

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: **ICC-01/04-01/07**

Date: **7 March 2014**

**TRIAL CHAMBER II**

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

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

**Public Document**

**Judgment pursuant to article 74 of the Statute**

command impels the following conclusions: it is not established that (1) in February 2003, the Ngiti militia was an organised apparatus of power; and (2) Germain Katanga, at that time, wielded control over the militia such as to exert control over the crimes for the purposes of article 25(3)(a) of the Statute.

1421. Consequently, the Chamber considers that it need not determine whether the other constituent elements of commission are established and must therefore find that the Prosecution has not established that Germain Katanga committed, within the meaning of article 25(3)(a), the alleged crimes.

### C. LEGAL RECHARACTERISATION OF THE FACTS

1422. Before embarking on its analysis, the Chamber will rehearse to the utmost the various briefs on the proposed legal recharacterisation of the mode of liability in the case at bar.

#### 1. Procedural background

1423. As mentioned above, in its decision of 21 November 2012, the Chamber decided by majority to implement regulation 55 of the Regulations of the Court, notifying the parties and participants to the proceedings that the mode of liability under which the Accused initially stood charged might undergo legal recharacterisation on the basis of article 25(3)(d) of the Statute.<sup>3225</sup> The Appeals Chamber upheld the decision by majority on 27 March 2013.<sup>3226</sup>

1424. In April 2013, the parties and the participants filed with the Chamber submissions on the proposed legal recharacterisation, in regard to points both of

<sup>3225</sup> [21 November 2012 Decision](#).

<sup>3226</sup> [27 March 2013 Appeals Chamber Judgment](#). See also [Defence for Germain Katanga, "Defence Request for Leave to Appeal the Decision 3319"](#), 21 December 2012, ICC-01/04-01/07-3323 (["Request for Leave to Appeal the 21 November 2012 Decision"](#)); [Decision on the "Defence Request for Leave to Appeal the Decision 3319"](#), 28 December 2012, ICC-01/04-01/07-3327 (["28 December 2012 Decision"](#)).

law and of fact, as the Chamber had directed<sup>3227</sup> with reference to regulation 55(2) of the Regulations of the Court.<sup>3228</sup> Responding by majority decision of 15 May 2013 to a Defence motion, the Chamber transmitted to the parties and participants additional factual material, which, in its view, could form the basis for the legal recharacterisation contemplated, also furnishing an initial, brief analysis of the constituent elements of article 25(3)(d)(ii) of the Statute. It accounted for the succinctness of the material thus transmitted and made clear that only in the present judgment would it expound on all its grounds on that point.<sup>3229</sup>

1425. Drawing on the further information thus transmitted, the Prosecution and the legal representative of child-soldier victims supplemented their factual observations on 24 May, as did the Defence on 3 June 2013.<sup>3230</sup> On that occasion, the Defence reiterated its intention stated on 15 April 2013<sup>3231</sup> to conduct further investigations,<sup>3232</sup> adding that it did not rule out recalling witnesses, including certain Prosecution witnesses.<sup>3233</sup>

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<sup>3227</sup> [First observations of the legal representative of the main group of victims on article 25\(3\)\(d\); Legal representative of the child-soldier victims, "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 œuvre de la norme 55 du Règlement de la Cour et à la disjonction des charges", 8 April 2013, ICC-01/04-01/07-3366 \("First observations of the legal representative of the child-soldier victims on article 25\(3\)\(d\)"\); First Prosecution observations on article 25\(3\)\(d\); First Defence observations on article 25\(3\)\(d\)](#). See also *Décision relative à la demande d'enregistrement au dossier de décisions et de requêtes communiquées uniquement par courriel*, 19 February 2014, ICC-01/04-01/07-3432 ("19 February 2014 Decision"), confidential annex 2.

<sup>3228</sup> [21 November 2012 Decision](#), paras. 53-57. See also 19 February 2014 Decision, confidential annex 1.

<sup>3229</sup> [15 May 2013 Decision](#), paras. 11 and 14. See also 19 February 2014 Decision, confidential annex 4.

<sup>3230</sup> [Legal representative of the child-soldier victims, "Observations du Représentant légal des victimes enfants soldats déposées en application de la décision ICC-01/04-01/07-3371", 24 May 2013, ICC-01/04-01/07-3375; Office of the Prosecutor, "Prosecution's Observations on the 'Décision relative à la transmission d'éléments juridiques et factuels complémentaires'", 24 May 2013, ICC-01/04-01/07-3376; Second Defence observations on article 25\(3\)\(d\)](#). See also 19 February 2014 Decision, confidential annexes 3 and 5.

<sup>3231</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 181-189 and 194.

<sup>3232</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 47-57 and 59.

<sup>3233</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 51. Further to a Prosecution motion, to which the Defence did not object, the Chamber authorised the Prosecution to file a reply [[Office of the Prosecutor, "Demande d'autorisation de répliquer aux 'Defence Observations on the Decision transmitting additional legal and factual material \(regulation 55\(2\) and 55\(3\) of the Regulation of the Court\)'" ICC-01/04-01/07-3379-Conf-Corr, 5 June 2013, ICC-01/04-01/07-3380; Defence for Germain](#)]

1426. By decision of 26 June 2013,<sup>3234</sup> the Chamber did not deny the Defence prayer for leave to conduct further investigations.<sup>3235</sup> Nonetheless, it prescribed a time limit of 11 weeks for the submission of the definitive list of the witnesses it intended to recall and the persons whom it wished to call. The Chamber further invited the Defence to apprise it of any difficulties encountered and to move the Bench, where necessary and on an exceptional basis, for further time. In so responding to the first Defence request to that end, the Chamber also instructed the Registry to respond as a matter of urgency to any request it might receive for review of Defence team funding arrangements with a view to reinstating the team.<sup>3236</sup>

1427. Further to a motion brought before it,<sup>3237</sup> the Chamber granted the Defence further time to submit the first list of witnesses and/or any persons it identified as potential Defence witnesses and wished to call.<sup>3238</sup> The Defence filed its observations on the matter on 5 August 2013.<sup>3239</sup> In so doing, it informed the Chamber that after travelling to the DRC in late July 2013, where it met three

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Katanga, "Defence Response to Prosecution 'Demande d'autorisation de répliquer aux 'Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)'", 6 June 2013, ICC-01/04-01/07-3381; Decision granting leave to reply, 6 June 2013, ICC-01/04-01/07-3382]. Said filing and the Defence response were received on 11 and 17 June 2013, respectively [Office of the Prosecutor, "Corrigendum du 'Réplique de l'Accusation aux 'Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court) ICC-01/04-01/07-3379-Conf-Corr'", 12 June 2013, ICC-01/04-01/07-3384-Conf-Exp-Corr (12 June 2013, ICC-01/04-01/07-3384-Red2); Defence for Germain Katanga, Defence Reply to 'Réplique de l'Accusation aux 'Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)'", 17 June 2013, ICC-01/04-01/07-3386-Red ("Defence 17 June 2013 Reply")].

<sup>3234</sup> Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013, 26 June 2013, ICC-01/04-01/07-3388-tENG ("26 June 2013 Decision"), paras. 17-18.

<sup>3235</sup> First Defence observations on article 25(3)(d), para. 194; Second Defence observations on article 25(3)(d), para. 59.

<sup>3236</sup> 26 June 2013 Decision, paras. 47-51.

<sup>3237</sup> Defence for Germain Katanga, "Defence Request for Extension of Time", 11 July 2013, ICC-01/04-01/07-3390-Conf.

<sup>3238</sup> Ordonnance autorisant une prorogation de délai, 12 July 2013, ICC-01/04-01/07-3392.

<sup>3239</sup> Defence for Germain Katanga, "Defence Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013", 5 August 2013, ICC-01/04-01/07-3394-Conf ("First Defence observations on further investigations").

Prosecution witnesses whom it initially considered recalling, it had ultimately decided not to do so.<sup>3240</sup>

1428. The Defence filed fresh observations on 17 September 2013,<sup>3241</sup> the date of expiry of the time afforded by the Chamber for submission of: (1) the definitive list of persons, who in the Defence view, could potentially provide useful information; and (2) new documentary evidence which it might be minded to tender in court. It then explained that it was impossible for it to furnish such a list and informed the Chamber that for reasons beyond its control, it had been unable to undertake the investigations which it considered necessary.<sup>3242</sup> It underscored that it had nonetheless done its utmost to complete the investigations intended to identify potential Defence witnesses, but that its efforts had been frustrated by contemporaneous military activity in Walendu-Bindi *collectivité* and North Kivu<sup>3243</sup> and the consequent insecurity. In filing the observations, the Defence submitted a list of 43 potential witnesses whom it had been unable to meet.<sup>3244</sup> It then restated its desire for the Chamber to desist from the legal recharacterisation envisioned: such a course of action, it submitted, would, perforce, be antithetical to the right to a fair trial enshrined in article 67(1) of the Statute.<sup>3245</sup>

1429. On 18 September 2013, the Chamber directed the Registrar to submit observations on the Defence's analysis of the difficulties encountered in pursuing further investigations occasioned by the prevailing situation in the DRC, in Ituri in particular, from July 2013 until 15 September 2013 inclusive.<sup>3246</sup> In particular,

<sup>3240</sup> [First Defence observations on further investigations](#), para. 12.

<sup>3241</sup> Defence for Germain Katanga, "Defence Second Observations following the *Décision relative aux requêtes présentée par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*", 17 September 2013, ICC-01/04-01/07-3397-Conf ("Second Defence observations on further investigations") and Annex A ("First annex").

<sup>3242</sup> Second Defence observations on further investigations, para. 2.

<sup>3243</sup> Second Defence observations on further investigations, para. 11.

<sup>3244</sup> Second Defence observations on further investigations, para. 38.

<sup>3245</sup> Second Defence observations on further investigations, para. 46. See also [First Defence observations on article 25\(3\)\(d\)](#), para. 192.

<sup>3246</sup> [Demande d'observations adressée au Greffier de la Cour sur l'écriture 3397-Conf de la Défense de Germain Katanga, 18 September 2013, ICC-01/04-01/07-3398 \("18 September 2013 Order"\)](#), para. 9.

the Chamber wished to ascertain “[TRANSLATION] whether the insecurity had, at that time, reached such a level that it effectively precluded travel to the locations listed in the Defence’s brief [Nyakunde in particular] and the holding of meaningful meetings with possible witnesses”<sup>3247</sup> and “[TRANSLATION] whether [...] the situation was likely to improve in the short term”.<sup>3248</sup> The Chamber also inquired as to whether the Registrar had “[TRANSLATION] any information, irrespective of its nature, not mentioned in the Defence brief and which needed to be brought to its attention”.<sup>3249</sup>

1430. The Registrar filed his observations on 23 September 2013.<sup>3250</sup> Concurring with the Defence, he stated: “[TRANSLATION] the factors which frustrated the missions planned for August lie outside the control of the Defence or the Court”.<sup>3251</sup> Nevertheless he differentiated between the areas envisioned. He also confirmed that the planned missions to Kasenyi, Tchomia, Aveba, Gety and Bavi, “[TRANSLATION] would not have been possible”.<sup>3252</sup> He specified however that “[TRANSLATION] up until 23 August 2013, [...] travel under military escort to Bogoro, Zombe [sic] and Nyankunde was feasible” and that “[TRANSLATION] [t]ravel to Goma and Beni was possible up until 21 August 2013”.<sup>3253</sup> In his conclusions, the Registrar considered it necessary to point out that “[TRANSLATION] had the Defence planned to travel before that period, missions to those areas would have been possible”. The legal representatives of the victims, in a joint brief, and the Prosecution also set out their observations on the difficulties raised by the Defence.<sup>3254</sup> The Prosecution drew attention to various points, which

<sup>3247</sup> [18 September 2013 Order](#), para. 9.

