[25] The prosecution continues, stating that "[o]nly after the Chamber's Article 74 decision is delivered will it be possible to determine whether and how it re-characterized any of the pleaded facts and circumstances".[26] The prosecution also submits that, "if the Chamber enters a conviction, any arguable violation of the rights of the Appellant will further depend, among other matters, on the fact and circumstances that constitute the basis of the conviction, as well as on the manner in which the Chamber assesses the evidence".[27] It is, submits the defence, inappropriate for an accused to have to wait to read the final judgment to have a clear view of the case he faced.

21. Inherent in these prosecution submissions is a shared appreciation that there is, at present, a lack of clarity regarding the factual basis on which the Chamber envisages a potential conviction of Katanga under article 25(3)(d). Where the parties disagree is the moment that the defence should be made aware of this factual basis. The defence submits that it is entitled to receive such details before any verdict on article 25(3)(d). If, as the prosecution suggests, the defence should simply wait for the verdict to know finally the facts on which the Chamber intends to rely in assessing Katanga's liability under article 25(3)(d), Katanga's rights spelled out in Regulation 55(3) would be meaningless. The preparation of a defence to a new mode of liability in accordance with Regulation 55(3) and article 67(1)(b), which may include the calling or re-calling of witnesses, can only be effective if the facts underlining the new mode of liability are known in sufficient detail.

22. In this regard, both the Trial Chamber and the Appeals Chamber have emphasized the importance of identifying the facts "with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.»[28]

[25] ICC-01/04-01/07-3347-Corr, Corrigendum to "Prosecution Response to Defence 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", 22 January 2013, para. 49. *See also* ICC-01/04-01/07-3348, Observations du représentant légal sur le document déposé par la Défense à l'appui de son appel contre la Décision de la Chambre de première instance II n° 3319 (mise en oeuvre de la Norme 55 du Règlement de la Cour), 25 January 2013, paras 25-6 (« Legal representative Nsita' submission on the appeal»); ICC-01/04-01/07-3349, Observations du Représentant légal des victimes enfants soldats sur le mémoire de la Défense à l'appui de l'appel de la « Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges contre les accusés », para. 21 (« Legal representative Gillissen' submission on the appeal»).
[26] *Id,* para. 49. *See also* Legal representative Nsita' submission on the appeal, paras 25-6; Legal representative Gillissen' submission on the appeal, para. 21.
[27] *Id,* para 46.
[28] *Prosecutor v. Lubanga,* ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2012, fn. 163. See also *Prosecutor v. Katanga*

23. By comparison, in the *ad hoc* tribunals stringent requirements have been imposed on the prosecution in providing particulars in support of an alleged joint criminal enterprise (JCE), which, to a degree, can be compared with the 25(3)(d) liability.[29] It has been held

and Ngudjolo, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, para. 22, describing the purpose of the Pre-Trial Chamber as enabling "the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused." See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-522, Decision on the content of the updated docunent containing the charges, 28 December 2012, para. 35, according to which "the accused has the right to be informed "in detail" of the content of the charges. This enables him to meaningfully prepare his defence."

[29] See, *inter alia,* Linda Engvall, The Future of Extended Joint Criminal Enterprise - Will the ICTY's Innovation Meet the Standards of the ICC?, 76 Nordic J. Int'l L. 241 2007, p. 257: "When searching for the future of JCE, the terms used in Article 25 cause confusion. Both the terms "common purpose" in 25(3)(d) and "jointly" in 25(3)(a) could refer to JCE. Learned scholars have had different and contrasting ideas on which provision will cover JCE, although most scholars seem to believe that Article 25(3)(d) is the closest provision to encompass it."
Orlovsky, Katharine, International Criminal Law: Towards New Solutions in the Fight against Illegal Arms Brokers [notes], 29 Hastings Int'l & Comp. L. Rev. 343 (2005-2006), http://www.heinonline.org/HOL/Page?handle=hein.journals/hasint29&div=24&collection=journals: "The common purpose doctrine in the Rome Statute largely corresponds to JCE. JCE 1 and most types of JCE 2 will fit within 25(3)(d)(i), which requires shared intent. JCE 3, however, may "fall outside the ambit of the ICC regime.""
Oberg, Marko Divac, Fact-Finding without Facts from the Perspective of the Fact-Finder [article] American Society of International Law Proceedings, 105 Am. Soc'y Int'l L. Proc. 319 (2011), http://www.heinonline.org/HOL/Page?handle=hein.journals/asilp105&div=49&collection=journals : "In the International Criminal Court (ICC), however, it is not clear that JCE III exists. Article 25(3)(a) of the Rome Statute sets forth modes of co-perpetration or indirect perpetration, but those appear to be narrower than JCE III. Another possibility is Article 25(3)(d), which asserts jurisdiction over a person who "[i]n any other way contributes to the commission or attempted commission" of a crime "by a group of persons acting with a common purpose." Although the Pre-Trial Chamber has stated that this provision is "closely akin" to JCE, Article 25(3)(d) seems to be more restricted than extended JCE, given that the contribution to the crime must be made either "with the aim of furthering" the group's criminal activity or "in the knowledge of the intention of the group to commit the crime," a higher mens rea than that required for JCE m. Accordingly, it appears that the Rome Statute does not allow the ICC to import extended JCE doctrine."
Fletcher, George P., Ohlin, Jens David, Reclaiming Fundamental Principles of Criminal Law in the Darfur Case [article], 3 J. Int'l Crim. Just. 539 (2005), http://www.heinonline.org/HOL/Page?handle=hein.journals/jicj3&div=46&collection=journals : "We contend that the doctrine of joint criminal enterprise as developed in Tadic should have limited application before the ICC, which is governed by the Rome Statute's Article 25(3)(d)-a more precise statutory provision than the judicially created doctrine of joint criminal enterprise."
Milanovic, Marko, Odd Couple, An [article], 5 J. Int'l Crim. Just. 1139 (2007), http://www.heinonline.org/HOL/Page?handle=hein.journals/jicj5&div=103&collection=journals : "Furthermore, as with superior responsibility, the STL Statute's provision on JCE, Article 3(1)(b), appears to be based on that of the Rome Statute, specifically Article 25(3)(d). Yet, it is not even clear that the text of the Rome Statute actually allows for JCE3, even though it is to be expected that the ICC will conclude that it does."
Ambos, Kai, Joint Criminal Enterprise and Command Responsibility [article], 5 J. Int'l Crim. Just. 159 (2007), http://www.heinonline.org/HOL/Page?handle=hein.journals/jicj5&div=17&collection=journals: "Thus, the only form of participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute. In fact, the Tadic Appeals Chamber determined that Article 23(3)(d) ICC Statute contains a 'substantially similar notion' and 'upholds' the JCE doctrine, yet, this view suffers from a lack of differentiation among the categories of JCE created by the same decision. While JCE I constitutes, as shown above, a form of co-perpetration within the meaning of Article 25(3)(a) 2nd alternative ICC Statute, JCE II and III are not included in Article 25(3)(d) at least for two reasons."
Deborah Bayleh, Six Degrees of Separation-Canadian Accessory Liability in Afghan War Crimes, 20 Dalhousie J. Legal Stud. 61 2011, p. 88: "Article 25(3)(d). The use of the familiar phrase "common purpose" suggests that this provision is the Rome Statute's version of the international complicity doctrines of conspiracy, criminal organizations and JCE. Even the ICC Pre-Trial Chamber held in Lubanga that the concept defined in Article 25(3)(d) is "closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY."

that the JCE is a material fact, and its nature and time period must be pleaded in the indictment.[30] The contents of the common purpose of the JCE must also be clearly set out.[31]

24. Moreover, amongst others in the ICTR case of *Karemera et al*, the Chamber held that, in order to understand the charges against him, the accused is entitled to know the role he played and with whom he is alleged to have participated in the JCE.[32] The accused must further be informed of the acts performed by his alleged co-perpetrators, subordinates or accomplices.[33] While it may not be possible to name all members of the joint criminal enterprise due to the scale of the events, the prosecution is required to indicate whether the names of additional members are known or unknown;[34] and to what categories these persons belonged.[35]

25. These details must be set out in the indictment, failing which it is defective. Such defects may be cured only where the prosecution provides the accused with "timely, clear, and consistent information detailing the factual basis underpinning the charge".[36]

Gunel Guhiyeva, THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION, 5 Eyes on the ICC 49 2008-2009, pp. 80, 84: "The Pre-Trial Chamber in the Lubanga case characterized liability arising under Article 25 (3)(d) as "a residual form of accessory liability.' As long as Article 25(3)(c) already covers contribution which "otherwise assists" in the commission of a crime, the borderline between two provisions (Articles 25(3)(c) and (d)) seems to be vague.' (…) Thus, the conclusion can be reached that, while it is relatively easy to determine the "place" of JCE I under the Rome Statute, whether and to what extent JCE II and III are also covered by this instrument is a difficult question that remains to be answered by the Court through further interpretation of Article 25(3)."

Kevin Jon Heller, Lubanga Decision Roundtable: More on Co-Perpetration, http://opiniojuris.org/2012/03/16/lubanga-decision-roundtable-more-on-co-perpetration/: Scholars are divided concerning the correct interpretation of Article 25(3)(d). Cassese, Eser, and Werle agree with me; Jens and both the Pre-Trial Chamber and the Trial Chamber do not, insisting that Article 25(3)(d) is functionally equivalent to JCE I.

[30] *Prosectutor v. Dordevic*, Decision on Form of Indictment, April 3, 2008, para. 9; Krnojelac, Decision on Form of Amended Indictment, May 11, 2000; also see Prosecutor v Ntagerura et al, Judgement February 25, 2004, para. 34; Prosecutor v Prlic et al, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, July 22, 2005, para. 11; Prosecutor v Boskoski & Tarculovski, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment, November 1, 2005, para. 30.

[31] *Prosecutor v Pavkovic et al*, Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment, July 8, 2005, para. 28.

[32] *Prosecutor v Karemera et al*, Decision on Defects in the Form of the Indictment, August 5, 2005, para. 19. Also see: *Prosecutor v Prlic et al*, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, July 22, 2005, para. 27; *Prosecutor v Pavkovic et al*, Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment, July 8, 2005, para. 25.

[33] *Prosecutor v Karemera et al*, Decision on Defects in the Form of the Indictment, August 5, 2005, para. 19.

[34] *Prosecutor v Karemera et al*, Decision on Defects in the Form of the Indictment, August 5, 2005, para. 20.

[35] *Prosecutor v Pavkovic et al*, Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment, July 8, 2005, para. 26.

[36] *Prosecutor v. Muvunyi*, Appeal judgment, August 29, 2008, para. 20; *Prosecutor v. Kupreskic et al*, Appeal judgment, October 23, 2001, para. 114; *Prosecutor v. Seromba*, Appeals Chamber Judgement, March 12, 2008, para 100; *Prosecutor v. Simba,* Appeals Chamber Judgement, November 27, 2007, para. 64; *Prosecutor v. Muhimana,* Appeals Chamber Judgement, May 21, 2007, paras. 76, 195, 217; *Prosecutor v. Gacumbitsi,* Appeals

26. The defence is cognizant that the *ad hoc* tribunals differ from the ICC in many ways – for instance, the *ad hoc* tribunals have not incorporated any legal provision similar to Regulation 55 and the ICTY and ICTR jurisprudence must be viewed in this context. Nonetheless, it is noteworthy that the statutory fair trial rights of the accused are very similar, including that an accused before the ICC has a similar right to « timely, clear, and consistent information detailing the factual basis underpinning the charge ».[37]

Article 25(3)(a) and article 25(3)(d) are mutually exclusive

27. Liability as a principal under 25(3)(a) and accessorial liability under article 25(3)(d) are mutually exclusive. The culpability of the accused is personal with regard to the former and not derived, as it is with regard to the latter.[38] A finding of responsibility of an accused as a principal thus "renders moot" further questions of accessorial liability, including that provided for in article 25(3)(d):

> If the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are jointly responsible as principals for having committed the crimes listed in the Amended Document Containing the Charges through their subordinates, such a finding renders moot further questions of accessorial liability. This means that the Chamber will not consider other forms of accessorial liability provided for in article 25(3) (b) to (d) of the Statute or the alleged superior responsibility of the two suspects provided for in article 28 of the Statute.[39]

28. In addition to this finding by the Pre-Trial Chamber in the present case, the Trial Chamber in *Ruto* held similarly that "[a] person cannot be deemed concurrently as a principal and

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Chamber Judgement, July 7, 2006, para. 49; *Prosecutor v. Ntagerura et al.* Appeals Chamber Judgement, July 7, 2006, paras. 28, 65; *Prosecutor v. Bagosora et al*, Decision on Kabiligi Request for Particulars of the Amended Indictment, September 27, 2005, para. 5; Prosecutor v. Bagosora et al, Decision on Exclusion of Testimony Outside the Scope of the Indictment, September 27, 2005, para. 3.

[37] See Article 67(1)(a) and supra, footnote 21.

[38] *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, Separate Opinion of Judge Shahabuddeen ("Separate Opinion of Judge Shahabuddeen (Gacumbitsi)"), para. 44, referring to G. P. Fletcher, *Rethinking Criminal Law* (Oxford, 2000), p. 642, and Andrew Ashworth*, Principles of Criminal Law,* 2nd ed. (Oxford, 1995), pp. 410, 415, 439 and 441. *See* also Separate Opinion of Judge Shahabuddeen (Gacumbitsi), para. 45 ("The object of co-perpetratorship theory is to establish a juridical link which would make the accused liable for the crime on the basis that he had personally committed it. The link rests on the view that he would personally have "committed" the crime if it could only have been committed on fulfilment by him of his assigned role in the group; on that reasoning, it could be said that he was in "control" of the commission of the crime even though the actual crime was in fact perpetrated by another member or other members of the group. He could therefore be said to be personally linked to the commission of the crime").

[39] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-716-Conf, *Decision on the confirmation of charges*, 26 September 2008, para. 471.

an accessory at the same time."[40] Judge Shahabuddeen has also commented in this regard,

> […] *Tadić* referred to co-perpetratorship but did not adopt it; presumably the case recognised that both theories could not be adopted at the same time. As has been noticed, the contribution of an accused to a [joint criminal enterprise] does not have to be a *sine qua non* of the commission of the crime. Indeed, the contribution does not have to be substantial, as it has to be in the case of aiding and abetting. By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would "ruin" the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a *sine qua non.* Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.[41]

29. Judge Shahabbuddeen referred, *inter alia*, to the dissenting opinion of Judge Anzilotti in *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, according to whom it "is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences [...] [E]ither the contradiction is only apparent [...] or else one [rule] prevails over the other […]."[42]

30. It follows, given in particular the dismissal by the *Katanga* Pre-Trial Chamber of Article 25(3)(d), that the Defence cannot be said to have foreseen a wholly different mode of liability, whether based or not on the same material facts.[43] Nor indeed, could it thus have conducted its case, through its investigations, its questioning of witnesses, and in its written submissions, on the basis that Mr. Katanga was deemed by the Chamber throughout the duration of the trial as a principal, and – in addition – on the basis of a possible re-characterisation under Article 25(3)(d)(ii), as an accessory to the same crimes. That a re-characterisation to Article 25(3)(d)(ii) was not reasonably foreseeable to the Defence, and specifically, in the absence of timely notice by the Majority, violates the rights of Mr. Katanga under 67(1)(a),[44] and affects the fairness of the proceedings. Issues of fairness will be address further below.

[40] *Prosecutor v. Ruto et al*., ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 284, referring to *Prosecutor v. Ruto et al*., Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1, para. 36.
[41] Separate Opinion of Judge Shahabuddeen (Gacumbitsi), para. 50. Footnote omitted.
[42] Separate Opinion of Judge Shahabuddeen (Gacumbitsi), para. 50, referring to *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 90, and see, *ibid*., at p. 105 per Judge Urrutia, also dissenting. *See* also Judge Abi-Saab in *Prosecutor v. Tadić,* (1994-1995) 1 ICTY JR 529, where he took a position similar to that taken by Judge Anzilotti.
[43]
[44] *See* also Dissent, para. 26.

General observations on Article 25(3)(d)

31. Article 25(3)(d) is the most controversial mode of liability in the Statute. The inclusion of this provision "gave rise to divergent views" in the words of the drafters.[45] While stressing the need to find a "formula acceptable to all […] before inclusion in the statute",[46] it was very hard in reality for the delegations to agree on a definition of some type of common purpose liability.[47] The provision eventually adopted leaves open many questions yet to be answered.

32. The one thing that appears clear is that article 25(3)(d) incorporates an accessory liability mode. Indeed, Pre-Trial Chambers I and II confirmed that article 25(3)(d) constitutes a "residual form of accessory liability".[48] Similarly, Werle noted that "the wording of the provision clearly reflects the difference between commission, as liability for the crime as the result of one's own conduct, and all other modes of participation, as accessory liability for a crime committed by someone else" and thus suggested (d) to be part of the latter category.[49]

33. It is noteworthy that there is no definite finding yet on the legal ingredients of article

[45] U.N.G.A. Preparatory Committee on the Establishment of the International Criminal Court, Decisions Taken by the Preparatory Committee at its session held from 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.5, 12 March 1997, pages 21-22; *see also* U.N.G.A., Preparatory Committee on the Establishment of the International Criminal Court, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13, 4 February 1998, pages 52-53;
[46] Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996, Proceedings of the Preparatory Committee, Draft Summary, Doc. No. A/AC.249/CRP.3/Add.1, 8 April 1996, para. 15. [OTP2005/000009582.]
[47] Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996, Proceedings of the Preparatory Committee, Draft Summary, Doc. No. A/AC.249/CRP.3/Add.1, 8 April 1996, paras 3, 14. [OTP2005/000009582.] U.N.G.A., Preparatory Committee on the Establishment of the International Criminal Court 25 March-12 April 1996, Summary of the Proceedings, U.N.Doc. A/AC.249/1, 7 May 1996, paras. 88-89; Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March-April and August 1996, G.A. Official Records, 51st Sess. Supp. No. 22 (A/51/22), 13 September 1996, para. 191.
[48] *Prosecutor v. Mbarushimana,* ICC-01/04-01/10-1, Decision on the Prosecutor's Application for Warrant of Arrest against Callixte Mbarushimana, 11 October 2010, ("Mbarushimana Arrest Warrant Decision"), para. 38; ICC-01/04-01/10-465-Red, (PTCI) Decision on the confirmation of charges, paras 278-279; *Prosecutor v. Lubanga,* ICC-01/04-01/06-803-tEN, (PTCI) Decision on the confirmation of charges, 14-05-2007, para. 337; *Prosecutor v. Ruto & all,* ICC-01/09-01/11-373, (PTCII) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 354 ("[…] Article 25(3)(d) of the Statute begins with the phrase "[i]n any other way contributes to the commission or attempted commission of the crime". Thus, the provision must be understood as a residual mode of accessorial liability, which is triggered only when subparagraphs (a)-(c) are not satisfied. This particular interpretation has also been followed by Pre-Trial Chamber I in its latest decision under article 61(7) of the Statute in the case of the *Prosecutor v. Callixte Mbarushimana*.[…]").
[49] Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, 5 J. Int'l Crim. Just. 956 2007, p. 957.

