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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 Redacted Version

Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)

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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Introduction

1. This filing contains additional observations by the defence as requested by the Trial Chamber in its majority Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)¹ of the 15th May 2013 (“Decision re Additional Legal and Factual Material”), Judge Van Der Wyngaert issuing a dissenting opinion.² In this ‘May’ decision the Chamber sets out the factual allegations upon which it may proceed to a requalification of the charges against Germain Katanga. The Prosecutor and the Representative of child soldiers submitted observations on 24 May 2013.³
2. This filing is submitted confidentially since it contains the name of prosecution and defence witnesses which are not public. A public redacted version will be submitted as well.

Defence Submissions

3. These observations are in addition to the submissions found in ‘*Defence Observations on Article 25(3)(d)*’ of 15th April 2013⁴ made in response to the *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons* (“Notice Decision”).⁵ The defence there addressed a broad number of issues, including the effect on the overall fairness of the trial and the rights of the accused, the ingredients of the new mode of liability, the excessive nature of the proposed change, the future investigations that may be necessary and other matters not repeated here but strongly maintained.
4. In particular, the defence submitted that the Notice Decision was deficient in that it failed to provide adequate notice to the accused of the factual basis upon which a change in the mode of liability would be made. Observations on the need for proper notice are to be

¹ ICC-01/04-01/07-3371-tENG.

² Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3371-Anx.

³ Prosecution’s Observations on the “Décision relative à la transmission d’éléments juridiques et factuels complémentaires- ICC-01/04-01/07-3376, 24 May 2013; Observations du Représentant légal des victimes enfants soldats, ICC-01/04-01/07-3375, 24 May 2013

⁴ ICC-01/04-01/07-3369.

⁵ ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012.

found in the recent Appeal Decision relating to Regulation 55.⁶ 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.”⁷ And, as observed by the separate opinion in the Appeal Chamber, “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.”⁸

5. The Trial Chamber consequently issued its decision of 15th May ‘transmitting additional legal and factual material’ in an effort to clarify matters for the benefit of the defence. The defence respectfully acknowledges those efforts. However, the defence is not thereby placed in a much different position than it was formerly. In providing the further material the Trial Chamber states that “this information was already largely present in the 21 November 2012 Decision”.⁹ And indeed, very little additional material has been provided to the defence.
6. Consequently, the defence submission still stands, namely that ‘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’,¹⁰ as the details do not give the defendant adequate notice of the basis of the modified charge as required by article 67(1)(a) of the Statute. Lack of specific information leaves the accused uninformed of the case he faces, a position magnified by the complexity of the case.
7. The defence submits that the facts and circumstances contained in the Confirmation Decision will be exceeded if a change were to occur on the basis suggested by the two Chamber decisions. The defence refers to its previous submissions in that respect,¹¹ now

⁶ Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, ICC-01/04-01/07-3363, (“Appeals Chamber Decision”), paragraphs 50, 58, 95, 101 and 102.

⁷ Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012, footnote 37.

⁸ Dissenting opinion of Judge Cuno Tarfusser, ICC-01/04-01/07-3363, 27 May 2013, para. 25.

⁹ Decision re Additional Legal and Factual Material, para. 15.

¹⁰ Defence Observations on Article 25(3)(d), ICC-01/04-01/07-3369, 15 April 2013, para. 6

¹¹ Defence Request for Leave to Appeal the Decision 3319, ICC-01/04-01/07-3323, 21 December 2013, paras 15, 22-25; 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, ICC-01/04-01/07-3339, 10 January 2013, paras 14, 67-94.

further supported by the arguments in the dissenting opinion¹².

8. In its 'May' decision 'the Chamber firstly 'considers it useful to enlighten the Defence as to how it will interpret article 25(3)(d)(ii) of the Statute'.¹³ The defence refers to its submissions on interpretation of that article contained in its previous observations.¹⁴
9. The Chamber then seeks to provide additional information on the facts and circumstances relating to the new mode of liability and asserts that 'neither the facts nor their underlying allegations are new – they are all found in the Decision on the confirmation of charges and, where appropriate, the Summary of the Charges'. The Chamber is at pains to point out that the facts and circumstances so identified '[...] should not be treated as factual findings beyond reasonable doubt already made by the Chamber under the provisions of article 25(3)(d)(ii) given that, as the Chamber has already affirmed in the 12 November 2012 Decision, it has not yet deliberated specifically regarding this aspect of the case against Germain Katanga.'¹⁵ The defence refers to its earlier submissions relating to the appearance of bias generated by the timing and nature of such an intervention. Given that both the accused and the defence have always been treated by the Chamber with the utmost respect and courtesy, the defence emphasises that the jurisprudence concerns 'appearance'.
10. The defence in its earlier observations requested the Chamber to provide more detail.¹⁶ The Chamber responds by stating that 'it is not possible at this time for the Defence to be provided with all of the evidence which may be presented in support of one or other aspect of the factual allegations under consideration.'¹⁷ The defence does not expect 'all the evidence' to be presented to it but submits that it is appropriate for the Chamber, when contemplating whether or not to alter the basis of the charge, in a complex case, to provide a sufficient degree of detail to the defence. Indeed, that is also the view of the Chamber.
11. The problem that may have arisen is that the Majority's view of what is necessary and appropriate to meet the minimum requirements necessary to protect the interests of the accused are markedly different to the view of the defence. At the beginning of the trial the accused was presented with a clear picture of the allegations he faced, his mode of responsibility and details of the evidence in support of those allegations. That is not the

¹² ICC-01/04-01/07-3371-Anx.