<sup>3248</sup> [18 September 2013 Order](#), para. 9.

<sup>3249</sup> [18 September 2013 Order](#), para. 9.

<sup>3250</sup> The Registrar, “*Observations du Greffe en application de la Décision ICC-01/04-01/07-3398*”, 23 September 2013, ICC-01/04-01/07-3400-Conf (“Registrar’s observations on further investigations”).

<sup>3251</sup> Registrar’s observations on further investigations, para. 18.

<sup>3252</sup> Registrar’s observations on further investigations, para. 18.

<sup>3253</sup> Registrar’s observations on further investigations, para. 18.

<sup>3254</sup> Office of the Prosecutor, “*Corrigendum de la Réponse de l’Accusation aux ‘Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses*

in its opinion, constituted a lack of diligence on the part of the Defence in the conduct of its further investigations.<sup>3255</sup>

1431. Further to a Defence motion,<sup>3256</sup> the Chamber granted it leave to file observations on the issues “concerning a possible lack of diligence” on its part and “the actuality and relevance of its further investigations”.<sup>3257</sup> The Chamber then made clear that in the judgment it would rule on whether the difficulties raised by the Defence were real and on the consonance of the recharacterisation procedure with the rights of the Accused and would then entertain the body of observations laid before it on the matter.<sup>3258</sup> Lastly, having underscored that further investigations were not the only possible means of mounting a defence, the Chamber invited the Defence to state its views on the existing body of evidence on record to allow it to adapt its defence strategy to the new legal characterisation envisioned.<sup>3259</sup> To such end, it enjoined the Defence to file any observations which it considered necessary, specifically on the topics determined by the Chamber in its 26 June 2013 Decision.<sup>3260</sup>

1432. On 4 October 2013, the Defence filed its observations on the submissions of the Registrar, the Prosecution and the legal representatives and appended thereto its

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observations 3379 et 3386 des 3 et 17 juin 2013’ ICC-01/04-01/07-3397-Conf”, 26 September 2013, ICC-01/04-01/07-3402-Conf-Corr (26 September 2013, ICC-01/04-01/07-3402-Conf-Red-Corr) (“Prosecution observations on further Defence investigations”); Legal representatives of victims, “Observations sur le document intitulé ‘Defence second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*’” (ICC-01/04-01/07-3397-Conf)”, 25 September 2013, ICC-01/04-01/07-3401-Conf.

<sup>3255</sup> Prosecution observations on further Defence investigations, paras. 18-22.

<sup>3256</sup> Defence for Germain Katanga, “Defence Request for Leave to Reply”, 30 September 2013, ICC-01/04-01/07-3403-Conf; Defence for Germain Katanga, “ADDENDUM to: Defence Request for Leave to Reply”, 1 October 2013, ICC-01/04-01/07-3404-Conf.

<sup>3257</sup> [Decision on the Defence observations \(document 3397-Conf of 17 September 2013\)](#), 2 October 2013, ICC-01/04-01/07-3406-tENG (“2 October 2013 Decision”), para. 15.

<sup>3258</sup> [2 October 2013 Decision](#), para. 14.

<sup>3259</sup> [2 October 2013 Decision](#), para. 17.

<sup>3260</sup> [2 October 2013 Decision](#), paras. 17-18.

correspondence with the Registry on its planned missions.<sup>3261</sup> It further underscored that were the Chamber to proceed to judgment on the basis of article 25(3)(d) of the Statute, prolongation of the further investigations would be necessary to the fairness of proceedings.<sup>3262</sup>

1433. Since the Defence was silent as to the request for a status conference made by the Prosecution in its observations of 26 September 2013,<sup>3263</sup> the Chamber considered, by order of 10 October 2013, that such a hearing need not be held.<sup>3264</sup> It added that a status conference would not further enlighten the Bench, particularly given all of the observations initially furnished by the parties, the participants and the Registrar and the additional clarifications subsequently provided by the Defence for Germain Katanga.<sup>3265</sup>

1434. On 25 October 2013,<sup>3266</sup> having been accorded additional time by the Chamber, the Defence filed further observations on the evidence on record at the Chamber's invitation.<sup>3267</sup> It pointed out that, were the Bench to embark on recharacterisation on the basis of article 25(3)(d) of the Statute, fairness mandated that it be afforded the opportunity to investigate afresh,<sup>3268</sup> whilst underlining that any further delay occasioned by additional investigations would perforce delay unnecessarily the conclusion of the trial.<sup>3269</sup> Citing in support the Dissent to the 2 October 2013 Decision, it took the view that the Chamber could not render judgment without first ruling on the issue of its inability to undertake investigations in the DRC and

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<sup>3261</sup> Defence for Germain Katanga, "Defence Observations on the Registry, Prosecution and Victim Representatives' Observations", 4 October 2013, ICC-01/04-01/07-3407-Conf ("Third Defence observations on further investigations") and Annex B ("Second annex").

<sup>3262</sup> Third Defence observations on further investigations, paras. 6-7.

<sup>3263</sup> Prosecution observations on further Defence investigations, para. 25.

<sup>3264</sup> [Order on the Defence's observations concerning the observations of the Registrar, the Prosecutor and the Legal Representatives \(document 3407-Conf of 4 October 2013\), 10 October 2013, ICC-01/04-01/07-3412-tENG \("10 October 2013 Order"\)](#).

<sup>3265</sup> [10 October 2013 Order](#), para. 5.

<sup>3266</sup> [Third Defence observations on article 25\(3\)\(d\)](#).

<sup>3267</sup> [2 October 2013 Decision](#), para. 18.

<sup>3268</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 8, 91 and 93(ii)(a).

<sup>3269</sup> [Third Defence observations on article 25\(3\)\(d\)](#), para. 8.



on its prayer for additional time to that end.<sup>3270</sup> Finally, relying on articles 64(2) and 69(4) of the Statute, the Defence moved the Chamber to exclude from its analysis certain parts of the Accused's *viva voce* evidence since, in the Defence contention, the Bench had provoked information on Germain Katanga's contribution to the attack on Bogoro by putting questions to him without affording him notice that his answers might be used against him in a subsequent legal recharacterisation.<sup>3271</sup>

1435. By decision of 19 November 2013,<sup>3272</sup> the Chamber recalled the terms of its 2 and 10 October 2013 decisions, reiterating that only in the present judgment would it rule on the consonance of the recharacterisation procedure with the rights of the Accused, and thereby adjudge compliance with the stipulations of regulation 55 of the Regulations of the Court.<sup>3273</sup>

1436. On 11 December 2013, the Defence prayed the Chamber to suspend permanently the proceedings against Germain Katanga.<sup>3274</sup> It maintained that it had been unable to conduct the necessary investigations on account of the prevailing insecurity in Walendu-Bindi *collectivité* – a circumstance beyond its control.<sup>3275</sup> However, it took the view that the pursuance of further investigations was a central element to appraisal of the fairness of the procedure.<sup>3276</sup> For the Defence, conviction on the basis of article 25(3)(d) would deprive the Accused of his article 67(1)(b) and 67(1)(e) rights under the Statute.<sup>3277</sup> Accordingly, it submitted that the Chamber must stay the proceedings and such stay must be

<sup>3270</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 12-13.

<sup>3271</sup> [Third Defence observations on article 25\(3\)\(d\)](#), paras. 17, 92 and 93(ii)(b).

<sup>3272</sup> [Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013, 19 November 2013, ICC-01/04-01/07-3419 \("19 November 2013 Decision"\)](#).

<sup>3273</sup> [19 November 2013 Decision](#), para. 12.

<sup>3274</sup> Defence for Germain Katanga, "Defence Request for a Permanent Stay of Proceedings", 11 December 2013, ICC-01/04-01/07-3422 ("Request for Stay of Proceedings").

<sup>3275</sup> Request for Stay of Proceedings, para. 37.

<sup>3276</sup> Request for Stay of Proceedings, para. 40.

<sup>3277</sup> Request for Stay of Proceedings, para. 40.

permanent, failing which the right of the Accused to be tried within a reasonable time would also be violated.<sup>3278</sup>

1437. Lastly, on 27 January 2014, the Defence filed final and most succinct observations informing the Chamber that, in its view, the situation in eastern DRC had not improved over the past two months, such that any travel there for investigations remained impossible.<sup>3279</sup>

## 2. Relevant provisions

1438. Regulation 55 of the Regulations of the Court, entitled “Authority of the Chamber to modify the legal characterisation of facts” provides:

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

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

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

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

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

1439. Article 64 of the Statute sets out the “Functions and powers of the Trial Chamber”, mandating, *inter alia*, that it:

<sup>3278</sup> Request for Stay of Proceedings, para. 49. See also paras. 50-56.

<sup>3279</sup> [Defence for Germain Katanga, “Defence Further Report on the Security Situation in Eastern DRC”, 27 January 2014, ICC-01/04-01/07-3427.](#)

2. [...] ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

1440. Article 67 of the Statute sets out the minimum guarantees to which the accused is entitled at trial. The provisions of relevance here read:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

[...]

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

[...]

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[...]

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

### 3. Analysis

1441. In the following section, the Chamber, on whom the duty is cast to ensure that the trial is fair and expeditious, will examine the consonance of the legal recharacterisation contemplated with the requirements of the Statute and the Regulations of the Court.

1442. Firstly, it must be recalled that the Appeals Chamber unambiguously and unanimously upheld the legality of regulation 55 of the Regulations of the Court vis-à-vis the provisions of the Statute.<sup>3280</sup> Endorsing the entire grounds and holdings of the 8 December 2009 judgment and consistent with the stance taken in its previous rulings,<sup>3281</sup> the Chamber is of the view that the legality of the regulation need not be reviewed.