25(3)(d). In both the *Ruto* and the *Mbarushimana* cases, different Pre-Trial Chambers examined its ingredients and expressed differing views.[50] In these cases, the defence and the prosecution, respectively sought leave to appeal the confirmation decision on issues relating to interpretation issues of article 25(3)(d).[51] A request for leave to appeal was granted in the *Mbarushimana* case,[52] but the Appeals Chamber did not consider the appeal on its merits.[53] Consequently neither a Trial Chamber nor the Appeals Chamber has ruled on this mode of liability,[54] leaving the definition of the legal ingredients open to debate. While this may be an inherent problem with a 'new' court, the fact remains that it is a further factor to be taken into account in the present case as it presents a further and difficult obstacle to the accused late in the trial process.

34. The terminology used in article 25(3)(d) is ambiguous. Article 25(3)(d) provides as follows:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;

35. On its plain reading, article 25(3)(d) appears to criminalise any "other" contributions to statutory crimes committed by a group of persons acting with a common purpose that cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting under Articles 25(3)(b) or (c).[55] The Pre-Trial Chamber in *Lubanga* gave a similar interpretation to article 25(3)(d).[56]

36. Consequently, article 25(3)(d) risks being relied upon as a "catch-all" mode of liability

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[50] ICC-01/09-01/11-373, *Prosecutor v. Ruto & all*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012; ICC-01/04-01/10-1, *Prosecutor v. Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest Mbarushimana, 11 October 2010; ICC-01/04-01/10-465-Red, *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011.

[51] ICC-01/09-01/11-376, *Prosecutor v. Ruto & all*, Defence Application for Leave to Appeal the Decision on the Confirmation of Charges, 30 January 2012, paras 45-46. ICC-01/04-01/10-499-Corr (OA 4); *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-480, Prosecution's Application for Leave to Appeal the 'Decision confirming the charges', 27 December 2011.

[52] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-487, Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the confirmation of charges', 1 March 2012.

[53] ICC-01/04-01/10-514 30-05-2012, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", paras. 50, 65-66, 68-69.

[54] *Id*, paras. 65-69.

[55] Jens David Ohlin, *Joint Criminal Confusion* 12 New Crim. L. Rev. 406 (2009), p. 411.

[56] *Prosecutor v. Lubanga,* ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 14 May 2007, para. 337.

and has been much criticized for that reason.[57] In particular, several authors have highlighted the "lack of clarity" of this disposition,[58] being uncertain as to which level of intent is required,[59] and whether 25(3)(d) corresponds to the concept of JCE used before the *ad hoc* tribunals, and if so which one (JCE I, II, III).[60] One author states: "I am completely confident that no one can be completely confident that his or her interpretation [of this article] is 100 percent correct";[61] considering that "it is impossible to construct a coherent and non-redundant interpretation of Article 25(3)(d) on group complicity", he argues in favour of its amendment,[62] the doctrine underlining the danger raised by such a vague disposition which can catch all types of conduct.[63]

37. The Chamber should therefore give full consideration to the fact that the mode of liability it intends to rely on, after deliberation, is highly controversial. In the event that the Chamber decides to change the liability mode, it should construe the legal ingredients of article 25(3)(d) narrowly. Otherwise, any finding of guilt based on this controversial and undefined 'catch all' mode of liability, imposed at such a late stage of the proceedings, would be highly contentious.

38. Article 22(2) requires that the "definition of a crime shall be strictly construed and shall not be extended by analogy." This provision also states that, "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." Cassese states that article 22(2) requires the law to be "sufficiently clear and precise to enable the accused to know what it entails, and that the accused was able to be

[57] For criticism in respect of Article 25(3)(d) liability, see Vincenzo Militello, The Personal Nature of Individual Criminal Responsibility and the ICC Statute, JICJ 5 (2007) 941-952, at p. 950; also see: Gerhard Werle: Individual Responsibility in Article 25 ICC Statute, JICJ 5 (2007) 953-975, at p. 970; Albin Eser, Individual Criminal Responsibility in The Rome Statute of the International Criminal Court: A Commentary, pp. 767, 802. See also, K. Ambos, Article 25: Individual Criminal Responsibility, in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, (Hart Publishing 2nd ed. 2008) at pp. 743, 754, 759; and Ohlin, Joint Criminal Confusion, p. 417.

[58] Deborah Bayleh, Six Degrees of Separation-Canadian Accessory Liability in Afghan War Crimes, Dalhousie Journal of Legal Studies, Vol. 20, 2011, p. 88.

[59] Deborah Bayleh, *id*, p. 88-91; Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 417-418; Gunel Guhiyeva, 'THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION, 5 Eyes on the ICC 49 2008-2009, p. 81.

[60] Deborah Bayleh, *id*, p. 88-91; Gunel Guhiyeva, *id*, p. 80-84; Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 410-415; Linda Engvall, The Future of Extended Joint Criminal Enterprise - Will the ICTY's Innovation Meet the Standards of the ICC?, 76 Nordic J. Int'l L. 241 2007, pp. 247, 257.

[61] Jens David Ohlin, ICC Decision on Complicity for Collective Crimes, 21 December 2011, http://www.liebercode.org/2011/12/icc-decision-on-complicity-for.html**.**

[62] Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 406.

[63] See Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. Int'l Crim. Just. 69 2007, p. 78.

aware of its existence."[64]

39. Although article 25(3)(d) concerns a mode of liability, and not a crime, it criminalises conduct which would otherwise not be in violation of the Statute. Adopting a broad rather than a narrow definition of the legal ingredients of article 25(3)(d) would have a similar effect as adopting an equally broad definition of any of the statutory crimes: it determines the bounds of international criminal conduct. Article 22(2) should be equally applicable to article 25(3)(d) as to articles 5 – 8 of the Rome Statute. This accords with Cassese's view that the principle of legality set out in article 22 applies both to the crimes and to the modes of liability.[65] Accordingly, all ambiguities left under article 25(3)(d) must be resolved in favor of the accused, as is also required by the civil law principle of *in dubio pro reo*.[66]

40. In addition, persons should be held accountable for their own criminal conduct only, and not be found guilty on the basis of liability by mere "association".[67] In this regard, it is worth noting that the drafters explicitly discussed and rejected the criminalization of membership of a group, no matter how criminal.[68] As one commentator has stated, "Judges need to be careful that approaches to accomplice liability […] do not degenerate into a form of collective guilt."[69] This would also infringe the gravity threshold under article 17(1)(d) of the Rome Statute, which includes consideration for the role a person played in the organisation or group.[70] Similarly, the Prosecutor's policy to target « those

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[64] Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford Univ. Press 2009), 91-92.
[65] *Id*, 91-92.
[66] *In dubio pro reo* is an old Latin term which is used in civil law traditions. See See M. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U Penn L Rev 506, 541 (1972–73).
[67] *Prosecutor v Brdjanin*, Appeal Judgement, 3 April 2007, para. 428 (also 431).
[68] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. III, Doc. A/CONF.183/13, page 258. *See also* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Committee of the Whole, Summary Record of the 1st Meeting, A/CONF.183/C.1/SR.1, 20 November 1998, for the recorded discussion of this proposal (Paragraphs 5 and 6 (criminal organizations)
[5. When the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.
6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in article 76, and the relevant provision of articles 73 and 79 are applicable. In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State Party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it.])
[69] William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge University Press, 2007), 216. *See also* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problems of Collective Guilt* 111 Yale L. J. 1499 (2002).
[70] ICC-01/04-520-Anx2, Decision on the Prosecutor s Application for a Warrant of Arrest, Article 58, 10 February 2006, paras 48, 50-54. *See also* 53(1)(c), 53(2)(b)(c), and Preamble [4], arts 1, 5 of the Rome Statute. For further analysis, *see* Ray Murphy, "Gravity Issues and the International Criminal Court (2006) 17 Criminal

who bear the greatest responsibility » takes account of the role a person played in the commission of the alleged crimes. The concept of gravity with regard to article 17 "should not be exclusively attached to the act that constituted the crime", the prosecution explains, "but also to the degree of participation in its commission."[71] The gravity element, or lack of it, may become significant in this case. Article 25(3)(d) must also be interpreted in the light of the preamble which directs the focus of the Statute to be 'the most serious crimes of concern to the international community'. It is implicit in this notion that the aim is not to target very indirect and remote contributions to crimes.

41. In line with these principles, the defence respectfully requests the Chamber to give weight to the defence propositions on the legal ingredients of article 25(3)(d) set out below. In addition, the defence seeks to demonstrate that there is insufficient evidence to establish Katanga's guilt under article 25(3)(d). In the event that the Chamber decides to change the liability mode, the defence submits that it cannot convict Germain Katanga under 25(3)(d).

<u>Article 25(3)(d): Legal and Factual Observations</u>

42. In the defence submission, in order to hold Katanga liable pursuant to article 25(3)(d), the Prosecutor must prove the following elements beyond a reasonable doubt:[72]

(i) One or more of the crimes charged have been attempted or committed;
(ii) Katanga made a contribution "[i]n any other way";
(iii) 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; <u>and</u>
(viii) The contribution was made in either of the following ways:

Law Forum 281, 312; Prosecutor v. Mbarushimana, ICC-01/04-01/10-T-8, 20 Sept 2011, pp. 25-26. The Rome Statute does not define the gravity treshold but article 53(2)(c) is helpful in that it allows the Prosecutor to consider a person's role in the alleged crime in determining whether it is in the interests of justice to prosecute that person: "2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: … (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime … the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

[71] ICC-OTP (2003), Paper on Some Policy Issues Before the Office of the Prosecutor, pp 3, 6-7, available at <u>http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf</u>

[72] ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Mbarushimana, 11 October 2010, para. 39. See also ICC-01/09-01/11-373, *Prosecutor v. Ruto & all,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 351.

- 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.

(i) One or more of the crimes charged must be attempted or committed

43. With regard to whether the crimes charged were in fact committed, nothing has changed with the potential change of modes of liability. The defence refers to its submissions in respect of each of the crimes charged set out in the defence closing brief.[73]

(ii) Contribution "[i]n any other way"

Legal Definition

44. Both the Prosecution and Legal Representative of the victims of Bogoro suggest that any contribution to the crime is sufficient to satisfy article 25(3)(d) provided that there is a link between the act or conduct of the accused and the commission of a crime by a group of persons acting with a common purpose.[74] In light of the mandate of the ICC to try only "the most serious crimes"[75], the defence submits that this is a highly controversial proposition and requests the Chamber not to follow it. It is submitted that what is required is a real contribution[76] in the sense that what is done must make, or in the case of an attempt, be capable of making, a tangible difference to the successful commission of the crimes.

45. In *Mbarushimana,* the Pre-Trial Chamber held that the contribution "must at least be significant."[77] The Prosecutor sought and was granted leave to appeal this issue. The Prosecutor alleged that the Pre-Trial Chamber erred when finding that, under article 25(3)(d), the contribution of the person must be "significant". However, the Appeals

[73] ICC-01/04-01/07-3266-Conf-Corr2, Second Corrigendum to the Defence Closing Brief, 23 April 2012 ("Defence Brief"), paras 745-1110.
[74] ICC-01/04-01/07-3367, Prosecution's observations on Article 25(3)(d), 8 April 2013, paras. 11-13; ICC-01/04-01/07-3365, Observations du représentant légal quant à la responsabilité de G. Katanga en vertu de l'article 25-3-d) du Statut, 8 April 2013, paras. 19-23.
[75] Article 5 of the Statute.
[76] Notice Decision, para 34
[77] *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 283 ("In view of the foregoing considerations, the Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise. On the other hand, given the "residual" nature of article 25(3)(d) and its focus on group criminality, the Chamber finds that a contribution to the commission of a crime by a group acting with a common purpose be at least significant"). *See id*, paras 276-285.

Chamber declined to consider the merits of this ground of appeal, because one critical constitutive element of the form of responsibility enshrined under article 25(3)(d) was, according to the Pre-Trial Chamber, not met, *i.e* there were no "substantial grounds to believe that the FDLR leadership constituted a 'group of persons acting with a common purpose' within the meaning of article 25(3)(d)".[78] Therefore the alleged error would not have materially affected the outcome of the appeal and the Appeals Chamber dismissed this ground.[79] The level of contribution required under article 25(3)(d) remains unsettled and is still to be determined by a Trial Chamber or the Appeals Chamber.

46. In the case of *Sang*, the defence argued that article 25(3)(d) requires the contribution "[i]n any other way" to be substantial. The Pre-Trial Chamber rejected this argument, highlighting that 25(3)(d) liability "is a catch all form of liability",[80] which is triggered only when subparagraphs (a)-(c) are not satisfied. In order not to disturb the hierarchy between the different modes of participation under article 25(3) – (a) being on the top and (d) being on the bottom of that hierarchy – the Kenya Pre-Trial Chamber held that the contribution element under to article 25(3)(d) "is satisfied by a less than "substantial" contribution, as far as such contribution results in the commission of the crimes charged".[81] The defence was not granted leave to appeal this decision. While the Pre-Trial Chamber conceded that the alleged issue – *ie* "Whether the Majority erred by failing to include any threshold for the required level of contribution by Mr. Sang under Article 25(3)(d)" - is of fundamental importance in terms of the confines of its reach under the Statute, it considered that the defence's argument was constructed on a misconception and misreading of the Chamber's decision: while it found that the contribution of Mr. Sang was satisfied "by a less than 'substantial contribution', as far as such contribution result[ed] in the commission of the crimes charged", nowhere in its findings on the facts had the Chamber found that Mr. Sang's contribution was not "significant".[82]

[78] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514 30-05-2012, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", para. 65 "[…] [T]he Pre-Trial Chamber found that a fundamental element of article 25 (3) (d) of the Statute, namely the existence of a group acting with a common purpose, had not been established. Even if the Pre-Trial Chamber had adopted a different interpretation of 'contribution' under article 25 (3) (d), it would not have confirmed the charges against Mr Mbamshimana. Accordingly, even if the Appeals Chamber would agree with the Prosecutor that the Pre-Trial Chamber erred in its interpretation of article 25 (3) (d) of the Statute [requiring the contribution as significant], it would not reverse the Impugned Decision because the error would not have materially affected the decision.").
[79] *Id*. 65-66, 68-69.
[80] ICC-01/09-01/11-373, *Prosecutor v. Ruto et al*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 354.
[81] *Prosecutor v. Ruto et al*., ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 354, 353-367.
[82] *Id*, paras 8, 48-54, p. 22.

47. The defence agrees with the Sang defence submissions that, to trigger liability under article 25(3)(d), the evidence must show that the contribution of the accused was substantial.[83] This follows from the fact that article 25(3)(d) is a form of accessory liability,[84] which should require the typical characteristics of accessory liability, that the "person's act had a substantial effect on the commission of the crime by someone else, while in the case of commission as a principal, the crime is ascribed as one's own conduct."[85]

48. A submission made at the *Mbarushimana* confirmation hearing,[86] was that article 25(3)(d) is expressed in a very similar fashion to article 25(3)(c).[87] Indeed, article 25(3)(c) refers to a person who « aids, abets or <u>otherwise assists</u> » in the commission or attempted commission of a statutory crime, while 25(3)(d) refers to a person who contributes to its commission or attempted commission « <u>[i]n any other way</u> » (emphasis added). Therefore, there would be no compelling reason to distinguish the level of contribution required under 25(3)(d) from that required under article 25(3)(c). Article 25(3)(c) has not yet been applied and defined in any of the ICC cases, but will most likely require a substantial contribution in the view of one commentator.[88] Such an interpretation would be most consistent with the interpretation of aiding and abetting given by the *ad hoc* tribunals.[89] It would also be in line with the gravity threshold mentioned above.[90]

49. In light of the Chamber's obligation to give a narrow interpretation to the elements of the 25(3)(d) mode of liability, the Chamber should impose the higher requirement - a 'substantial' contribution. In interpreting 'substantial', the Chamber is referred to the

[83] ICC-01/09-01/11-354, Joshua Arap Sang Defence Brief following the Confirmation of Charges Hearing, 24 October 2011, paras. 65-74.
[84] Mbarushimana Arrest Warrant Decision, para. 38; ICC-01/04-01/10-465-Red, (PTCI) Decision on the confirmation of charges, paras 278-279; *Prosecutor v. Lubanga,* ICC-01/04-01/06-803-tEN, (PTCI) Decision on the confirmation of charges, 14-05-2007, para. 337; *Prosecutor v. Ruto & all*, ICC-01/09-01/11-373, (PTCII) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 354.
[85] Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, 5 J. Int'l Crim. Just. 956 2007, p. 955.
[86] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8, 20 Sept 2011, p. 4-32. The submissions may merit a little more weight as they were made by Professor Kai Ambos.
[87] *Id,* at page 24.
[88] Albin Eser, *Chapter 20. Individual Criminal Responsibility in* Antonio Cassese, Paula Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, vol. I (Oxford Univ. Press 2002) 767-823, 800.
[89] *The Prosecutor v. Dusko Tadic*, Trial Chamber, Judgment, Case No. IT-94-1-T, 7 May 1997, Para. 689.
[90] See supra para. 40.. See also the oral arguments of Kai Ambos presented in: *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8, 20 Sept 2011, pp. 25-26.

definition given in the ICTY case of *Tadic*; "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed"[91] and was read to cover "all acts of assistance by words or acts that lend encouragement or support."[92] Easily exchangeable acts may not be considered substantial - that is acts or actors that can easily be replaced by others do not substantially contribute to the crime.[93]

50. If the Chamber is not persuaded by these arguments, the defence invites the Chamber to concur with the *Mbarushimana* Pre-Trial Chamber on this point. The defence requests the Chamber to adopt similar factors as those set out in *Mbarushimana* in evaluating on a case-by-case basis whether a contribution is significant. These factors include : « (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose ; (ii) efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes ; (iii) whether the person creates or merely executes the criminal plan (iv) the position of the suspect in the group or relative to the group ; and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed. »[94] These factors « are not a substitute for assessing the suspect's contribution to a crime, but they can assist in the assessment ».[95]

Application to Katanga

51. Applying the *Mbarushimana* criteria to Katanga's case, the defence submits that there is insufficient evidence to establish that Katanga made a substantial or significant contribution. Some of these criteria require further defence investigations. Thus far, the defence did not focus on these specific ingredients. Accordingly, the arguments and supporting evidence set out below are incomplete.