¹³ Decision re Additional Legal and Factual Material, para. 11.

¹⁴ See Defence Observations on Article 25(3)(d), *inter alia*, paras 42 and following.

¹⁵ Decision re Additional Legal and Factual Material, para. 12.

¹⁶ Defence Observations on Article 25(3)(d), para. 193.

¹⁷ Decision re Additional Legal and Factual Material, para. 13.

present situation. In this respect, the defence should not be placed in a worse position at the end of a trial than it was at the beginning. Alternatively, it could simply be that there is not a sufficient basis in the Confirmation Decision for the Chamber to find the detail required for a charge under Article 25(3)(d), not just with respect to evidence, but more importantly, in relation to the factual allegations. This appears to be the inevitable result of the collapse of the initial prosecution theory on how the crimes were planned and executed.

12. As to providing detail, the Chamber argues that ‘to do so would in effect be to anticipate the deliberations which, it should be recalled, have not yet taken place’.¹⁸ Such a position, made a full year after retiring to consider the evidence, is bound to be viewed as somewhat artificial. The Chamber has engaged, in any event, in providing some aspects on a ‘hypothetical’ basis, so why not more?
13. The defence respectfully requests the Chamber to provide it with specific references to the admitted testimony of witnesses that constitute or support the factual allegations said to support the suggest new mode of liability, in conformity with its duties under Article 67(1).
14. The Chamber refers to the defence observing that it “is left guessing as to the evidential parameters within which it must base its submissions’.¹⁹ In that context it refers to the defence having already benefitted from the Chamber’s initial, detailed analysis of the credibility of various Prosecution witnesses. The defence is grateful for those indications as to the credibility of witnesses but it is only proper for the Chamber, having come to those conclusions, to have provided the defence with that analysis.
15. The Chamber provides a list which is “only intended to circumscribe more clearly the factual basis (the factual elements and the main factual allegations) on which the Chamber may carry out a recharacterisation. Moreover, this information was already largely present in the 21 November 2012 Decision.”²⁰ Consequently, the defence has already made submissions on much of the material.

First factual element

¹⁸ Decision re Additional Legal and Factual Material, para. 13.

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*, para. 15.

16. The first factual element referred to is that ‘Ngiti combatants intentionally committed crimes confirmed by the Pre-Trial Chamber, during and after the 24 February 2003 attack on Bogoro’.²¹ As to further details, paragraph 19 reads ‘In this regard, the Defence is invited to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI.’ There is no further particularity. There is no indication which particular combatants, from where, did what, to whom. The Confirmation Decision speaks generally of ‘FNI/FRPI attackers’. For example, as at paragraph 302 – ‘FNI/FRPI attackers [...] willfully killed civilians - most of them women, children and elderly - who sought refuge in the Bogoro Institute, a school situated within the UPC military camp’. How though would that fact stand if in fact it was demonstrated that the killings at the school were done exclusively by ‘FNI’ or Lendu?

17. As a result of the lack of detail about the plan, and the orchestration of the plan, to ‘wipe out’ Bogoro, it is equally unclear how a link can be established between the alleged Ngiti perpetrators of crimes at Bogoro and the Ngiti commanders and combatants alleged to be part of a group with a common purpose. The fact that some Ngiti people have been identified as having committed crimes at Bogoro does not provide evidence of any link between them and any of the alleged planners of the Bogoro attack. Unless it is suggested that any Ngiti person belongs to the alleged Ngiti group acting with a common purpose, their mere speaking of the Ngiti language does not link the alleged Ngiti perpetrators to this group. The defence refers to its earlier submissions with regard to the diverse elements who may have participated in the commission of crimes at Bogoro.²² The issue is not whether Ngiti individuals were involved in crimes at Bogoro, as the prosecution appears to suggest,²³ but whether these Ngiti individuals belonged to the group of Ngiti commanders and combatants acting with a common purpose. It is not sufficient for this purpose that crimes have been committed against civilians. It must be demonstrated beyond a reasonable doubt not just that this happened but that the circumstances are such that the only reasonable explanation is that this resulted from a formulation of a purpose common to the group identified in the charges.

18. The importance of such detail is that without it the defence is not in a position to address the issue of nexus between any particular actor and the accused. The defence will

²¹ *Ibid.*, para. 18.

²² Defence Observations on Article 25(3)(d), para. 101.

²³ Prosecution’s Observations, paras. 8-13.

not find the detail in the Confirmation Decision. The references provided of the Confirmation Decision refer the defence to a broad tranche of the crimes section. Of note is the further referencing in the Confirmation Decision to ‘non witnesses’. For example; the references contained in footnote 390²⁴, which is typical of the lack of information now provided to the accused, where none of those referred to remain as effective witnesses. Nor can an accused gather much solace from being ‘invited to refer to the existing evidence in the record of the case, which shows that certain crimes were committed by Ngiti combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI.’²⁵ The observation that ‘some of the crimes’ were committed by combatants from Walendu Bindi’ begs the question – which crimes and which combatants?