1443. Nor will the present judgment revisit the legality of the implementation of regulation 55 at the deliberations stage. In its 21 November 2012 Decision, whilst observing that notice, in the case at bar, had been afforded at an advanced stage of the proceedings, the Chamber saw nothing, in principle, to preclude its implementation of the provision at the deliberations stage.<sup>3282</sup> Irrespective of its potential impact on the rights of the Accused, recourse to such a procedure at an advanced stage was therefore entertained and disposed of by the Appeals Chamber in its 27 March 2013 Judgment, wherein it held:

[W]hile it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible, Mr Katanga's argument that the timing of the Impugned Decision is incompatible with the terms of regulation 55 (2) of the Regulations of the Court is not persuasive.<sup>3283</sup>

It thereby upheld the possibility for a trial chamber to afford notice to the parties only at the deliberations stage that the legal characterisation of the facts might be modified in accordance with regulation 55(2) of the Regulations of the Court. Nonetheless, it added that it was necessary to ensure that the trial remained fair.<sup>3284</sup>

<sup>3280</sup> *The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, 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 2009, ICC-01/04-01/06-2205, paras. 66-72, 73-78 and 82-87. See also 27 March 2013 Appeals Chamber Judgment.*

<sup>3281</sup> See, in particular, *21 November 2012 Decision*, paras. 10-11.

<sup>3282</sup> *21 November 2012 Decision*, para. 20.

<sup>3283</sup> *27 March 2013 Appeals Chamber Judgment*, para. 24.

<sup>3284</sup> *27 March 2013 Appeals Chamber Judgment*, para. 1.

1444. Hence, the issue remains that of whether, in the case at bench, the proposed recharacterisation may be effected without exceeding the facts and circumstances described in the charges and whether, in view of all of the circumstances of the case, implementation of regulation 55 may occasion unfairness of the proceedings against Germain Katanga, by depriving him of the minimum guarantees afforded by article 67(1) of the Statute.

**a) Whether the extent of the legal recharacterisation of the facts exceeds the facts and circumstances described in the charges**

1445. The Chamber rehearsed the facts founding the legal recharacterisation in two core documents: the 21 November 2012 Decision and, to a greater extent, in addressing a Defence motion, in the 15 May 2013 Decision. Moreover, issuance of the Appeals Chamber judgment between 21 November 2012 and 15 May 2013 further illuminated the matter.

1446. The Defence contended that the legal recharacterisation envisioned by the Chamber, as enunciated in the 21 November 2012 and 15 May 2013 Decisions, cannot be effected in the case at bar without exceeding the facts and circumstances described in the charges.<sup>3285</sup> In its view, the recharacterisation contemplated requires new facts to be established: the existence and composition of a group of combatants in Walendu-Bindi *collectivité* and Germain Katanga's role and contribution to the group. The Chamber will analyse these arguments in the first two sub-sections below.

1447. More generally, the Defence further considered that recharacterisation would entail the Chamber's alteration of the narrative in a fundamental way, particularly as regards the nature of the relationship between the Accused and the physical perpetrators of the crimes and the structure of the group in

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<sup>3285</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 7, 46 and 58; [Third Defence observations on article 25\(3\)\(d\)](#), para. 16.

question.<sup>3286</sup> The Chamber will turn its attention to this argument in a third subsection analysing the extent of the envisioned legal recharacterisation of the facts. In this regard, it recalls that in its review of the procedure undertaken on 27 March 2013, the Appeals Chamber did not at the outset note that the change in characterisation contemplated in the case at bar would “immediately” entail a departure from the facts and circumstances described in the charges.<sup>3287</sup> Nonetheless, the Appeals Chamber judgment also makes clear that its review was “limited”<sup>3288</sup> and that it lay with the Chamber to “demonstrate” in its judgment that the recharacterisation did not exceed the facts and circumstances.<sup>3289</sup> Accordingly, it behoves the Chamber to so verify in the present decision.

1448. First, it bears underscoring, as it did in the 21 November 2012 Decision,<sup>3290</sup> that the Chamber endorses the definition of the term “facts” used by the Appeals Chamber in its 8 December 2009 Judgment:

In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.<sup>3291</sup>

1449. Said definition, wherein the term “facts” is clearly equated with the expression “factual allegations”, was reaffirmed by the Appeals Chamber in its 27 March 2013 Judgment. On that occasion, it stated that it was unpersuaded by the Defence argument that only “material facts”, but not “subsidiary or collateral

<sup>3286</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 157.

<sup>3287</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 46.

<sup>3288</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 46.

<sup>3289</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 45.

<sup>3290</sup> [21 November 2012 Decision](#), footnote 37.

<sup>3291</sup> [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, 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 2009, ICC-01/04-01/06-2205](#), footnote 163.

facts” may be subject to a change in legal characterisation.<sup>3292</sup> It further recalled that it had not determined in the 8 December 2009 Judgment how narrowly or broadly the “facts and circumstances described in the charges” as a whole should be understood.<sup>3293</sup>

1450. The Chamber wishes further to specify that its analysis will also inquire as to whether the “factual elements” underpinning the new characterisation and as itemised in the 21 November 2012 and 15 May 2013 Decisions, appear in the *Decision on the confirmation of charges* – otherwise put, whether they are “within” and do not exceed the facts contained in the said decision.<sup>3294</sup> It will also inquire as to whether they constitute “facts” in the sense of substantiating the legal elements of the crimes or the criminal responsibility.

1451. The decision handed down by the Pre-Trial Chamber will constitute its principal reference.<sup>3295</sup> Where the Pre-Trial Chamber considered express reference to the Document Containing the Charges necessary,<sup>3296</sup> the Chamber will verify that the said document did contain the information which clearly states the factual allegations in question.

<sup>3292</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 50.

<sup>3293</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 50.

<sup>3294</sup> See in this regard, [21 November 2012 Decision](#), para. 31 adverting, in respect of the latter expression, to the precise language of regulation 55 of the Regulations of the Court.

<sup>3295</sup> See in this regard, [Decision on the Filing of a Summary of the Charges](#), para. 31; [Defence for Germain Katanga, “Defence Observations on a ‘Summary Document Reflecting the Charges’”, 6 October 2009, ICC-01/04-01/07-1509](#), para. 2(i); [Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, ICC-01/04-01/07-956-tFRA \(“13 March 2009 Order”\)](#), para. 9.

<sup>3296</sup> Regulations of the Court, regulation 52.

(articles 7(1)(g) and 8(2)(e)(vi)), pillaging (article 8(2)(e)(v)) and destruction (article 8(2)(e)(xii)), the Chamber will rely on the intentional commission of the crime by FRPI members.

1483. The same, it must be noted, cannot be said for the criminal responsibility which the Accused may accrue for the crime proscribed by article 8(2)(e)(vii) of the Statute. Whereas the Pre-Trial Chamber found that there were substantial grounds to believe that *members of the FRPI* had intentionally committed the first-mentioned crimes,<sup>3356</sup> it undertook no similar analysis for the commission of the crime of using child soldiers. Upon consideration of that crime, it found that there were substantial grounds to believe that *Germain Katanga* had committed the crime within the meaning of article 25(3)(a): its analysis of the subjective elements so attests.<sup>3357</sup> For the Chamber, legal recharacterisation entailing modification of joint direct commission, as just described, to a form of accessoryship, such as that provided for by article 25(3)(d) of the Statute, would necessarily entail exceeding the facts and circumstances of the case, in contravention of article 74 of the Statute and the specific provisions of regulation 55 of the Regulations of the Court.

#### v. Conclusion

1484. From all of the foregoing, it is clear that the factual allegations underpinning the recharacterisation are, in essence, those rehearsed in the *Decision on the confirmation of charges* and which founded the Pre-Trial Chamber's conclusions of law in respect of *Germain Katanga* on the basis of article 25(3)(a). Therefrom, the Chamber concludes that the proposed recharacterisation is wholly consonant with the stipulations of regulation 55(1) of the Regulations of the Court and articles 67(1) and 74(2) of the Statute.

<sup>3356</sup> [Decision on the confirmation of charges](#), para. 245.

<sup>3357</sup> [Decision on the confirmation of charges](#), paras. 253-263.



**b) Whether the Accused was informed promptly and in detail of the nature, cause and content of the charges**

1485. From article 74(2) of the Statute and regulation 52 of the Regulations of the Court taken together, a “charge” must be understood as:

- a statement of the facts and circumstances *including* the time and place of the alleged crimes, given that the term “fact” denotes, as aforementioned, the factual allegations underpinning each of the legal elements of the crime charged; and
- a legal characterisation of the facts, which must accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation therein under articles 25 and 28 of the Statute.<sup>3358</sup>

1486. The right of an accused to be informed promptly and in detail of the charges against him or her encompasses, therefore, both the facts and their legal characterisation. In respect of the legal characterisation of the facts, the Chamber has already stated that the requirements of article 67(1)(a) of the Statute were met,<sup>3359</sup> since, in the case at bar, the Accused had been put on notice that the legal characterisation could be changed pursuant to regulation 55(2) of the Regulations of the Court. Attention must also be drawn to the Appeals Chamber ruling on the matter in its 27 March 2013 Judgment<sup>3360</sup> that implementation of regulation 55, in and of itself, at the deliberations stage, does not cast doubt on the fairness of the proceedings. Accordingly, the Chamber takes the view that this matter need not be revisited.

1487. As to the facts, none of the factual allegations on which the Chamber may rely in examining Germain Katanga’s criminal responsibility within the meaning of

<sup>3358</sup> See, in particular, [Decision on the Filing of a Summary of the Charges](#), para. 10.

<sup>3359</sup> [21 November 2012 Decision](#), paras. 21-34.

<sup>3360</sup> [27 March 2013 Appeals Chamber Judgment](#), paras. 94 and 100.

article 25(3)(d) of the Statute, in its view, exceed those to which the Pre-Trial Chamber adverted in its analysis of article 25(3)(a).

1488. Insofar as the facts underpinning the new legal characterisation clearly appear in the *Decision on the confirmation of charges*, the Chamber should satisfy itself that initial notice of the charges, as confirmed by the Pre-Trial Chamber, did not violate the stipulations of article 67(1)(a) of the Statute. It is expedient, specifically since the Defence raised the matter before trial commenced, to inquire as to whether the Chamber's modus operandi as of issuance of the *Decision on the confirmation of charges*, when considered as a whole, satisfied the requirements of article 67(1)(a) of the Statute. In addressing this point, the Chamber will afford consideration to fresh information which may have been available to the Defence in the time between issuance of the Pre-Trial Chamber's Decision pursuant to article 61 of the Statute and the commencement of trial.

1489. Inasmuch as certain facts clearly assume greater prominence when considered in respect of article 25(3)(d) of the Statute, the Chamber must also satisfy itself that the Defence was sufficiently informed of the facts underpinning the new legal characterisation. To such end, it must entertain the additional information which the Defence initially obtained in the 21 November 2012 Decision and subsequently throughout implementation of the recharacterisation procedure.

1490. In this regard, the Chamber recalls, as it did in its 21 October 2009 Decision, "that strict compliance with the provisions of articles 64(2) and 67(1)(a) of the Statute requires that the decision should set out, with a maximum of precision, the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes".<sup>3361</sup> Further still, it considers that, here it must scrutinise the Accused's conduct with the utmost circumspection so as to satisfy itself that the conduct constituting the contribution to the crime was described in

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<sup>3361</sup> [Decision on the Filing of a Summary of the Charges](#), para. 31.

sufficient detail when notice was first provided. Since the Accused's responsibility is now framed as accessoryship, the conduct which may establish this mode of liability must be viewed as a fact of particular importance.