(i) The sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose

52. It is disputed that the plan to attack the UPC was unlawful or that the plan itself

[91] Albin Eser, *Chapter 20. Individual Criminal Responsibility in* Antonio Cassese, Paula Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, vol. I (Oxford Univ. Press 2002) 767-823, 800, *citing to* The Prosecutor v. Dusko Tadic, Trial Chamber, Judgment, Case No. IT-94-1-T, 7 May 1997, Para.689.
[92] *Id*.
[93] *Id*, 801.
[94] ICC-01/04-01/10-465-Red, para. 284.
[95] *Id*.

possessed a criminal purpose. It cannot be said that when the plan was first advanced by the APC or Adirodou, it possessed a criminal element. Bogoro was but part of a larger plan that was first mooted in November 2002. The Bogoro attack was itself part of a number of attacks that took place - as described by Katanga in his evidence and involving a number of UPC camps and contemporaneous attacks as far north as Mongbwalu and west to the Komanda-Irumu road.[96] Did they all have a criminal element? It was not explored as not then a relevant matter. When is the Bogoro part of the plan said to have acquired a criminal element if at all? And was Katanga necessarily aware that it had done so? The exact nature and composition of the attack was not something of which Katanga was necessarily aware. His knowledge was that an attack was to take place but he was unaware of the exact date of the attack. His belief was that the attack was under the authority of the APC – and as such would benefit from the authority of an army with professional content. The identity of the participants remains unclear. Katanga said he had doubts the attack would succeed in any event.[97]

53. If Katanga was present at meetings in Beni when general policy as to how to confront the UPC in Ituri was discussed, it does not demonstrate that he played other than a lawful role. Bogoro was never the focus of such plans, but incidental to them. The defence submits that Katanga made a contribution to a plan formulated and orchestrated by Kinshasa/Maison Militaire/EMOI, the APC, RCD-K/ML to regain control on behalf of the Republic of Congo of its Eastern Province of Ituri.[98] Any contribution he can be said to have made was made to a different group than that described in the decision confirming the charges.[99] The Chamber cannot find the group with a common purpose to mean the alliance between those associated with Kinshasa as this appears nowhere in the confirmation decision.[100] The Chamber did not make mention of this group in its Notice

[96] A. "….The road from Komanda to Irumu was involved as well as Chay, Ngadjo, there also had to be movement there. And in the north also from Mongbwalu, people had to move in that area as well as in Mahagi. So this was an operation that was planned to cover almost every area…". "There was also a base in Irumu, Nyankunde, Marabo, Ngadjo, Chay. And in the north, ever since the month of November the UPC had also conquered Mongbwalu. There was Bambu, Mokoro (* phon), Lipri. There were UPC camps in all those areas so it was important to attack them." T-325, p. 21.
[97] Defence Brief, para. 700, with reference to D2-300-T-318-pp.4-5, 16, 23-l.8-18, 32-l.13-21 (FRA-pp.4-5, 14-16, 20-21, 28-l.7-14)..
[98] Defence Brief, paras. 602-639.
[99] The Confirmation Decision refers to the hierachically organised groups constituted by the FNI -for Ngudjolo-, the FRPI -for Katanga- (paras 541-542, 543-544), and to the coalition FNI/FRPI (paras 240, 384, 411, 416, 418, 542). It refers to a common plan between Katanga and Ngudjolo (para. 548) and to their "joint control over the implementation of the plan, insofar as their essential overall coordinating roles gave to them, and only to them, the power to frustrate the implementation of the plan." (para. 561).
[100] The Pre-Trial Chamber did not make any findings regarding an eventual participation of EMOI, RCD-K/ML or APC in the Bogoro attack in the Confirmation Decision. More precisely, it makes no reference to the EMOI. There are one reference to the RCD-K/ML in fn 10 regarding the Bunia attack of 6 August 2002, and a reference

Decision but referred to the Ngiti combatants and commanders.[101]

54. Nor is his precise role in respect of weapons or delivery of weapons clear or adequately examined. It would be wrong to assert that Katanga was the supplier of the weapons that arrived in Aveba. That was the Government in Kinshasa with the assistance of their agents and personnel in Beni. Nor did Katanga receive and distribute those weapons. The weapons were received into the possession of the APC and distributed by them. From the time the APC arrived weapons were taken into their possession and they determined who received them.[102] The reason that weapons were delivered at Aveba was not Katanga's presence there, but rather that there was an airstrip.[103] Any arms Katanga received were for his group at Atele – and he asserts that none of that group went to Bogoro but remained in Aveba to follow Kasaki's proscription and to defend Aveba.[104] There is no sufficient evidence to show that Katanga controlled Aveba or access to Aveba at that time. Nor that he had control of the landing strip - Garimbaya of the APC was positioned there with his camp at Aero.[105] There is no evidence to demonstrate that Katanga could have prevented the delivery of weapons to Aveba at that time. In any event, a failure to act cannot constitute a contribution. The details of the exact position were not the subject of specific defence investigation or inquiry.

55. The defence submits that the purpose of the group consisting of the APC, RCD-KML and EMOI was legitimate: it was part of a national effort to regain the Eastern Territories that had fallen into the hands of foreign States and their agents – amongst them the UPC.[106] It was lawful and remains so. If their purpose went beyond legitimate war, Katanga was unaware. Katanga shared the assumption that most civilians in and around Bogoro had left the region.[107] Katanga was supported in that assumption by what he observed on his military mission to Bogoro with Blaise Koka on the 10th February 2003. During this

to the document entitled "*Déclaration politique sur la déconfiture de l 'UPC et les interférences négatives du RCD-ML dans les événements de l 'Ituri of 11 March 2003*" in fn 54, 554 and 557 but no information as to its role. There are one reference to the presence of APC soldiers in Bogoro in 2001 at para. 279 and fn 381, a reference to the participation of APC soldiers during the Nyankunde attack in September 2002 in fn 560, and a reference to discussions with APC soldiers about eventual delivery of weapons in fn 753, an that is all.

[101] Notice Decision, para. 27.

[102] D2-300-T-317-ENG, pp. 51 -53.

[103] Defence Brief, para. 654; D2-300-T-324-ENG-p.77.

[104] Defence Brief, paras 656, 679-681, 682-686, 1307; D2-300-T-317-ENG CT2 , pp51-53; D2-300-T-318-ENG CT, pp. 4-7.

[105] Defence brief, paras 577, 665.

[106] Defence Brief, paras. 605-619, 1157-1161

[107] Defence Brief, paras. 646, 648, 693, 775-777, 855-856, 1160-1161.

mission, he saw no civilians.[108] Soon after the Bogoro attack, the APC soldiers left Aveba and Katanga's coordinating role came to an end. It can therefore not be argued that he sustained his participation after acquiring knowledge of the criminality of the group's common purpose. The role played by Katanga on his own account - upon which the defence focuses – was described by him as 'coordinator' – but that was not fully explained and certainly not examined in the context of 25(3)(d). It was not a planning role. The defence addressed that role in its Closing Brief and, given that the section is relatively short, reproduces it here:

> ***The Role of Coordinator***
>
> 598. Returning to Beni, Katanga did not have a defined status in the FRPI which, as was discussed above, had a very lose structure with Adirodu as spokesman and his brother the coordinator in Beni. It is obvious, the defence submits, that Adirodu was manipulating the FRPI for his own political aims and ambitions and Mbusa's too. What is clear is that Adirodu, whose project the FRPI was, was not a man to share office – he wanted the running of the FRPI all to himself.
>
> 599. Katanga was certainly not 'President' as the FRPI did not have one at that stage. He says he performed the role of coordinator. The Prosecution scoff at this suggestion (their para. 592) but is it not in fact a perfectly reasonable statement to make? After all, there was an APC presence and it is highly probable the APC command were keen to retain control of them as far as they could, not to mention later presence of APC officers. There would have to be some coordination, between the combatants and those in Beni, and someone to coordinate. Ndjabu also described himself as having been 'coordinator'. Katanga said it was necessary to have someone who could liaise between the two groups and to make the combatants in Aveba understand that they were allies of the APC and that messages from Beni would be well received. Katanga would try to settle disputes between the APC and local combatants. Katanga placed his position as being between Mbadu and Kasaki. His status changed from 'commander of Aveba' to 'coordinator' at Aveba. (The Prosecutor says Katanga has 'perverted' the BCA acronym but it is difficult to see how the name change helps when it started off life as 'Bureau de combatants'). And the role of coordinator existed – as with Ndjabu, Sambidhu, and references in the *Manifeste* later to '*la création des postes de coordination stratégique ou antenne de representation.'* This latter metaphor says it all.
>
> 600. His role was also to mediate between the combatants and the population. His role as coordinator did not give him any military authority over the combatants. His role was to enable people to get on together. He would sometimes intervene when there were internal problems between combatants. Sometimes, Katanga succeeded in resolving such problems. Because he was young, he was not always listened and would ask Kasaki to assist. This role of coordinator was parallel or additional to his command of some of the combatants at Aveba, and the issue of his overall authority will be addressed later. Katanga said he was called many things by people at that time but he held no 'rank', displayed no rank and never introduced himself with a rank or function. The only change came at Tchey, when Kakado intervened in events in March 2003, as will be developed below.[109]

56. It is to be noted that Katanga gave relatively little detail of the role of coordinator in his examination-in-chief and was barely cross-examined on it. Also, most of the evidence as

[108] Defence Brief, paras 687, 693, 775, 856.
[109] Defence Brief, paras 598-600 (footnotes omitted).

to his explanation of the role of coordinator was given in response to the Judge's extensive questions on this issue right at the close of his evidence.[110]

57. The use of the word 'coordinator' should be approached with some care. It possesses no settled meaning, is not a rank, and was a word used solely by Katanga. The defence submits that his evidence of the role of 'co-ordinator' demonstrates a non- military role or function. It was not 'to coordinate' military operations such as the Bogoro attack for example. It was to prevent conflicts and problems arising as between the locals and the APC.

58. The role was distinct to the limited 'command' Katanga claimed to have over the 60 or so Atele fighters – those who had largely followed him from the BCA camp or elsewhere and were independent to those under the command of Mbadu at BCA or of Garimbaya at Aero.[111] It is to be noted that none of the Atele fighters left to attack Bogoro on the 24th but remained as part of the 'cleansing', under the proscription of Kasaki following the deaths of fellow Aveba fighters during the attack of the 10th of February, as well as to defend against Kisoro.[112]

59. Katanga had played a mitigating role in local affairs before – he gave the example of liaising between Kasaki and Chief Akobi.[113] Katanga had struck up a relationship with Kasaki.[114]

60. It is unclear why the word 'coordinator' was chosen by him. He said that there had not been one before and agreed he had made up the role himself.[115] He may have been influenced by Ndjabu because Ndjabu, who of course was not militia, had used the same term in Beni.[116]

61. Katanga described the role as 'it was someone to somehow bring together the combatants of Aveba and the APC soldiers'.[117]

PRESIDING JUDGE COTTE: (Interpretation) Somehow teach them to live together?

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[110] See T-324, pp. 65-91, and T-325, pp. 1-36.
[111] Defence Brief, para. 578, 668.
[112] See *supra*, para. 54.
[113] T-324, p.66.
[114] T-324, p 72.
[115] T-324, p. 77
[116] Defence Brief, para. 585.
[117] T-324, p. 77.

> A. Yes.
> PRESIDING JUDGE COTTE: (Interpretation) Because they had a common objective?
> A. Yes.[118]

62. That objective, the defence submits, was the plan established in November 2002 in Beni to advance on Bunia, of which the attack on Bogoro was but part but at that time remained to be specified. The specific attack plan was brought by Adirodou in mid-February.[119]

63. The role discussed in evidence was a non military role.

> PRESIDING JUDGE COTTE: (Interpretation) As coordinator -- you talked about your role as coordinator. Were you able to have authority, military authority over the men, over the combatants?
> THE WITNESS: (Interpretation) My function only enabled me to facilitate rapprochement.[120]
>
> PRESIDING JUDGE COTTE: (Interpretation) As coordinator?
> THE WITNESS: (Interpretation) Yes. As coordinator, I was only able to bring people close together. Combatants from Kaswara, for example, I could be there, and I tell them that, 'Before you receive any substantial assistance, you need to tell us your numbers and whether you are all together, and tell us about the number of weapons you have.' That was the kind of thing I did.[121]
>
> PRESIDING JUDGE COTTE: (Interpretation) And your work was to coordinate and bring people together. Is that the case?
> THE WITNESS: (Interpretation) Yes.[122]
>
> PRESIDING JUDGE COTTE: (Interpretation) […] Now, when you returned from Beni in December 2002, you told us that you then became the co-ordinator. Now, can you tell us once again and more precisely what the attributions of the co-ordinator were. Who and what were you co-ordinating? And I m sure you understand the difference there. Which people did you co-ordinate and what did you co-ordinate? What did you do in your capacity of co-ordinator?
> A. Yes, your Honour. When we returned to Beni, the mission was clearly defined. We were supposed to have APC units and then local combatants. From time to time there were differences between us. Because of the differences in training, we felt that the professionals were making fun of us. So this created minor conflicts. So, in order for me to become the coordinator we had to define or tell the combatants who were with us in Aveba that we were the allies of the APC soldiers who were with us. They were our friends, our -- those who supported us, our allies. And in case of problems, they would not abandon us. Furthermore, even though they were there, when, for example, there was a delegation from Beni that came to Aveba, they could live in APC houses, that is, in their camp. But each time they would need to carry out joint meetings and to assess the prevailing situation. They needed to know the needs of the combatants as well as those of the APC soldiers. That would make it possible for them to send joint reports. That is, bring together the combatants and our allies, the APC soldiers, and make it possible that messages coming from Beni, for example, should be well received by our local combatants through Kasaki.

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[118] T-324, p. 79.
[119] T-325, pp.20 -22.
[120] T-317, p. 31.
[121] T-317, p. 32.
[122] T-317, p. 32.

> PRESIDING JUDGE COTTE: (Interpretation) So if we understand ourselves well and if we talk in terms of mechanics, you had to put oil into the equipment for it to function well?
> A. Yes.[123]

64. Katanga continued in his evidence to provide examples of dealing with the 'sparks', the conflicts that might have existed between the combatants and the APC; he spoke of trying to resolve a problem between Mbadu and Bebi[124] and said that 'sometimes I succeeded and sometimes I did not'. He said he would try and get Kasaki's help to provide a solution.[125]

65. He gave a further example of seeking to settle a conflict that arose between Blaise Koka and Kasaki relating to Bunia. There is no example concerning events at Bogoro.[126]

66. 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.'

> PRESIDING JUDGE COTTE (Interpretation): What could the co-ordinator do then under those circumstances?
> A. The position of the co-ordinator was simply to avoid sparks and skirmishes and to enable people to live in a congenial atmosphere.[127]

67. The next day in evidence the matter was returned to with further questions from the judges. He explained that as for any specific role as coordinator he had possession of the Thuraya and could liaise with the General Staff of the APC or that even Mbusa would call him.[128] He was asked:

> 'PRESIDING JUDGE COTTE (Interpretation) You were informed because the means of communication were with you, but did you have a specific role that was planned for you, the co-ordinator? That is, as part of the operation?
> A. As part of community life to ensure peace, I provided minimum service. That is, I could provide that service if they asked for it'[129]
>
> PRESIDING JUDGE COTTE: (Interpretation) Now, on page 81, and I'm talking about your role as a co-ordinator, transcript 324, yesterday we talked about -- rather, 327, I believe, yesterday we talked about this issue of co-ordination and you told us that your role was to quell conflicts. Now, that role of conciliation, so to speak, which you played, did it help you to appease or to quell down any conflicts between the APC militants and local combatants within the entire Walendu-Bindi collectivity? As a co-ordinator, was it your role to settle all these conflicts within Walendu-Bindi, disputes between APC

[123] T-324, pp. 74-75.
[124] T-324, p. 76.
[125] T-324, p. 76.
[126] T-324, p.66.
[127] T-324, p. 89.
[128] T -325 p.22
[129] T-325 p. 22

combatants and local combatants? Let me take a simple example to illustrate my point. As a co-ordinator, if a conflict arose between Yuda, for example, who was the APC commander in Kagaba and Cobra who was the local commander in Bavi, if I understood properly, could you have intervened in such a case?
A. Your Honour, we attempted to do so but it did not work. It did not work on a -- in a sustained manner. When I attempted to go too far, it really did not work. Let me take an example of what happened between the garnison and Cobra's group. We did our level best to reconcile them and to bring them together, but it did not work.
PRESIDING JUDGE COTTE: (Interpretation) Very well. So in theory, your role as a co-ordinator would have applied in such circumstances, but practically it was difficult, if not impossible?
A. Mr. President, I would say it was impossible.[130]

68. That being largely the sum of the references, the defence will address its comments in the light of them.

69. Even if the Chamber is of the view that Katanga made a contribution to the Ngiti combatants and commanders, it can still not be argued that Katanga sustained his participation after acquiring knowledge of the criminality of the group's common purpose. He was of the belief that Bogoro was an attack against soldiers, not civilians. His belief was founded in part on the fact that a formally trained army was in charge of the attack and his understanding of the proscriptions that formed part of the fetishes and general conduct of Ngiti.[131]

70. As for prior knowledge, a suspicion that such conduct could occur or would occur in the ordinary course of events is insufficient. As to actual knowledge, the defence are not aware of any reliable evidence to indicate that Katanga knew of a specific criminal intent. The defence submits that Katanga did not participate in, or contribute to, any previous attacks against the civilian population by the group that attacked Bogoro. As to other incidents, there is clearly insufficient, reliable evidence to support the view that Katanga participated in the Nyakunde attack five and half months earlier.[132] That attack was launched jointly by retreating APC forces under Faustin – later arrested for crimes - and Kandro, one of the Ngiti commanders who was killed a few days later. The defence has already pointed out that the circumstances in which this attack took place as well as its participants differed significantly from the circumstances and participants of the Bogoro attack.[133] The anger among the Ngiti attackers in Nyakunde was directed towards the

[130] T-325, pp. 83-84.
[131] Defence Brief, paras. 561, 665-667, 860, 1179, 1284.
[132] Defence Brief, paras. 567-569.
[133] Defence Brief, paras. 564-569.