19. It may be concluded that on the current proposed charge the defence has not been, and indeed could not be, provided with sufficient detail of the identity of the attackers, how they come to have a common purpose or their link to the accused, unless the facts and circumstances in the Confirmation Decision are even further exceeded.

Second factual element

20. The second factual element deals with the group and its purpose and reads in part ‘The Ngiti combatants who committed the crimes belonged to the Ngiti group of commanders and combatants from Walendu-Bindi collectivité, sometimes identified by the name FRPI, which acted with a common purpose.’²⁶ Accepting that Walendu Bindi covers about 2500 square kilometres of tracks and hills, the geographical designation is not a particularly helpful detail in identifying the group. It is further stated that ‘amongst the group were the commanders and combatants from the network of different (nominated) camps in Walendu-Bindi collectivité’ and that these commanders ‘included German Katanga, Garimbaya, Mbadu, Yuda, Dark, Ngorima, Cobra Matata, Oudo Mbafefe, Lobho

²⁴ Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, footnote 390: ‘Statement of W-157 at DRC-OTP-1006-0054 at 0071-0072, paras 123, 125: “[...][REDACTED]. Il a dit qu’il fallait écraser Bogoro, car on avait déjà essayé de l’écraser deux fois. La troisième fois [sic] il fallait réussir.”; Statement of W-280 at DRC-OTP-1007-1089 at 1095, para. 37: “[REDACTED], KUTE nous a transmis de nouveau les ordres de NGUDJOLO: « Lorsque vous arriverez à Bogoro, il faudra tout effacer ». Je sais que c’est de NGUDJOLO que cet ordre venait. Le chef de KUTE était NGUDJOLO. Ce dernier donnait les ordres [sic] à KUTE et KUTE n’avait pas d’autre choix que de suivre les ordres.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0243, lines 427-428: “le but était qu’on puisse se mettre ensemble pour attaquer BOGORO. On voulait effacer BOGORO.”; Transcript of statement of W-250 at DRC-OTP-0177-0147 at 0279, line 571.’

²⁵ Decision re Additional Legal and Factual Material, para. 19.

²⁶ *Ibid.*, para. 20.

Tchamangere, Move, Alpha Bebi, Joel Androso, Joel Anguluma and Kisoro.’²⁷ It would appear that Katanga is therefore part of that group rather than outside the group. The defence previously submitted that 25(3)(d) requires that the contributor is not part of the group.

21. Many of the commanders mentioned do not appear in the Confirmation Decision, or only in a citation in a footnote of a withdrawn witness or dubious source. Mbadu’s name does not appear in the decision confirming the charges. Garimbaya’s, Move’s and Kisoro’s names appear only once in the decision confirming the charges.²⁸ Kisoro was hostile to Katanga and to others and is mentioned only in the context of the incident where Kisoro attacked the plane which arrives from Beni to Aveba with weapons because he did not receive weapons and ammunition.²⁹ The remainder of the names are scattered throughout the decision and mentioned only sporadically. Their role or function within the Ngiti ‘group’ of commanders and combatants and the common plan is not explained in the Pre-Trial Chamber’s decision.
22. There is no reference as to what any of the commanders are said to have done, nor of their relationship or contact with the accused. Again, the majority of foot-noted references relate to ‘non-witnesses’, as described above. The same is true of the remaining factual assertions at paragraph 20, including those relating to structure, arms supply, communication, positioning before the attack, meetings and the involvement of several commanders in the planning. It is hard for the accused to address the absence of coordination between various autonomous Ngiti combatant groups, spread throughout an area of the size and nature of Walendu-Bindi, without knowing, more specifically, how the different camps are supposed to have cooperated in carrying out the Bogoro attack and the crimes allegedly committed in carrying out this attack.
23. There are facts added to those confirmed in the Confirmation Decision. This is apparent in terms of the names of the commanders and the camps. Four out of the ten camps mentioned by the Majority do not appear anywhere in the decision confirming the charges.³⁰ The other six are mentioned only in footnotes, often by witnesses who have been declared unreliable in the Ngudjolo decision or otherwise fall within the category of

²⁷ *Ibid.*, paras 20 (iii) and (iv)

²⁸ See Confirmation Decision, respectively, para. 16, footnotes 753 and 698.

²⁹ See footnote 698, statement of W-28 at DRC-OTP-0171-1828 at 1833, para. 24.

³⁰ Lakpa, Nyabiri, Mandre, Bulanzabo. The word ‘Olongba’ does not appear in the Confirmation Decision.. See also Dissenting opinion, para. 13.

defunct or unreliable witnesses.³¹ Yet, these camps are now supposed to collaborate closely with one another, so much so that they are all part of the same network of Ngiti commanders and combatants from the Walendu-Bindi collectivity - a new fact which appears nowhere in the decision confirming the charges.³² The notion that the group of Ngiti commanders and combatants from Walendu-Bindi collectivity decided, on their own initiative, to attack Bogoro and to commit the crimes finds no basis in the decision confirming the charges.