**i. Pre-trial notice of the charges concerning Germain Katanga's responsibility under article 25(3)(a) of the Statute**

1491. Before considering whether, in the case at bar, notice of the charges met the requirements of precision and clarity aforementioned, it is necessary to recapitulate briefly and in general terms certain peculiarities of the proceedings specific to the Court's Statute and to set out the Chamber's *modus operandi* in the instant case.

1492. First, the Chamber recalls that under the Rome Statute, the Pre-Trial Chamber confirms and hence circumscribes the charges before the Court. To do so, it relies, *inter alia*, on the document containing the charges tendered by the Prosecution pursuant to regulation 52 of the Regulations of the Court prior to the confirmation hearing and, where necessary, on the evidence led by the Prosecution.<sup>3362</sup>

1493. As the Legal Representative of child-soldier victims pointed out,<sup>3363</sup> the *Decision on the confirmation of charges* cannot be seen simply as an indictment, which does no more than state the essential facts on which the Prosecution will rely. The decision, handed down by a triumviral bench, is, in the case at bar, a document of 250 or so pages wherein the Pre-Trial Chamber scrutinises the factual allegations which the Prosecution intends to establish at trial. In addition to specifying the relevant Prosecution evidence tendered, the decision sets out the reasoning behind the Pre-Trial Chamber's confirmation of some of those factual allegations. Of further note is that such allegations sometimes include additional factual material which provides a better grasp of the context surrounding the

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<sup>3362</sup> T. 78, p. 4.

<sup>3363</sup> T. 78, pp. 27-29.

conduct alleged. Lastly, it should be underlined that in its decision pursuant to article 61(7) of the Statute, the Pre-Trial Chamber chose, where necessary, to refer to the Document Containing the Charges, as it furnishes further details of the content of the factual allegations.

1494. Secondly, the Chamber wishes to underscore that in the case at bar and as it so directed,<sup>3364</sup> the Prosecution produced a table which set out in orderly and systematic fashion the body of evidence on which it was to rely at trial.<sup>3365</sup> The Chamber considered such a table necessary, particularly to impart to the Defence further particulars of the charges, thus providing a clear and comprehensive overview of the incriminating evidence and its connection to the charges brought against the accused persons. Such orderly correlation between the evidence and each factual allegation contained in the *Decision on the confirmation of charges* is also a hallmark of the present case. The Chamber recalls in this regard its 13 March 2009 Decision, wherein it opined that such a table ensured “that there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber” and that compared to a narrative document containing the charges, it offered “the added benefit of additional detailed information and more precision”.<sup>3366</sup>

1495. Having so recalled, it should also be noted that on 11 March 2009, the Defence stressed the importance it attached, specifically in the light of the provisions of

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<sup>3364</sup> [13 March 2009 Order](#), paras. 5-16 (“the Table of Incriminating Evidence breaks down each confirmed charge into its constituent elements - contextual circumstances as well as material and mental elements - as prescribed by the *Elements of crimes*. For each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passage(s), which are directly relevant to the specific factual allegation.”, para. 13).

<sup>3365</sup> [Office of the Prosecutor, “Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge”, 27 May 2009, ICC-01/04-01/07-1174 and annexes \(“Table” or “Table of Incriminating Evidence”\); Office of the Prosecutor, “Prosecution’s Amended Table of Incriminating Evidence and Amended List of Evidence”, 16 November 2009, ICC-01/04-01/07-1643 and annexes. See also \[13 March 2009 Order\]\(#\), para. 12.](#)

<sup>3366</sup> [13 March 2009 Order](#), paras. 5 and 7.

article 67(1)(a) of the Statute, to receiving a clear and precise charge sheet. It then requested that the Prosecution produce a single reference document containing the charges confirmed by the Pre-Trial Chamber for trial.<sup>3367</sup> The Chamber entertained this motion, articulated in the broadest of terms, and considers that it was disposed of in its ruling of 13 March 2009, wherein it did not enjoin the Prosecution to produce a new document containing the charges, but directed from it the Table of Incriminating Evidence aforementioned.<sup>3368</sup>

1496. The Defence described the Table produced as a “useful tool” which furnished a detailed picture of the evidence to be relied on by the Prosecution in support of each charge.<sup>3369</sup> Nonetheless, the Defence reiterated its broad request for the production of a single reference document.<sup>3370</sup>

1497. Responding on 21 October 2009 to the Defence’s concern, the Chamber ordered, on an exceptional basis,<sup>3371</sup> the production of a “Summary of the Charges” setting out with concision the facts underpinning each charge confirmed by the Pre-Trial Chamber. Underscoring “the volume” of the material already disclosed to the Defence and “the difficulties experienced in collating it”, the Chamber considered that, in the circumstances, it was necessary to have a single, concise and intelligible reference document in order for the Defence to be “better apprised” of the nature, cause and content of the charges against the

<sup>3367</sup> [Defence for Germain Katanga, “Defence Application for an Amended Document Containing the Charges”, 12 March 2009, ICC-01/04-01/07-954.](#)

<sup>3368</sup> [13 March 2009 Order](#), paras. 4 and 7.

<sup>3369</sup> [Defence for Germain Katanga, “Renewed Application by the Defence for Germain Katanga for a New Amended Document containing the Charges”, 17 July 2009, ICC-01/04-01/07-1310](#), para. 6.

<sup>3370</sup> [Defence for Germain Katanga, “Renewed Application by the Defence for Germain Katanga for a New Amended Document containing the Charges”, 17 July 2009, ICC-01/04-01/07-1310](#), para. 1. See also [Defence for Germain Katanga, “Defence Proposals to Remedy Deficiencies in the Notice of the Accused”, 14 August 2009, ICC-01/04-01/07-1377](#), paras. 8-9.

<sup>3371</sup> [Decision on the Filing of a Summary of the Charges](#), see, in particular, para. 29.

Accused.<sup>3372</sup> It then further instructed the Prosecution to amend its Table with due regard for the Defence suggestions.<sup>3373</sup>

1498. On 3 November 2009, the Prosecution accordingly filed a 46-page Summary.<sup>3374</sup> The Defence commented that its wish – a clear and concise synthesis of the facts underpinning the charges – had been fulfilled,<sup>3375</sup> but stated however the need for further time in which to make a detailed analysis of the document in the light of the new Table,<sup>3376</sup> which in essence it underscored, was but a synopsis of the charges.

1499. Although the Chamber had drawn attention to the purely technical nature of the resultant Summary in a decision on 10 November 2009,<sup>3377</sup> the Defence maintained that the notice of the charges contained some imprecision, which, to its mind, could raise concerns as to the trial’s fairness.<sup>3378</sup>

1500. In a motion brought just a matter of days before the trial commenced, and with specific reference, on this occasion, to the terms used by the Pre-Trial Chamber and repeated in the Summary, the Defence identified and raised a series

<sup>3372</sup> [Decision on the Filing of a Summary of the Charges](#), paras. 11-12.

<sup>3373</sup> [Decision on the Filing of a Summary of the Charges](#), p. 20. In this respect, it must be emphasised that in an order of 27 July 2009, the Chamber noted that the Table was not actually fit for the initial purpose of clearly setting out the charges against the Accused and the supporting allegations. This observation can be explained by the Prosecution’s decision to refer to the document containing the charges which the Office of the Prosecutor had prepared before the charges were confirmed, rather than to the decision which the Pre-Trial Chamber had ultimately handed down. However in that same order, the Chamber further noted that neither Defence team had thought that it need specify how the table failed to provide them with the information which they considered necessary – as aforementioned, the Defence for Germain Katanga simply requested, in the broadest of terms, that a new document containing the charges be produced ([Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses](#), 27 July 2009, ICC-01/04-01/07-1337, paras. 7-9).

<sup>3374</sup> [Summary of the Charges](#).

<sup>3375</sup> T-74, pp. 26-27. See also [Defence for Germain Katanga, “Defence Observations on the Document Summarising the Charges”, 19 November 2009, ICC-01/04-01/07-1653 \(“Defence observations on the Summary of the Charges”\)](#), para. 4.

<sup>3376</sup> [Defence for Germain Katanga, “Defence Observations on the Summary of Charges and request for clarification and or an extension of time”, 5 November 2009, ICC-01/04-01/07-1601](#).

<sup>3377</sup> [Decision on the Request of the Defence for Germain Katanga for an Extension of Time for its Observations on the Summary of Charges \(Regulation 35 of the Regulations of the Court\)](#), 10 November 2009, ICC-01/04-01/07-1619-tENG, para. 8.

<sup>3378</sup> [Defence observations on the Summary of the Charges](#).

of issues, which, in its submission, merited clarification in accordance with article 67(1)(a) of the Statute.<sup>3379</sup> It took the view that certain expressions used by the Pre-Trial Chamber were potentially ambiguous and that it behoved the Prosecution to state their meaning. Accordingly, it requested that a new, more precise summary of the charges be filed. Of note is that this was the first time that the Defence had raised the issue of imprecision of certain passages of the *Decision on the confirmation of charges* and it did so in concrete terms, with specific examples.

1501. The Chamber disposed of and declined to grant the motion in an oral decision of 23 November 2009.<sup>3380</sup> That decision, it must be pointed out, was preceded by a discussion before the Chamber<sup>3381</sup> shortly before trial commenced, wherein the Chamber specifically asked the Defence whether it ultimately considered the Pre-Trial Chamber's Decision insufficiently precise as regards the Accused's right to notice of the charges. It further stated that the new Table filed by the Prosecution appeared to allay some of the doubts which the Defence had raised.<sup>3382</sup>

1502. During the same discussion, the Defence took the view that there was factual imprecision in the Pre-Trial Chamber's decision and consequently in the Summary.<sup>3383</sup> It requested that the Prosecution give further precision on the factual assertions which the Pre-Trial Chamber had confirmed.<sup>3384</sup> The Prosecution, for its part, recalled that on 25 June 2008,<sup>3385</sup> the Pre-Trial Chamber had ruled on a great many of the imprecisions raised by the Defence<sup>3386</sup> and was

<sup>3379</sup> [Defence observations on the Summary of the Charges](#).

<sup>3380</sup> [Oral decision, T-79](#), p. 1 *et seq.*

<sup>3381</sup> T-78, p. 3 *et seq.*

<sup>3382</sup> T-78, p. 7.

<sup>3383</sup> T-78, p. 8.

<sup>3384</sup> T-78, p. 10.

<sup>3385</sup> Pre-Trial Chamber I, [Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648](#).