Bira, not the Hema.[134] The Nyakunde attack was the direct reaction to an earlier UPC attack on Songolo in which the UPC was assisted by the Bira.[135] 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.

71. In the period between the Nyakunde attack and the Bogoro attack, Katanga and other Ngiti combatants participated in one attack, directed by the APC, against the UPC in Chai. Katanga was shot in the leg. There were no civilian casualties in this attack and Katanga did not see civilians there.[136] Similarly, when he participated in an APC-led operation at Ofai in December 2002 to prevent the UPC advancing on Beni, there is no evidence of civilian losses.[137] This further supports the position that Katanga had no reason to know that the group of Ngiti combatants and commanders who attacked Bogoro had a criminal common purpose.

72. Katanga 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.[138] The Prosecutor failed to establish beyond reasonable doubt that Katanga was involved in the later Bogoro attack or any attack following the Bogoro attack.[139] The evidence the prosecution relies on to allege that Katanga participated in the Bogoro attack itself is unreliable.[140] The Prosecutor also failed to establish, on the basis of reliable evidence, that Katanga participated in the subsequent attacks on Mandro and Bunia.[141]

73. Accordingly, there is no sound basis for concluding that Katanga continued his alleged participation after acquiring 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 relevant crimes.

[134] Defence Brief, para. 558.
[135] Defence Brief, paras. 564-566.
[136] Defence Brief, para. 579.
[137] Defence Brief, paras. paras 579, 815.
[138] Defence Brief, para. 693.
[139] Defence Brief, paras. 679-686, 694-711.
[140] Defence Brief, paras. 679-711.
[141] Defence Brief, paras. 720-726.

(ii) Efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes

74. As for Katanga's efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes, the defence has pointed out in its brief that, at the time of the Bogoro attack, Katanga had no control over the Ngiti commanders and combatants other than some 60 combatants based in Atele-2 in Aveba, none of whom participated in the Bogoro attack.[142] Authority lay with others, particularly in the community. Katanga was only 24.[143] At the time in question his powers were limited and insufficient to prevent criminal activity. This was all the more so because he was effectively working under the authority of the APC, in particular Commander Blaise Koka.[144]

75. When, much later, Katanga exercised some level of control over the FRPI, there is no evidence of criminal acts done by the Ngiti and particularly in respect of any forces from Aveba.[145] MONUC chose Aveba as the demobilization site because the situation there was relatively calm.[146]

(iii) Whether the person creates or merely executes the criminal plan

76. In its closing brief, the defence has set out in detail that EMOI, RCD-KML and APC created the plan to attack Bogoro among other places.[147] The plan was part of a larger plan to reclaim Eastern Ituri. Bogoro was but part of that plan. Katanga was neither the creator, nor the executioner of this legitimate plan. It is unclear to the defence what

[142] Defence Brief, para. 578.
[143] D2-300-T-314-p.21, l.23 (FRA-p.19)
[144] Defence Brief, paras. paras. 599, 654-662, 1208-1209, 1267.
[145] Defence Brief, para. 1266 ("His *de facto* control over combatants instead grew gradually. The MONUC and human rights reports in evidence relating to events even late in 2003 demonstrate how difficult it was for any leader among the combatants to have *de facto* control over anyone – and much less effective control. This was even more complicated at the beginning of 2003, when the combatants were even more autonomous than later in that year. It is worthy to note that, as Germain Katanga's authority grew, the situation and internal conflicts between the combatants as well as harassments of the local populations gradually decreased.".)
[146] Defence brief, para. 1266 ("The reason that Aveba was chosen as the location to set up the demobilisation programs was precisely because the situation there was calm and Katanga was someone who was really respected.")
[147] Defence brief, paras 602-639; 697-699; 1158-1160; 1157: "In alleging that Katanga and Ngudjolo formulated a plan together to attack Bogoro, the Prosecution ignores the role EMOI, the APC, and RCD-K/ML played in the plan to attack Bogoro. The defence submits that the plan to attack Bogoro was formulated and orchestrated by EMOI, together with the RCD-K/ML. In brief, the RCD-K/ML had a clear motive to attack Bogoro as it blocked the road to Bunia. The RCD-K/ML used to have the Ituri region under its control. Since the Sun City Agreement did not give Bunia and Bogoro back to the RCD-K/ML, it intended to re-conquer Ituri from the UPC by force.2097 EMOI assisted in organising and planning this military operation by providing all the logistical resources from Kinshasa."

contributing function is supported by the evidence. As a coordinator, he was not in a position to make decisions, but merely to negotiate. The role of co-ordinator is more extensively reviewed elsewhere.

77. In particular, the decision to deliver weapons was taken by the EMOI-RCD-K/ML-APC alliance in Beni, not by Katanga.[148] Similarly, the decision to attack Bogoro was taken by Beni, the EMOI, not by Katanga.[149] In this regard, a comparison can be made with the *Ministries* case as cited by the *Mbarushimana* Pre-Trial Chamber.[150] In that case, the accused was acquitted because he lacked the discretion with disposition of financial means, even though he furnished the means for which concentration camps were purchased, constructed, and maintained. Katanga's role as coordinator was essentially a non-military function. He also lacked the discretion or influence in how weapons were distributed and used ultimately.[151] There is no evidence that at the relevant time he possessed the authority to prevent the use of Aveba as a logistics base. He was just 24 and living in a traditional community of elders and *féticheurs*.[152] Accordingly, Katanga should similarly be acquitted because any contribution he made does not qualify as 'significant' under article 25(3)(d).

(iv) The position of the suspect in the group or relative to the group

78. The prosecution makes a number of assertions which are unsupported by the evidence, essentially repeating its averments in its closing brief. Among such assertions is the allegation that Germain Katanga became overall leader of the combatants in September 2002, and head of the FRPI at the time of the attack.[153] The defence disputes these assertions.

79. The defence has provided detailed analysis regarding Katanga's position relative to certain Ngiti combatants and commanders.[154] At the time of the Bogoro attack, Katanga

[148] Defence Brief, paras 610-612, 618, 621, 624-625, 656, 658, 662, 1168-1169, 1179.
[149] Defence Brief, paras 613-619, 622-623, 626-629, 631-639, 697-699, 706, 1131, 1157-1159, 1168-1169, 1179.
[150] ICC-01/04-01/10-465-Red, *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, para. 284 and fn. 672.
[151] Defence Brief, paras 607, 611-612, 621, 624-627, 654- 656, 658, 662, 1207-1209, 1267.
[152] Defence Brief, paras 671-678.
[153] ICC-01/04-01/07-3367, para 36
[154] Defence Brief, part IV-A, *Authority of Katanga on the eve of the main Bogoro attack,* p. 182 & s; part VI, *(iii) The Prosecutor failed to establish beyond reasonable doubt that the accused had control over the organisation – Defence position*, p. 335 & s. See also part VI, *(iv) The Prosecution failed to establish that the organisation consisted of an organized and hierarchical apparatus of power – Defence position,* p. 340 & s, and *(v) The*

was neither *de jure*, nor *de facto* leader of the Ngiti combatants. Shortly after, Katanga became the leader in name only, but not in reality.[155] It was not until 2004 that Katanga was officially the President of the FRPI and had an increased level of control.[156]

80. At the time of the Bogoro attack and a significant period after, Katanga lacked control over autonomous Ngiti commanders who were intolerant of authority. They were all 'Chiefs' to a greater or lesser degree within their own fief. There was no hierarchical structure. Cooperation between them was difficult and could not be enforced. They were not a disciplined body and the months prior to Bogoro saw infighting, jealousies and intolerance. What rare cooperation there was appears to have been on a strictly voluntary basis.[157] Thus, it is incorrect to submit, as the victims representative does, relying on P-28, whose testimony was considered unreliable for a large part, that Mr Katanga had three commanders under his orders at Aveba: Mbadu, Garimbaya and Move.[158] On the contrary, they were independent.[159]

(v) The role the suspect played vis-à-vis the seriousness and scope of the crimes committed

81. The Pre-Trial Chamber in *Mbarushimana* referred to 'the role the suspect played vis-à-vis the seriousness of the crimes committed' as 'perhaps' the most important criterion.[160] In describing this criterion, the *Mbarushimana* Pre-Trial Chamber drew a parallel with the Dachau Concentration Camp cases where it was held that, "if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner."[161]

82. Germain Katanga's duties were not in themselves illegal or interwoven with illegality; nor can it be said that he performed these duties in an illegal manner. It is unclear if Katanga was engaged in the supply of weapons as opposed to being a recipient of them. In any event, such weapons as arrived in Aveba were brought for a legitimate purpose.

Prosecution failed to demonstrate that the execution of the crimes was secured by almost automatic compliance with the orders issued by Katanga, p. 357 & s.

[155] Defence Brief, part IV-C, *President?*, p. 200 & s.; part VI, *(iii) The Prosecutor failed to establish beyond reasonable doubt that the accused had control over the organisation – Defence position*, p. 335 & s.

[156] Defence Brief, paras 717, 1230, 1233, 1289.

[157] Defence Brief, part IV-A, *Authority of Katanga on the eve of the main Bogoro attack,* p. 182 & s.

[158] ICC-01/04-01/07-3365, para. 45.

[159] Defence Brief, paras 664, 665, 667.

[160] ICC-01/04-01/10-465-Red, para. 284.

[161] ICC-01/04-01/10-465-Red, *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, para. 284 and fn. 673.

83. As a coordinator, in the sense in which he explained it, Katanga did not have control over the crimes. He was not the chief of the Ngiti combatants. He said he had 60 men under his authority. He was not present at the crime scene, nor were any of these 60 men from Atele-2,[162] and he had no imput or say over the seriousness and scope of the crimes committed. At the time he lacked decision-making power. The Ngiti combatants were not organized and included multiple elements. The perpetrators of the crimes committed are ill-defined. Many of the excesses were committed by the Lendu North combatants and villagers.[163]

84. Accordingly, Katanga's role vis-à-vis the seriousness of the crimes was not significant.

(iii) Contribution to the commission of the crimes charged

Legal Definition

85. The defence submits that the conduct of the accused must form part of the causal nexus of the commission of the crime, as submitted in the course of the *Mbarushimana* case.[164] The prosecution and victim representative appear to agree with the nexus requirement.[165] However, the Prosecutor also asserts that the contribution can be made to any member of the group acting with a common purpose.[166] This suggestion shows a clear misunderstanding of the provision. It is not a contribution made to a person or persons, which is in question, but the question to be asked is whether a contribution has been made to the commission of a crime.

Application to Katanga

[162] Defence Brief, paras 702-705, 707, 1211-1212.
[163] Defence Brief, para. 1161: "The purpose of attacking Bogoro was not to "erase" the civilians, but rather, to chase out the UPC soldiers who were blocking the road to Bunia and provided a security problem for the Ngiti and Lendu populations in the region. Indeed, instructions were given so as to not attack civilians. The defence concedes that there were excesses. However, the defence submits that these excesses were committed by uncontrollable combatants or civilians who were not part of the original politico-military plan. Indeed, Pichou testified that many uninvited combatants and civilians had the habit of turning up at battles like Bogoro. The plan cannot be inferred only from the consequences. The plan to dislodge the UPC, a force that attacked everywhere and blocked the road, from Bogoro is, wholly legitimate, and not prohibited by *jus im bello*, the body of law about which the Court is to adjudicate" (footnotes omitted).
[164] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8, 20 Sept 2011, p. 26 (submissions of Kai Ambos).
[165] ICC-01/04-01/07-3367, paras 11-13; ICC-01/04-01/07-3365, paras 19-23.
[166] ICC-01/04-01/07-3367, para. 13.

86. Contrary to the victims representative's assertion,[167] there is no direct nexus between Katanga's alleged contribution and the commission of the alleged crimes. Katanga was not present at Bogoro, and lacked control over those who were. There is no evidence that Katanga distributed weapons that were used to commit the crimes charged. It is unproved that any weapons delivered to Aveba were delivered with the intention of committing crime, or were specifically employed in Bogoro. The evidence is inconclusive as to what proportion of the weapons used at the attack came through Aveba or as to whether Germain Katanga had at any stage control of any of the weapons which went to the front, let alone those which were used in the commission of crimes. Given the variety of possible sources of weapons, including their recovery at the front line, through combatants at Bedu Ezekere from unknown sources, through Garimbaya at Aveba, or through other routes than Aveba, it is impossible to infer that the weapons made reference to in the evidence as passing through Aveba with Germain Katanga's cooperation, were the same weapons used or intended to be used for the purpose of committing crimes at Bogoro.

87. To the extent that any were even used at Bogoro, if at all, they may have been used to attack UPC soldiers rather than civilians. Evidence of gunshot wounds as being the cause of death of civilians killed at Bogoro is very limited. It is for the Prosecutor to establish a nexus between Katanga's conduct and the crimes charged.

88. Even if the Chamber finds that there is sufficient evidence that Katanga distributed weapons that were used to kill civilians in Bogoro, he can still not be held liable for any of the allegations of rape and sexual slavery. Nor can he be held liable for pillage, destruction or the use of child soldiers. The Prosecutor must prove that he made a direct contribution to the crimes. In the event that the Chamber finds that Katanga's alleged role in the distribution of weapons constituted a direct contribution to the crimes committed by a group of persons acting with a common purpose, this cannot extend to any crimes which did not involve bullets.

89. As for his role as a coordinator, Katanga played this role *vis-à-vis* the RCD-K/ML, APC and EMOI. This was, however, directed towards a legitimate plan to fight against the UPC soldiers.[168]

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[167] ICC-01/04-01/07-3365, para. 94.
[168] Defence Brief, paras 599-600, 648, 654, 657-660, 662, 664, 1160-1160, 12205, 1208, 1267.

(iv) The crimes charged were committed by a group of persons acting with a common purpose

Legal Definition

90. It must be established beyond a reasonable doubt that the crimes committed were committed by members of a group with a common purpose or an acquittal must follow. It would be insufficient to merely draw the inference, from the occurence of the attack, that someone or some group made a plan, or that the occurence of the attack means that there must have been a plan, without further identification of the participants involved. Nor can it be inferred from the fact that crimes occurred, and were committed by persons in the attack, that such was the purpose of the attack. Such acts may equally have been opportunistic. This is reflected in the approach adopted by the ICTY in respect of the not dissimilar area of joint criminal enterprise. For example, in *Limaj et al,*[169] the Chamber found that the Prosecutor failed to establish beyond reasonable doubt that the ill-treatment of over thirty prisoners in a prison camp operational for at least six weeks was carried out as part of a joint criminal enterprise. The Chamber held:[170]

> There is no direct evidence, however, to establish either the existence or the scope of the alleged criminal enterprise. At the most, there is a possibility of inferring from the existence of the prison camp that there was a design or plan by someone or some group, probably in the KLA, to detain a number of individuals. To the extent that they are revealed by the evidence, the reasons for the detention of those persons who were detained vary from case to case, but in the vast majority of cases are unclear or remain unknown.

91. In reaching this conclusion, the *Limaj* Chamber took into account the fact that nobody other than the three accused was specifically identified as participating in the joint criminal enterprise. From the evidence, it could be inferred that a number of identified and unidentified persons were involved in the commission of crimes. However, the Chamber found that "[t]here is absolutely no evidence to establish how, or on whose decision, the prison camp came to be established, or how or on whose orders Haradin Bala took up duties at the camp. While the evidence could support an inference, on one possible view, that there must have existed some form of joint criminal enterprise which was comprised of persons unknown who were members of the KLA, that is so general that it cannot provide a sufficient categorisation to identify the participants in the joint

[169] *Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005 ("Limaj Judgment").
[170] *Limaj* Judgment, para. 666.

criminal enterprise. »[171]

92. The Chamber also took into account the fact that « it cannot be ruled out on the available evidence that some of the perpetrators of the crimes established in, or in connection with, the prison camp did so merely as visitors who came to the camp on an *ad hoc* basis and while there, for personal reasons, such as revenge, mistreated or killed old enemies. It is true that such "opportunistic visitors" could also have become participants in the alleged joint criminal enterprise by contributing to the overall effect of the prison camp. However, in order to prove their participation it would be necessary to establish that their contribution to the pursuance of the common purpose of the alleged joint criminal enterprise was substantial. In the present case that is not possible on the available evidence to infer that all the crimes relating to the prison camp were committed by participants in a joint criminal enterprise. In consequence, it cannot be determined with sufficient certainty that the commission of these crimes was envisaged within the alleged joint criminal enterprise. »[172]

93. Finally, the Chamber took into consideration the fact that some of the perpetrators may have been driven by personal motivation unconnected to the common purpose of the group, such as personal revenge or distribution.[173]

94. The Appeals Chamber confirmed the *Limaj* Chamber's ruling in respect to the failure to establish a JCE.[174]

95. Given the resemblance between JCE and common purpose under article 25(3)(d), the defence submits that the Chamber will be positively assisted by considering such jurisprudence and, given the persuasive logic of the arguments, be moved to adopt a similar approach for common purpose.

96. On similar reasoning as in *Limaj et al*, the Prosecutor's suggestion that the persons who physically perform the material elements of the crime or attempt its commission are

[171] *Limaj* Judgment, para. 666; with reference to: *Brdjanin* Trial Judgement, para 346; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, 11 May 2000, paras 16-17.
[172] *Limaj* Judgment, para. 667; with reference to *Kvocka* Appeals Judgement, paras 97, 99 and 599.
[173] *Limaj* Judgment, para. 668.
[174] *Limaj* Appeals Judgment, paras. 99-124. Although the Appeals Chamber found that "no reasonable trier of fact could have found that it was impossible "to determine the identity of those involved in the operation of the prison camp, apart from the Accused Haradin Bala"" (para. 104), it confirmed the Chamber's findings on all other points.

members of the group and espouse the common purpose[175] should be rejected. This is an erroneous contention. Whether the individual physical perpetrators of a crime are members of the group with a common purpose is a matter of evidence. There may be a range of criminal perpetrators on the ground, but it is only those who as a matter of evidence can be associated with a 'group' acting with the same 'common purpose' who may be said to be part of that group acting with a common purpose.