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

25. The common purpose identified is to 'wipe out Bogoro' and a policy of reprisals against Hema. The footnoted references again relate almost entirely to witnesses who can no longer be relied upon. Hatred of the Hema population is assigned to the 'group' in a generalised manner. It has not been established on the evidence that the various commanders and camps cited by the Chamber shared this common purpose.

26. Pausing there, it is, the defence submits, a striking feature of the Chamber's exercise that references to factual findings by the Confirmation Chamber refer to facts that are entirely, or largely, drawn from statements made by witnesses that are now wholly discredited or 'non-witnesses'. That is to say, witnesses that the Chamber has held to be wholly discredited, or were withdrawn by the prosecution as being wholly discredited, or not relied upon by the prosecution and not called at trial, or dead and not relied upon. The consequent extent of the Trial Chamber's vicarious reliance on 'non-witnesses' is vast, and provides the defence with no adequate notice of the basis for the factual allegations sufficient for the defence to focus its submissions and further investigations.

27. By 'non-witnesses' the defence identifies; those witnesses now utterly discredited

³¹ See, *inter alia*, footnote 709 referring to P-28, footnote 739 referring to P-28 and P-157.

³² See also Dissenting opinion, para. 15.

³³ Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Conf-Corr2 ("Defence brief"), at para. 665.

according to the Chamber: P-250 [REDACTED], P-219 [REDACTED], P-279 [REDACTED], P-280 [REDACTED], P-159 [REDACTED]; witness abandoned by the prosecution having given evidence, as lying: P-159 [REDACTED]; witnesses inherently unreliable but in any event dead and not relied upon: P-258, P-167; abandoned witnesses P-157, P-238, P-311, P-243, P-358, P-359. As to P-28 [REDACTED], he is plainly a highly discredited witnesses and the defence is unclear what reliance will be placed on him, though given the extent of his evidence already rejected by the Chamber it is difficult for any significant weight to be attached to the remainder. Other witnesses having inherent weaknesses already indicated by the Chamber: P-12 [REDACTED], P-160 [REDACTED]. Finally, there are those witnesses who did not provide the evidence assigned to them in the footnotes.

28. The purpose identified makes reference to the Confirmation Decision to 'ordering the militias to "wipe out" Bogoro village' The Trial Chamber refers to it in paragraph 20: 'Regarding the second factual element, the Chamber underscores that the involvement of several commanders from Walendu-Bindi in devising the plan to "wipe out" Bogoro was already set forth in the Decision on the confirmation of charges'.³⁴ That reference to 'wiping out' is found at paragraphs 390, 532, 549, and 555 of the Confirmation Decision. The footnotes refer to P-157 (abandoned witness), P-280 (deemed unreliable by Chamber), P-250 (deemed unreliable by the Chamber), There is one reference to P-28.³⁵ The same applies to much of the sub-text referencing, particularly the paragraphs concerning criminal responsibility of the accused. The reliance on what is now 'non-witness' material is so extensive that in many parts of the Confirmation Decision the asserted 'fact' is left wholly unsupported. A glance at all the relevant footnotes makes this abundantly clear. The extent of 'defunct' referencing is staggering. Certainly such references do not sufficiently inform Mr. Katanga of the altered mode of liability against him.

29. The defence was presented in the Confirmation Decision with not merely a legal characterisation but with a basis for it. That was the case, and the underlying 'facts', supported by specific references, that the defence was on notice to meet. The defence does not have that necessary detail now. The Confirmation Decision does not provide the detail because the references in its footnotes are obsolete. The Trial Chamber does not provide it as its notice is too vague and fails to provide the accused with the detail forming the basis

³⁴ Paragraph 21.

³⁵ The extent of reliance on his testimony is unknown other than that the greater part of it has already been deemed unreliable by the Chamber. In particular the Chamber has previously rejected his account of participating at Bogoro which was his central testimony.

of the factual assertions. This absence of detail is a significant obstacle on ‘Route 55’.

30. While emphasising that “the involvement of several commanders from Walendu-Bindi in devising the plan to “wipe out” Bogoro was already set forth in the Decision on the confirmation of charges”,³⁶ the Majority does not specify where in the Decision on the confirmation of charges this information can be found and in what way these “several commanders from Walendu-Bindi” were involved in devising the plan to “wipe out” Bogoro. Who were these several commanders? Did they participate in meetings? If so, where and how often? What preparations, if any, did they make? Did they inform the remainder of the group of the common plan, and if so, how did they do that? Did everyone voluntarily subscribe to it? How were the tasks in preparing and implementing the common plan divided among the various members of the group?³⁷

31. The Chamber advised that, in respect of the group/common plan element, ‘the Defence would do well, for example, to refer in the first instance to all of the evidence presented in support of the Prosecution allegation of the existence of an organised, hierarchical structure in Walendu-Bindi collectivité prior to the attack on Bogoro.’³⁸ Reference is made in particular to section 7.1 of the prosecution’s final brief³⁹ in respect of the group element, a 23 page section headed ‘LA FRPI ETAIT UNE STRUCTURE ORGANISEE ET HIERARCHIQUE’.⁴⁰ 153 footnotes of the 242 present in section 7.1 of OTP closing brief (pp. 59 to 83) refer to P-28, P-250 or P-219. A great preponderance of the references are to defunct witnesses. The accused is advised to have regard ‘to all of the evidence presented in support of the Prosecution allegation’. Such general advice presents the defence with inadequate notice at this stage of the proceedings. Nor does it present an adequate picture of the role of the accused vis-à-vis the alleged group members in the terms set out in the previous defence observations.