<sup>3386</sup> T-78, pp. 19-20.

of the opinion that all of the documents tendered by the Office of the Prosecutor addressed the issues raised by the Defence.<sup>3387</sup>

1503. In an oral decision issued immediately after the aforementioned discussion, the Chamber stated that it was alive to the needs of the Defence. Since the Defence had underlined that its requested delineation of the precise contours of the case proceeding to trial was not decisive, insofar as it had advised that it would enter a plea of not guilty, the Chamber specified that the ambit of the case “[TRANSLATION] was contained” in two documents: the *Decision on the confirmation of charges* and the exhaustive Table of Incriminating Evidence. It therefore invited the Defence to contact the Office of Prosecutor in relation to the two documents, so as to exchange any information that might duly illuminate it. Lastly, the Chamber wished to be apprised of the outcome of the exchange.<sup>3388</sup>

1504. The following day, upon commencement of trial, Germain Katanga pleaded not guilty to each charge read out by the court officer at the Chamber’s behest.<sup>3389</sup> The Defence sought leave to appeal the oral decision on 30 November 2009.<sup>3390</sup> Despite asserting that the Prosecution was the only competent authority and in a position to clarify the purportedly imprecise information, the Defence considered the Chamber’s oral decision unlawful and pointed out that the Accused’s right pursuant to article 67 would be denied absent full clarification of all the points raised in his 19 November 2009 brief.<sup>3391</sup>

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<sup>3387</sup> T-78, p. 21 and 23.

<sup>3388</sup> T-79, pp. 2-3.

<sup>3389</sup> T-80, p. 14 *et seq.*

<sup>3390</sup> [Defence for Germain Katanga, “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-01/04-01/07-1690](#). See also [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, ICC-01/04-01/07-2213](#).

<sup>3391</sup> [Defence for Germain Katanga, “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-01/04-01/07-1690](#), paras. 3 and 14.



1505. On 2 December 2009, having sought leave to appeal, the Prosecution, as agreed, produced a document seeking to dispel the ambiguities identified by the Defence in its 19 November 2009 observations. The 52 page-document, conveyed to the Chamber by e-mail on 3 December 2009, took the form of an internal memorandum entitled "Communication of details in response to Defence Motion 1653" ("the 2 December 2009 Memorandum").<sup>3392</sup>

1506. The Chamber observes that, thereafter, no observation from the Defence regarding the document was forthcoming, despite the importance which this aspect of the case held for it, as it had further underlined when seeking leave to appeal. The Defence took no particular objection to its content and did not see fit to move the Chamber anew. Thenceforth, the matter of the precision of the charges was not addressed again, whether during the trial, in the Defence's closing brief or in its closing statements on Germain Katanga's criminal responsibility under article 25(3)(a) of the Statute.

1507. Upon scrutiny of the body of relevant documents (the *Decision on the confirmation of charges*, the Table of Incriminating Evidence, the Summary and the 2 December 2009 Memorandum), the Chamber further notes that the imprecisions which the Defence raised on 19 November 2009 and saw as a source of ambiguity were all addressed either in the body of the said documents or in their footnotes, that is, if they needed dispelling in pursuance of a meaningful defence on the basis of article 25(3)(a).

1508. In any event, the ambiguities discerned by the Defence were clearly dispelled at trial and its Closing Brief shows that it was able to mount an effective defence on the various points raised. This body of documents which, it bears repeating, all stem from the Chamber's stated desire to correlate the evidence with each factual allegation, allowed the Defence to make informed and precise reference to aspects both temporal (dates of the attacks which preceded and post-dated the attack on

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<sup>3392</sup> 19 February 2014 Decision, confidential annex 8.

Bogoro, dates of the rape and sexual enslavement and dates of the use of child soldiers and pillaging) and geographic (attack on Nyakunde and names of the FNI and FRPI camps where the child soldiers were allegedly trained) and, further still, to the circumstances of the Accused's conduct (identity of the child soldiers whose services he may have enlisted, identity of the women subjected to sexual slavery, names of certain commanders who had a part in contriving the common plan, ethnicity of the combatants who committed the crimes of rape, sexual slavery, destruction and pillaging, and the membership of a specific group).

1509. The foregoing impels the conclusion that the many Defence requests for precision were all met. In addition to the clarification thus obtained, the Defence was therefore furnished with clear and sufficiently detailed information before trial commenced.

**ii. Notice of the charges in the procedure concerning regulation 55 of the Regulations of the Court**

1510. Upon issuance of the 21 November 2012 Decision, the Defence first raised the imprecision of that which, in its view, constituted new allegations brought in respect of the possible application of article 25(3)(d) of the Statute.<sup>3393</sup> It contended that the 21 November 2012 Decision was deficient and did not constitute adequate notice.<sup>3394</sup> The Defence was of the further opinion that even after the Chamber had provided additional factual material,<sup>3395</sup> it was still not in a position to respond to the new mode of liability envisioned, even emphasising that at the beginning of the trial, it had been presented with a clear picture of the charges to which it had to answer.<sup>3396</sup>

<sup>3393</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 16. See also [Third Defence observations on article 25\(3\)\(d\)](#), para. 51.

<sup>3394</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 4.

<sup>3395</sup> [15 May 2013 Decision](#).

<sup>3396</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 11.

1511. This criticism appears first and foremost to form part of reasoning aimed at arguing that the contemplated recharacterisation exceeded the facts and circumstances contained in the charges, a matter which has just been addressed. However, since certain factual aspects assume particular salience in the context of the new legal characterisation envisaged, the Chamber considers that it must further consider the matter, as, moreover, the Appeals Chamber so ordered.

1512. In a general sense, the Appeals Chamber considered that “more detailed information about the factual allegations to which the potential change in the legal characterisation of the facts relate[s]” could be required, adding that such information could be provided subsequently in the proceedings, that is, after notice was given.<sup>3397</sup> Returning to the case at bar, it pointed out that in the 21 November 2012 Decision the Chamber had provided little detail as to the group of persons acting with a common purpose.<sup>3398</sup>

1513. The Chamber duly noted the Appeals Chamber judgment and, by decision of 15 May 2013, furnished the Defence with a more detailed list of the facts described by the Pre-Trial Chamber which underpin the new legal characterisation. The Defence thus had the benefit of a more precise statement of the facts concerning the composition of the group acting with a common purpose, the common purpose, the acts and conduct constituting Germain Katanga’s contribution, and his awareness thereof. As regards the commission of the crimes, the Chamber also invited the Defence “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*”.<sup>3399</sup>

1514. The Chamber thereby sought to pinpoint the specific facts to which it would refer in the envisioned recharacterisation by additionally connecting them to the constituent elements of article 25(3)(d) which it had also imparted, even though,

<sup>3397</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 101.

<sup>3398</sup> [27 March 2013 Appeals Chamber Judgment](#), para. 102.

<sup>3399</sup> [15 May 2013 Decision](#), paras. 20-25.

in its opinion, those factual allegations concerned issues with which the parties and participants were well-acquainted and which had been canvassed at trial.

1515. The fact remains, in the Defence opinion, that adequate notice should have afforded greater precision as to: (1) the common purpose, by specifying, *inter alia*, the meetings which Germain Katanga allegedly attended and who attended;<sup>3400</sup> (2) identification of the group concerned, the reference to its geographical whereabouts being insufficient;<sup>3401</sup> (3) the planning of the attack and the cooperation between the commanders in organising and planning the assault on Bogoro;<sup>3402</sup> and (4) the identity of the physical perpetrators of the crimes committed.<sup>3403</sup>

1516. As regards the meetings and the planning of the attack, in its 26 June 2013 Decision, the Chamber advised the Defence against confining itself to a purely formal conception of the common purpose by seeking proof of planning or an express statement of the group's ambitions and/or the communication of a decision which it may have formally taken.<sup>3404</sup> It wished to expound specifically on that point so that the Defence could make observations which were even more informed as to the type of information it might need. In any case, even assuming that the existence of such meetings was essential for proof of the common purpose, it behoved the Defence to advert to those previously canvassed at trial, by referring, for example, to the meeting mentioned in paragraph 548 (vi) of the *Decision on the confirmation of charges* and which the Prosecution analysed in its Closing Brief.<sup>3405</sup>

<sup>3400</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 14; [Second Defence observations on article 25\(3\)\(d\)](#), para. 33; [Third Defence observations on article 25\(3\)\(d\)](#), para. 24.

<sup>3401</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 9-12, 15 and 97; [Third Defence observations on article 25\(3\)\(d\)](#), para. 4.

<sup>3402</sup> [Second Defence observations on article 25\(3\)\(d\)](#), paras. 22 and 30; [Third Defence observations on article 25\(3\)\(d\)](#), para. 50.

<sup>3403</sup> [First Defence observations on article 25\(3\)\(d\)](#), para. 83; [Third Defence observations on article 25\(3\)\(d\)](#), para. 76. See also [Second Defence observations on article 25\(3\)\(d\)](#), para. 19.

<sup>3404</sup> [26 June 2013 Decision](#), paras. 27 and 28.

<sup>3405</sup> [Prosecution Closing Brief](#), para. 536.

1517. As to identification of the group and cooperation among its members, the Chamber specifically advised the Defence to refer to the body of evidence led to substantiate the allegation of the existence of an organised and hierarchical entity.<sup>3406</sup> The Chamber considered that the Defence had all the necessary information inasmuch as, given how the Pre-Trial Chamber had framed the charges, the parties and participants were able to debate lengthily in court the matter of, *inter alia*, how the members of the group of Ngiti commanders and combatants of Walendu-Bindi *collectivité* performed their activities and specifically, whether they constituted a single, homogenous group: the structure of the present judgment so attests.

1518. Turning lastly to the identity of the physical perpetrators of the crimes, the Chamber is of the view that it furnished all the necessary information in its 15 May 2013 Decision, making specific reference, once again, to the Ngiti combatants of Walendu-Bindi *collectivité*, at times identified by the name FRPI, and restating for the Defence, and not for the first time, the name of the camps and commanders who were members of the group which acted with a common purpose.<sup>3407</sup> Whereas the Chamber acknowledged that the identification of the physical perpetrators of the crimes was touched upon only briefly during the examination of the witnesses in court,<sup>3408</sup> it must be noted that the matter did not however pass uncanvassed by the proceedings, since witnesses were specifically questioned on the subject.<sup>3409</sup> Furthermore, the Chamber made equally plain that the crimes committed by the Ngiti combatants of Walendu-Bindi *collectivité* would be the sole focus of its analysis. Ultimately, it considers that proof of the actual *identity* of the physical perpetrators of the crimes (name and civil status), need not perforce be provided, whether in relation to article 25(3)(a) or

<sup>3406</sup> [15 May 2013 Decision](#), para. 21; [26 June 2013 Decision](#), paras. 21-23.

<sup>3407</sup> [15 May 2013 Decision](#), para. 20 iii and iv. See also [26 June 2013 Decision](#), para. 25.

<sup>3408</sup> [26 June 2013 Decision](#), paras. 35-36.

<sup>3409</sup> See, in particular, P-132, P-268, P-353 and V-2.

article 25(3)(d). It therefore takes the view that such information did not necessarily have to be imparted to the Defence.

1519. The Chamber considers it important to underscore anew that the procedure for which regulation 55 of the Regulations of the Court makes provision does not seek to embark on a retrial on fresh charges with fresh factual allegations. Whereas the Chamber wished to provide as many particulars as possible to the Defence – given the importance now assumed by certain factual material and the insistence on the part of the Defence, once apprised of the approach which the Majority was minded to adopt – it considered that it need not, however, prepare a new indictment or set forth fresh allegations.