Application to Katanga

97. The Prosecution claims that the Ngiti combatants are a clearly defined group, "both in terms of the factors that make it a group as such and in terms of the identity of its members".[176] The defence disagrees and reiterates it has little information about the group of persons acting with a common purpose.[177] Nobody in the group of Ngiti commanders and combatants has been identified by name,[178] as observed by the dissenting judge.[179]

98. The prosecution avers that there were hundreds of combatants from Walendu Bindi and Bedu Ezekere attacking Bogoro.[180] The defence notes that in its judgment in the Ngudjolo case the Chamber was not able to express itself any more precisely than to observe that combatants did come from Walendu Bindi. It appeared unable on the evidence to be satisfied with respect to further detail in terms of their identities, numbers, precise locations of origin or chains of command. In the absence of such information, it is impossible to identify these fighters from Walendu-Bindi as members of the group of Ngiti commanders and combatants acting with a common purpose, as referred to by the Trial Chamber in its Notice Decision. This is particularly so because the evidence demonstrates that multiple Ngiti and other attackers were present at Bogoro. Not all of them belonged to the same group. Thus, the failure to identify the members of the group, and most of the Ngiti attackers, by name or position makes it difficult, if not impossible, for the Chamber to find beyond a reasonable doubt that Bogoro was attacked by a group of Ngiti commanders and combatants with a common purpose.

[175] ICC-01/04-01/07-3367, para. 9
[176] ICC-01/04-01/07-3367, para. 42.
[177] See *supra* paras 13, 15, 17-18, 53.
[178] *See* Notice Decision, para. 26.
[179] *See* Dissent, para. 17 and fn. 23.
[180] ICC-01/04-01/07-3367, para. 22.

99. There is insufficient evidence to support an allegation that all Ngiti commanders and combatants were part of a group with a common purpose. The defence has already indicated that the Ngiti combatants acted in an autonomous fashion. Their organization was loose and at the relevant time lacked a hierarchical or horizontal structure. Lateral cooperation was limited, with feuds and battles among the many self-proclaimed commanders scattered throughout the Walendu-Bindi collectivity[181] including attacks against Aveba.[182] There was consequently no evidence of effective structural organization, and no clear hierarchy, horizontal or vertical, among the various autonomous groups.

100. In addition, it is unclear what their common purpose was and who shared the common purpose. The Ngiti combatants involved in the Bogoro attack all had their own reason for doing so. Many of those involved lived near Bogoro and faced an ongoing imminent threat of being attacked by the UPC. Some may have had personal reasons of revenge. Others may have been motivated by the prospect of pillaging cattle and goods. Ethnic hatred may have played a part for others.[183] In this regard, contrary to the Victims Representative's assertion, the Trial Chamber cannot rely on P-219, P-250 and P-280's testimony to determine whether there was an ethnic conflict.[184] Since they were found unreliable,[185] their testimony cannot be relied on for any part. Thus, no common purpose can be identified from the evidence presented.

101. Even if it can be established that at least some of the Ngiti commanders and combatants were part of a group with a common purpose, it can still not be established with certainty that they committed the crimes charged. Pichou testified that it was common among the Ngiti community to join in an attack when the sound of bullets was heard.[186] Many rogue elements, opportunistic participants or civilians from neighbouring villages ended up participating in such attacks.[187] They were clearly not part of any group with a common purpose. It is clearly possible that such outsiders of the group committed a high number of the crimes.

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[181] Defence Brief, paras 663-664, 666, 668.
[182] Defence Brief, paras 683-684 (referring to Katanga's and other defence witnesses' testimonies).
[183] Defence Brief, para. 1313.
[184] ICC-01/04-01/07-3365, para. 58.
[185] Notice Decision, para. 39 ; ICC-01/04-02/12-3, *Jugement rendu en application de l'article 74 du Statut*, 18 décembre 2012, paras 159 (P-250), 219 (P-280), 283 (P-219).
[186] Defence Brief, para. 1279, referring to D2-228-T-250-p.10-11 (FRA-p.10).
[187] In particular to pillage: see Defence Brief, paras 901-902.

102. Also, many non-Ngiti fighters participated in the attack. The defence has adduced evidence of the presence of the APC at Bogoro.[188] There is ample evidence of the participation of other non-Ngiti groups, the most significant one being the combatants from Bedu-Ezekere,[189] which appear to have been several groups, together with opportunistic and vengeful villagers. There was also evidence of the participation of Ugandans and Bira attackers.[190] Unless it can be established beyond reasonable doubt that the crimes committed at Bogoro were committed by persons belonging to the group with a common purpose to which Katanga allegedly contributed, Katanga cannot be held liable for these crimes.

(v) The common purpose of the group was criminal, *e.g.* to commit crimes under the Rome Statute

Legal Definition

103. The Pre-Trial Chamber in *Mbarushimana* found that the common purpose under article 25(3)(d) must at least have an element of criminality, which it described as "[…] one critical constitutive element of the form of responsibility enshrined under article 25(3)(d) of the Statute […]."[191] This reasoning was accepted by the Appeals Chamber in *Mbarushimana*.[192] It is also noteworthy that in *Mbarushimana*, the charges were not confirmed because the prosecution failed to satisfy the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population. This finding, the Majority determined, led it

> […] to take the view that, based on the analysis of the evidence as a whole, there are likewise not substantial grounds to believe that the FDLR leadership constituted 'a group of persons acting with a common purpose' within the meaning of article 25(3)(d) of the Statute, particularly in light of the requirement that the common purpose pursued by the

[188] Defence Brief, paras 706, 1281.
[189] Defence Brief, paras 710, 1052, 1131, 1151-1155.
[190] Defence Brief, paras 577, 869, 900, 1052-1053, 1281-1282, fn 2335; P-233-T-88-pp.22-23, 27 (FRA-pp.27-28, 33-34).
[191] The Pre-Trial Chamber found that there was "no substantial grounds to believe that the FDLR leadership constituted 'a group of persons acting with a common purpose' within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality." *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 291, 292.
[192] *See Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, paras 65-66. The Appeals Chamber noted that 'the Pre-Trial Chamber found that a fundamental element of article 25 (3) (d) of the Statute, namely the existence of a group acting with a common purpose, had not been established.' (para. 66).

group must have at least an element of criminality.[193]

104.The *Mbarushimana* Appeals Chamber's reasoning[194] explicitly contradicts Mr Nsita' submission that the purpose does not need to be criminal.[195] This submission is based on an incorrect interpretation of article 25(3)(d), which must be strictly construed.[196] In the absence then, of at least an element of criminality, an otherwise "critical constitutive" ingredient of the form of responsibility under article 25(3)(d)(i) or (ii) is missing, as is in turn, the constitutive element of a "group of persons acting with a common purpose". (…) Indeed, it is implicitly required by the ICC Statute, as the defendant's intention must be either (i) to further the group's criminal activity or criminal purpose or (ii) knowing of the group's intention to commit the crime.[197] Thus, under either alternative, the defendant's intention must be directed toward the group's criminal purpose.

105.Multiple scholars share this point of view. For instance, Eser notes that, "though not explicitly required by the ICC statute, this purpose is usually a criminal one."[198]

106.Not only should the purpose be criminal, it should be aimed at committing crimes under the jurisdiction of the ICC. For instance, Schabas states that "article 25 of the Rome Statute makes it quite clear that the common purpose must be to commit a crime within the jurisdiction of the Court. In other words, the enterprise cannot be one to commit any crime, or any act, but only one to commit a crime that is already within the jurisdiction of the Court."[199]

107.In describing the *actus reus* for this mode, Van Sliedregt refers to the design of JCE at the ICTY, which shares commonalities with the common purpose liability under article 25(3)(d). This was acknowledged by Pre-Trial Chamber I when it first had to deal with the notion of common purpose in the case of *Lubanga*. It held that the concept is "closely

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[193] *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para 291. Footnote omitted.
[194] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, paras 65-66.
[195] ICC-01/04-01/07-3365, paras. 13-17.
[196] Cf. Article 22(2) of the Statute.
[197] Prosecutor v. Mbarushimana, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Mbarushimana, 11 October 2010, para. 39; *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 289.
[198] Albin Eser, *Chapter 20. Individual Criminal Responsibility in* Antonio Cassese, Paula Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, vol. I (Oxford Univ. Press 2002) 767-823, 802.
[199] William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge University Press, 2007), 217.

akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY."[200] As that Pre-Trial Chamber noted, the tribunal jurisprudence may therefore be helpful for discerning the meaning of the common purpose.[201] *Tadić* is the starting point for the analysis of the common group plan. According to that decision, the common plan, design or purpose "amounts to or involves the commission of one of the crimes provided for in the Statutes."[202]

108. The Special Court for Sierra Leone has adopted a similar approach. In the *Taylor* case, the court has considered whether the JCE must have a purpose criminalized by the SCSL Statute and to what extent the criminality of the purpose must be laid out with specificity in the indictment. The court went to great lengths to re-interpret the Prosecutor's initial indictment to justify finding that the prosecution had pleaded, with the required level of specificity, that the enterprise had a purpose that was criminal under the SCSL Statute.[203] The initial indictment appeared merely to allege a purpose of taking control of Sierra Leone and its diamonds.[204] However, as Schabas notes "[a]lthough trying to take control of a country, and of its mineral wealth, is almost certainly contrary to national law, it is

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[200] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of charges (Public Redacted Version with Annex I), ICC-01/04-01/06-803, 29 January 2007, para. 335. *See also* Werle, 974 (noting that article 25(3)(d) may cover the same acts that were covered by the ICTY's JCE concept; the use of *may* and the fact that the author makes the comparison reinforces the idea that regulations on JCE may be similar or akin to article 25(3)(d) of the Statute, but that they are by no means the criminalizing the same activities.)

[201] There are, however, also notable differences. Ohlin even argues that liability Under 25(3)(d) is "wholly different from JCE liability", *see* Jens David Ohlin, *Joint Criminal Confusion* 12 New Crim. L. Rev. 406 (2009) at 410 *citing* Antonio Cassese, International Criminal Law 2nd ed. (Oxford Univ. Press, 2008**)** 213 ("the gist of Article 2 5(3)(d) is the regulation not of JCE but rather of a different mode of responsibility"). See also William A. Schabas, An Introduction to the International Criminal Court 211 (3d ed. 2007); Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 J. Int'l Crim. Just. 159, 172 (2007) ("the only form of participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute"). See further Albin Eser, *Chapter 20. Individual Criminal Responsibility in* Antonio Cassese, Paula Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, vol. I (Oxford Univ. Press 2002) 767-823, at 803 (noting that the "group factor of this type of complicity ... may still have some symbolic relevance")." *See also* G Fletcher and J Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case* 3 J. Int'l Crim. Just. 539 (2005), 549 ("We argue that the ICTY's formulation of joint criminal enterprise has largely been displaced by the passage of the Rome Statute, which, unlike the ICTY Statute, includes a specific provision, setting forth the contours of vicarious liability" and "We content that the doctrine of [JCE] as developed by Tadic should have limited application before the ICC, which is governed by the Rome Statute's Article 25(3)(d)—a more precise statutory provision than the judicially created doctrine of joint criminal enterprise").

[202] E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, (T.M.C. Asser Press, The Hague: 2003), 99 *citing to* Tadic, Appeal Judgment, para. 228. *See also* Limaj Judgment, para. 511.

[203] *See* Prosecutor v. Taylor, Case No. SCSL-03-1-T, Trial Chamber, *Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE,* 27 Feb. 2009 and Prosecutor v. Taylor, Case No. SCSL-03-1-T, Appeals Chamber, *Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment",* 1 May 2009.

[204] William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge University Press, 2007), 217, *citing to* Prosecutor v. Taylor, SCSL-03-1-T, *Amended Indictment*, 17 Mar. 2006, paras. 42-43.

not a crime within the jurisdiction of the" SCSL.[205]

109. Accordingly, the defence suggests that the Chamber similarly considers that the common purpose under article 25(3)(d) must be criminal and directed toward the commission of crimes under the Rome Statute.

Application to Katanga

110. In light of the above, the criminal common purpose in this case must be to attack the civilian population of Bogoro. It is insufficient for the purpose to have been to attack the UPC, even if the crimes against civilians were foreseeable. Indeed, the criteria of the occurrence in the "ordinary course of events", defined in article 30(2)(b),[206] which applies only "[u]nless otherwise provided", does not apply to article 25(3)(d), because article 25(3)(d) specifies the intent and knowledge required (i and ii).[207] The prosecution seems to agree in this regard.[208] Thus, the crimes must have been intended as part of the common purpose of the group.

111. The prosecution and the Victims Representative argue that there was a plan to 'wipe out' Bogoro[209] but there is no evidence that those words were ever used to describe the Bogoro attack. This is, the defence submits, because there was no such a plan, at least not from any group Katanga had any dealings with.

112. The defence reiterates that Katanga merely contributed to a different group than that

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[205] Schabas, *id*, 217.

[206] Article 30 Mental element

1. Unless otherwise provided**,** a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[207] Article 25 Individual criminal responsibility

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

[208] ICC-01/04-01/07-3367, para. 16.

[209] ICC-01/04-01/07-3367, paras. 32, 45, 62, 64 ; ICC-01/04-01/07-3365, part II. (1) (B) (b) *Existence d'un groupe de personne « agissant de concert » : « effacer Bogoro ».*

identified by the Chamber – e.g. EMOI, RCD-KML and APC – with a legitimate purpose of chasing the UPC out of Bogoro and other parts of Ituri.[210] Accordingly, Katanga's contribution to this group was not criminal even if the consequences were criminal. The crimes committed at Bogoro were committed as the consequence of implementing the EMOI plan to attack the UPC based in Bogoro town. However, these crimes were neither encompassed by the common purpose nor intended by the members of the group to whom Katanga made a contribution.

(vi) Membership of the group with a common purpose

Legal Definition

113. There is an ongoing academic discussion as to whether contributors under article 25(3)(d) can themselves be a member of the group with a common purpose or whether he or she must necessarily be an outsider. Heller, Cassese, Eser and Werle are of the view that « Article 25(3)(d) is limited to contributions to a group crime that are made by individuals who are *not* members of the group ».[211] Heller explained his position as follows:[212]

> Suffice it to say here that I find it difficult to understand why, if Article 25(3)(d) includes situations in which an individual contributes to the commission of a crime he agreed to commit, the drafters would have either (1) created two provisions that covered contributions to a common plan without specifically distinguishing between them in terms of the contribution they require, or (2) placed a mode of participation that is considered a form of principal liability by every other international criminal tribunal and by the overwhelming majority of domestic legal systems *after* modes of participation (such as soliciting and aiding and abetting) that are clearly forms of accessorial liability

114. The *Mbarushima* Pre-Trial Chamber, on the other hand, found that a person from within the group with a common purpose can contribute to this group.[213] On this basis, both the Prosecutor and the legal representative of the victims of Bogoro argue that article 25(3)(d) applies irrespective of whether the accused is a member of the group acting with a common purpose.[214] However, the Appeals Chamber did not explicitly rule on this specific issue and it is still open to debate – indeed, vigorous debate.

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[210] See *supra*, paras 53, 55, 76.
[211] Antonio Cassese, *International Criminal Law* 2nd ed. (Oxford Univ. Press 2008), 213; Kevin Jon Heller, Lubanga Decision Roundtable: More on Co-Perpetration (March 16, 2012) at: http://opiniojuris.org/2012/03/16/lubanga-decision-roundtable-more-on-co-perpetration/. For an opposite view, see Ohlin at: http://www.liebercode.org/2011/12/icc-decision-on-complicity-for.html.
[212] *Id*.
[213] ICC-01/04-01/10-465-Red, paras 272-275.
[214] ICC-01/04-01/07-3367, para. 9; ICC-01/04-01/07-3365, para. 18.

115. The defence shares Cassese's point of view, a view supported by the other academics who argue that the contributor under article 25(3)(d) should be an outsider to the group with a common purpose. This view is the most consistent with a textual interpretation of article 25(3)(d), which distinguishes the accused and his actions from the group and their actions. Indeed, when read literally, it would appear that a person who contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose excludes the members of that group itself. Such members can be found liable as co-perpetrators under article 25(3)(a). Being a member of the group itself would bring the contribution to a level of direct rather than accessory liability. Charging such a person, who would be considered a principal perpetrator in the *ad hoc* tribunals, with accessory liability under article 25(3)(d) would then be inappropriate. Such a person should be charged as a principal instead. The defence for Gbagbo made a similar argument during the confirmation hearing.[215]

116. Accordingly, the defence submits that the Chamber can only find Katanga liable under article 25(3)(d) if it is of the view that Katanga is an outsider to the group with a common purpose.

Application to Katanga

117. Katanga's precise relationship to a group or groups was barely explored in the evidence. The defence submits that it is impossible to determine whether Katanga was an insider or outsider to the group with a common purpose. If the group were composed of any of the Ngiti combatants who were under Katanga's orders – e.g. 60 men at Atembele 2 – Katanga would be an insider and thus not liable under article 25(3)(a). If, on the other hand, the group with a common purpose refers to Yuda's group of combatants who fought at Bogoro, Katanga would be an outsider. However, if that were the case, it cannot be established that Katanga made a direct and intentional contribution to the crimes committed by this group, if any. As previously submitted, Katanga made a contribution to EMOI, APC and RCD-KML, a group or groups not identified by the Pre-Trial Chamber or the Chamber. He was a clear outsider to that group. But he is not charged with this contribution, nor is this contribution illegitimate let alone criminal.

[215] ICC-02/11-01/11-T-14-ENG ET WT 19-02-2013 21/52 SZ PT Confirmation of Charges Hearing (Open Session).

(vii) Intentional contribution

Legal Definition

118. The Appeals Chamber has yet to give a conclusive definition to the term 'intentional'. In the *Decision on the Prosecutor's Application for a Warrant of Arrest against Calixte Mbarushimana*, dated 28 September 2010, the Pre-Trial Chamber noted "the various interpretations of the word 'intentional' used in article 25(3)(d) of the Statute".[216]

119. In the decision on the confirmation of the charges, the *Mbarushimana* Pre-Trial Chamber made reference to article 30 in determining what is an "intentional contribution" under article 25(3)(d). It noted that article 30(2)(a) defines intentional conduct as meaning to engage in the conduct. The Pre-Trial Chamber, however, required a higher standard than that set out in article 30(2)(a), stressing that:[217]

> "the application of this requirement alone may lead to the imposition of criminal liability on persons whose intentional actions have an unintended, significant effect on a group that is acting with a common purpose. The Chamber is thus of the view that the "intentionality" of the contribution must include an additional element, linking the contribution with the crimes alleged. Such an element should not, however, overlap with either of the two prongs set out in article 25(3)(d)(i) and (ii), as this would make one or both of them redundant. The Chamber therefore finds that, in order for a person to incur 25(3)(d) liability, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility."