32. As to the purpose of this ill-defined group, the Chamber has nominated two specific factual elements and invited the defence for specific comment. The common purpose of the the Ngiti group of commanders and combatants from Walendu-Bindi collectivité is nominated at paragraph 20 (i) (a) and (b). Paragraph 20(i)(a) states it involved “attacking UPC military elements in Bogoro, as well as the village itself, in order to “wipe [it] out”,

³⁶ Decision re Additional Legal and Factual Material, para. 21.

³⁷ See also Dissenting Opinion, para. 30.

³⁸ Decision re Additional Legal and Factual Material, para. 21.

³⁹ Corrigendum du Mémoire final, 16 March 2012, ICC-01/04-01/07-3251-Conf-Corr.

⁴⁰ *Ibid.* – pages 59 to 83.

involving the commission of the crimes confirmed by the Pre-Trial Chamber in an attack which targeted the predominantly Hema civilian population, as such.”

33. The essence of the alleged common plan appears to be ‘to wipe out Bogoro’. That specific reference in the Confirmation Decision is, as discussed at paragraph 27 above. It is important to bear in mind that this was not a mere descriptive phrase but was alleged to have been a specific order given to the combatants prior to the attack. It was the *sine qua non* of the plan. There is now no such statement in the trial evidence. Who then formulated, planned, and orchestrated the common purpose to ‘wipe out’ Bogoro? Where and when and how was this plan formulated? Was Katanga present at any planning meetings, and if so, where, when and with whom did such meetings take place? Is the purpose to ‘wipe out Bogoro’ to be established inferentially? And if it can be – though the defence submit inferential proof is inappropriate – then on what circumstantial material is such an inference to be drawn?
34. Paragraph 20(i)(b) states “implementing a common policy which was part of a larger campaign of reprisals specifically directed against the predominantly Hema civilians.” It is unclear to what the ‘larger campaign of reprisals’ refers. What ‘campaign’? The Confirmation Decision employs the words ‘a larger campaign of reprisals specifically directed against the predominantly Hema civilians living in villages in the Ituri region’ and, at footnote 545, refers only to evidence from P-160, P-279, and P-258. More than that, as previously observed,⁴¹ people in Walendu Bindi barely participated in any battle prior to Bogoro other than against the UPDF. Chai involved no civilian attacks. Events at Nyakunde, a Bira town and reviewed in the defence final brief, is further discussed below. There is insufficient evidence to demonstrate that a wider campaign targeting Hema civilians existed before Bogoro. Events post Bogoro are irrelevant to supporting a notion of common policy at the time of that attack or of indicating the ancillary issue of crimes arising in the ordinary course of events.
35. The Chamber invites the defence also to address paragraph 20(ii): “the members of the group, in particular those who committed crimes, felt hatred towards the Hema population.” There is no such factual statement in the Confirmation Decision and the references to that decision (paras. 275, 280, 386, 426 and 555 (iii)) make no mention of it. A passing reference to hate songs in the Confirmation Decision is based solely on material

⁴¹ Defence brief, para. 555, 557, 559, 579, 815.

from P-28 and P-219. There is no assistance provided to the defence in identifying trial material to that effect. The defence addressed the issue in paragraph 784 of its final brief. There is no material that supports such a ‘fact’ extending to ‘the members of the group’ or what appears to be a further unidentified sub-group, namely ‘in particular those who committed the crimes’. It is at most an *ex post facto* deduction and not an identifiable element that would place a party on notice. While some Ngiti individuals may have hated the Hema, that is an insufficient basis for asserting that the entire group or a specific sub-group of Ngiti commanders and combatants felt a hatred towards the Hema. There is no evidence that Katanga bore a hatred – indeed the evidence demonstrates compassion.⁴²

Third factual element

36. The third factual element (paragraph 22) identified is ‘intentionally made a significant contribution’ Again, the defence refers to its previous observations as to law, its application to the present case and in particular the lengthy review of the questions asked by the Judges and the answers provided by the accused as to his meaning of the role of coordinator.⁴³ There is no reliable evidence that Germain Katanga sought to contribute to an attack carried out against the civilian population of Bogoro.