1520. In the present case, it is those facts and circumstances – confirmed by the Pre-Trial Chamber and discussed for several months at trial, throughout the presentation of both the incriminating and exonerating evidence – which necessarily prompted the Chamber to contemplate legal recharacterisation. In satisfying itself that notice of the facts concerning the new legal characterisation was sufficiently precise, regard must be had not only to the information furnished by the Chamber further to the 21 November 2012 Decision, but also to all information which, given the conduct of the hearings and their content, was clearly already in the hands of the Defence.

1521. Whereas several points raised by the Defence assume particular salience in respect of the new characterisation, as, moreover, the Chamber has had occasion to note, it must be pointed out that all such points were debated at trial. It was precisely in the light of what was then canvassed and the body of information garnered in the course of those hearings that the Defence was able to present its case on the guilt of Germain Katanga, for the purposes of article 25(3)(d) of the Statute, in its various observations on the new mode of liability.

1522. Furthermore, the Chamber notes that the arguments raised by the Defence to substantiate its grievance of imprecision in the facts underpinning the legal

recharacterisation envisioned<sup>3410</sup> are, to a very great extent, identical to the complaints of imprecision which it saw fit to raise at the outset of trial, when notice of the charges was initially given and in the run-up to the *Decision on the confirmation of charges*.<sup>3411</sup> This observation, moreover, confirms the Chamber's analysis on the matter of whether the recharacterisation exceeds the facts and circumstances described in the charges.

1523. The Defence further argued that if the safeguards of article 67(1)(a) of the Statute were to be fully respected, the Chamber was duty-bound to provide it with the evidence to be used in the recharacterisation and to apprise it of the Bench's position regarding the remaining evidence on record after several witnesses were dismissed.<sup>3412</sup>

1524. As to the list of evidence to which it will refer, the Chamber considers that at this juncture, the Defence could not have been unaware of that evidence and therefore the Bench had no need to provide it. Turning now to the analysis of witness credibility, the Chamber considers that the Defence prayers on the matter were disposed of in its 15 May 2013 Decision. On that occasion, it underscored that the Defence "ha[d] already benefitted", "as an exception", "[TRANSLATION] from the initial, detailed analysis of the credibility of some of the most important Prosecution witnesses, and of Defence witnesses".<sup>3413</sup> Not once did it intimate that the Defence was entitled to avail itself of the analysis of witness credibility or of the evidence on record before judgment was handed down, but instead considered that in that instance, and with due regard for the circumstances specific to the case, it was expedient, for the purposes of guaranteeing a fair trial,

<sup>3410</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 9-12, 15 and 97; [Third Defence observations on article 25\(3\)\(d\)](#), para. 51.

<sup>3411</sup> [Defence for Germain Katanga, "Defence Motion seeking the Amendment of the Document containing the Charges", 9 June 2008, ICC-01/04-01/07-574](#); Pre-Trial Chamber I, [Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648](#)

<sup>3412</sup> [First Defence observations on article 25\(3\)\(d\)](#), paras. 141-142; [Second Defence observations on article 25\(3\)\(d\)](#), para. 13.

<sup>3413</sup> [15 May 2013 Decision](#), para. 14.

to impart forthwith the information to the Defence so that it might respond more promptly and more effectively to the recharacterisation proposed.

1525. Finally, in the Defence view, inasmuch as the facts described by the Pre-Trial Chamber were, at that stage of the proceedings, based on witnesses who were found not credible at the close of trial, the notice afforded by the Chamber in the case at that stage was inadequate.<sup>3414</sup>

1526. The Chamber considers that such argument misapprehends the role of the Pre-Trial Chamber, that it is improper to call into question the well-established fact that the Prosecution is entitled to lead new evidence at trial,<sup>3415</sup> and that the incriminating evidence, as regards the factual allegations which the Prosecution sought to establish, is duly identified in the table summarising the charges.

### iii. Conclusion

1527. Having regard to the circumstances and particulars set out in the *Decision on the confirmation of charges* and the specific measures taken during the pre-trial proceedings and as of implementation of regulation 55, the Chamber considers that the Accused was duly informed in detail of the nature, cause and content of the charges.

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<sup>3414</sup> [Second Defence observations on article 25\(3\)\(d\)](#), in particular paras. 26, 29, 34-35, 37 and 59.

<sup>3415</sup> See, in particular, Rome Statute, article 64(3)(c). See also [The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence"](#), 13 October 2006, ICC-01/04-01/06-568, paras. 2, 54 and 56; [The Prosecutor v. Callixte Mbarushimana, Appeals Chamber, 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, ICC-01/04-01/10-514, para. 44; [Dissenting Opinion of Judge Silvia Fernández de Gurmendi to Pre-Trial Chamber I's decision in Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute](#), 3 June 2013, ICC-02/11-01/11-432-Anx-Corr, paras. 14-16.



argument of the violation of the right of the Accused to a fair trial is also unfounded.

**e) Whether the Accused had adequate time and facilities for the preparation of the defence**

1536. As a preliminary comment, it must be underlined that during the period preceding notice of the recharacterisation and once duly informed of the charges, the Defence had the opportunity to call those witnesses whom it wished to testify for Germain Katanga and to cross-examine the Prosecution witnesses. At that time, it was entirely at liberty to lay before the Chamber its conception of the case, to impugn certain facts, as presented by the Prosecution witnesses, and to cast doubt on their credibility.

1537. Regulation 55(3) of the Regulations of the Court mandates that in affording notice of a possible change to the legal characterisation, as was the case on 21 November 2012, the Chamber is duty-bound, in application of paragraph 2, to ensure, *inter alia*, that the accused has adequate time and facilities for the effective preparation of the defence.

1538. In this respect, it must be recalled that where regulation 55 of the Regulations of the Court is implemented, further investigations or searches for new evidence are not the only possible means of mounting a defence. In fact, the Defence also has the possibility of stating its position in the light of and with regard to the existing body of evidence in the record, thereby allowing it to adapt its defence strategy to the new legal characterisation envisioned. It must therefore have the possibility to clarify, supplement and nuance the oral and written submissions which it previously advanced in respect of the mode of liability initially confirmed by the Pre-Trial Chamber.<sup>3429</sup>

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<sup>3429</sup> [2 October 2013 Decision](#), para. 17.

1539. To satisfy itself that the legal characterisation contemplated duly meets the requirements of article 67(1)(b) and 67(1)(e) of the Statute, the Chamber will therefore review the circumstances in which the recharacterisation phase of the proceedings took place. It will dwell particularly on all of the measures it took to protect the rights of the Accused. First under consideration will be the matter of the opportunity, in the broadest sense, which was afforded to the Defence to: (1) present its case on the recharacterisation envisioned and to put across its view on the correlation between the law on article 25(3)(d) with existing evidence on record; and (2) the opportunity accorded to it to tender new evidence into the record, following notice of possible recharacterisation. In this respect, the leading of new evidence, subsequent to the implementation of regulation 55, may take a number of forms: the recalling of witnesses who testified at trial, whether for the Prosecution or the Defence; the calling and the testimony of new witnesses, be they persons whom the Defence met in the course of its earlier investigations<sup>3430</sup> or newly identified persons; and the tendering of new documentary evidence.

**i. The opportunity to present its case on the recharacterisation envisioned and on the correlation of existing evidence with the law on article 25(3)(d)**

1540. The Chamber first notes that all of the incriminating evidence relied on by the Prosecution was canvassed and tendered into the record prior to notice of the recharacterisation. It observes in this respect that counsel for Germain Katanga had, both prior to notice of the legal recharacterisation and thereafter, the opportunity and means to mount a complete defence and to advance every argument on the Prosecution witnesses' live evidence concerning the initial factual allegations. Hence, in the present case, evidence was led in complete adversariality.

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<sup>3430</sup> Jean Logo, an investigator for the Defence, testified that he had spoken to over 800 people (D02-258, T. 289, pp. 57 and 58).

1541. The Chamber recalls that on numerous occasions and over the course of several months, the Defence was in a position to present its case in respect of all the issues raised by the legal recharacterisation contemplated. It submitted written observations supplementing, bolstering or nuancing its initial arguments and responded to those of the Prosecution and the legal representatives of victims.

1542. As aforementioned, the Defence prepared three documents setting out its observations on legal and factual issues and on substantive matters arising from the legal recharacterisation envisioned,<sup>3431</sup> as well as one reply.<sup>3432</sup> For the purposes of its preparation, the Defence team, entirely reinstated in late November 2012,<sup>3433</sup> was also afforded the three months of the appellate proceedings against the 21 November 2012 decision affording notice.<sup>3434</sup>

1543. In addition, the Chamber wishes to draw particular attention to three measures it considered important to implement, and did so at its own initiative to facilitate the Defence's preparation.

1544. Firstly, it informed the Defence on 21 November 2012 that it was dismissing two Prosecution witnesses, P-219 and P-250. In so doing, the Chamber allowed the Defence, at that juncture, to take account of its appraisal of the credibility of certain key Prosecution witnesses, considering that "[t]his information w[ould] allow the Defence to identify more quickly that evidence to which it does not need to refer in the current context."<sup>3435</sup> The measure, of which the Defence availed itself in preparation of its three briefs, undoubtedly saved it time, allowing it to respond with much greater efficiency to the proposed recharacterisation.

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<sup>3431</sup> [First Defence observations on article 25\(3\)\(d\)](#); [Second Defence observations on article 25\(3\)\(d\)](#); [Third Defence observations on article 25\(3\)\(d\)](#).

<sup>3432</sup> [Defence 17 June 2013 Reply](#).

<sup>3433</sup> [Annex to the 28 December 2012 Decision, ICC-01/04-01/07-3327-AnxA](#).

<sup>3434</sup> See also [26 June 2013 Decision](#), para. 44.

<sup>3435</sup> [21 November 2012 Decision](#), para. 39.

1545. Secondly, in its 15 May 2013 Decision, the Chamber saw fit to impart to the parties and participants the constituent elements of the mode of liability for which article 25(3)(d) of Statute makes provision.<sup>3436</sup> Thus, as of its second brief on the subject, the Defence was in a position to better tailor and impart relevance to its observations inasmuch as it was informed of the constituent elements of the law on which the Chamber intended to rely. Thus apprised, the Defence was able to dispense with alternative arguments on the application of the constituent elements of the mode of liability contemplated. Of note, however, is that, in some regards, the Defence subsequently elected to expound a factual argumentation which did not adopt the legal elements which the Chamber had sought to bring to its attention.<sup>3437</sup>

1546. Thirdly, on 2 October 2013 and of its own accord, the Chamber again invited the Defence to submit, if it so desired and on the basis of the existing evidence on record, further observations on the gamut of topics determined in its 26 June 2013 Decision.<sup>3438</sup>

1547. Ultimately, the Defence observations, both factual and legal, and entertained in the Chamber's analysis of Germain Katanga's responsibility, were undeniably facilitated and simplified by the measures it took.