120. Thus, based on the wording of article 25(3)(d)(i) and (ii), the Prosecutor must establish, at the very least, that the defendant personally knew that this group planned to commit the specific crime under the Rome Statute. Under this rubric, to demonstrate that the defendant was merely aware of the general criminal purpose of the group would fail to meet the 'intentional' requirement.

121. Article 25(3)(d)(i) is a high threshold requiring *dolus specialis* - the "specific intention to promote the practical acts and ideological objectives of the group".[218] Accordingly, there

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[216] *Prosecutor v. Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Calixte Mbarushimana, ICC-01/04-01/10-1-US, 28 September 2010, para. 39 and fn. 66.
[217] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para. 288.
[218] Kai Ambos, *Article 25 Individual Criminal Responsibility*, *in* Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court –Observers' Notes, Article by Article*, 2nd ed., (C.H.Beck Hart Nomos, 2008) 757-761.

is a double intent requirement under article 25(3)(d). First, the accused must have directed his contribution toward the group, intending either that the group commits a statutory crime, or that he has furthered its criminal activity. Second, the accused must presuppose that the group will carry out the activity in the state of mind required by the Statute.[219]

Application to Katanga

122. It is clear from Katanga's own testimony that his conduct was intentional. However, his intention was not to contribute to the commission of the crimes charged. He was of the belief that he was assisting a legitimate plan formulated by EMOI, RCD-KML and the APC to fight the UPC. He did not mean to make a contribution in any shape or form to the APC's distribution of weapons in order to massacre civilians. Rather, he meant these weapons to be used in the war against UPC soldiers. Unless the launching of war is an unlawful act, which it is not in the circumstances of this case and under the Rome Statute, Katanga's conduct was legitimate and intentional. It was however not intentional in the sense of article 25(3)(d)(i) or (ii).

(viii) Subjective elements of criminal aim or knowledge

- **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.**

Legal Definition

123. Articles 25(3)(d)(i) and (ii) incorporate the subjective elements of the 25(3)(d) mode of liability. Article 25(3)(d)(i) requires that the contribution was made deliberately with the aim of furthering the criminal activity or purpose of the group involving the commission of statutory crimes. Alternatively, pursuant to article 25(3)(d)(ii), the intentional contribution must be made in the knowledge, not only of the general criminal purpose of the group, but also that the group had the intention of committing specific crimes under the ICC Statute.

124. The Chamber in *Mbarushimana* put it as follows: "in order for a person to incur 25(3)(d)

[219] Albin Eser, *Chapter 20. Individual Criminal Responsibility in* Antonio Cassese, Paula Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, vol. I (Oxford Univ. Press 2002) 767-823, 797.

liability, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility. »[220]

125. Because knowledge of the criminal intention of the group to which the contribution is made is sufficient for criminal liability under article 25(3)(d), the Chamber in *Mbarushimana* held it is "not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged. This stands in sharp contrast with liability under article 25(3)(a) of the Statute, where the suspect must meet the subjective elements of the crimes charged. »[221]

126. The knowledge, however, must be very explicit. Article 25(3)(d) clearly excludes "foreseeability". Article 25(3)(d) requires that the contribution be directed toward a crime that is specifically contemplated by the criminal group. That would rule out being held liable for contributing to an unplanned but foreseeable crime. As argued, the common purpose of the group must be criminal. This reading of articles 25(3)(d)(i) and (ii) is consistent with article 30 requiring generally that defendants before the Court had knowledge and intent to commit the crimes charged under the ICC jurisdiction, unless otherwise provided. Therefore, as noted above in paragraph 110, the criteria of the occurrence in the "ordinary course of events", defined in article 30, which applies only "[u]nless otherwise provided", does not apply to article 25(3)(d) mode of liability, because article 25(3)(d) already specifies the intent required (i and ii). This is justified to limit the scope of this large, 'catch-all' mode of liability; it must be interpreted strictly.

127. Thus, the defence submits that liability under article 25(3)(d) cannot arise merely through proof that the accused was aware that the crime 'will occur in the ordinary course of events'. This is because 'intent' has the specific requirement of 'meaning to engage in' or knowledge that his contribution was directed toward the commission of statutory crimes. Consequently, a person can be held liable under article 25(3) only if the intent and knowledge was directed towards the commission of crimes under the ICC Statute. It is not sufficient that a person knew that there was "a sufficient risk" that, in the ordinary

[220] ICC-01/04-01/10-465-Red**,** para. 288.
[221] ICC-01/04-01/10-465-Red**,** para. 289.

course of events, his contribution would result in the commission of ICC crimes.[222] That was the interpretation given in the *Lubanga* judgment in the context of liability under article 25(3)(a) which does not incorporate the same explicit requirements of knowledge and intent. Liability under article 25(3)(a) incorporates other, much stronger safeguards against liability by mere "association"[223] than liability under article 25(3)(d). Article 25(3)(a) places particular emphasis on control over the commission of the crimes to ensure that liability does not extend beyond individual and intentional criminal conduct. Article 25(3)(d) does not have the same requirement of control but places greater emphasis on knowledge and intent. Thus, the same interpretation cannot be given to article 25(3)(d) liability.

Application to Katanga

128. The variety of assertions made by the prosecution with respect to Germain Katanga meaning to engage in conduct leading to a contribution to crime,[224] are either marginally supported by the testimony of witnesses who the Chamber has already found to be unreliable or are totally unsupported in the evidence. The same observation pertains to the prosecution assertions in relation to his alleged knowledge of the criminal purpose of the 'group'.[225] Lacking direct evidence, the prosecution tries to resort to the tool of inference, but inference must rest on necessary implication, not plausible outcomes.

129. Katanga never intended to contribute to the commission of crimes under the ICC Statute. To reiterate, his intention was to assist in fighting a legitimate war against the UPC. Nor did he know of the criminal intent of the group to which he made his contribution. The group – or more exactly temporary coalition - he assisted was composed of EMOI, RCD-KML, and APC commanders and soldiers. He did not make his contribution to the group of Ngiti commanders and combatants. But even if the Chamber does not accept this proposition, he remained unaware of a criminal intent on the part of the Ngiti commanders and combatants. As explained in the Defence Brief,[226] the EMOI, RCD-K/ML and APC recruited the Ngiti combatants to participate in their plan to attack the

[222] *Prosecutor v. Lubanga,* ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 987. The Majority of the Chamber concludes that as to the objective part of this requirement, this means that the agreement on a common plan leads to co-perpetration if its implementation embodies a sufficient risk that, in the ordinary course of events, a crime will be committed.
[223] *Prosecutor v Brdjanin*, Appeal Judgement, 3 April 2007, para. 428 (also 431).
[224] ICC-01/04-01/07-3367, para. 62
[225] ICC-01/04-01/07-3367, paras 63 e*t sec.*
[226] See *supra*, paras 53, 55, 76.

UPC in Bogoro. Katanga was unaware of a criminal intention of the Ngiti combatants.

130. In any event, even if the Trial Chamber does not accept this proposition, Germain cannot be held liable for pillage, destruction, rape and sexual slavery under 25(3)(d)(ii). Indeed, the Pre-trial Chamber found that pillage, rape and sexual slavery were not part of the common plan, but rather, would occur in the ordinary course of events:

> 550. Although <u>the evidence</u> tendered by the Prosecution is <u>not sufficient</u> <u>to establish</u> substantial grounds to believe <u>that the agreement or common plan specifically instructed the soldiers to pillage</u> 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.
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> 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 <u>to rape or sexually enslave the civilian women</u> 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.[227]

131. The defence submits that given that the criteria of the occurrence in the "ordinary course of events" does not apply to article 25(3)(d) mode of liability, Mr Katanga cannot be held liable for these alleged crimes. Thus, contrary to the victims representative' submission[228] (although conceding that *'Les pillages, destructions, viols et esclavage sexuel ne faisaient pas nécessairement partie du plan* […]'),[229] it is irrelevant whether the accused was aware that these crimes would occur in the ordinary course of events.

132. In conclusion, the evidence presented does not prove beyond reasonable doubt that Katanga made a criminal contribution under article 25(3)(d). An acquittal would be the only just outcome, which renders the continuation of a costly and possibly protracted Regulation 55 process unnecessary. On this basis, the defence urges the Chamber not to change Katanga's mode of liability, but instead render judgment on the basis of article 25(3)(a) as soon as possible.

<u>Prejudice caused by an eventual change of modes of liability</u>

133. It is submitted that it is now incumbent on the Chamber to address the next issue which is

[227] Confirmation Decision, paras 550, 551.
[228] ICC-01/04-01/07-3365, paras 69, 96.
[229] ICC-01/04-01/07-3365, para. 66.

whether, notwithstanding the legality of this process (as confirmed by the Appeals Chamber), it is appropriate to apply the regulation in the specific circumstances of the case. The notice provided to the accused still forms an integral part of that analysis. If the Chamber considers that, in all the circumstances and having heard the parties, while legal notice was given, the prejudice caused by late notice to the defence outweighs the interest in continuing with the trial on an altered basis, then the Chamber should not proceed. The Defence, rather than repeating them, incorporates by reference its arguments on its appeal of the Notice Decision.[230]

134. Defence counsel in the case come from the adversarial system where judges play a significantly different role than judges from the inquisitorial system. The defence was disappointed that the Appeal Chamber did not take the opportunity to curb the influence of Regulation 55, save for technical matters. After all, the fruits of almost twenty years of international criminal law, which provide an accused with full notice of the charges he faces, appear to have been jetisoned if he or she no longer needs adequate notice of the alleged nature or alleged participation of the crime's alleged. Instead, the ICC is in danger of developing core jurisprudence that appears to have as its primary objective 'closing the impunity gap' –an uncertain concept–at the necessarily expense of an accused's core right to know the case against him so as to be able to prepare his case in an adequate manner.

135. In addition to the closing of impunity gaps as identified by the Appeals Chamber (Regulation Decision para. 22), the object and purpose of the Rome Statute is also '[...] to guarantee lasting respect for [...] international justice' (eleventh paragraph of the Preamble). The defence submits that lasting respect for international justice cannot be guaranteed if the object and purpose of the Rome Statute to guarantee fair trial rights, is abrogated.[231] Furthermore, the closing of impunity gaps argument is based on a preambular paragraph of the Rome Statute. The said paragraph is not an operative part of the ICC texts, which comprises the actual articles of the Statute, Rules, and Regulations, in this specific, hierarchal order. The weight then, to be given to a preambular paragraph is less than that attributed to the operative parts of the Statute, including fair trial rights.

[230] 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, 10 January 2013.
[231] Natalie Wagner, A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga: Child Soldiers and Direct Participation, available at http://link.springer.com/article/10.1007%2Fs10609-012-9194-0# (publication forthcoming in *Criminal Law Review*).

136. Regulation 55 has even been invoked as justifying a refusal to allow the Prosecutor to charge offences in the alternative.[232] Yet charging in the alternative, where appropriate to do so, and amending charges in good time where that is necessary, at least provides an accused with notice of the charge he/she faces. (And, incidentally, provides an opportunity to admit, if appropriate to do so, a lessor offence.) If it has been decided as a matter of policy by the judges that charging in the alternative is not to be allowed and that Regulation 55, with all the lack of notice that that entails, can make up for it, then an accused should not be prejudiced by such a policy. It creates systemic unfairness. In the Chamber doing so at this stage will risk being seen as performing a prosecutorial function. It is clearly the Prosecutor's task to charge and prosecute the accused. This concern is reflected in a number of commentaries already generated by the Decision.[233]

137. If Regulation 55 is going to be available at this stage and to this extent then all accused must appreciate that they stand trial effectively on all the modes of liability contained in Article 25. This risks amounting to a 'Prosecutor's Charter'. It will not encourage diligent prosecution but favour the indolent prosecutor who can charge at the highest level and rely on the Trial Chamber 'to put things right' – even if the prosecution presents incapable, incredible witnesses to support its case. And it will leave an accused in the invidious position of having to choose between presenting a positive case and informing the court of the circumstances of events on the one hand - to the benefit of the court's historical, truth-finding, function - or on the other, merely contesting the prosecution's case and avoiding providing a defence narrative in case it gives rise to alternative,

[232] ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 202-203 (202. "By its decision, the Chamber intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other."); ICC-01/05-01/08-532, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, paras 53, 56, 57 (53. "Thus, the Chamber is not convinced by the Prosecutor's argument that the Statute would not authorise the Chamber to decline a charge because it considers the charge unduly burdensome to the Defence. To the contrary, the Chamber is duty bound to safeguard the rights of the Defence at any time of the proceedings. This entails that, when circumstances so warrant, the Chamber may not confirm all charges as such, in case the essence of the violation of the law underlying these charges is fully subsumed by one charge."); ICC-01/09-01/11-1, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", para. 36, quoted in ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 284.

[233] See, for instance, Dov Jacobs, A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court? http://ssrn.com/abstract=1971821, pp. 19-21.

unspecified charges.

138. In this case the charges, as contained in the Document Containing the Charges, though convoluted, were clear in that they provided a detailed picture of Germain Katanga's alleged role in the attack on Bogoro. He knew the allegations he faced and the role he was said to have played in the crimes. That role involved his being head of the FRPI, of negotiating with Ngudjolo the plan 'to wipe out Bogoro' (a plan in fact said to have been designed by Boba Boba, one of Ngudjolo's men), of controlling all the FRPI's leaders and combatants, of organising the attack, with detailed references to missions and meetings, provision of arms, inciting combatants, manoeuvres before and during the attack, participation in the attack attended by gross criminal conduct, further criminal conduct engaged in for several days after the attack, of sex slaves met and rape condoned.[234] That was the case which this accused had to confront and upon which he was advised by his counsel and upon which the defence cross-examined witnesses, made its submissions and called its witnesses, including Germain Katanga.

139. It appears to the defence that the core prosecution witnesses are no longer credible. In its notice the Trial Chamber advised the defence that it no longer relied on the evidence of witnesses 219 and 250. In its judgement concerning Ngudjolo the Trial Chamber dismissed as incredible witnesses 279 and 280. It also addressed significant weaknesses in the evidence of witnesses 12 and 160. It appears to have rejected nearly all the evidence of 28 – so much in fact that it is difficult to see how, in rejecting so much of the essence of that witness's account, it could be considered safe to rely on any residual aspects of his evidence as providing material that could be relied upon beyond all reasonable doubt. That leaves witness 161 –evidence the defence submits is unreliable. The defence relies and refers to its review of the prosecution witnesses in its final brief.

140. Consequently, if the defence view is correct, almost all the underlying evidence supporting the confirmation decision relating to Germain Katanga has collapsed. What remains is unclear. All the support for the facts referred to in the Confirmation of Charges Decision that implicate Katanga, as indicated in the footnote references to that decision, relate to witnesses that are now judged incredible, or substantially so by the Chamber, or by witnesses that the prosecution abandoned (for good reason say the defence).

[234] ICC-01/04-01/07-1588-Anx1, Document Summarising the Charges Confirmed by the Pre-Trial Chamber, 3 November 2009.

141. So where are we now? If all the evidence available to the Chamber can be seen as providing a line or continuum of evidence ranging from 'everything proved' at one end to 'nothing proved' at the other end, then it is impossible for the defence to judge where on that line or continuum, on the basis of any remaining reliable evidence, the judges may find themselves. The judges, as the finders of fact, could be at any point on that continuum. The defence's difficulty in addressing requalification is in guessing where that point may be.

142. The position or view of the judges of the remaining evidence has the same import for the defence when addressing a new mode of liability as the detailed confirmation finding and ancillary prosecution documents have had on the defence case to date. It permits it to address the charge and the evidential issues. Without adequate notice the defence is left guessing as to the evidential parameters within which it must base its submissions. Having to address the new, possible mode of liability against the entirety of the evidence, less a couple of witnesses, is insufficient notice of the case it must address. Nor is the defence assisted by the observations of the prosecution that seek merely to repeat the totality of the evidence without taking into account the Chamber's findings in its Notice Decision in respect of witness 219 and 250, nor its observations in the Ngudjolo case to witnesses 279 and 280. The result is that the prosecution, in its observations on article 25(3)(d), referring to its Final Brief, eludes 272 references to those witnesses as supporting the facts alleged. There are also 146 references to witness 28.

143. The defence however, is required to make observations and has done so on the assumption that the case to be addressed concerns an alleged intentional contribution by Katanga to a group possessed of a criminal purpose and that he knew of the groups criminal intent. More specifically the defence assumes that that contribution arises from evidence provided largely by Katanga himself that he was a 'coordinator'. The defence make that assumption on the basis of what it can glean from the Notice Decision.

144. It is to be noted that Katanga gave relatively little detail of the role in his examination-in-chief and was barely cross-examined on it. Much of the evidence as to his explanation of the role of coordinator was given in response to the Judge's questions right at the close of his evidence.[235]

[235] See T-324, pp. 65- 91 and T-325, pp. 1-36.

145. The Statute of the ICC sets out the minimum fair trial guarantees in Article 67(1) of the Statute, and in particular:

> (i) "To be informed promptly and in detail of the nature, cause and content of the charge" (Article 67 (1)(a)).
> (ii) "To have adequate time and facilities for the preparation of the defence" (Article 67(1)(b)) and Regulation 55(3));
> (iii) "To be tried without undue delay" (Article 67(1)(c));
> (iv) "Not to be compelled to testify or to confess guilt and to remain silent" (Article 67(1)(g));
> (v) "Not to have imposed on him [...] any reversal of the burden of proof or any onus of rebuttal" (Article 67(1)(i)).

The defence referred to them in detail in its Appeal submissions. The accused must be given an effective opportunity to address a proposed requalification, and in good time

146. The jurisprudence of the European Court indicates that the accused must be given an effective opportunity to address a proposed requalification, and in good time. It is submitted that, in all the circumstances, this has not occurred. The defence is deprived of the possibility of integrating its observations on article 25(3)(d) into its submissions on article 25(3)(a). It is respectfully submitted that the defence could have been given notice of the possibility of requalification at least prior to the presentation of its final written and oral submissions in the case. The Chamber may not have been sure of the appropriateness of having regard to article 25(3)(d) at that stage but it can be reasonably assumed that the possibility had come to the attention of the judges. Indeed, it is noteworthy that the bulk of the evidence relating to the role of coordinator arose in the course of the accused's answering of the Judge's questions at the close of his giving evidence.