37. In respect of this third element, “the Chamber notes that Germain Katanga’s position of authority over the commanders and combatants in Aveba and in Walendu-Bindi *collectivité* on the eve of the battle of Bogoro and, more so than the title of coordinator which he claimed, the functions which he allegedly assumed as part of the “overall coordinating role” he played are particularly important”. The Confirmation Decision reference is to its paragraph 555 and is couched in terms of his having an ‘overall coordinating role’ – a role described in the context of the full blown common plan with Ngudjolo. It is even temporally limited by reference to ‘from the meeting at Aveba’ – though what ‘meeting’ is now unknown to the defence - and includes ‘orders to wipe out Bogoro’, ‘distribution of the plan’, ‘organising the planning meeting at Aveba’, ‘hate-filled lyrics sung’. The footnotes relating to that section – footnotes 749 to 758 – are based on defunct and incredible witnesses. Again, the nominated factual elements continue in similar vein, based on underlying, abandoned material that castes the case in a very

⁴² Defence brief, paras 1006 and 1317.

⁴³ Defence Observations on Article 25(3)(d), paras 118-122.

different manner.

38. Unless the defence is provided with further and better detail of the basis upon which such general elements are based then it remains unable to respond appropriately and article 67(1) is unsatisfied. It is unsurprising that the Chamber has thus far been unable to provide the necessary level of clarity, given the disintegration of the prosecution's original theory. It is doubtful whether the Confirmation Decision itself now provides a sufficient basis for the alleged 'overall coordinating role', and how precisely this leads to an intentional contribution to the activities of the said group, without exceeding the facts and circumstances in the Confirmation Decision.

Fourth factual element

39. The fourth nominated factual element (paragraph 24) is that "Katanga's contribution was made in the knowledge of the intention of the Ngiti commanders and combatants from Walendu-Bindi *collectivité* to commit the crimes confirmed by the Pre-Trial Chamber." The defence has argued extensively as to the legitimate object of the plan and his lack of intention to attack the civilian population, kill, murder or destroy and the inappropriateness of knowledge based on crimes arising in the ordinary course of events.
40. Since the date of conception of the common plan to attack Bogoro with criminal intent is unclear, the defence cannot determine whether any contribution by the accused preceded it. For example, in the context of Mr. Katanga's alleged assistance in the distribution of weapons, this is not unlawful, particularly given the ongoing conflict in Ituri. Mr. Katanga can be found guilty under article 25(3)(d) only if, in the defence submission, it is established beyond a reasonable doubt that Mr. Katanga helped distribute weapons with the intention that they be used to commit specific crimes, and that these weapons were in fact used to commit those crimes. It is recognized that the Chamber has indicated its intention to adopt a slightly lower threshold by only requiring knowledge of the criminal intention of the group. However, even on that analysis, it is crucial to know when and in what manner the criminal purpose was formulated and how it came to the attention of Katanga, in order to address the legitimacy of any contribution in relation to weapons.

41. The Chamber nominates, as part of the fourth element,⁴⁴ the fact that Katanga knew there would be an attack against civilians, and that the conduct of the group was part of a wider attack on Hema. It indicates that this aspect is more directly related to the Accused's knowledge of the fact that the conduct of the group was part of a large-scale operation directed against the civilian population. The references in the Confirmation Decision, which found Bogoro part of a widespread and systematic attack, are based largely on attacks that have not featured in the evidence and/or which took place after Bogoro.⁴⁵
42. The Chamber relies on various paragraphs in the decision confirming the charges that deal with different elements of the mode of liability initially charged. For instance, paragraph 24(i) of the Majority's *Decision re Additional Legal and Factual Material* relies on paragraphs of the Confirmation Decision that deal with Mr. Katanga's alleged awareness of the existence of an armed conflict and knowledge that the Bogoro attack was part of a strategic plan to secure control over the village.⁴⁶ As such, the Pre-Trial Chamber held that Mr. Katanga was "fully aware of the factual circumstances that established the existence of an armed conflict in the Ituri District between, at least, August 2002 and May 2003, and that the 24 February 2003 attack on Bogoro was part of that armed conflict."⁴⁷
43. Paragraph 24(ii) relies on paragraphs of the Confirmation Decision that deal with Mr. Katanga's knowledge that the Bogoro attack was part of a series of widespread or systematic attacks on the Hema civilian population in Ituri.⁴⁸ None of these references can be relied on in support of demonstrating an allegation that Mr. Katanga made his alleged contribution in the knowledge of the intention of the Ngiti commanders and combatants to commit the crimes charged. These references rather support the threshold elements of war crimes and crimes against humanity.
44. The defence has previously submitted, in its closing brief and later relevant filings, on the general circumstances and the absence of a proper evidential basis for the accused having fore-knowledge. No further light is shed on the evidential basis for it, though the Chamber does indicate that 'it wishes to highlight that the Accused's alleged involvement in, *inter alia*, the battle of Nyakunde and his knowledge of it constitute one of the essential points of this element'. The defence is grateful for that specific indication and the further

⁴⁴ Paragraph 24(ii).

⁴⁵ Confirmation Decision, para. 410.

⁴⁶ Confirmation Decision, para. 387.

⁴⁷ Confirmation Decision, para. 388.