**ii. The opportunity to tender new evidence into the record**

1548. Once put on notice pursuant to regulation 55(2) of the Regulations of the Court, the Defence essentially strove to underline the importance of conducting further investigations, maintaining that some factual material underpinning the new legal characterisation entailed aspects new to the case. Accordingly, it informed the Chamber of the many issues which, in its view, were insufficiently analysed and explored in the evidence on record and which it wished to analyse

<sup>3436</sup> [15 May 2013 Decision](#), para. 16.

<sup>3437</sup> See, for example, [Second Defence observations on article 25\(3\)\(d\)](#), para. 40.

<sup>3438</sup> [2 October 2013 Decision](#), para. 18.

and pursue further in prospect of legal recharacterisation effected on the basis of article 25(3)(d) of the Statute.

1549. Thus in its 26 June 2013 Decision, the Chamber itemised the various points which the Defence wished to investigate further<sup>3439</sup> by grouping them in clusters of topics, and thus opined:

17. [...] the Chamber accepts that, although addressed at trial, some topics are of particular salience to the analysis of Germain Katanga's liability under article 25(3)(d)(ii) of the Statute. The Chamber considers this to hold particularly true for (1) the attack on Nyankunde and/or other attacks predating the attack on Bogoro; (2) the identification of the perpetrators of the crimes; and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.

18. In principle, therefore, the Chamber is agreeable to further investigations by the Defence for the purposes of a final list of those witnesses whom it intends to recall or call for the first time. Only subsequently will the Chamber rule on the need to grant more detailed requests brought before it.<sup>3440</sup>

It accorded the Defence three months for the conduct of additional investigations.<sup>3441</sup>

1550. Based on information from the Defence, the Chamber enjoined the Registry to adjudge, as a matter of urgency, any application for review of the funding arrangements for its team in prospect of further investigations.<sup>3442</sup> Indeed, the Defence had stated that it was operating with a depleted team and at the time had neither investigators nor co-counsel, which was the case for one month, from April to May 2013. Nonetheless, it neglected to mention that, save for the month

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<sup>3439</sup> At the time, the Chamber identified six different topics: (1) the relationship between the Accused and the members of the Ngiti group of commanders and combatants and the extent of the cooperation between the various combatants, commanders and camps prior to the attack on Bogoro; (2) the meetings between the group members and Germain Katanga's presence or absence at meetings where a criminal plan was discussed; (3) the behaviour of the group members prior to the battle of Bogoro and Germain Katanga's particular knowledge thereof (in particular, the battle of Nyakunde); (4) the identification of the physical perpetrators of the crimes and excesses by combatant groups other than the Ngiti; (5) Germain Katanga's coordinating role; and (6) the supply of weapons and their use in the 24 February 2003 attack on Bogoro.

<sup>3440</sup> [26 June 2013 Decision](#), paras. 17-18.

<sup>3441</sup> [26 June 2013 Decision](#). The Chamber is of the view that in this regard, the Defence need not seek leave to conduct the investigations it considers necessary.

<sup>3442</sup> [26 June 2013 Decision](#), paras. 47-51.

mentioned, its team had been fully reinstated as of late November 2012 and that thenceforth and upon its request, funds could be released for the further investigations which its 21 December 2012 application for leave to appeal had already presented as necessary.<sup>3443</sup> Lastly, the Chamber wishes to underscore that, until June 2013, at no time did the Defence see it necessary to move the Chamber pursuant to regulation 83(4) of the Regulations of the Court, which concerns the scope of legal assistance paid by the Court.

1551. In the said 26 June 2013 Decision, the Chamber directed the Defence to provide by 29 July 2013 an initial list of witnesses whom it wished to call and to submit the final list of its evidence by 17 September 2013. It emphasised that, in accordance with regulation 35 of the Regulations of the Court, the Chamber should be moved forthwith and by reasoned request, as regards any extension of time.<sup>3444</sup>

1552. Further in the 26 June 2013 Decision, the Chamber was also careful to delineate clearly the purview, as it saw it, of regulation 55:

56. [...] The Chamber therefore fully accepts that in the light of this new account of the facts, the Defence might consider it necessary to scrutinise certain facets of the case record not considered of paramount importance when the initial legal characterisation was considered. However – and this bears underscoring – the objective of the procedure established by regulation 55 is not a retrial or, as the Defence has itself stated, is not to afford the parties and participants a second bite at the cherry.<sup>3445</sup>

1553. It has never taken the view that further Defence investigations *in situ* were indispensable to meet the fair trial requirement. It merely refrained from objecting to the Defence's possible pursuance of its investigations so that the latter could arrive at a definitive list of persons, if any, whom it might seek to recall or call.<sup>3446</sup> Mindful, however, that the new procedural phase should proceed

<sup>3443</sup> [Request for Leave to Appeal the 21 November 2012 Decision](#), para. 54. See also [Defence appeal brief on lawfulness of activation of regulation 55](#), paras. 49 and 51.

<sup>3444</sup> [26 June 2013 Decision](#), para. 45.

<sup>3445</sup> [26 June 2013 Decision](#), para. 56.

<sup>3446</sup> [26 June 2013 Decision](#), para. 18.

expeditiously, it wished to circumscribe it by laying down the foregoing time limits.

1554. The Chamber must further underline that, in its 26 June 2013 Decision, it made clear that it would rule on the propriety and necessity of recalling specific witnesses in the light of specific motions from the Defence.<sup>3447</sup>

**a. New evidence from recalled witnesses**

1555. The Defence first stated that it foresaw recalling certain Prosecution witnesses to question them further on the identification of the physical perpetrators of the crimes.<sup>3448</sup> To this end, the Chamber therefore satisfied itself of the prompt and full cooperation of the Prosecution and the Registry.<sup>3449</sup>

1556. The Defence subsequently stated that, in close cooperation with the Office of the Prosecutor, it had undertaken a short mission to the DRC during which it was able to meet and question P-323, P-233 and P-268, the three Prosecution witnesses whose recall it had raised.<sup>3450</sup> Ultimately, the Defence explained that although the witnesses, particularly P-323, had undoubtedly provided further and relevant information, it did not, however, seek their recall nor that of any other Prosecution witness.<sup>3451</sup> The Chamber must therefore conclude that the Defence was afforded the opportunity to recall these various witnesses, specifically to question them in greater detail as to facts of particular salience to the legal recharacterisation, but notes, however, that the Defence elected not to do so.

1557. Turning now to Defence witnesses, the Defence first stated that it envisioned recalling some, including Witnesses D02-148 and D02-176.<sup>3452</sup> Although the

<sup>3447</sup> [26 June 2013 Decision](#), paras. 18, 52-56 and 61.

<sup>3448</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 51. See also [Defence 17 June 2013 Reply](#), paras. 13, 18 and 19.

<sup>3449</sup> See, in particular, [26 June 2013 Decision](#), paras. 36, 44 and 59; 19 February 2014 Decision, confidential annex 6.

<sup>3450</sup> [First Defence observations on further investigations](#), paras. 9-10.

<sup>3451</sup> [First Defence observations on further investigations](#), para. 12.

<sup>3452</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 53.

with the duty of celerity cast on the Chamber, the Bench will assess whether recourse must be had to the provisions of rule 68(a) of the Rules.”<sup>3488</sup> Although the Defence made mention of video link testimony,<sup>3489</sup> it nonetheless chose not to use it in that instance.

### c. Analysis

1572. The right to adequate time and facilities for the proper preparation of the defence presupposes that the Defence team will have sufficient time to conceive, prepare and raise meaningful and effective grounds of defence which are tailored to its case. The right to a fair trial, of which the principle of equality of arms forms an integral part, mandates, furthermore, that each party to proceedings be afforded a reasonable opportunity to present its case under conditions which do not clearly disadvantage it vis-à-vis its adversary.

1573. The determination as to whether the right to adequate time and facilities for the defence was violated cannot be a wholly abstract analysis. Everything turns on the specific circumstances of the case which the accused, counsel and the members of the Defence team had to confront and the nature and status of the proceedings.

1574. The Chamber acknowledges that in the instant case, recourse to the provisions of regulation 55 at an advanced stage in the proceedings, to a certain extent compelled the Accused to redirect, and perhaps complement his defence, which required special preparation on his part within a short space of time. Notice of a possible legal recharacterisation before the Defence rested its case would undoubtedly have lessened the impact – which, however, should not be overstated – that implementation of such a procedure may have had on its right

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<sup>3488</sup> [26 June 2013 Decision](#), para. 65. Rule 68(a) of the Rules of Procedure and Evidence provides that transcripts of *viva voce* evidence may be admitted into the record under certain circumstances.

<sup>3489</sup> [Defence 17 June 2013 Reply](#), para. 22.



to adequate time and facilities for the preparation of its defence.<sup>3490</sup> Thus, in particular to alleviate the situation, the Chamber implemented various measures to ease the Defence's preparation and enable it to respond more effectively to the new mode of liability.<sup>3491</sup> In so doing and within the legal framework circumscribed by regulation 55, the Chamber endeavoured, as far as possible, to lend assistance to the Defence where so petitioned.

1575. The precise terms of regulation 55 show that other than the provision of notice of the implementation of the recharacterisation procedure, only one procedural duty is cast on the Chamber, a duty clearly set out at paragraphs 2 and 3(a), which must be read together: it behoves the Bench, after consideration of the evidence on record, to allow the parties and participants to make submissions on the proposed recharacterisation, and, to such end, specifically ensure that the Accused has adequate time and facilities for the effective preparation of his defence in accordance with article 67(1)(b) of the Statute.

1576. As concerns the opportunity to examine or have examined a witness, to call a new witness or to present other evidence, for which paragraph 3(b) of the regulation makes provision, and which may entail investigations, the Chamber has already stated that not only did such investigations not constitute the only possible means of mounting a defence, but also, and first and foremost, that the Defence is not vested with the automatic right to avail itself of such means. In this regard, the regulation in no uncertain terms makes the opportunity contingent on the discretion of the Chamber with whom lies the prerogative to appraise whether it is "necessary".<sup>3492</sup> As regards this last point, the Chamber in any event considered that the Prosecution was unauthorised to seek the introduction of new

<sup>3490</sup> See, in particular, [First Defence observations on article 25\(3\)\(d\)](#), para. 146.

<sup>3491</sup> See, in particular, "Section X(C)(3)(e)(i) The opportunity to present its case on the recharacterisation envisioned and on the correlation of the existing evidence with the law on article 25(3)(d)", paras. 1544-1547.