147. In this context, it is worth reiterating Judge Fulford's observation that "changes to the legal characterisation of the facts made at the very end of the case *(viz.* in the final Decision) will inevitably infringe certain central safeguards provided for the accused in the Rome Statute (as reflected in other international provisions), and it will run counter to the approach taken in key human rights jurisprudence. Article 21(3) places an obligation on the Chamber to apply the law in accordance with internationally recognised human rights. The accused has a fundamental right under the Rome Statute "to be informed promptly and in detail of the nature, cause and content of the charge [...]" and this right is reflected in other key international instruments".[236]

[236] Judge Fulford, ICC-01/04-01/06-2061-Anx, Corrigendum to "Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009", 21 July 2009, para. 22.

148. Also, the prosecution has acknowledged the importance of adequate and timely notice. In the course of the proceedings of the case of *Ruto and Sang*, the prosecution made the following observation:

> 36. [...] Notice should be given as soon as feasible, to protect the fair trial rights of the parties. It thus is wholly illogical to delay notice. Prompt consideration and notice will enable the parties to fairly prepare and present their cases, without the risk of being taken by surprise at the end of trial by an unexpected change in the legal framework of the case. [...]
>
> 41. In this case, giving early notice of the possibility of a recharacterization will "ensure that the trial is fair" because it will enable the parties to present their evidence and examine witnesses with all possibilities in mind. Advance knowledge can only help the accused and advance the interests of a fair trial. It will avoid delays and adjournments (envisaged in Regulation 55(3)(a)), the recall of witnesses (envisaged in Regulation 55(3)(b)), and will enable the accused to prepare his defence with full knowledge of the possible statutory provisions under consideration by the Chamber. It will also ensure respect for the accused's Article 67(1)(a) right to be informed "in detail of the nature, cause and content of the charge[s]" against him. Giving notice at the start of trial is also appropriate because the possibility of a legal recharacterization in this case is self-evident from the outset due to the breadth of the accused's alleged contributions.
>
> 43. [...] In the present case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair surprise, should the Chamber ultimately opt to re-characterize the accuseds' individual criminal responsibility.[237]

149. Turning now to the current position, the question of notice aside, the Majority's intention to change the modes of liability at this stage suggests that, *prima facie*, it takes a different view on the evidence presented thus far from that set out above. In its Notice Decision, the Majority states that it "has objectively examined all evidence relating to Germain Katanga's role and taken the view that it is appropriate to propose a re-characterisation in the instant case".[238] If the Majority foresaw an acquittal under article 25(3)(d), then it would likely not have bothered to change the mode of liability at this stage. This accords with the minority view that the Notice Decision "creates the perception that: (i) they would have had to acquit Germain Katanga on the indirect co-perpetration charges which he is facing and (ii) that Article 25(3)(d)(ii) is seen as a provision which could sustain a conviction. This perception is created because, had the Majority been prepared to convict the accused under Article 25(3)(a), then it stands to reason that they would have just convicted on that basis, rather than resorting to a Regulation 55(2) Notice Decision."[239]

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[237] ICC-01/09-01/11-433, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 3 July 2012, paras 36, 41, 43 (footnotes omitted).
[238] Notice Decision, para. 8.
[239] Dissent, para. 31. See also William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, http://humanrightsdoctorate.blogspot.nl/: 'Reading between the lines, one may see that

150. However, even with every effort to provide adequate time and facilities to the defence, the accused will still suffer prejudice. The defence cannot stress enough that the Chamber's intention to alter the mode of liability from 25(3)(a) to (d) causes real, irreparable, rather than hypothetical prejudice. Irrespective of any additional time and means given to present arguments specifically challenging the allegations under article 25(3)(d), the defence cannot undo what it has done in defending Germain Katanga as an indirect co-perpetrator, as charged and confirmed in the confirmation decision.

151. This is significant, as "the particular circumstances of the case will have to be taken into account" in determining whether the application of Regulation 55 is appropriate.[240] This is also apparent from the Appeals Chamber's Decision on Regulation 55.[241] Offering the accused the safeguards described in Regulation 55(2) and (3) is not necessarily sufficient to justify its application. Of the essence is that "the change in the re-characterisation must not lead to an unfair trial".[242] Allowing the defence additional time and resources for further investigations, and to re-call witnesses heard previously or call new witnesses, does not automatically remedy any unfairness caused by re-characterising the charges.[243]

152. That this is true is particularly obvious in the case of Katanga who was deprived of the opportunity to present his defence in full knowledge of the legal and factual framework of the charges against him. As a consequence, the defence addressed the charges on the specific ingredients of article 25(3)(a) of the Rome Statute. It devoted 51 pages of its closing brief to these ingredients.[244] It called witnesses, including Germain Katanga, in respect to these specific ingredients.

153. To challenge these allegations, the defence focused on tackling each of the ingredients of indirect co-perpetration that the prosecution must establish beyond a reasonable doubt.

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the majority judges concur that the mode of liability upon which both prosecutor and defendant have based their case, and on which evidence was led, is likely to lead to an acquittal. So they have found another mode of liability that they find more suitable and that will, presumably, result in a conviction.'

240 *Prosecutor v. Lubanga,* ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" ("Lubanga Appeals Chamber Decision on Regulation 55"), para. 100.

241 Appeals Chamber Judgment, paras. 88-91, 95-99, 102

242 Lubanga Appeals Chamber Decision on Regulation 55, para. 100.

243 *See also* Dissent, para. 8.

244 Defence Brief, part VI- LEGAL AND FACTUAL SUBMISSIONS ON THE INDIVIDUAL CRIMINAL LIABILITY, pp. 311-362.

That is, the defence sought to demonstrate that the prosecution failed to establish that:[245]

(i) Katanga was part of a common plan or an agreement with Ngudjolo;
(ii) Katanga and Ngudjolo carried out essential contributions in a coordinated manner resulting in the fulfilment of the material elements of the crime;
(iii) Katanga had control over the FRPI or the Ngiti combatants;
(iv) The FRPI or Ngiti combatants consisted of an organized and hierarchical apparatus of power;
(v) The execution of the crimes was secured by almost automatic compliance with the orders issued by Katanga;
(vi) Katanga had the *mens rea* to commit the crimes; that is, that he either meant to engage in the crimes, meant to cause the crimes or was aware that they would be committed in the ordinary course of events (article 30(2))
(vii) Katanga and Ngudjolo were mutually aware and accepted that implementing the common plan would result in the fulfilment of the material elements of the crimes; and
(viii) Katanga was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through the Ngiti combatants.

154. These ingredients differ significantly from the ingredients of criminal liability under article 25(3)(d) as analysed above. Clearly the requirements under article 25(3)(a) are more stringent and harder to prove than those under 25(3)(d). Under article 25(3)(a), the defence primarily focused on demonstrating lack of common plan between Katanga and Ngudjolo and a lack of essential contribution to implement this plan on the part of both accused. The entire case theory as described by the Pre-Trial Chamber is based on the premise that Katanga and Ngudjolo entered into an agreement 'to wipe out Bogoro'.[246]

155. In the view of the defence, since the Prosecutor failed to establish that there was an agreement between Ngudjolo and Katanga to wipe out Bogoro, an acquittal of both defendants should have followed. The allegations against them were intertwined. Given that the Pre-Trial Chamber held that Ngudjolo and Katanga were the only co-perpetrators in the plan to wipe out Bogoro,[247] Katanga cannot then be held to have agreed with others to wipe out Bogoro.

156. The majority does not appear to share this view. Instead, it now examines whether there is a case against Katanga without Ngudjolo in the common plan or agreement. However, in changing the liability from (a) to (d), the Chamber goes further than simply cutting Ngudjolo out of the story. It radically transforms the story.

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[245] ICC-01/04-01/07-717, Decision on the confirmation of charges, 1 October 2008, paras. 488, 525, 526.
[246] Confirmation decision, para. 548 (" (…) Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to "wipe out" Bogoro (…) »).
[247] Confirmation decision, paras. 548, 560, 561, 563.

157. This theory now appears to have been reversed and Katanga's previously alleged, automatically obedient subordinates appear to have been transformed into "a group of persons acting with a common purpose" to whose crimes Katanga is alleged to have made a contribution.[248] Thus, Katanga's previously alleged subordinates (although it remains unclear who they are exactly) have become perpetrators with a cogently different status and correlation to Katanga in the planning and execution of the crimes.[249] The nature of the role of the accused, and that of the actual perpetrators of crimes, is central to the factual narrative underlying the charges. In relying on a different kind of relationship between the accused and the alleged actual perpetrators, the Majority is changing the fabric of the story in a fundamental way.

158. In addition, the Chamber appears to shift the level of contribution from essential – Katanga being the 'mastermind' of the criminal plan – to a contribution in 'any other way' – Katanga being a general coordinator.[250] The defence underscores that Katanga's role and his contribution to the plan to attack Bogoro by permitting Aveba to be used for the transmission of weapons and troops, as referred to in the confirmation decision,[251] are clearly secondary to his alleged joint planning with Ngudjolo of this attack and his direct responsibility for its implementation.[252] The former contribution is secondary and non-essential. The latter is primary and substantial. These are significantly different roles, the latter being the material role for the purposes of the existing charges. Accordingly, and as pointed out by the dissenting judge,[253] these changes alter the narrative to such an extent that they change the "statement of facts", which the Appeals Chamber has held to be impermissible under Regulation 55(1).[254] The Appeals Chamber, in its judgment on the Notice decision, considered that 'Whether the change of narrative is of such an extent or nature that it does, in fact, exceed the facts or circumstances is something on which the Appeals Chamber will only be able to rule if and when the Trial Chamber has changed the legal characterisation in its decision under article 74 of the Statute.' Therefore this is

[248] *See* also Dissent, para. 22.
[249] As stated in the Dissent, "All of a sudden, these individuals - who are not identified are thus transformed by the Majority from a legion of blindly obedient and 'fungible' executants, who automatically complied with Germain Katanga's orders (and whose personal intentions were therefore irrelevant in the sense of Article 25(3)(a)) to a 'group of persons acting with a common purpose' (in the sense of Article 25(3)(d)). At the same time, Germain Katanga is demoted from a leader with almost total control (in the sense of Article 25(3)(a)) to an accomplice who is now supporting the criminal common purpose of an unidentified subsection of his former subordinates (in the sense of Article 25(3)(d)). Needless to say, the purported 'common purpose' of this undetermined criminal group is nowhere to be found in the Confirmation Decision."
[250] Notice Decision, para. 28.
[251] Confirmation Decision, para. 555 (ii).
[252] Confirmation Decision, paras. 548, 555 (i)).
[253] See Dissent, paras. 18-23.
[254] Lubanga Regulation 55 Appeals Judgment, para. 97. See also Dissent, paras. 12, 20.

issue it still open to debate.[255]

159. Under article 25(3)(d), much of the defence evidence presented at trial is irrelevant. It makes no difference whether or not Katanga controlled the crimes or those carrying them out. No proof is required of him being the 'mastermind' of the organization. The defence mainly challenged the vertical relationship, and focused less on the horizontal relationship. Now it appears that a horizontal relationship between Katanga and the other Ngiti commanders and combatants might be sufficient under article 25(3)(d). In fact, Katanga's position among the Ngiti combatants appears irrelevant under article 25(3)(d).

160. As a result of these changes, and in the circumstances of this particular case, it is evident that the defence will suffer prejudice if the Chamber decides to change the mode of liability. The defence tackled the ingredients under 25(3)(a), not only by challenging the prosecution evidence but also by presenting an alternative narrative and presenting defence witnesses in support of that positive defence.[256] None of this, however, would have been necessary or recommendable if Katanga was charged under 25(3)(d). Under article 25(3)(d), his position does not matter. Nor his control over the crimes.

161. It also appears that, though the Chamber could not find sufficient evidence to establish beyond reasonable doubt that Germain Katanga was guilty as charged, they will use elements of his own admissions to prosecute him under 25(3)(d).[257] However, to secure his conviction under article 25(3)(d), the Chamber would have to engage in a 'cherry-picking' exercise, a view also expressed in the dissenting opinion.[258]

162. Indeed, the Chamber would have to take Germain Katanga's concession of his role as a coordinator out of the context in which it was said. Germain Katanga never conceded to contributing to an unlawful act. Thus, his testimony cannot form the basis of a conviction.

163. A change of liability mode to this degree should not be based on the defence evidence in

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[255] Appeals Chamber Judgment, para. 58; see also paras 46-47.
[256] *See*, Defence Brief, *inter alia*, part II, *REVIEW OF THE CREDIBILITY OF PROSECUTION AND VICTIMS WITNESSES*, p. 11 & s.; part IV, *The Role of Coordinator*, p. 162 & s., *EMOI,* p. 163 & s., *Involvement of the APC*, p. 181 & s., *EMOI plan of attack and preparation for the attack at Kagaba*, p. 195 & s; part VI, *(i) The Prosecution failed to establish beyond reasonable doubt that Germain Katanga was part of a common plan or an agreement with one or more persons - Position of the Defence*, p. 316 & s, in particular *Plan formulated in Beni* , p. 322 & s.
[257] Notice Decision, para. 5.
[258] Dissent, para. 21.

this case. While an accused who elects to give evidence necessarily waives his right of silence, and is not protected from self- incrimination, the choice to give evidence is made in light of the particular allegations contained in the Confirmation of Charges decision. In this case, at this stage in the developing jurisprudence of the ICC, it was not known to the accused that his evidence could be used against him in respect of essentially a different charge. Katanga was the first accused ever to give evidence at the ICC. There was no previous authority to alert him to that fact. Indeed the pronouncements of the Chamber had led to a clear view that the Chamber was focused entirely on the charges as laid. No reference was made to invoking Regulation 55 in this manner. He was not advised nor cautioned of that possibility even though the Chamber, by its questioning, focused intently on the role of coordinator. When confronted with the decision whether or not to testify, Mr Katanga did not know the charge which he would ultimately be facing, but was merely under the erroneous impression that he was charged exclusively with being a co-perpetrator. Even if he could have appreciated the full impact of regulation 55, which it is submitted he could not, he was still at that stage unaware of the charge under article 25(3)(d) and how it would be framed. Even at this stage he does not have sufficient particulars in this respect. If the chamber is moved to recognise that an essential unfairness arose in this case then one remedy it has is not to invoke Regulation 55 or, alternatively, not to base any decision on the evidence given by the accused.

164. Further to the submission at paragraph 163 that ‘one remedy it has is not to invoke Regulation 55 or, alternatively, not to base any decision on the evidence given by the accused’ the defence submits that the Chamber should not rely on Mr Katanga's testimony, in order to preserve the accused's rights. Mr Katanga did not make an informed choice when he testified. The Defence requests the Trial Chamber, if it intends to modify the mode of liability, not to rely on Mr Katanga’s testimony to incriminate him. It should not give any evidentiary weight to his testimony in its deliberations on the question of guilt of the accused.[259] This measure is in order to preserve the fairness of the trial, given the particular circumstances. It also will serve to protect his specific right “not to be compelled to testify or to confess guilt and to remain silent” and “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal” (article 67(1)(g) and (i)). Mr Katanga did not make an informed choice because when he testified, he did not know the charges against him, and more precisely, the mode of

[259] See ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011, p. 9, by which the Trial Chamber decided that it will not give any evidentiary weight to witness P-159's testimony in its deliberations on the question of guilt of the accused.

liability that will be used against him. Given the importance of the privilege against self-incrimination, it is of the utmost importance that the accused is informed in sufficient detail about the precise allegations against him, and the manner in which he is alleged to have participated in the crimes charged, at the time he chooses to testify. The ability of an accused person to make an informed decision as to whether to waive his right to silence is contingent on him first knowing in detail the nature of the charges against him, and on his awareness that an issue can be considered incriminating.

165. It would appear, on one view, that had Germain Katanga remained silent or denied everything he would have been acquitted. Instead, he chose to assist the Chamber in acquiring a better understanding of the conflict and context in which the crimes were allegedly committed. The defence did not deny that crimes were committed in Bogoro, nor that persons from his community participated in the attack. Any concession that Ngiti militia were involved in the Bogoro attack might now be problematic. Calling a witness like D-148, who the defence called to show that Katanga was not in charge of those fighting at Bogoro, might now turn against Katanga because his evidence as well as the evidence of others confirms that Yuda, an Ngiti commander, was present at the Bogoro attack. The defence has always denied that Katanga had any control over Yuda or any of the other Ngiti commanders and combatants present at Bogoro. The defence submitted that the commanders were autonomous and each had control over the fighters within their respective camps. The defence also sought to demonstrate that there was no structure between them. However, it focused on challenging vertical rather than lateral relations.[260]

166. When the defendant remains silent or denies everything, then a change of liability mode does not have the same effect. Indeed, the defendant would deny the charges under the initial mode of liability as well as under the amended mode of liability. The prejudice would not be the same, as the mode of liability would be altered on the basis of the prosecution evidence. The timing would still be highly questionable but would not necessarily cause irreparable damage. If, on the other hand, the defence presents a positive defence and the defendant testifies, then it is very important for him to know what the consequences of his testimony and the presentation of other defence evidence could be.

167. If the Chamber anticipates a conviction principally on the basis of the defence evidence,

[260] Defence Brief, paras 663-670.

then the accused should have known that this was a possibility before the commencement of the defence. In saying that the defendant freely chose to testify,[261] then such a concept of informed consent mischaracterizes the jurisprudence of the European Court of Human Rights (ECHR).

168. The Majority has made a restrictive interpretation of the jurisprudence of the ECHR when it concludes that Katanga's right not to incriminate himself was not violated because he was not subjected to pressure or duress to give his testimony. The ECHR case law in regard to this right defines "coercion" not only as duress or pressure, but more generally, as the absence of will of the accused to give information for a specific and determined purpose. It is the freedom of choice of the accused to testify in full knowledge of the consequences of the testimony which constitutes the relevant criteria in evaluating if the right not to incriminate oneself has been violated or not.