⁴⁸ Confirmation Decision, para. 417.

indication that “the Chamber is therefore of the view that these three factual allegations may be relevant to establishing Germain Katanga’s knowledge of the group’s criminal intent”.⁴⁹ The Defence submits that further details are needed to explain the relevance of the Nyakunde attack and other incidents referenced in paragraph 25 of its Decision with regard to Mr. Katanga’s awareness that crimes would be committed at Bogoro in the ordinary course of events.⁵⁰

45. The subject of Nyakunde, the absence of the accused, and the general circumstances surrounding the event, have been the subject of defence observations in both the closing brief, at paragraphs 563 to 571, and in its April observations. In the Confirmation Decision, Nyakunde was identified as the key example.⁵¹ However, the two witnesses quoted in the Confirmation Decision, without reference to Katanga, are P-157 (abandoned as lying) and P-28. P-219 referred to seeing Katanga there two days after the attack but he is no longer deemed credible. There is no cogent evidence that Katanga was present. As to the events that took place there, in its final brief, the defence observed that ‘The town was substantially a Bira town and any Hema appeared to have left. The civilians killed were mainly Bira. The true number of casualties is unknown, reports are largely unsourced and no forensic evidence has been produced.’⁵² Nyakunde – a Bira settlement - was a unique event, a cocktail of a large body of revengeful, retreating APC troops under APC Major Faustin and the residents and combatants of Songolo that had suffered a massacre just days previous. In and of itself, it does not establish a pattern, let alone a clear and unambiguous pattern sufficient to support a compelling inference that Katanga must have known that the crimes would be committed in the ordinary course of events. Crucially, there has not been evidence in this lengthy case of any attacks before Bogoro in which Katanga is alleged to have participated, or of which he could have had knowledge, and which involved attacks on Hema civilians, murder, rape or other such excesses.

46. The defence submits that the extracted elements, and consequently the charge, are still lacking the requisite clarity to put the accused on notice of the case against him. It is evident that the Chamber has gone to great lengths to identify relevant references in the Confirmation Decision and yet has still failed to present adequate notice of the allegation under Article 25(3)(d). It is submitted that it would not be possible for the Chamber to achieve this without extending or distorting the facts and circumstances as set out in the

⁴⁹ Decision re Additional Legal and Factual Material, para. 25.

⁵⁰ Dissenting Opinion, para. 32.

⁵¹ Confirmation Decision, para. 409, footnote 535

⁵² Paragraph 555.

Confirmation Decision. In these circumstances, it is submitted that the only proper conclusion is that it would not be fair to re-qualify the charges.

Further measures under Regulation 55 (3)(b)

47. The Chamber stated in its May decision that “the Chamber is mindful that certain factual issues are now decisive in evaluating Germain Katanga’s responsibility under article 25(3)(d)(ii).”⁵³ Given the case advanced by the Prosecutor of common plan with Ngudjolo, the defence had no previous need to focus on these decisive factual issues as those issues were overwhelmed by the over-arching nature of the common plan theory. They are now determined to be crucial to a case built on the new mode of liability. Had the case been presented on this new basis at the outset the defence would have conducted the case in a different way. It would not have focused on the absence of a relationship between the two accused but on Katanga’s relationship with, and knowledge of, such Ngiti group, or sub group, as could be identified to have been acting with a common purpose, together with the authorship of crimes. The defence did not focus on these aspects because it was unnecessary to do so. Regulation 55 (3) is there to address this difficulty.

48. As previously indicated in its April observations, at paragraphs 181 to 189, the defence needs to make further investigations. The defence is not trying to have a second bite of the cherry. It would have addressed these matters as necessary matters had it known the nature of the proposed charge. It will not be a prospect welcomed by either the accused or the Chamber. It will be no easy task at this stage, though a necessary one. As with any defence investigations, it is not possible at this stage to spell it all out, and in any event the defence does not know exactly how the investigations will develop or what evidence it may unearth. Had the defence been put on notice of these charges five years ago, it would not be making this application now.

49. The additional and further investigations are likely to extend to all those matters set out in paragraphs 181-189 of the defence’s April observations and will include the following areas ; where sufficiently identified, the relationship as between Katanga and the nominated individuals or group members so as to establish his specific relationship and particular knowledge of their criminal intentions. / The previous behaviour of the

⁵³ Decision re Additional Legal and Factual Material, para. 17.

individuals or group members and Katanga's specific knowledge of them. / Meetings of the individuals or identified group members and Katanga's presence or absence, in respect of any meetings where a criminal plan was discussed, including alibi evidence. / Evidence specifically of the extent of co-operation between the various combatants, commanders and camps prior to the Bogoro attack. / Evidence relating to excesses at Bogoro committed by groups other than the Ngiti - to include the attacks made by Lendu and Bira, and also excesses by APC soldiers present at the attack. / Evidence relating to the massacres at Tchomia and at Kasenyi that the defence allege were the work of Lendu with no Ngiti participation - and to weaken the present thesis whereby Ngiti were responsible for a significant portion of the crimes committed. / To investigate more precisely the manner in which civilians were killed. / And – relevant to the school site massacre – the number of victims there: the defence understanding is that the majority of civilians killed were killed at the school and killed not by 'FNI-FRPI' but by Lendu; again, this bears directly on both the existence of a common purpose among any Ngiti and also on issues of intent and knowledge. / To investigate the extent of pillage more fully with a view to demonstrating that the pillage was committed largely by Lendu – they being 'on site'. / To investigate in more detail the extent of acts of rape or abduction by Ngiti and by Lendu. The defence understanding is that rape is rare amongst the Ngiti but more extensive among Lendu. Again, this was not relevant to a common plan defence but is relevant to common purpose as it touches on issues of purpose and knowledge. / The role of co-ordinator is now a more significant factor and its parameters need more careful analysis – again it was not a prominent feature of the defence case at trial as the common plan theory overwhelmed it. / The supply of guns – as set out at paragraph 185 of the April observations - and greater detail as to who controlled that supply is again of greater significance in the case of common purpose than of common plan.