<sup>3492</sup> [21 November 2012 Decision](#), para. 57; [15 May 2013 Decision](#), paras. 27 and 28; [26 June 2013 Decision](#), paras. 53-56; [2 October 2013 Decision](#), para. 17.

evidence on the alternative mode of liability contemplated and that to grant it this opportunity anew would afford it an undue advantage.<sup>3493</sup>

1577. Hence, the Chamber must inquire as to whether, with respect to the existing evidence, the Defence, availing itself of the necessary human and financial resources, was able to present its case on the new recharacterisation. In this instance, the Defence, composed of an entirely new team as of late November 2012,<sup>3494</sup> had the necessary human and financial resources to produce all the analyses and observations which it deemed necessary. As underscored, it did so by obtaining not only the Chamber's analysis of the credibility of certain key Prosecution witnesses but also of the law on the new characterisation envisaged. Subsequently and in the course of its rulings, the Chamber saw it necessary to provide it with numerous references to the relevant parts of the *Decision on the confirmation of charges*, to set out its views on some of the Decision's factual allegations to which it would refer<sup>3495</sup> and to specify how some of the issues raised by the Defence could be tackled and understood, including as regards the camps and commanders of Walendu-Bindi *collectivité*,<sup>3496</sup> the common purpose<sup>3497</sup> and the group's criminal intention.<sup>3498</sup>

1578. The submissions produced by the Defence, as provided for by regulation 55(2) of the Regulations of the Court, were therefore fully informed. Further still, it bears recalling that the Chamber took the initiative to invite further submissions from the Defence on the existing evidence on record, even though it had already done so in its first and second briefs. In fact, it appears that immersed in its

<sup>3493</sup> [21 November 2012 Decision](#), para. 56.

<sup>3494</sup> [Annex to the 28 December 2012 Decision, ICC-01/04-01/07-3327-AnxA](#).

<sup>3495</sup> [15 May 2013 Decision](#), paras. 19, 21, 23 and 25.

<sup>3496</sup> [26 June 2013 Decision](#), para. 25.

<sup>3497</sup> [26 June 2013 Decision](#), paras. 27 and 28.

<sup>3498</sup> [26 June 2013 Decision](#), paras. 30-32.

investigations, the Defence had somehow “overlooked”<sup>3499</sup> the procedural opportunity to which regulation 55 nonetheless attaches particular importance.

1579. The Chamber notes that ultimately the Defence was able to undertake part of the further investigations it had desired to conduct, whereas they were not indispensable to the fairness of the trial. In this respect, it must be recalled that the Chamber was well-disposed to the Defence’s exploration of certain issues and even saw fit to set out for it in detail those factual topics which appeared particularly relevant to the legal recharacterisation context.<sup>3500</sup> In pursuing its further investigations, the Defence once more availed itself of the necessary human and financial resources and, moreover, was in a position to move the Registry to that end well before July 2013. Apprised, as from the of 21 November 2012 Decision, of the possibility of a legal recharacterisation of the mode of liability, the Defence was able to start developing its strategy for further investigations and promptly take all the necessary measures.<sup>3501</sup> The Chamber must note further that the Defence merely made frequent references to the prospect of fresh investigations, whilst displaying from the outset the utmost doubt as to their potential outcome, even suggesting that they should in any event be postponed.<sup>3502</sup>

1580. The outcome of the further investigations is known in part: the Defence ultimately chose not to recall the Prosecution witnesses whom it considered material and whom it could have met in the DRC, electing also not to recall its witnesses, whom it had mentioned by name.

<sup>3499</sup> [2 October 2013 Decision](#), para. 17.

<sup>3500</sup> [26 June 2013 Decision](#), paras. 17 and 58.

<sup>3501</sup> See, in particular, [26 June 2013 Decision](#), para. 44.

<sup>3502</sup> [Second Defence observations on article 25\(3\)\(d\)](#), para. 55; [Request for Leave to Appeal the 21 November 2012 Decision](#), para. 50; [First Defence observations on further investigations](#), para. 16; [Defence appeal brief on lawfulness of activation of regulation 55](#), para. 49. See also [Second Defence observations on further investigations](#), para. 2.

1581. The Defence declined to justify specifically the need to further investigate persons whom the Defence investigator had “[TRANSLATION] pursued”<sup>3503</sup> and succeeded in contacting in the DRC and who had not testified at trial. It so refrained on 17 September 2013, upon expiry of the time imparted and thereafter, despite the Chamber’s express direction for such justification.<sup>3504</sup> Indeed, in both the 15 May 2013 and 26 June 2013 decisions, the Chamber had stressed the importance of receiving material to allow it to appraise whether it was “necessary” to implement the provisions of regulation 55(3)(d) of the Regulations of the Court.<sup>3505</sup>

1582. The Chamber must further point out that, whereas pursuance of interviews with certain persons whom the Defence may have met for the first time in summer 2013 may have been important, it was at liberty to request an extension of time, provided that, as the Chamber had made clear, justification was provided.<sup>3506</sup> Yet, once more the Defence refrained from availing itself of the opportunity which the Chamber had nonetheless expressly offered, other than generally seeking further time for its investigations – no further information or justification was forthcoming as to the importance of a given piece of *viva voce* evidence to its case or its relevance to the recharacterisation.<sup>3507</sup>

1583. In addition, had the persons pursued and met *in situ* voiced concern at the prospect of speaking and hence testifying, the Defence should have taken action for the implementation of the proper protection procedures as provided by the founding instruments for situations of this kind. Once again, it must be noted that it chose not to seek protective measures which, had it genuinely needed to call such persons, would have allowed it to do so in optimal conditions.

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<sup>3503</sup> Second Defence observations on further investigations, para. 22. See also Third Defence observations on further investigations, paras. 19 and 24.

<sup>3504</sup> [26 June 2013 Decision](#), para. 62; [2 October 2013 Decision](#), para. 15.

<sup>3505</sup> [15 May 2013 Decision](#), para. 27; [26 June 2013 Decision](#), paras. 53 and 54.

<sup>3506</sup> [26 June 2013 Decision](#), para. 45.

<sup>3507</sup> See in this regard, Second Defence observations on further investigations, paras. 2 and 45; [Third Defence observations on article 25\(3\)\(d\)](#), paras. 8 and 93(ii)(a).

1584. The Chamber must assume that since it had the resources necessary for the purpose, the Defence did its utmost to secure fresh evidence of relevance to its case in the areas to which it was able to travel. If the investigations undertaken proved unsatisfactory, it was entirely at liberty to so observe. No automatic right vests in the defence to secure an outcome which always suits its case. The Chamber notes that the Defence had a reinstated team which enjoyed access to the body of evidence on record and had the opportunity to gather further evidence. That the Defence was unable to uncover fresh evidence of relevance to its case and to bolster the arguments which it wished to bring to the fore does not, however, mean that it was unable to prepare effectively.

1585. Admittedly, the Defence was unable to travel to all areas of interest. Here it is important to underscore that the fairness of proceedings requires only that the defence be afforded optimal access to information which it considers of relevance to mounting a defence.<sup>3508</sup> Access to information is an important ingredient of a fair trial, but restricted access thereto, be it the creature of circumstances or of any other ilk, is not intrinsically incompatible with the fairness requirement.

1586. Moreover, it must be noted that the Chamber, and it, would appear, the Defence itself were unable to appraise the relevance of any information which may have been provided by the vast majority of potential witnesses living in the areas to which travel was precluded. Indeed, the First annex makes clear that part of the Defence investigations consisted entirely of engaging in a “fishing expedition” on the basis of the barest of information, which sometimes concerned solely the person’s whereabouts – no information of a temporal nature or alluding to the experience of the potential witness was provided.<sup>3509</sup> At no time, therefore,

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<sup>3508</sup> Defence for Germain Katanga, “Urgent Defence Motion for Cooperation of the DRC Government”, 23 February 2010, ICC-01/04-01/07-1900-Conf-Exp (25 August 2011, ICC-01/04-01/07-1900-Red2), paras. 19.

<sup>3509</sup> The persons are those identified as follows: D-097, D-132, D-084, D-063, D-150, D-269, D-039, D-275, D-217, D-278, D-113, D-114, D-018, D-101, D-082, D-027, D-200, D-284, D-221, D-227 and D-213 (First annex).

was the Chamber in a position to appraise the relevance of the information which such potential witnesses may have brought.

1587. It is true that the list furnished by the Defence includes a number of witnesses who, at first sight, could conceivably be relevant on account of their presence at the battle of Bogoro, or in Nyakunde in 2002. However, the Chamber notes that the overwhelming majority of them appeared to live<sup>3510</sup> in areas which the Defence actually visited or to which, as mentioned, it could have travelled (Beni and Goma in particular). Of note is that the Defence did not impart the information which would have allowed the Chamber to gauge the significance of such evidence and does not appear to have exploited all of the resources at its disposal to meet with the potential witnesses living in areas to which it decided not to travel unimpeded by security considerations. The aforementioned unilateral decision taken on 2 August 2013 to postpone the investigations is particularly decisive in that regard.

1588. From all of the foregoing, it is the Chamber's view that, in the instant case, the stipulations of article 67(1)(b) of the Statute, and hence article 67(1)(e) were not violated.

**f) Whether the Accused was tried within a reasonable time**

1589. The Chamber recalls that in its 21 November 2012 Decision,<sup>3511</sup> it ruled on how the right to be tried without undue delay must be construed and how, in that respect, the phase preceding the implementation of regulation 55 must be appraised.

1590. Regarding the conduct of the phase concerning the implementation of regulation 55, the Chamber heeded the Appeals Chamber's direction to ensure that it proceeded fairly but also, and particularly when it entered the latter stages,

<sup>3510</sup> Third Defence observations on further investigations, para. 18.

<sup>3511</sup> [21 November 2012 Decision](#), paras. 43-46.

within a reasonable time. The analysis set down in this section, the perfect regularity in the sequence of written submissions, which were produced at its behest, and the decisions it rendered since 21 November 2012 show, if proof were needed, that the Bench was ever mindful of the need for expeditiousness. Faced with the need to achieve a delicate balance, it ensured that the Defence could play its part under the fairest possible conditions and it did so by responding to each of the Defence's written submissions and offering guidance to the Defence, whilst steering the recharacterisation procedure within a strict timeframe.

1591. It is the Chamber's view that the requirements of article 67(1)(c) were fully respected.

#### 4. Conclusion

1592. Accordingly, the Chamber considers that it has overseen the fair and expeditious conduct of the trial in the case at bench, with due regard for the rights of the Accused.

1593. As to the 11 December 2013 Defence motion to stay the proceedings,<sup>3512</sup> the Chamber recalls that in adjudging a remedy of that nature, the Appeals Chamber held a stay to be a "drastic remedy"<sup>3513</sup> to which recourse would only be countenanced where a fair trial is precluded by breaches of the fundamental rights of the accused.<sup>3514</sup>

1594. As the Chamber previously found, the difficulties which beset the Defence investigations did not entail any violation of the rights of the Accused, and articles 67(1)(b), 67(1)(c) and 67(1)(e) in particular.

<sup>3512</sup> Request for Stay of Proceedings; "Section X(C)(1) Procedural background", para. 1436.

<sup>3513</sup> *The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"*, 8 October 2010, ICC-01/04-01/06-2582, para. 55.

<sup>3514</sup> *The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772, para. 37.

1595. Accordingly, the Chamber cannot grant the Defence motion for a permanent stay of the proceedings.