169. This is clear from the *Sassi and Pelissier* case, where the ECHR found that knowing the charges is vital to frame a defence strategy and that the right not to incriminate oneself is only meaningful if one knows the charges. Indeed, an accused person should decide to remain silent or to testify in regard to the charges against him and not in a vacuum. In this regard, the European Court held that « [i]t is is not for the Court to assess the merits of the defences the applicants could have relied on had they had an opportunity to make submissions on the charge of aiding and abetting criminal bankruptcy. The Court merely notes that it is plausible to argue that the defence would have been different from the defence to the substantive charge. »[262] It also emphasised the importance to afford defendants the possibility of exercising their 'right to be informed in detail of the nature and cause of the accusation against them' and their 'right to have adequate time and facilities for the preparation of their defence'.[263]

170. More precisely, the European Court stressed « the need for special attention to be paid to the notification of the "accusation" to the defendant" and the "crucial role" played by the particulars of the offence in the criminal process. It underlined that the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite

[261] Notice Decision, para 51.
[262] ECHR (Grand Chamber), Pélissier and Sassi v. France, no. 25444/94, Judgment, 25 March 1999, para. 60; ECHR, Drassich v. Italy, no. 25575/04, Judgment, 11 December 2007, para. 40; ECHR, Mattei v. France, no. 34043/02, Judgment, 19 December 2006, para. 41.
[263] Sassi and Pelissier, paras. 7-8.

for ensuring that the proceedings are fair.[264] It added that:

> Thus, in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.[265]

171. In the current case, the proper notification of the charges has been a live issue since the beginning. On several occasions, the defence unsuccessfully requested further clarifications with regard to the Document containing the Charges, in particular in respect to the alleged co-perpetrators of Mr. Katanga.[266] The defence also challenged the mode of liability defined by the Pre-Trial Chamber at the beginning of the trial, but the Trial Chamber never ruled on this issue.[267]

[264] ECHR (Grand Chamber), Pélissier and Sassi v. France, no. 25444/94, Judgment, 25 March 1999, paras. 51-54 (references omitted), confirmed by ECHR, Dallos v. Hungary, no. 29082/95, Judgment, 1 March 2001, para. 47, ECHR, Sadak et al. v. Turkey (No. 1), nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, paras 48-50, ECHR, Vesque v. France, no. 3774/02, Judgment (final), 3 July 2006, para. 41, ECHR, Drassich v. Italy, no. 25575/04, Judgment, 11 December 2007, paras 31-34. ECHR, Mattei v. France, no. 34043/02, Judgment, 19 December 2006, paras 34-36, 39, ECHR, I.H. and Others v. Austria, Judgment, 20 April 2006, No. 42780/98, paras. 30-31, 34.

[265] ECHR, I.H. and Others v. Austria, Judgment, 20 April 2006, No. 42780/98, para. 34.

[266] ICC-01/04-01/07-574, Defence Motion seeking the Amendment of the Document containing the Charges, 9 June 2008; ICC-01/04-01/07-620, Defence Reply to Prosecution's Consolidated Response to the Defences' Motions Regarding the Document Containing the Charges, 20 June 2008; ICC-01/04-01/07-954, Defence Application for an Amended Document Containing the Charges, 12 March 2009; ICC-01/04-01/07-1310, Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges, 17 July 2009; ICC-01/04-01/07-1509, Defence Observations on a 'Summary Document Reflecting the Charges', 6 October 2009; ICC-01/04-01/07-1547, Décision relative au dépôt d'un résumé des charges par le Procureur, 21 October 2009; ICC-01/04-01/07-1601, DEFENCE OBSERVATIONS ON THE SUMMARY OF CHARGES AND REQUEST FOR CLARIFICATION AND OR AN EXTENTION OF TIME, 5 November 2009; ICC-01/04-01/07-1653, Defence Observations on the Document Summarising the Charges, 19 November 2009; ICC-01/04-01/07-1690, Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23 November 2009 on the Defence Request for Clarification of the Charges, 30 November 2009; ICC-01/04-01/07-2213, Décision relative à la demande d'autorisation d'appel contre la décision orale de la Chambre de première instance II du 23 novembre 2009 relative à la notification des charges, 23 June 2010.

[267] On 25 June 2007, the Prosecutor sought Mr. Katanga's warrant of arrest on the basis of the mode of liability of "ordering" pursuant to Article 25(3)(b) of the Statute. (ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp, Application for a warrant of arrest for Germain Katanga; see also ICC-01/04-01/07-4-US, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, dated 6 July 2007 , para. 54.) On 2 July 2007, the Pre-Trial Chamber granted the Prosecutor's request but added the mode of liability of "co-perpetration" pursuant to Article 25(3)(a) of the Statute. (ICC-01/04-01/07-1-US-tENG, URGENT WARRANT OF ARREST FOR GERMAIN KATANGA, dated 27 September 2007; see also ICC-01/04-01/07-4-US, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, dated 6 July 2007, reclassified public on 12 February 2008, para. 60.) At the confirmation hearing, the defence challenged the theory of joint control as a notion of co-perpetration under Article 25(3)(a), developed by the *Lubanga* Pre-Trial Chamber. (ICC-01/04-01/07-T-46-ENG ET WT 11-07-2008, pp. 28-43. See also ICC-01/04-01/07-698, Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, para. 13-32.) On 26 September 2008, the Pre-Trial Chamber confirmed the charges on the basis of co-perpetration pursuant to Article 25(3)(a). The Chamber did not address the mode of liability of ordering pursuant to Article 25(3)(b), having considered that its finding on co-perpetration rendered moot further questions of accessory liability. (ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges, para. 471.) On 1st October 2009, the Trial Chamber

172. Furthermore, at no time was the accused placed on notice by the Pre-Trial Chamber or the Trial Chamber of the possibility of the mode of liability being changed in this manner. By contrast, before the final pleadings, after having received the final briefs, the Trial Chamber notified the parties of the possibility of an eventual requalification of the nature of the armed conflict.[268] Ironically, such a modification would have had a much lesser impact than a modification of the mode of liability. If at that point the Chamber was able to anticipate the possibility of a requalification of the nature of the conflict, there is no reason why it was unable to anticipate 'the possibility' of a requalification of the mode of liability. If the Chamber was unable to do so then the defence can hardly be criticised for not anticipating a change or, perhaps more importantly, anticipating that the Chamber would wish to depart from the Confirmation Charges. No indication of that was ever presented to the defence throughout the course of a long process.

173. Nor did the prosecution at any time propose the addition or modification of charges. Departure from the confirmed charges in the manner proposed was not anticipated nor reasonably foreseeable to the defence during the course of the evidential proceedings. It was not taken into account in defence preparations, investigations or general conduct of the case. A requalification would not be appropriate at this late stage, or else the accused's right to prompt notice of the charge would be violated.

174. Change of modes of liability is less controversial in the civil law systems with which the judges in the case are most familiar. Indeed, it would appear that Regulation 55 is largely influenced by civil law traditions.[269] Common law countries generally do not grant the trial court the right to alter the charges at such a late stage: the judges are bound by the legal qualification of the alleged crime included in the charges. The inquisitorial system in civil law countries is different. It embraces the maxim *iura novit curia*, according to which the judges are bound by the factual situation (person of the suspect, time, and place

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ordered the parties to give their views on whether the interpretation given by the Pre-Trial Chamber of Article 25(3)(a) should be retained or discarded. (ICC-01/04-01/07-T-71-Red-ENG WT 01-10-2009, 1-10-2009, pages 7-8.) The defence submitted its views on 30th October 2009, and requested the Trial Chamber not to adopt the interpretation given to Article 25(3)(a) by the Pre-Trial Chamber but to read this provision as it states: jointly with another or through another person.(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; *Cf.* its corrigendum ICC-01/04-01/07-1578-Corr notified on 2 November 2009.) The Chamber never ruled on the submission (See also Dissent, para. 38.).

[268] ICC-01/04-01/07-3274, Ordonnance relative aux modalités de présentation des conclusions orales, paras 13-14, 20 April 2012.

[269] C Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55' Criminal Law Forum (2005) 16: 1–31 at footnote 1.

of the conduct in question) but they are free in applying the provisions of law to those facts.

175. However, the ICC is essentially an adversarial process. There is not, as in the inquisitorial system, a central, judicially prepared *dossier* containing the bulk of the evidence to be relied on, fully accessible to both parties on equal terms. Rather, both parties present and manage their particular cases.[270]

176. In addition, very few domestic trials are comparable to trials of this nature. Domestic trials tend to be shorter, less complex, rooted in tried and tested systems, founded on rehearsed jurisprudence, conducted in a forum with which all the parties are familiar and the accused placed on trial within his own culture and system. It might be justified for the judges to change the mode of liability during the deliberation stage within such a system. The present case, though concerned with a fairly complex factual background, concerns charges related to an attack on one day. It has lasted five years and it would be perverse to change the nature of the charges now. Not only does the accused deserve speedier judgment but also the Chamber has had ample opportunity, over several years, to put him on notice of a change the mode of liability. The defence even invited it to do so before the commencement of trial when it challenged the liability mode of 'indirect co-perpetration' under 25(3)(a).[271] With no change hinted at or expressed, the defence understandably proceeded on the firm foundations of the confirmed charges.

177. The new charge gives rise to the probability that further investigations and evidence may be necessary in order that the accused can fully address the position.

178. Had Katanga been charged under article 25(3)(d) all along, the defence would have examined the horizontal structure in greater detail. In retrospect, it appears that this would have been crucial. Indeed, provided that the Chamber finds sufficient evidence to establish that the Ngiti commanders and combatants formed a group with a common

[270] See for instance, William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, http://humanrightsdoctorate.blogspot.nl/: "For the two majority judges, who come from a culture of inquisitorial proceedings, the idea of reframing a mode of liability in this way is perhaps not as unusual as it might be for a judge from a background in adversarial proceedings. They are more comfortable with procedure where it is the judge rather than the parties who drives the proceedings. But they may not have taken into account the unfairness that results when there are adversarial proceedings, like those prescribed by the Rome Statute, where the scope of the judicial debate is set at the outset of the trial and where the parties produce evidence pursuant to such an agreed understanding."

[271] 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; *Cf.* its corrigendum ICC-01/04-01/07-1578-Corr notified on 2 November 2009.

purpose, it seems that it is no longer relevant whether Katanga had any control over Yuda or any of the other Ngiti combatants the defence has conceded were present at Bogoro. However, the Katanga defence did not concede that the crimes themselves were committed by the Ngiti fighters.

179. Had the defence known that Katanga could be charged under article 25(3)(d), it would have focused more on the aspect that the bulk of the crimes were committed by groups other than the Ngiti combatants or, more particularly, the persons identified with the commission of the crimes. That aspect was of little relevance in a case that was based on common plan. Katanga, on the common plan theory, was equally liable for the crimes committed by those alleged to have been led by Ngudjolo. Charged differently, it would have explored in greater detail the behaviour of the individual Ngiti commanders and individual combatants. It would have made more efforts to investigate and demonstrate the involvement of other combatants, the Lendu, the Bira, and other groups together with camp-followers and other civilians.

180. The defence would have advanced evidence relating to excesses by others who were not Ngiti. The prosecution claim that the subject of excesses was gone into – but the issue is not whether it was touched upon but whether it was gone into commensurate to its importance to the possible new charge – and it was not. In addition, as the matter was not of prime importance in common plan, the choices of the defence to explore it – perhaps to the profound prejudice of the co-accused – lent to a certain necessary restraint. For example, persons killed at the school, one of the main incidents, were, according to the defence's information and understanding, massacred by Lendu from the Montagnes Bleu. Had the prosecution not joined the two cases and had the two accused not been charged with 25(3)(a) liability, but with independent attachment to group activity under 25(3)(d), then there would have been compelling reason in adducing such material. That was not the case with common plan.

<u>Need for further investigations</u>

181. The defence is currently unable to identify sufficiently which further investigations are requested, since the factual basis of the new mode of liability is unclear. Nonetheless, pending the provision of further details by the Chamber, the defence suggests potential lines of inquiry and seeks application of the measures described in regulation 55(3)(b) of

the RoC. The Defence may need further details as to the factual basis of the proposed new mode of liability to be able to prepare an effective defence and identify which investigations are requested. Nevertheless, since the Trial Chamber has ordered the defence to state, 'providing all appropriate justification', whether it intends to seek application of any of the measures described at regulation 55(3)(b), it will seek to indicate some potential lines of inquiry in addition to those matters raised in the course of these submissions.

182. Knowledge of a particular group's criminal intentions requires identification of the group and, in particular, the particular individuals, where those can be named, who formed part of the group. In the event that such are sufficiently identified then the relationship as between Katanga and those individuals or group members requires specific inquiry so as to establish his specific relationship and particular knowledge of their criminal intentions. The previous behaviour of the individuals within that group is relevant as a factor contributing to the accused's knowledge, whether or not 'Article 30' knowledge is sufficient. Inevitably the participation by an individual within that group in previous criminal activities is relevant and the accused's knowledge of those activities.

183. Specific meetings or situations in which it is said to have become apparent to the accused that an indentified group had criminal intent need to be identified and the nature of those meetings examined.

184. Participation by individuals or groups to which the accused may not have contributed needs to be further examined, particularly given the diverse nature of those involved in the attack on Bogoro. This is particularly relevant when common plan liability is abandoned, as the liability for crimes by Lendu at Bogoro becomes significant. As referred to earlier, the defence understanding is that significant excesses were committed by individuals or groups that came from Lendu villages. In particular, the killings at the school, which appear to constitute the main plank of the prosecution case, were committed by villagers from the *Montagnes Bleues*. In its previous efforts to explore that assertion which, under common plan, was not of such significance, the defence was frustrated by a lack of co-operation from witnesses orchestrated by those favourable to his co-accused. A further aspect of that is the participation of Lendu in the Kagaba and Tchomia attacks which while not particularly relevant to the confirmation charges are relevant as to the propensity of the Lendu to commit atrocities, rape and seize woman for

sexual purposes. In addition, pillage at the site was almost largely committed by Lendu rather than Ngiti, and in particular, Ngiti from Aveba. Though the latter was touched on in Katanga's evidence the assertion that pillage was largely the natural preserve of the Lendu was not developed – indeed there was no point in doing so given the then nature of the charges.

185. Supply of weapons was touched upon in the evidence but the precise history of such weapons – to whom they were provided and whether they were actually used at Bogoro and to what purpose or result – was not gone into in detail. This is relevant to the new proposed charge in a manner that it was not with the common plan. If killings were largely done by machetes – for example at the school - rather than by guns then any supply of guns is not necessarily evidence of a contribution to a criminal plan. In fact little evidence was adduced relating to the number of gunshot victims as opposed to those killed by machete. The point is that, subject to the factual findings of the court, the two can be distinguished and given other evidence that may be adduced – the behaviour for example of Lendu villagers who were not part of any Walendu Bindi group – lessens the incriminatory nature of any supply of weapons that may be proved.

186. A criminal purpose, or plan needs to be proved. Exactly how that is done remains unclear at this stage as it depends on the findings of the Chamber. The attack on Bogoro was just part of a larger plan. Katanga gave evidence that other attacks took place of a near contemporaneous nature in several and distant parts of Ituri. The defence would seek to discover the nature of such attacks.

187. The role of 'coordinator' is largely still undefined. If this is to be the focal point of the Chamber's considerations then the defence would like the opportunity to explore its nature further, not only in respect of Katanga providing a more focused view, but also the views of others in his community as to its practical extent.

188. With the arrival of Bosco Ntaganda in the Hague the defence may seek to obtain his view, if possible, of the situation at Bogoro. He was the alleged FPLC Deputy Chief of General Staff for Military Operations,[272] or UPC/FPLC commander of operations,[273]

[272] ICC-01/04-02/06-2-Anx-tENG, *Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, dated 22 August 2006, reclassified public on 28 April 2008, p. 3.
[273] ICC-01/04-02/06-36-Red, *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 26.

ranked third in the hierarchy of the FPLC,[274] has relevant information on the Bogoro attack, especially on the attackers and the crimes committed, the use of child soldiers, etc.[275] and whether he would be willing to testify for the defence, if necessary. Mr Ntaganda was not available as a witness when the defence had to submit its list of witnesses, since he was on the run and surrendered himself to the ICC only in March 2013.

189. Accordingly, it is requested that the defence be given adequate time to reinitiate investigations and present additional evidence to strengthen the propositions set out above. Until now, the defence focused on other issues and has not presented a full and thorough defence in answer to the modified allegations under article 25(3)(d).

Submission on the representative of child soldiers' request

190. The representative of child soldier victims requests the Chamber for an explanation as to why it did not invoke regulation 55 in respect to the use of child soldiers.[276] The defence submits that this request is without merit. Clearly, the Chamber has no obligation to explain why it bases its verdict on the crimes and mode of liability as charged and confirmed in the confirmation decision. This is the normal procedure. It is only when the Chamber departs from the normal procedure – *ie* by invoking regulation 55 – that it needs to provide a detailed explanation.

191. The child soldier victim representative then goes on to challenge the mode of liability as confirmed by the Pre-Trial Chamber. He suggests that, once a fully detailed explanation is provided by the Chamber and the parties and participants have had an opportunity to submit their observations, the mode of liability of co-perpetration for the use of child

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[274] ICC-01/04-02/06-2-Anx-tENG, *Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, p. 3.
[275] The defence submits that Mr Ntaganda may be an interesting witness since, according to the 2006 warrant of arrest, from July 2002 to December 2003, members of the FPLC carried out repeated acts of enlistment into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of, *inter alia*, Bogoro; that members of the FPLC carried out repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training camps at, inter alia, Bogoro, and that Bosco Ntaganda often visited the FPLC training camps where children under the age of fifteen were trained to become FPLC soldiers and that he took part directly in attacks in which FPLC soldiers under the age of fifteen actively participated. Cf. ICC-01/04-02/06-2-Anx-tENG, p. 24.
[276] ICC-01/04-01/07-3366, *Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3319 relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et à la disjonction des charges*, paras. 17, 21-43.

soldiers should be re-characterised as direct perpetration.[277] The defence submits that this request is filed out-of-time and should be dismissed on that basis. Unlike the defence which has challenged the mode of liability from the very beginning, until now, the child soldier representative has not once complained about the mode of liability. He did not make any such submission at any point in time in the course of the trial, nor did he raise his voice when the Notice Decision was issued in November 2012. To do so now is simply too late.

Conclusion

192. The defence submits that it will constitute a manifest unfairness to the accused, in all the circumstances of this case, to alter the mode of liability at this stage of the proceedings and requests the chamber to refrain from doing so.

193. Should the chamber continue to be minded to contemplate such a change then the defence seeks further and better notice of the facts and circumstances that may be relied upon.

194. The defence will also seek to be permitted to make further investigations and inquiries and if necessary to reopen the case in order to present further evidence for the Chamber's consideration under the new mode of liability.

195. In any event the defence submits that the evidence in the case fails to support a conviction under such a new mode of liability.

Respectfully submitted,

David HOOPER Q.C.

Dated this 15 April 2013

At London

[277] *Id*, paras. 18-19, 44-93.