50. In respect to Katanga's knowledge of the intentions of the group the defence notes that 'the Chamber wishes to highlight that the Accused's alleged involvement in, *inter alia*, the battle of Nyakunde and his knowledge of it constitute one of the essential points of this element'.⁵⁴ That attack has never been a focus of the defence case. The defence will focus on that attack, seek further witnesses of it, establish clearly the ethnic composition of the victims, explore fully the role of the APC, particularly as to pillage (the defence understands much of the pillage was organised by the APC under Major Faustin in order to transfer all the medical facilities further south), seek evidence to support Katanga's

⁵⁴ Decision re Additional Legal and Factual Material, para. 25.

alibi evidence, *etc.* The ‘*inter alia*’ in paragraph 24 relates, presumably, to other unspecified attacks by which the accused may have gained notice of the group’s intentions.

51. Some further investigations into the authors of the crimes. As referred to above and in its previous observations⁵⁵, the criminal behaviour of the Lendu is likely to be a significant if not crucial factual element for the defence to establish. It has not been necessary to do it so far. The defence may require the recalling of prosecution crime scene witnesses as to the accuracy of their identification of Ngiti or of particular Ngiti committing crimes. The defence has a number of witnesses that it may seek to call or recall, together with witnesses available to it before, but not called, as this element lacked its present significance..
52. APC soldiers can speak of both events at Nyankunde and at Bogoro. One APC soldier previously identified and who was a close witness to events was willing to testify only if he could be relocated. From prior experience, the defence is aware that former APC soldiers are reluctant to speak to the defence as they fear reprisals for speaking up about what truly happened. Accordingly, the defence may need more time to engage the VWU and explore possibilities of providing them with protective measures.
53. The defence would also seek to further discuss matters, with a view to recalling, [REDACTED]. There are other potential witnesses, who have not been called, that the defence will also seek to investigate.
54. [REDACTED].
55. Germain Katanga may have additional evidence to present, subject to the outcome of other defence inquiries.
56. An additional problem the defence is facing is that the security situation in Ituri and North Kivu, both areas the defence intends to re-visit if allowed, remains unstable. The defence has obtained the latest security situation, indicating that as a result of recent heavy clashes between the M-23 and FARDC, North Kivu is particularly inaccessible. The

⁵⁵ Defence Observations on Article 25(3)(d), para. 184: “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*.”

defence has previously identified a number of key players currently residing in Beni and Goma whom it would like to re-interview. In light of recent developments, such a mission would have to be postponed. Ituri is unstable and missions outside Bunia require special permission of the Registrar. Recent news also speaks of extensive Mai-Mai and other faction activity in North Kivu, and the introduction in the area of a 3,000 strong U.N. intervention brigade with an ‘offensive mandate’⁵⁶.

57. This defence fell under a new funding regime in May 2012. This was mitigated by the Chamber in its decision of 18 June 2012.⁵⁷ There has been no investigator at all for the past year and co-counsel only intermittently. The defence would have preferred to have conducted investigations over the past months in anticipation of leave being granted to investigate and possibly re-open the case but that has not proved possible. The up-shot is that defence investigations have been frozen for well over a year. Had the defence been in a position to conduct investigations in anticipation that the Chamber may permit further investigations then such investigations could now have been underway.

58. The defence will require six months to conduct the investigations. It will take three months to prepare the Congo based investigations and to address security issues. Also, Mr Jean Logo, the defence investigator, is now living and working in Kinshasa and may not, due to work and security reasons, be available to conduct investigations in Ituri. In addition the team member most active in the investigations is presently based in New York until August. All this is no fault of the accused.

⁵⁶ The Times, 1st June 2013, page 41

⁵⁷ ICC-01/04-01/07-T-341-ENG ET WT 18-06-2012.

Conclusion

59. The defence maintains that the additional factual and legal elements provided by the Decision re additional legal and factual material are insufficient to constitute a proper notice of the charges against the accused pursuant to Article 67(1)(a). In addition, the defence submits that the four factual elements suggested by the Chamber exceed the facts and circumstances of the charges confirmed by the Pre-Trial Chamber.
60. Should the chamber continue to be minded to contemplate a change of the mode of liability, the defence reiterates its request for further and better notice of the facts and circumstances that may be relied upon, based on the testimony of witnesses not withdrawn or found unreliable. It also seeks leave 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.
61. In any event, the defence submits that the evidence in the case fails to support a conviction under both the former (article 25(3)(a)) and the new (article 25(3)(d)) modes of liability

Respectfully submitted,



David HOOPER Q.C.

Dated this 3 June 2013

At London